CITY OF NEWBURGH
COUNCIL MEETING AGENDA
SESION GENERAL DEL CONSEJAL
December 14, 2015
1:00 PM

Mayor/Alcaldesa

1. Prayer/Oracion
2. Pledge of Allegiance/Juramento a la Alianza

City Clerk:/Secretaria de la Ciudad

3. Roll Call/ Lista de asistencia

Communications/Communicaciones

4. Approval of the minutes of the meeting of November 23, 2015/ Aprobacion del acta de las reunion del 23 Noviembre del 2015
5. City Manager Update/ Gerente de la Cuidad pone al dia la audiencia de los planes de cada departamento

Presentations/Presentaciones

6. Presentation by Trestle Inc. concerning City Calendar for the City of Newburgh 150th Anniversary

   Presentación por Trestle Inc. con respecto al calendario de la Ciudad del 150 aniversario de la Ciudad de Newburgh.

Comments from the public regarding the agenda/Comentarios del público con respecto a la agenda

Comments from the Council regarding the agenda/Comentarios del Consejo con respecto a la agenda

City Manager's Report/ Informe del Gerente de la Ciudad

7. Resolution No. 2015 NYS Department of Homeland Security and Emergency Services

   A resolution authorizing the City Manager to execute an Intergovernmental Memorandum of Agreement between the New York State Division of Homeland Security and Emergency Services Office of Fire Prevention and Control and the City of Newburgh Fire Department for temporary loan of fire suppression foam equipment. (Chief Vatter)

   Una resolución autorizando al Gerente de la Ciudad a llevar a cabo un acuerdo de Memorándum Intergubernamental entre las Oficinas Servicios de

Emergencia del Control y Prevención de Incendios y la División de Seguridad de Tierra Natal del estado de Nueva York y el Departamento de Bomberos de la Ciudad Newburgh por un préstamo temporario de equipo de espuma para supresión de fuego. (Chief Vatter)

8. Resolution No. 2015 - 23 Gardner Street

   A resolution to authorize the conveyance of real property known as 23 Gardner Street (Section 2, Block 16, Lot 3) at private sale to Matthew Gayton for the amount of $25,000. (Deirdre Glenn)

   Una resolución autorizando el convenio de bienes raíces conocido como 23 de la calle Gardner (Sección 2, Bloque 16, Lote 3) en una venta privada a Matthew Gayton por la cantidad de $25,000. (Deirdre Glenn)

9. Resolution No. 2015 43-44 Williamsburg Drive

   A resolution to authorize the conveyance of real property known as 43-44 Williamsburg Drive (Section 1, Block 2, Lot 22) at private sale to Leroy Foster for the amount of $10,000.00. (Deirdre Glenn)

   Una resolución autorizando el convenio de bienes raíces conocido como 43-44 del camino de Williamsburg (Sección 1, Bloque 2, Lote 22) en una venta privada a Leroy Foster por la cantidad de $10,000.00 (Deirdre Glenn)

10. Resolution No. 2015 - 50 William Street

    A resolution to authorize the conveyance of real property known as 50 William Street (Section 38, Block 2, Lot 36) at private sale to Elder Ivan Lozano for the amount of $1,000.00. (Deirdre Glenn)

    Una resolución autorizando el convenio de bienes raíces conocido como 50 de la calle William (Sección 38, Bloque 2, Lote 36) en una venta privada a Elder Ivan Lozano por la cantidad de $1,000.00. (Deirdre Glenn)

11. Resolution No. 2015 - 63 Grove Street

    A resolution to authorize the conveyance of real property known as 63 Grove Street (Section 26, Block 6, Lot 7.1) at private sale to Patrick Cousins for the amount of $70,000.00. (Deirdre Glenn)

    Una resolución autorizando el convenio de bienes raíces conocido como 63 de la calle Grove (Sección 26, Bloque 6, Lote 7.1) en una venta privada a Patrick Cousins por la cantidad de $70,000.00 (Deirdre Glenn)

12. Resolution No. 2015 - 69 Courtney Avenue

    A resolution to authorize the conveyance of real property known as 69 Courtney Avenue (Section 48, Block 11, Lot 1) at private sale to Howard Elder for the amount of $1,200.00. (Deirdre Glenn)

    Una resolución autorizando el convenio de bienes raíces conocido como 69 de la avenida Courtney (Sección 48, Bloque 11, Lote 1) en una venta privada a Howard Elder por la cantidad de $1,200. (Deirdre Glenn)

13. Resolution No. 2015 - 199 South Street
A Resolution to authorize the conveyance of Real Property known as 199 South Street (Section 18, Block 1, Lot 3) at private sale to David Fishel for the amount of $3,800.00. (Deirdre Glenn)

Una resolución autorizando el convenio de bienes raíces conocido como 199 de la calle South (Sección 18, Bloque 1, Lote 3) en una venta privada a David Fishel por la cantidad de $3,800.00. (Deirdre Glenn)

14. 266 Carpenter Avenue -

15. Resolution No. 2015 Transfer from Sewer Contingency to Engineering & WWTP

Resolution amending Resolution No: 296 - 2014, the 2015 budget for the City of Newburgh, New York to transfer $43,500.00 from Sewer Fund Contigency to Wastewater Treatment Plant – Contractual Expenses Related to sewer monitoring and repair. (John Aber & Jason Morris)

Resolución enmendando resolución Num: 296-2014, del Presupuesto de la Ciudad de Newburgh del 2015, para transferir $43,500.00 de los fondos imprevistos a la Planta que Trata agua residual –Gastos Contratados en relación a la vigilancia y la reparación del Alcantarillado. (John Aber & Jason Morris)

16. Resolution authorizing the City to apply for a Municipal Sewage System Asset Management Pilot Program Grant from the NYSDEC

A resolution authorizing the City Manager to apply for, and accept if awarded, a grant from the New York State Department of Environmental Conservation for participation in a three-year municipal sewage system asset management pilot program. (Jason Morris)

Una resolución autorizando al Gerente de la Ciudad a aplicar y aceptar si es otorgado, una beca del Departamento de Conservación del Estado de Nueva York para la participación en un programa piloto del Manejo de Propiedad del Alcantarillado Municipal por tres años. (Jason Morris)

17. Ordinance No. 2015 - Chapter 248 Sewers

ORDINANCE NO.: _____ - 2015 OF DECEMBER 14, 2015
An Ordinance amending Section 248-39(B) entitled "Pretreatment" of the Code of the City of Newburgh to comply with the Annual Industrial Pretreatment Report prepared by the U.S. Environmental Protection Agency. (Jason Morris)

DECRETO Num.:_____-2015 DEL14 DE DICIEMBRE DEL 2015

Un Decreto enmendando Sección 248- 39(B) titulado “Tratamiento Previo” del Código de la Ciudad de Newburgh para cumplir con el Reporte Anual de Tratamiento Previo Industrial preparado por la Agencia de Protección Ambiental de los Estados Unidos.

18. Resolution No. 2015 - Approval of Various Insurance Policies

A resolution authorizing approval of various insurance Policies for the period of January 1, 2016 to December 31, 2016. (Michelle Kelson)

Una resolución autorizando la aprobación de varias pólizas de seguro por el periodo comenzando el 1 de Enero del 2016 hasta el 31 de Diciembre del 2016. (Michelle Kelson)

19. Resolution No. 2015 - Authorization to transfer a portion of Ellis Avenue

A resolution of the City Council of the City of Newburgh New York authorizing the transfer of a portion of 141 Ellis Avenue in exchange for a portion of 139 Ellis Avenue. (Michelle Kelson)

Una resolución del Concejal de la Ciudad de Newburgh, Nueva York autorizando a transferir una porción de 141 de la avenida Ellis en intercambio por una porción del 139 de la avenida de Ellis. (Michelle Kelson)

20. Resolution No. 2015 - Direct Agreement TBE-Montgomery LLC Citibank NA

A Resolution authorizing the City Manager to execute a direct agreement with Taylor-Montgomery, LLC and Citibank, N.A. in connection with the Solid Waste Disposal and processing agreement between the City of Newburgh and the TBE-Montgomery, LLC. (Michelle Kelson)

Una resolución autorizando al Gerente de la Ciudad a llevar a cabo un acuerdo directo con Taylor-Montgomery, LLC y Citibank, N.A. en conexión con el acuerdo entre la Ciudad de Newburgh y TBE-Montgomery, LLC., sobre la disposición de Residuos Sólidos y procesamiento.(Michelle Kelson)

21. Res. 2015 - Extension of Lease Agreement Memorare Realty Holding Corp.

Resolution authorizing the City Manager to execute an extension until January 31, 2017 to the first amended agreement of lease with Memorare Realty Holding Corp. for the continued lease vacant real property known as Section 31, Block 5, Lots 13.2 and 14 for the purpose of providing parking for the Newburgh-Beacon ferry commuters and other parkers during non-commuting hours and authorizing the city manager to execute a Memorandum of Understanding with Metro-North Commuter Railroad Company to provide reimbursement of parking lot lease payments related to the Newburgh-Beacon Ferry Service. (Michael Ciaravino, Michelle Kelson & John Aber)

Resolución autorizando al Gerente de la Ciudad a ejecutar una extensión hasta el 31 de Enero del 2017 a la primera enmienda del contrato de renta con Memorare Realty Holding Corp. por la propiedad que continua rentada y conocida como Sección 31, Bloque 5, Lotes 13.2 y 14 con el propósito de proveer estacionamiento para los pasajeros que usan el transbordador de Newburgh- Beacon y otras personas que usan el estacionamiento cuando no hay transbordador y autorizando al Gerente de la Ciudad a ejecutar un Memorándum de entendimiento con la Compañía de Metro-North Tren de Pasajeros para proveer rembolso de los pagos por la renta del

estacionamiento relacionados con el servicio de transbordador de Newburgh-Beacon. (Michael Ciaravino, Michelle Kelson & John Aber)

22. Resolution No. 2015 CAC

    A resolution reappointing Richard Harper, Kippy Boyle, Chuck Thomas and Karen Eberle-McCarthy to the Conservation Advisory Council for two year terms.

23. Resolution No. 2015 Pilgrim Pipeline Project - SEQRA

    A resolution of the City Council of the City of Newburgh, New York, objecting to the Thruway Authority as Lead Agency and recommending the New York State Department of Environmental Conservation serve as Lead Agency for the Pilgrim Pipeline Project. (Michelle Kelson & Councilwoman Abrams)

    Una resolución del Concejal de la Ciudad de Newburgh, Nueva York, poniendo objeción a que la Autoridad de Autopista sea la Agencia Principal y recomendando que el Departamento de Conservación Ambiental del Estado de Nueva York sirva como Agencia Principal para el Proyecto de Tubería Pelegrino. (Councilwoman Abrams)

24. Resolution No. 2015 - Rescind the Vote to Start the Search for a New City Manager

    A resolution to rescind the vote to start the search for a new City Manager. (Mayor Kennedy)

    Una resolución para anular el voto que pide comenzar la búsqueda de un Nuevo Gerente de la Ciudad. (Mayor Kennedy)

25. Resolution No. 2015 - 123 William Street

    A resolution authorizing the settlement of Litigation regarding the in rem tax foreclosure of liens for the year 2013 relative to 123 William Street (section 45, block 15, lot 15).

26. Resolution No. 23 South Miller St.

    A resolution authorizing the settlement of litigation regarding the in rem tax foreclosure of liens for the year 2013 relative to 23 S. Miller Street (section 30, block 1, lot 18) and 25 S. Miller street (section 30, block 1, lot 17)

Old Business: / Asuntos Pendientes

New Business: / Nuevos Negocios

Public Comments Regarding General Matters of City Business

Further Comments from the Council/ Nuevas observaciones del Consejal:

Adjournment/ Aplazamiento:

RESOLUTION NO.: _____ - 2015

OF

DECEMBER 14, 2015

A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE AN INTERGOVERNMENTAL MEMORANDUM OF AGREEMENT BETWEEN THE NEW YORK STATE DIVISION OF HOMELAND SECURITY AND EMERGENCY SERVICES OFFICE OF FIRE PREVENTION AND CONTROL AND THE CITY OF NEWBURGH FIRE DEPARTMENT FOR TEMPORARY LOAN OF FIRE SUPRESSION FOAM EQUIPMENT

WHEREAS, on January 28, 2014, Governor Andrew Cuomo issued Executive Order 125 directing State agencies to conduct a review of safety procedures and emergency response preparedness related to the shipments of volatile crude from the Bakken Oil fields in North Dakota and other sources; and

WHEREAS, the State has formed the New York State Foam Task Force ("Task Force"), which is a state and local partnership, to support and supplement existing local foam capabilities to assure that trained personnel and the appropriate equipment is available at strategic locations throughout the State based on risk; and

WHEREAS, as a result of the review, Division of Homeland Security and Emergency Services ("DHSES") has acquired a quantity of foam trailers, equipment and supplies, and pre-positioned such equipment at strategic locations with participating agencies that agree to support the efforts of the Task Force; and

WHEREAS, an Intergovernmental Memorandum of Agreement (the "Agreement") is required to establish the responsibilities, guidelines and procedures for the assignment deployment and use of the equipment to the City of Newburgh by DHSES; and

WHEREAS, this Council deems it to be in the best interests of the City of Newburgh to enter into an Agreement with DHSES;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York that the City Manager be and he is hereby authorized to execute the Intergovernmental Memorandum of Agreement in substantially the same form as annexed hereto and made part hereof and take such actions as may be appropriate and necessary for the temporary loan of fire suppression foam equipment pursuant to this Agreement.

NEW YORK STATE | Homeland Security and Emergency Services

ANDREW M. CUOMO
Governor

JOHN P. MELVILLE
Commissioner

FRANK G. HOARE
General Counsel

Via Hand Delivery

Dear Foam Task Force Member:

Thank you for your participation in the New York State Foam Task Force.

Attached please find four (4) copies of your agency's agreement with the New York State Division of Homeland Security and Emergency Services. Once you have had an opportunity to review, please have each agreement originally signed and notarized and, along with a copy of your local board's resolution approving the agreement and participation in the program, mail all originals to the following address:

New York State Division of Homeland Security and Emergency Services
633 Third Avenue
32nd Floor
New York, NY 10017
Attn: Linda Messina

Upon approval by the Office of the Attorney General and State Comptroller, we will return one originally executed agreement to you for your files.

Should you have any questions regarding the agreement, please feel free to contact me by phone at (212) 867-7060 or via email at linda.messina@dhses.ny.gov.

Thank you.

Linda Messina

NEW YORK STATE | Homeland Security and Emergency Services | Fire Prevention and Control

Agreement No. X200007

INTERGOVERNMENTAL
MEMORANDUM OF AGREEMENT
By and Between
NYS DIVISION OF HOMELAND SECURITY AND EMERGENCY SERVICES
Office of Fire Prevention and Control
and
CITY OF NEWBURGH FIRE DEPARTMENT
for
TEMPORARY LOAN OF FIRE SUPRESSION FOAM EQUIPMENT

This Intergovernmental Memorandum of Agreement (Agreement) is entered by and between the State of New York **Division of Homeland Security and Emergency Services, Office of Fire Prevention and Control** ("DHSES", "OFPC" or "State of New York") with offices located at 1220 Washington Avenue, State Office Campus, Building 7A, Albany, New York 12226 and the **City of Newburgh Fire Department** ("Contractor" or "Participating Agency") with offices located at 22 Grand Street, Newburgh, NY 12550. The foregoing DHSES and/or Participating Agency shall sometimes be referred to herein individually as "Party" and collectively as the "Parties."

WITNESSETH:

WHEREAS, on January 28, 2014, Governor Andrew Cuomo issued Executive Order 125 directing State agencies to conduct a review of safety procedures and emergency response preparedness related to the shipments of volatile crude from the Bakken Oil fields in North Dakota and other sources; and

WHEREAS, the State has formed the New York State Foam Task Force (Task Force), which is a state and local partnership, to support and supplement existing local foam capabilities to assure that trained personnel and the appropriate equipment is available a strategic locations throughout the State based on risk;

WHEREAS, as a result of the review, DHSES has acquired a quantity of foam trailers, equipment and supplies, and pre-positioned such equipment at strategic locations with participating agencies that herein agree to support the efforts of the Task Force;

WHEREAS, this Agreement establishes the responsibilities, guidelines and procedures for the assignment, deployment and use of the equipment to the Participating Agency by DHSES;

WHEREAS, the Participating Agency acknowledges receipt of said equipment;

NOW, THEREFORE, in consideration of the promises set forth herein, be it known that a DHSES hereby grants a temporary revocable permit to Participating Agency to use the Equipment designated in Section 3, and the Parties agree to the terms and conditions as follows:

1. **PURPOSE**

DHSES is providing Class B foam trailers and equipment, further identified in Appendix B ("Equipment"), to participating agencies to receive, hold, maintain and use in order to pre-position the equipment for rapid response to incidents resulting in a spill or fire involving crude oil and other ignitable liquids, when activated by the State as a component of the New York State Foam Task Force.

The Equipment is being provided on a loan basis. Regardless of possession, title to all equipment identified in Appendix B shall remain with the State at all times. The State has the right to recall the Equipment at any time upon notification. As such, any permanent granting of the Equipment must be provided for in a separate written agreement signed by both Parties. The Parties understand and acknowledge that the Equipment issued under the terms and conditions of this Agreement is intended to enhance the ability of the Participating Agency and the State to assist in and support fire control and vapor suppression efforts at incidents involving crude oil and other ignitable liquids and is not intended to provide all the equipment appropriate and necessary to do so.

2. **APPENDIX A**

Appendix A, Standard Clauses for All New York State Agreements, is hereby attached and made part of this Agreement and shall take precedence over all other terms of this Agreement.

3. **DESCRIPTION OF EQUIPMENT**

DHSES agrees to provide to the Participating Agency on a temporary loan basis: foam trailers, equipment and supplies under the terms of this Agreement. All items, equipment and resources shall be collectively referred to herein as "Equipment." The specific Equipment loaned to the Participating Agency is specifically listed in Appendix B, which is hereby attached and incorporated into this Agreement.

4. **TERM AND TERMINATION OF AGREEMENT**

4.1 The Participating Agency specifically agrees that this Agreement shall be deemed executory only to the extent of the monies available, and no liability shall be incurred by the State beyond the monies available for the purpose. Section 112 of the State Finance Law requires that any contract made by a State Agency which exceeds fifty thousand dollars ($50,000) in amount, or if the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds ten thousand ($10,000), it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office before becoming effective. The Contract will be deemed executed upon, and will not be considered fully executed and binding until, receipt of approval by the AG and OSC.

4.2 The term of this Agreement, unless amended or extended by written mutual consent of the Parties, shall commence on the first Monday immediately following approval by the Office of State Comptroller and shall terminate after twenty-four (24) months from the day therefrom, unless terminated earlier

pursuant to sections 4.3 – 4.5 below. This Agreement may be extended in writing for an additional two (2) year period upon mutual agreement between the Parties.

4.3 DHSES may terminate this Agreement immediately, upon written notice of termination to the Participating Agency, if the Participating Agency fails to comply with the terms and conditions of this Agreement and/or with any laws, rules, regulations, policies or procedures affecting this Agreement. Written notice of termination shall be sent by personal messenger service or by certified mail, return receipt requested. The termination shall be effective in accordance with the terms of the notice outlined in Section 17.

4.4 Either Party shall have the right to terminate this Agreement early for: (i) unavailability of funds; (ii) cause; or (iii) convenience upon ten (10) business days' written notice.

4.5 The Participating Agency may terminate this Agreement, upon written notice of termination to the State, if the Participating Agency is unable or unwilling to comply with the terms and conditions of the Agreement.

4.6 Upon termination of this agreement by either the State or Participating Party, the Participating Agency shall return all equipment, less ordinary wear and tear, to DHSES.

5. **TERMS OF USE**

The Parties agree that the Participating Agency shall maintain possession of the Equipment provided the Participating Agency complies with the following conditions:

5.1 The Participating Agency understands and agrees that for incidents necessitating deployment of the Task Force time is of the essence and therefore it shall identify and assign personnel to deploy and operate as part of the Task Force, and will remain ready, willing and able to immediately deploy the equipment and personnel, as identified below, pursuant to activation by the State and shall immediately notify the State of the inability to respond to that request.

5.2 The Participating Agency agrees to make personnel available to participate in the initial and in-service training specified by New York State. The number of personnel trained shall be sufficient to provide for the response of 2 to 4 personnel with the Equipment when activated as part of the NYS Foam Task Force and deployed by the State., To the extent possible, scheduling of required training by OFPC will be undertaken to limit overtime for participating agency career staff and consistent with the availability of volunteer staffing. At a minimum the training shall include the following:

5.2.1 Initial Training: Approximately 20 – 24 hours;

5.2.2 Annual Refresher Training: Approximately 4 – 8 hours;

5.2.3 Annual Drill or Exercise: Approximately 4 – 8 hours.

5.3 In addition to ensuring availability and participation in the annual refresher training provided by OFPC, Participating Agency agrees that it shall participate, upon reasonable advance notice, in drills, exercises or other events as requested by the State.

5.4 The Participating Agency shall ensure that there are two (2) to four (4) trained persons available at all times (24hours/7days) to respond with the pre-positioned foam trailer and equipment within 30 minutes or less; however, it is understood and agreed that, at no time, shall there be less than two (2) trained persons available to respond. The Participating Agency acknowledges and agrees that it shall be responsible for all salaries, costs and fees associated with response or activities requested by OFPC and/or the New York State Foam Task Force.

5.5 Participating Agency agrees to be responsible to provide and make available or provide for the following:

5.5.1 All personal protective equipment (PPE) appropriate and necessary for its personnel to respond with and operate as part of the NYS Foam Task Force, including but not limited to structural firefighting turnout gear.

5.5.2 The 1.75" and 2.5" hose required for the appliances and foam attack lines associated with each trailer (estimated 200 feet of each type).

5.5.3 Participating Agency shall provide, and Participating Agency personnel shall retain the insurance coverage and protection provided by the Participating Agency for its personnel including but not limited to, the provisions established by General Municipal Law 207-a or the Volunteer Firefighter's Benefit Law.

5.5.4 A vehicle suitable for towing the assigned foam trailer during a response and approved by OFPC in advance.

5.5.5 Maintaining the Equipment covered under this Agreement in a state of readiness for use and response at all times (24 hours/7 days).

5.5.6 Immediate notification to the State of any condition or issue necessitating placing the Equipment out of service or of any condition or circumstance which prevents the Participating Agency from responding with the Equipment.

5.5.7 Comply with procedures and guidelines, established by DHSES, for the activation, deployment, and operations of the Task Force.

5.6 The Parties agree that the trailer may be used by the Participating Agency, as needed, for any local response under the following conditions:

5.6.1 The Participating Agency must notify OFPC of all local responses undertaken within twenty-four (24) hours of the commencement of activity.

5.6.2 The Participating Agency agrees to replace any foam concentrate or supplies used in local response, as specified by OFPC.

5.6.3 The Participating Agency agrees to repair any damage or wear to the trailer or equipment associated with or required after local use.

5.6.4 The Participating Agency shall assume all liability associated with operation or use of any loaned equipment during any local response.

5.7 The Participating Agency shall ensure that all intended users and operators of the Equipment successfully complete the training specified and provided by the State for that purpose.

5.8 The Participating Agency understands and agrees to be solely responsible to understand any and all safety or security issues surrounding the use of the Equipment and accommodate its use according to its capabilities and limitations.

5.9 The Participating Agency understands and agrees that, on occasion, the State will perform inventory and maintenance, routine and emergency, to the Equipment, which may be conducted with advance notice or no notice at all. The Participating Agency agrees that it shall provide DHSES, OFPC and its vendors and subcontractors with reasonable time and opportunity to properly maintain the Equipment in accordance with the manufacturer's recommendations and all applicable laws and regulations.

5.9.1 Additionally, the Participating Agency shall be prepared for use of alternative Equipment during planned and unplanned out servicing. Furthermore, it is hereby understood that the State has no obligation to provide alternate equipment to be available for local responses when Equipment is removed from service for maintenance or repairs, although it reserves the right to provide alternate equipment to maintain NYS Foam Task Force operational capabilities if resources are available to do so.

5.10 The Participating Agency understands and agrees that the State may take back the Equipment at any time for any reason or may redeploy the Equipment if it is determined to be needed in another area as directed by DHSES. Upon notification by the state the Participating Agency must make the Equipment immediately available. DHSES shall provide reasonable advance notice, or the maximum notice possible under the circumstances, to the Participating Agency Point of Contact.

5.11 The Participating Agency agrees that DHSES reserves the right to take back the Equipment in the event of a breach of this Agreement, if the Equipment is not being used to its full potential, is being misused or has been returned for reissuance by DHSES. In the event of reissuance, the Participating Agency agrees to undertake whatever actions are reasonably requested by DHSES to return possession of the Equipment to DHSES.

5.12 The Parties acknowledge that sustaining the Equipment issued or issuing additional resources shall be contingent upon an evaluation of need by DHSES and be subject to the availability of funding. The Parties reserve the right to expand the scope of this Agreement or the type and amount of the pre-positioned Equipment provided, subject to available funding, as agreed to by both Parties, and addressed within an updated and amended agreement .

5.13 DHSES shall be responsible for the following:

5.13.1 Ordering, purchasing and accepting Equipment from the vendor;

5.13.2 Conduct routine maintenance, repair and/or replacement of Equipment resulting from response activities pursuant to State activations. Participating Agency shall be responsible for costs relating to maintenance and repair required resulting from local deployment;

5.13.3 Testing and recertification of the Equipment provided, as required;

5.13.4 Replacement of foam supplies utilized during State specified training or deployment of the Foam Task Force [as directed by the State];

5.13.5 Reimbursement of costs incurred directly by the Participating Agency as the employer, with the exception of those costs that would otherwise have been incurred by the Participating Agency (such as deployment within the jurisdiction of the Participating Agency), for the cost of backfilling to provide shift coverage, including overtime, for personnel responding pursuant to activation by the State. The reimbursement shall not exceed costs for four (4) persons, except as approved by the State Fire Administrator;

5.13.6 Providing the initial training and annual refresher training required for the use of the Equipment. Consideration will be given to reimburse backfill costs associated with participation of Participating Agency's personnel in training, drills and exercises, subject to the availability of funds.

5.13.7 Organizing drills and exercises.

5.13.8 Activation, deployment, management and operations of the New York State Foam Task Force.

6. **LOAN OF RESOURCES**

6.1 The Equipment shall be loaned exclusively to the Participating Agency only for the purposes set forth in this Agreement. No other use of the equipment shall be authorized.

6.2 DHSES shall retain title to the Equipment loaned under this Agreement at all times.

6.3 The Participating Agency agrees that it has no claim in law or equity concerning the Equipment or associated training.

6.4 The Participating Agency agrees that it shall not sell, move or otherwise transfer the Equipment to any other party without the express written permission of DHSES.

6.5 In all instances, except where otherwise agreed to by DHSES, the Participating Agency is responsible for all costs associated with preparing, packing and transporting the equipment, including all applicable costs. Possession, but not title, of the equipment will pass from DHSES to the Participating Agency at the time of receipt of the equipment. All transportation to and from the site of the equipment and all associated costs will be covered exclusively by the Participating Agency. DHSES financial responsibility is limited to that identified in 5.13.

7. COMPENSATION

As compensation for loan of this equipment, the Participating Agency shall pay DHSES a one-time administrative fee of $1.00; payment of same waived. As such, this Agreement shall not be construed to have any monetary value. The Participating Agency is responsible for peripheral and maintenance costs of the Equipment as described in this Agreement.

8. PARTICIPATING AGENCY POINT OF CONTACT

The Participating Agency will designate its own member Point of Contact ("Participating Agency POC") for the purpose of arranging for and the installation, maintenance and return of the equipment to DHSES. The Participating Agency's POC shall also be responsible as a 24-hour point of contact for this Agreement and any issues arising from its existence and be responsible for maintaining the current status of the contact information. The Participating Agency Point of Contact shall be listed in Appendix B of this Agreement.

9. DHSES POINT OF CONTACT

State Fire Administrator
New York State Office of Fire Prevention and Control
NYS Division of Homeland Security and Emergency Services
State Office Campus
1220 Washington Ave, Building 7A
Albany, NY 12242
Office: 518-474-6746

10. CONDITION AND MAINTENANCE OF EQUIPMENT

10.1 DHSES will make its best effort to ensure that the Equipment loaned under this Agreement is furnished to the Participating Agency in a serviceable condition suitable for its intended use.

However, DHSES makes neither warranty nor guarantee of fitness of the property for any particular purpose or use.

10.2 The Participating Agency shall be responsible to receive the Equipment and certify that the Participating Agency's orientation with the Equipment occurred. Additionally, the Participating Agency shall, as appropriate, 1) provide equipment inventory reports to DHSES upon request; 2) assist in resolving equipment related issues, such as defective equipment; 3) conduct any maintenance, as determined by DHSES, in accordance with the manufacturer's recommendations and all applicable laws and regulations to assist in its operational functionality; and 4) satisfaction of any State or federal reporting requirements.

11. **EQUIPMENT SECURITY**

Upon acceptance of the Equipment, Participating Agency shall notify OFPC of the location where the equipment is to be stored and assumes all responsibility for secure storage, maintenance, and property accountability. Any change in the storage location must be approved in advance by DHSES.

12. **NO THIRD-PARTY TRANSFERS**

This Agreement or the Equipment loaned hereunder shall not be transferred to any other party by the Participating Agency without the express written permission of DHSES.

13. **RETURN OF EQUIPMENT**

Upon expiration of the Agreement, the Participating Agency shall be responsible to return all Equipment to DHSES in the same condition as it was issued, less and except ordinary wear and tear caused by response activities pursuant to state activations. If the Equipment is not returned, or not returned in good working order and repair, the Participating Agency may be responsible to reimburse DHSES the replacement value or repair of the Equipment, which shall be determined by the estimated replacement value for each item of equipment listed in Appendix B.

14. **LIABILITY AND INSURANCE**

14.1 The Participating Agency shall indemnify and hold harmless the State of New York for any and all claims arising out of the local use of the Equipment, including but not limited to deployment, training, drills and exercises. DHSES does not agree to any indemnification provisions in any documents attached hereto that require DHSES or the State of New York to indemnify or hold harmless the Participating Agency or third parties.

14.2 In consideration of the Participating Agency's agreement to deploy and respond during a State activation of the Task Force, the State, subject to the availability of lawful appropriations and consistent with Section 8 of the State Court of Claims Act and Section 17 of the Public Officers Law, shall hold the Participating Agency harmless from, and indemnify it for, any final judgment of a court of competent jurisdiction to the extent attributable to the acts and omissions of its officers or employees when acting within the course and scope of their employment.

14.3 Notwithstanding anything to the contrary in this Agreement, DHSES shall not be liable to the Participating Agency for any special, consequential, or punitive damages, or loss of profits or revenues, whether such

damages are alleged as a result of tort (including strict liability), Agreement, warranty, or otherwise, arising out of or relating to DHSES's acts or omissions under this Agreement. Participating Agency remains liable for direct damages attributable to their respective negligence, misconduct and omissions without limitation.

14.4 Nothing contained herein is intended limit the rights and privileges afforded to either Party by operation of law.

14.5 Nothing contained in this Agreement is intended to, or shall be construed in any manner, as creating or establishing the relationship of employer/employee between the Parties. The Participating Agency shall at all times remain an "independent Participating Agency" with respect to the efforts to be performed under this Agreement. DHSES shall not be responsible for any payment of Unemployment Compensation, FICA, retirement, life and/or medical insurance and Workers' Compensation Insurance, as the Participating Agency is an independent Participating Agency.

14.6 Participating Agency shall carry general liability insurance in the amount of $1,000,000 per occurrence and $3,000,000 dollar in the aggregate. Such insurance shall remain in effect throughout the term of the Agreement.

14.6.1 The Participating Agency shall name the State of New York and DHSES as an "additional insured."

14.6.2 The Participating Agency shall provide certification of insurance to DHSES and must include: 1) the insurance policy number; 2) the name and address of the broker and title of authorized official of broker; and 3) the signature of the authorized official or broker.

14.6.3 Nothing contained in this Agreement is intended to, or shall be construed in any manner, as creating or establishing the relationship of employer/employee or any other between the Parties.

15. **INTERPRETATION**

This Agreement shall be interpreted according to the laws of the State of New York.

16. **NOTICES**

Any and all notifications, consents and other communications to DHSES regarding the implementation, production, or operational production or operational processes or procedures of this Contract shall be in writing. All notices permitted or required hereunder shall be in writing and shall be transmitted either:

(a) via certified or registered United States mail, return receipt requested;
(b) by facsimile transmission;
(c) by personal delivery;
(d) by expedited delivery service; or
(e) by e-mail.

17. **AMENDMENTS**

This Agreement may not be changed, altered or modified except in writing and signed by both Parties and, if required, approved by both the Attorney General and Comptroller of the State of New York.

18. **ENTIRE AGREEMENT**

This Agreement constitutes the entire Agreement of the parties hereto and all previous communications between the parties, whether written or oral, with reference to the subject matter of this contract are hereby superseded.

IN WITNESS WHEREOF, this Agreement has been executed by a duly authorized representative of the Parties.

State Agency Certification
"In addition to the acceptance of this contract, I also certify that original copies of this signature page will be attached to all other exact copies of this contract."

ON BEHALF OF PARTICIPATING AGENCY:

Signed, _____

Name: _____

Title: _____

ON BEHALF OF DHSES:

Signed, _____

Name: _____

Title: _____

Participating Agency Acknowledgement for Agreement No. **X200007**

State of New York)
)ss.
County of_____)

On this ___ day of _____2015, before me personally came _____ to me known, who, being by me duly sworn, did depose and say that she/he resides in _____, that she/he is the _____ of the municipal fire department described in and which executed the above instrument; and that she/he is duly authorized by the governing body of said municipality to sigh her/his name thereto.

_____
(Signature and office of the person taking acknowledgement)

APPENDIX A

Standard Clauses for All New York State Contracts

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licenser, licensee, lessor, lessee or any other party):

1. EXECUTORY CLAUSE. In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

2. NON-ASSIGNMENT CLAUSE. In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

3. COMPTROLLER'S APPROVAL. In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds $50,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds $10,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services is required when such contracts exceed $85,000 (State Finance Law Section 163.6-a). However, such pre-approval shall not be required for any contract established as a centralized contract through the Office of General Services or for a purchase order or other transaction issued under such centralized contract.

4. WORKERS' COMPENSATION BENEFITS. In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

5. NON-DISCRIMINATION REQUIREMENTS. To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex (including gender identity or expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristics, marital status or domestic violence victim status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be

performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of $50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

6. WAGE AND HOURS PROVISIONS. If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.

7. NON-COLLUSIVE BIDDING CERTIFICATION. In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

8. INTERNATIONAL BOYCOTT PROHIBITION. In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds $5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2NYCRR 105.4).

9. SET-OFF RIGHTS. The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

10. RECORDS. The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION. (a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN. In accordance with Section 312 of the Executive Law and 5 NYCRR 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of $25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of $100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of $100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment

opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a", "b", and "c" above, in every subcontract over $25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

13. CONFLICTING TERMS. In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

14. GOVERNING LAW. This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

15. LATE PAYMENT. Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law.

16. NO ARBITRATION. Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

17. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS. The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of Section 165 of the State Finance Law, (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or

public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in §165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES. In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

20. OMNIBUS PROCUREMENT ACT OF 1992. It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development
Division for Small Business
Albany, New York 12245
Telephone: 518-292-5100
Fax: 518-292-5884
email: opa@esd.ny.gov

A directory of certified minority and women-owned business enterprises is available from:

NYS Department of Economic Development
Division of Minority and Women's Business Development
633 Third Avenue
New York, NY 10017
212-803-2414
email: mwbecertification@esd.ny.gov
https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp

The Omnibus Procurement Act of 1992 requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than $1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

21. RECIPROCITY AND SANCTIONS PROVISIONS. Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 15, 2002, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii. Contact NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

22. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT. Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW. If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4-g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

24. PROCUREMENT LOBBYING. To the extent this agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law Sections 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.
To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

26. IRAN DIVESTMENT ACT. By entering into this Agreement, Contractor certifies in accordance with State Finance Law §165-a that it is not on the "Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012" ("Prohibited Entities List") posted at: http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf

Contractor further certifies that it will not utilize on this Contract any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this Contract, it must provide the same certification

at the time the Contract is renewed or extended. Contractor also agrees that any proposed Assignee of this Contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the State.

During the term of the Contract, should the state agency receive information that a person (as defined in State Finance Law §165-a) is in violation of the above-referenced certifications, the state agency will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the state agency shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.
The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the Prohibited Entities list after contract award.

APPENDIX B

Equipment Inventory and Participating Agency Point of Contact

Quantity	Item	Estimated Replacement Value
1	Dual Tote Chariot II Foam Trailer, 330 gal totes	$39,840.01
	Including:	
	1 TFT Blitzfire Portable Monitor with Foam Shaper	
	1 350 gpm in-line eductor	
	1 125 gpm 1.5" nozzle	
	1 95 gpm in-line eductor	
	1 National Foam Gladiator Tri-Flow Foam Nozzle	
	1 23 gpm Foam Transfer Pump Kit	
	Misc. Fittings and Adapters	$543.50
1	Radio Controlled Monitor (RF) upgrade	$8,895.00
1	National Foam Universal Gold 1x3, 660 gallons	$28,115.74
	TOTAL	$77,394.25

Participating Agency Point of Contact

Organization: Newburgh Fire Department

Name: Michael Vatter

Title: Chief

Address: 22 Grand Street, Newburgh, NY 12550

Phone: (845) 569-7412

Email: firechief@cityofnewburgh-ny.gov

RESOLUTION NO.: _____- 2015

OF

DECEMBER 14, 2015

A RESOLUTION TO AUTHORIZE THE CONVEYANCE OF REAL PROPERTY KNOWN AS 23 GARDNER STREET (SECTION 2, BLOCK 16, LOT 3) AT PRIVATE SALE TO MATTHEW GAYTON FOR THE AMOUNT OF $25,000.00

WHEREAS, the City of Newburgh has acquired title to several parcels of real property by foreclosure *In Rem* pursuant of Article 11 Title 3 of the Real property Tax law of the State of New York; and

WHEREAS, pursuant to Section 1166 of the Real Property Tax Law the City may sell properties acquired by foreclosure *In Rem* at private sale; and

WHEREAS, the City of Newburgh desires to sell 23 Gardner Street, being more accurately described as Section 2, Block 16, Lot 3 on the official tax map of the City of Newburgh; and

WHEREAS, the prospective buyer has offered to purchase this property at private sale; and

WHEREAS, this Council has determined that it would be in the best interests of the City of Newburgh to sell said property to the prospective buyer for the sum as outlined below, and upon the same terms and conditions annexed hereto and made a part hereof,

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York, that the sale of the following property to the indicated purchaser be and hereby is confirmed and the City Manager is authorized and directed to execute and deliver a quitclaim deed to said purchaser upon receipt of the indicated purchase price in money order, good certified or bank check, made payable to **THE CITY OF NEWBURGH,** such sums are to be paid on or before March 14, 2016, being ninety (90) days from the date of this resolution; and

Property address	Section, Block, Lot	Purchaser	Purchase Price
23 Gardner Street	2 – 16 – 3	Matthew Gayton	$25,000.00

BE IT FURTHER RESOLVED, by the Council of the City of Newburgh, New York, that the parcel is not required for public use.

Terms and Conditions Sale
23 Gardner Street, City of Newburgh (2-16-3)

STANDARD TERMS:

1. City of Newburgh acquired title to this property in accordance with Article 11 of the Real Property Tax Law of the State of New York, and all known rights of redemption under said provisions of law have been extinguished by the tax sale proceedings and/or as a result of forfeiture.
2. For purposes of these Terms and Conditions, parcel shall be defined as a section, block and lot number.
3. All real property, including any buildings thereon, is sold "AS IS" and without any representation or warranty whatsoever as to the condition or title, and subject to: (a) any state of facts an accurate survey or personal inspection of the premises would disclose; (b) applicable zoning/land use/building regulations; (c) water and sewer assessments are the responsibility of the purchaser, whether they are received or not; (d) easements, covenants, conditions and rights-of-way of record existing at the time of the levy of the tax, the non-payment of which resulted in the tax sale in which City of Newburgh acquired title; and (e) for purposes of taxation, the purchaser shall be deemed to be the owner prior to the next applicable taxable status date after the date of sale.
4. The property is sold subject to unpaid 2015-2016 School Taxes and any subsequent levies. The purchaser shall reimburse the City for 2015-2016 School Taxes and any subsequent levies. Upon the closing, the property shall become subject to taxation. Water and sewer charges and sanitation fees will be paid by the City to the date of closing.
5. **WARNING: FAILURE TO COMPLY WITH THE TERMS OF THIS PARAGRAPH MAY RESULT IN YOUR LOSS OF THE PROPERTY AFTER PURCHASE**. **The deed will contain provisions stating that the purchaser is required to rehabilitate any building on the property and bring it into compliance with all State, County and Local standards for occupancy within (18) months of the date of the deed. Within such eighteen (18) month time period the purchaser must either: obtain a Certificate of Occupancy for all buildings on the property; make all buildings granted a Certificate of Occupancy before the date of purchase fit for the use stated in such Certificate of Occupancy; or demolish such buildings. The deed shall require the purchaser to schedule an inspection by City officials at or before the end of the eighteen (18) month period. If the purchaser has not complied with the deed provisions regarding rehabilitation of the property and obtained a Certificate of Occupancy or Certificate of Compliance by that time, then the title to the property shall revert to the City of Newburgh. The deed shall also provide that the property shall not be conveyed to any other person before a Certificate of Occupancy or Certificate of Compliance is issued. A written request made to the City Manager for an extension of the eighteen (18) month rehabilitation period shall be accompanied by a non-refundable fee of $250.00 per parcel for which a request is submitted. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to rehabilitate of up to, but not to exceed, three (3) months. Any additional request thereafter shall be made in writing and placed before the City Council for their consideration**.
6. The property is sold subject to an owner-occupancy restriction. The purchaser has agreed to purchase the property subject to the five (5) year owner occupancy restriction shall, within 18 months of the delivery of the deed, establish his domicile and principal residence at said premises and maintain his domicile and principal residence at said premises for a period of at least five (5) years thereafter, provided that within said five (5) year period, the purchaser may convey said premises to another who shall also maintain their domicile and principal residence at said premises for said period. This shall be set forth as a restrictive covenant in the deed, subject upon its breach, to a right of re-entry in favor of the City of Newburgh. This shall be in addition to all other provisions, covenants and conditions set forth in the Terms of Sale.
7. Notice is hereby given that the property is vacant and unoccupied. This parcel is being sold subject to the City's Vacant Property Ordinance and all provisions of law applicable thereto. At closing, the purchaser will be required to register the property and remit the vacant property fee. It is the sole responsibility of the purchaser to redevelop such parcel in accordance with same.

8. All purchasers are advised to personally inspect the premises and to examine title to the premises prior to the date upon which the sale is scheduled to take place. Upon delivery of the quitclaim deed by the City of Newburgh to the successful purchaser, any and all claims with respect to title to the premises are merged in the deed and do not survive.
9. No personal property is included in the sale of any of the parcels owned by City of Newburgh, unless the former owner or occupant has abandoned same. The disposition of any personal property located on any parcel sold shall be the sole responsibility of the successful purchaser following the closing of sale.
10. The City makes no representation, express or implied, as to the condition of any property, warranty of title, or as to the suitability of any for any particular use or occupancy. Property may contain paint or other similar surface coating material containing lead. Purchaser shall be responsible for the correction of such conditions when required by applicable law. Property also may contain other environmental hazards. Purchaser shall be responsible for ascertaining and investigating such conditions prior to bidding. Purchaser shall be responsible for investigating and ascertaining from the City Building Inspector's records the legal permitted use of any property prior to closing. Purchaser acknowledges receivership of the pamphlet entitled "Protecting Your Family from Lead in Your Home." Purchaser also acknowledges that he/she has had the opportunity to conduct a risk assessment or inspection of the premises for the presence of lead-based paint, lead-based paint hazards or mold.
11. The entire purchase price and all closing costs/fees must be paid by money order or guaranteed funds to the City of Newburgh Comptroller's Office on or before March 14, 2016. *The City of Newburgh does not accept credit card payments for the purchase price and closing costs/fees.* **The City is not required to send notice of acceptance or any other notice to a purchaser.** At closing, purchaser, as grantee, may take title as a natural person or as an entity wherein purchaser is an officer or managing member of said entity. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to close title of up to, but not to exceed, sixty (60) additional days. No request shall be entertained unless in writing, stating the reasons therefor, and unless accompanied by a fee of $250.00 per parcel for which a request is submitted. The fee shall be in addition to all other fees and deposits and shall not be credited against the purchase price and shall not be returnable. Any additional request made thereafter shall be made in writing and placed before the City Council for their consideration.
12. In the event that a sale is cancelled by court order, judgment, the Comptroller or the Newburgh City Council, the successful bidder shall be entitled only to a refund of the purchase money paid with interest. Purchaser agrees that he shall <u>not</u> be entitled to special or consequential damages, attorney's fees, reimbursement for any expenses incurred as a result of ownership, improvements of property, or for taxes paid during period of ownership, and this agreement by the purchaser is a material condition of the sale.
13. Sale shall be final, absolute and without recourse once title has closed and the deed has been recorded. In no event, shall City of Newburgh be or become liable for any defects in title for any cause whatsoever, and no claim, demand or suit of any nature shall exist in favor of the purchaser, his heirs, successors or assigns, against City of Newburgh arising from this sale.
14. Conveyance shall be by quitclaim deed only, containing a description of the property as it appeared on the tax roll for the year upon which the City acquired title or as corrected up to date of deed. The deed will be recorded by the City upon payment in full of the purchase price, buyer's premium, and closing fees/costs. Possession of property is forbidden until the deed is recorded conveying title to the purchaser. **Title vests upon recording of deed.**
15. Upon closing, the City shall deliver a quitclaim deed conveying all of its right, title and interest in the subject property, which deed shall be drawn by the City Corporation Counsel. The City shall not convey its interest in any street, water, sewer or drainage easement, or any other interest the City may have in the property. The City shall only convey that interest obtained by the City pursuant to the judgment rendered in an *in rem* tax foreclosure action filed in the Orange County Clerk's Office.
16. The description of the property shall be from the City of Newburgh Tax Map reference or a survey description certified to the City of Newburgh and provided to the City Corporation Counsel by the purchaser at least ten (10) days in advance of closing title and approved by the City's Engineer.

17. Evictions, if necessary, are solely the responsibility of the successful bidder after closing and recording of the deed.
18. By acknowledging and executing these Terms & Conditions, the purchaser certifies that he/she is not representing the former owner(s) of the property against whom City of Newburgh foreclosed and has no intent to defraud City of Newburgh of the unpaid taxes, assessment, penalties and charges which have been levied against the property. The purchaser agrees that neither he/she nor his/her assigns shall convey the property to the former owner(s) against whom City of Newburgh foreclosed within 24 months subsequent to the auction date. If such conveyance occurs, the purchaser understands that he/she may be found to have committed fraud, and/or intent to defraud, and will be liable for any deficiency between the purchase price at auction and such sums as may be owed to City of Newburgh as related to the foreclosure on the property and consents to immediate judgment by City of Newburgh for said amounts.

RESOLUTION NO.: _____- 2015

OF

DECEMBER 14, 2015

A RESOLUTION TO AUTHORIZE THE CONVEYANCE OF REAL PROPERTY KNOWN AS 43-44 WILLIAMSBURG DRIVE (SECTION 1, BLOCK 2, LOT 22) AT PRIVATE SALE TO LEROY FOSTER FOR THE AMOUNT OF $10,000.00

WHEREAS, the City of Newburgh has acquired title to several parcels of real property by foreclosure *In Rem* pursuant of Article 11 Title 3 of the Real property Tax law of the State of New York; and

WHEREAS, pursuant to Section 1166 of the Real Property Tax Law the City may sell properties acquired by foreclosure *In Rem* at private sale; and

WHEREAS, the City of Newburgh desires to sell 43-44 Williamsburg Drive, being more accurately described as Section 1, Block 2, Lot 22 on the official tax map of the City of Newburgh; and

WHEREAS, the prospective buyer has offered to purchase this property at private sale; and

WHEREAS, this Council has determined that it would be in the best interests of the City of Newburgh to sell said property to the prospective buyer for the sum as outlined below, and upon the same terms and conditions annexed hereto and made a part hereof,

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York, that the sale of the following property to the indicated purchaser be and hereby is confirmed and the City Manager is authorized and directed to execute and deliver a quitclaim deed to said purchaser upon receipt of the indicated purchase price in money order, good certified or bank check, made payable to **THE CITY OF NEWBURGH,** such sums are to be paid on or before March 14, 2016, being ninety (90) days from the date of this resolution; and

Property address	Section, Block, Lot	Purchaser	Purchase Price
43-44 Williamsburg Drive	1 – 2 – 22	Leroy Foster	$10,000.00

BE IT FURTHER RESOLVED, by the Council of the City of Newburgh, New York, that the parcel is not required for public use.

Terms and Conditions Sale
43-44 Williamsburg Drive, City of Newburgh (1-2-22)

STANDARD TERMS:

1. City of Newburgh acquired title to this property in accordance with Article 11 of the Real Property Tax Law of the State of New York, and all known rights of redemption under said provisions of law have been extinguished by the tax sale proceedings and/or as a result of forfeiture.
2. For purposes of these Terms and Conditions, parcel shall be defined as a section, block and lot number.
3. All real property, including any buildings thereon, is sold "AS IS" and without any representation or warranty whatsoever as to the condition or title, and subject to: (a) any state of facts an accurate survey or personal inspection of the premises would disclose; (b) applicable zoning/land use/building regulations; (c) water and sewer assessments are the responsibility of the purchaser, whether they are received or not; (d) easements, covenants, conditions and rights-of-way of record existing at the time of the levy of the tax, the non-payment of which resulted in the tax sale in which City of Newburgh acquired title; and (e) for purposes of taxation, the purchaser shall be deemed to be the owner prior to the next applicable taxable status date after the date of sale.
4. The property is sold subject to unpaid taxes for the tax years of 2016 City/County Tax and 2015-2016 School Taxes and any subsequent levies. The purchaser shall reimburse the City for 2016 City/County Taxes and 2015-2016 School Taxes and any subsequent levies. Upon the closing, the property shall become subject to taxation. Water and sewer charges and sanitation fees will be paid by the City to the date of closing.
5. **WARNING: FAILURE TO COMPLY WITH THE TERMS OF THIS PARAGRAPH MAY RESULT IN YOUR LOSS OF THE PROPERTY AFTER PURCHASE**. **The deed will contain provisions stating that the purchaser is required to rehabilitate any building on the property and bring it into compliance with all State, County and Local standards for occupancy within (18) months of the date of the deed. Within such eighteen (18) month time period the purchaser must either: obtain a Certificate of Occupancy for all buildings on the property; make all buildings granted a Certificate of Occupancy before the date of purchase fit for the use stated in such Certificate of Occupancy; or demolish such buildings. The deed shall require the purchaser to schedule an inspection by City officials at or before the end of the eighteen (18) month period. If the purchaser has not complied with the deed provisions regarding rehabilitation of the property and obtained a Certificate of Occupancy or Certificate of Compliance by that time, then the title to the property shall revert to the City of Newburgh. The deed shall also provide that the property shall not be conveyed to any other person before a Certificate of Occupancy or Certificate of Compliance is issued. A written request made to the City Manager for an extension of the eighteen (18) month rehabilitation period shall be accompanied by a non-refundable fee of $250.00 per parcel for which a request is submitted. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to rehabilitate of up to, but not to exceed, three (3) months. Any additional request thereafter shall be made in writing and placed before the City Council for their consideration**.
6. The property is sold subject to an owner-occupancy restriction. The purchaser has agreed to purchase the property subject to the five (5) year owner occupancy restriction shall, within 18 months of the delivery of the deed, establish his domicile and principal residence at said premises and maintain his domicile and principal residence at said premises for a period of at least five (5) years thereafter, provided that within said five (5) year period, the purchaser may convey said premises to another who shall also maintain their domicile and principal residence at said premises for said period. This shall be set forth as a restrictive covenant in the deed, subject upon its breach, to a right of re-entry in favor of the City of Newburgh. This shall be in addition to all other provisions, covenants and conditions set forth in the Terms of Sale.
7. Notice is hereby given that the property is vacant and unoccupied. This parcel is being sold subject to the City's Vacant Property Ordinance and all provisions of law applicable thereto. At closing, the

purchaser will be required to register the property and remit the vacant property fee. It is the sole responsibility of the purchaser to redevelop such parcel in accordance with same.

8. All purchasers are advised to personally inspect the premises and to examine title to the premises prior to the date upon which the sale is scheduled to take place. Upon delivery of the quitclaim deed by the City of Newburgh to the successful purchaser, any and all claims with respect to title to the premises are merged in the deed and do not survive.
9. No personal property is included in the sale of any of the parcels owned by City of Newburgh, unless the former owner or occupant has abandoned same. The disposition of any personal property located on any parcel sold shall be the sole responsibility of the successful purchaser following the closing of sale.
10. The City makes no representation, express or implied, as to the condition of any property, warranty of title, or as to the suitability of any for any particular use or occupancy. Property may contain paint or other similar surface coating material containing lead. Purchaser shall be responsible for the correction of such conditions when required by applicable law. Property also may contain other environmental hazards. Purchaser shall be responsible for ascertaining and investigating such conditions prior to bidding. Purchaser shall be responsible for investigating and ascertaining from the City Building Inspector's records the legal permitted use of any property prior to closing. Purchaser acknowledges receivership of the pamphlet entitled "Protecting Your Family from Lead in Your Home." Purchaser also acknowledges that he/she has had the opportunity to conduct a risk assessment or inspection of the premises for the presence of lead-based paint, lead-based paint hazards or mold.
11. The entire purchase price and all closing costs/fees must be paid by money order or guaranteed funds to the City of Newburgh Comptroller's Office on or before March 14, 2016. *The City of Newburgh does not accept credit card payments for the purchase price and closing costs/fees.* **The City is not required to send notice of acceptance or any other notice to a purchaser.** At closing, purchaser, as grantee, may take title as a natural person or as an entity wherein purchaser is an officer or managing member of said entity. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to close title of up to, but not to exceed, sixty (60) additional days. No request shall be entertained unless in writing, stating the reasons therefor, and unless accompanied by a fee of $250.00 per parcel for which a request is submitted. The fee shall be in addition to all other fees and deposits and shall not be credited against the purchase price and shall not be returnable. Any additional request made thereafter shall be made in writing and placed before the City Council for their consideration.
12. In the event that a sale is cancelled by court order, judgment, the Comptroller or the Newburgh City Council, the successful bidder shall be entitled only to a refund of the purchase money paid with interest. Purchaser agrees that he shall <u>not</u> be entitled to special or consequential damages, attorney's fees, reimbursement for any expenses incurred as a result of ownership, improvements of property, or for taxes paid during period of ownership, and this agreement by the purchaser is a material condition of the sale.
13. Sale shall be final, absolute and without recourse once title has closed and the deed has been recorded. In no event, shall City of Newburgh be or become liable for any defects in title for any cause whatsoever, and no claim, demand or suit of any nature shall exist in favor of the purchaser, his heirs, successors or assigns, against City of Newburgh arising from this sale.
14. Conveyance shall be by quitclaim deed only, containing a description of the property as it appeared on the tax roll for the year upon which the City acquired title or as corrected up to date of deed. The deed will be recorded by the City upon payment in full of the purchase price, buyer's premium, and closing fees/costs. Possession of property is forbidden until the deed is recorded conveying title to the purchaser. **Title vests upon recording of deed.**
15. Upon closing, the City shall deliver a quitclaim deed conveying all of its right, title and interest in the subject property, which deed shall be drawn by the City Corporation Counsel. The City shall not convey its interest in any street, water, sewer or drainage easement, or any other interest the City may have in the property. The City shall only convey that interest obtained by the City pursuant to the judgment rendered in an *in rem* tax foreclosure action filed in the Orange County Clerk's Office.

16. The description of the property shall be from the City of Newburgh Tax Map reference or a survey description certified to the City of Newburgh and provided to the City Corporation Counsel by the purchaser at least ten (10) days in advance of closing title and approved by the City's Engineer.
17. Evictions, if necessary, are solely the responsibility of the purchaser after closing and recording of the deed.
18. By acknowledging and executing these Terms & Conditions, the purchaser certifies that he/she is not representing the former owner(s) of the property against whom City of Newburgh foreclosed and has no intent to defraud City of Newburgh of the unpaid taxes, assessment, penalties and charges which have been levied against the property. The purchaser agrees that neither he/she nor his/her assigns shall convey the property to the former owner(s) against whom City of Newburgh foreclosed within 24 months subsequent to the auction date. If such conveyance occurs, the purchaser understands that he/she may be found to have committed fraud, and/or intent to defraud, and will be liable for any deficiency between the purchase price at auction and such sums as may be owed to City of Newburgh as related to the foreclosure on the property and consents to immediate judgment by City of Newburgh for said amounts.

RESOLUTION NO.: _____- 2015

OF

DECEMBER 14, 2015

A RESOLUTION TO AUTHORIZE THE CONVEYANCE OF REAL PROPERTY KNOWN AS 50 WILLIAM STREET (SECTION 38, BLOCK 2, LOT 36) AT PRIVATE SALE TO ELDER IVAN LOZANO FOR THE AMOUNT OF $1,000.00

WHEREAS, the City of Newburgh has acquired title to several parcels of real property by foreclosure *In Rem* pursuant of Article 11 Title 3 of the Real property Tax law of the State of New York; and

WHEREAS, pursuant to Section 1166 of the Real Property Tax Law the City may sell properties acquired by foreclosure *In Rem* at private sale; and

WHEREAS, the City of Newburgh desires to sell 50 William Street, being more accurately described as Section 38, Block 2, Lot 36 on the official tax map of the City of Newburgh; and

WHEREAS, the prospective buyer has offered to purchase this property at private sale; and

WHEREAS, this Council has determined that it would be in the best interests of the City of Newburgh to sell said property to the prospective buyer for the sum as outlined below, and upon the same terms and conditions annexed hereto and made a part hereof,

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York, that the sale of the following property to the indicated purchaser be and hereby is confirmed and the City Manager is authorized and directed to execute and deliver a quitclaim deed to said purchaser upon receipt of the indicated purchase price in money order, good certified or bank check, made payable to **THE CITY OF NEWBURGH,** such sums are to be paid on or before March 14, 2016, being ninety (90) days from the date of this resolution; and

Property Address	Section, Block, Lot	Purchaser	Purchase Price
50 William Street	38 – 2 – 36	Elder Ivan Lozano	$1,000.00

BE IT FURTHER RESOLVED, by the Council of the City of Newburgh, New York, that the parcel is not required for public use.

Terms and Conditions Sale
50 William Street, City of Newburgh (38-2-36)

STANDARD TERMS:

1. City of Newburgh acquired title to this property in accordance with Article 11 of the Real Property Tax Law of the State of New York, and all known rights of redemption under said provisions of law have been extinguished by the tax sale proceedings and/or as a result of forfeiture.
2. For purposes of these Terms and Conditions, parcel shall be defined as a section, block and lot number.
3. All real property, including any buildings thereon, is sold "AS IS" and without any representation or warranty whatsoever as to the condition or title, and subject to: (a) any state of facts an accurate survey or personal inspection of the premises would disclose; (b) applicable zoning/land use/building regulations; (c) water and sewer assessments are the responsibility of the purchaser, whether they are received or not; (d) easements, covenants, conditions and rights-of-way of record existing at the time of the levy of the tax, the non-payment of which resulted in the tax sale in which City of Newburgh acquired title; and (e) for purposes of taxation, the purchaser shall be deemed to be the owner prior to the next applicable taxable status date after the date of sale.
4. The property is sold subject to unpaid 2016 City/County Taxes and 2015-2016 School Taxes and any subsequent levies. The purchaser shall reimburse the City for 2016 City/County Taxes and 2015-2016 School Taxes and any subsequent levies. Upon the closing, the property shall become subject to taxation. Water and sewer charges and sanitation fees will be paid by the City to the date of closing.
5. All purchasers are advised to personally inspect the premises and to examine title to the premises prior to the date upon which the sale is scheduled to take place. Upon delivery of the quitclaim deed by the City of Newburgh to the successful purchaser, any and all claims with respect to title to the premises are merged in the deed and do not survive.
6. No personal property is included in the sale of any of the parcels owned by City of Newburgh, unless the former owner or occupant has abandoned same. The disposition of any personal property located on any parcel sold shall be the sole responsibility of the successful purchaser following the closing of sale.
7. Notice is hereby given that the property lies within the East End Historic District as designated upon the zoning or tax map. This parcel is being sold subject to all provision of law applicable thereto and it is the sole responsibility of the purchaser to redevelop such parcel so designated in accordance with same.
8. The City makes no representation, express or implied, as to the condition of any property, warranty of title, or as to the suitability of any for any particular use or occupancy. Property may contain paint or other similar surface coating material containing lead. Purchaser shall be responsible for the correction of such conditions when required by applicable law. Property also may contain other environmental hazards. Purchaser shall be responsible for ascertaining and investigating such conditions prior to bidding. Purchaser shall be responsible for investigating and ascertaining from the City Building Inspector's records the legal permitted use of any property prior to closing. Purchaser acknowledges receivership of the pamphlet entitled "Protecting Your Family from Lead in Your Home." Purchaser also acknowledges that he/she has had the opportunity to conduct a risk assessment or inspection of the premises for the presence of lead-based paint, lead-based paint hazards or mold.
9. The entire purchase price and all closing costs/fees must be paid by money order or guaranteed funds to the City of Newburgh Comptroller's Office on or before March 14, 2016. *The City of Newburgh does not accept credit card payments for the purchase price and closing costs/fees.* **The City is not required to send notice of acceptance or any other notice to a purchaser.** At closing, purchaser, as grantee, may take title as a natural person or as an entity wherein purchaser is an officer or managing member of said entity. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to close title of up to, but not to exceed, sixty (60) additional days. No request shall be entertained unless in writing, stating the reasons therefor, and unless accompanied by a fee of $250.00 per parcel for which a request is submitted. The fee shall be in addition to all other fees and deposits and shall not be credited against the purchase price and

shall not be returnable. Any additional request made thereafter shall be made in writing and placed before the City Council for their consideration.

10. In the event that a sale is cancelled by court order, judgment, the Comptroller or the Newburgh City Council, the successful bidder shall be entitled only to a refund of the purchase money paid with interest. Purchaser agrees that he shall not be entitled to special or consequential damages, attorney's fees, reimbursement for any expenses incurred as a result of ownership, improvements of property, or for taxes paid during period of ownership, and this agreement by the purchaser is a material condition of the sale.
11. Sale shall be final, absolute and without recourse once title has closed and the deed has been recorded. In no event, shall City of Newburgh be or become liable for any defects in title for any cause whatsoever, and no claim, demand or suit of any nature shall exist in favor of the purchaser, his heirs, successors or assigns, against City of Newburgh arising from this sale.
12. Conveyance shall be by quitclaim deed only, containing a description of the property as it appeared on the tax roll for the year upon which the City acquired title or as corrected up to date of deed. The deed will be recorded by the City upon payment in full of the purchase price, buyer's premium, and closing fees/costs. Possession of property is forbidden until the deed is recorded conveying title to the purchaser. **Title vests upon recording of deed.**
13. Upon closing, the City shall deliver a quitclaim deed conveying all of its right, title and interest in the subject property, which deed shall be drawn by the City Corporation Counsel. The City shall not convey its interest in any street, water, sewer or drainage easement, or any other interest the City may have in the property. The City shall only convey that interest obtained by the City pursuant to the judgment rendered in an *in rem* tax foreclosure action filed in the Orange County Clerk's Office.
14. The description of the property shall be from the City of Newburgh Tax Map reference or a survey description certified to the City of Newburgh and provided to the City Corporation Counsel by the purchaser at least thirty (30) days in advance of closing title and approved by the City's Engineer.
15. Evictions, if necessary, are solely the responsibility of the successful bidder after closing and recording of the deed.
16. By acknowledging and executing these Terms & Conditions, the purchaser certifies that he/she is not representing the former owner(s) of the property against whom City of Newburgh foreclosed and has no intent to defraud City of Newburgh of the unpaid taxes, assessment, penalties and charges which have been levied against the property. The purchaser agrees that neither he/she nor his/her assigns shall convey the property to the former owner(s) against whom City of Newburgh foreclosed within 24 months subsequent to the auction date. If such conveyance occurs, the purchaser understands that he/she may be found to have committed fraud, and/or intent to defraud, and will be liable for any deficiency between the purchase price at auction and such sums as may be owed to City of Newburgh as related to the foreclosure on the property and consents to immediate judgment by City of Newburgh for said amounts.

RESOLUTION NO.: _____- 2015

OF

DECEMBER 14, 2015

A RESOLUTION TO AUTHORIZE THE CONVEYANCE OF REAL PROPERTY KNOWN AS 63 GROVE STREET (SECTION 26, BLOCK 6, LOT 7.1) AT PRIVATE SALE TO PATRICK COUSINS FOR THE AMOUNT OF $70,000.00

WHEREAS, the City of Newburgh has acquired title to several parcels of real property by foreclosure *In Rem* pursuant of Article 11 Title 3 of the Real property Tax law of the State of New York; and

WHEREAS, pursuant to Section 1166 of the Real Property Tax Law the City may sell properties acquired by foreclosure *In Rem* at private sale; and

WHEREAS, the City of Newburgh desires to sell 63 Grove Street, being more accurately described as Section 26, Block 6, Lot 7.1 on the official tax map of the City of Newburgh; and

WHEREAS, the prospective buyer has offered to purchase this property at private sale; and

WHEREAS, this Council has determined that it would be in the best interests of the City of Newburgh to sell said property to the prospective buyer for the sum as outlined below, and upon the same terms and conditions annexed hereto and made a part hereof,

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York, that the sale of the following property to the indicated purchaser be and hereby is confirmed and the City Manager is authorized and directed to execute and deliver a quitclaim deed to said purchaser upon receipt of the indicated purchase price in money order, good certified or bank check, made payable to **THE CITY OF NEWBURGH,** such sums are to be paid on or before March 14, 2016 being ninety (90) days from the date of this resolution; and

Property Address	Section, Block, Lot	Purchaser	Purchase Price
63 Grove Street	26 – 6 – 7.1	Patrick Cousins	$70,000.00

BE IT FURTHER RESOLVED, by the Council of the City of Newburgh, New York, that the parcel is not required for public use.

Terms and Conditions Sale
63 Grove Street, City of Newburgh (26-6-7.1)

STANDARD TERMS:

1. City of Newburgh acquired title to this property in accordance with Article 11 of the Real Property Tax Law of the State of New York, and all known rights of redemption under said provisions of law have been extinguished by the tax sale proceedings and/or as a result of forfeiture.
2. For purposes of these Terms and Conditions, parcel shall be defined as a section, block and lot number.
3. All real property, including any buildings thereon, is sold "AS IS" and without any representation or warranty whatsoever as to the condition or title, and subject to: (a) any state of facts an accurate survey or personal inspection of the premises would disclose; (b) applicable zoning/land use/building regulations; (c) water and sewer assessments are the responsibility of the purchaser, whether they are received or not; (d) easements, covenants, conditions and rights-of-way of record existing at the time of the levy of the tax, the non-payment of which resulted in the tax sale in which City of Newburgh acquired title; and (e) for purposes of taxation, the purchaser shall be deemed to be the owner prior to the next applicable taxable status date after the date of sale.
4. The property is sold subject to unpaid 2016 City/County Tax, 2015-2016 School Taxes and any subsequent levies. The purchaser shall reimburse the City for 2016 City/County Taxes and 2015-2016 School Taxes and any subsequent levies. Upon the closing, the property shall become subject to taxation and apportionment of the 2015 City and County taxes shall be made as of the date of closing. Water and sewer charges and sanitation fees will be paid by the City to the date of closing except that where the water meter reading nets a usage to the purchaser of less than 6 units for the quarterly bill, the purchaser shall be responsible for a minimum water and sewer bill of six units.
5. **WARNING: FAILURE TO COMPLY WITH THE TERMS OF THIS PARAGRAPH MAY RESULT IN YOUR LOSS OF THE PROPERTY AFTER PURCHASE**. **The deed will contain provisions stating that the purchaser is required to rehabilitate any building on the property and bring it into compliance with all State, County and Local standards for occupancy within (18) months of the date of the deed. Within such eighteen (18) month time period the purchaser must either: obtain a Certificate of Occupancy for all buildings on the property; make all buildings granted a Certificate of Occupancy before the date of purchase fit for the use stated in such Certificate of Occupancy; or demolish such buildings. The deed shall require the purchaser to schedule an inspection by City officials at or before the end of the eighteen (18) month period. If the purchaser has not complied with the deed provisions regarding rehabilitation of the property and obtained a Certificate of Occupancy or Certificate of Compliance by that time, then the title to the property shall revert to the City of Newburgh. The deed shall also provide that the property shall not be conveyed to any other person before a Certificate of Occupancy or Certificate of Compliance is issued. A written request made to the City Manager for an extension of the eighteen (18) month rehabilitation period shall be accompanied by a non-refundable fee of $250.00 per parcel for which a request is submitted. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to rehabilitate of up to, but not to exceed, three (3) months. Any additional request thereafter shall be made in writing and placed before the City Council for their consideration**.
6. The property is sold subject to an owner-occupancy restriction. The purchaser has agreed to purchase the property subject to the five (5) year owner occupancy restriction shall, within 18 months of the delivery of the deed, establish his domicile and principal residence at said premises and maintain his domicile and principal residence at said premises for a period of at least five (5) years thereafter, provided that within said five (5) year period, the purchaser may convey said premises to another who shall also maintain their domicile and principal residence at said premises for said period. This shall be set forth as a restrictive covenant in the deed, subject upon its breach, to a right of re-entry in favor of the City of Newburgh. This shall be in addition to all other provisions, covenants and conditions set forth in the Terms of Sale.

7. All purchasers are advised to personally inspect the premises and to examine title to the premises prior to the date upon which the sale is scheduled to take place. Upon delivery of the quitclaim deed by the City of Newburgh to the successful purchaser, any and all claims with respect to title to the premises are merged in the deed and do not survive.
8. No personal property is included in the sale of any of the parcels owned by City of Newburgh, unless the former owner or occupant has abandoned same. The disposition of any personal property located on any parcel sold shall be the sole responsibility of the successful purchaser following the closing of sale.
9. The City makes no representation, express or implied, as to the condition of any property, warranty of title, or as to the suitability of any for any particular use or occupancy. Property may contain paint or other similar surface coating material containing lead. Purchaser shall be responsible for the correction of such conditions when required by applicable law. Property also may contain other environmental hazards. Purchaser shall be responsible for ascertaining and investigating such conditions prior to bidding. Purchaser shall be responsible for investigating and ascertaining from the City Building Inspector's records the legal permitted use of any property prior to closing. Purchaser acknowledges receivership of the pamphlet entitled "Protecting Your Family from Lead in Your Home." Purchaser also acknowledges that he/she has had the opportunity to conduct a risk assessment or inspection of the premises for the presence of lead-based paint, lead-based paint hazards or mold.
10. The entire purchase price and all closing costs/fees must be paid by money order or guaranteed funds to the City of Newburgh Comptroller's Office on or before March 14, 2016. *The City of Newburgh does not accept credit card payments for the purchase price and closing costs/fees.* **The City is not required to send notice of acceptance or any other notice to a purchaser.** At closing, purchaser, as grantee, may take title as a natural person or as an entity wherein purchaser is an officer or managing member of said entity. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to close title of up to, but not to exceed, sixty (60) additional days. No request shall be entertained unless in writing, stating the reasons therefor, and unless accompanied by a fee of $250.00 per parcel for which a request is submitted. The fee shall be in addition to all other fees and deposits and shall not be credited against the purchase price and shall not be returnable. Any additional request made thereafter shall be made in writing and placed before the City Council for their consideration.
11. In the event that a sale is cancelled by court order, judgment, the Comptroller or the Newburgh City Council, the successful bidder shall be entitled only to a refund of the purchase money paid with interest. Purchaser agrees that he shall <u>not</u> be entitled to special or consequential damages, attorney's fees, reimbursement for any expenses incurred as a result of ownership, improvements of property, or for taxes paid during period of ownership, and this agreement by the purchaser is a material condition of the sale.
12. Sale shall be final, absolute and without recourse once title has closed and the deed has been recorded. In no event, shall City of Newburgh be or become liable for any defects in title for any cause whatsoever, and no claim, demand or suit of any nature shall exist in favor of the purchaser, his heirs, successors or assigns, against City of Newburgh arising from this sale.
13. Conveyance shall be by quitclaim deed only, containing a description of the property as it appeared on the tax roll for the year upon which the City acquired title or as corrected up to date of deed. The deed will be recorded by the City upon payment in full of the purchase price, buyer's premium, and closing fees/costs. Possession of property is forbidden until the deed is recorded conveying title to the purchaser. **Title vests upon recording of deed.**
14. Upon closing, the City shall deliver a quitclaim deed conveying all of its right, title and interest in the subject property, which deed shall be drawn by the City Corporation Counsel. The City shall not convey its interest in any street, water, sewer or drainage easement, or any other interest the City may have in the property. The City shall only convey that interest obtained by the City pursuant to the judgment rendered in an *in rem* tax foreclosure action filed in the Orange County Clerk's Office.
15. The description of the property shall be from the City of Newburgh Tax Map reference or a survey description certified to the City of Newburgh and provided to the City Corporation Counsel by the purchaser at least thirty (30) days in advance of closing title and approved by the City's Engineer.

16. Evictions, if necessary, are solely the responsibility of the purchaser after closing and recording of the deed.
17. By acknowledging and executing these Terms & Conditions, the purchaser certifies that he/she is not representing the former owner(s) of the property against whom City of Newburgh foreclosed and has no intent to defraud City of Newburgh of the unpaid taxes, assessment, penalties and charges which have been levied against the property. The purchaser agrees that neither he/she nor his/her assigns shall convey the property to the former owner(s) against whom City of Newburgh foreclosed within 24 months subsequent to the auction date. If such conveyance occurs, the purchaser understands that he/she may be found to have committed fraud, and/or intent to defraud, and will be liable for any deficiency between the purchase price at auction and such sums as may be owed to City of Newburgh as related to the foreclosure on the property and consents to immediate judgment by City of Newburgh for said amounts.

RESOLUTION NO.: _____- 2015

OF

DECEMBER 14, 2015

A RESOLUTION TO AUTHORIZE THE CONVEYANCE OF REAL PROPERTY KNOWN AS 69 COURTNEY AVENUE (SECTION 48, BLOCK 11, LOT 1) AT PRIVATE SALE TO HOWARD ELDER FOR THE AMOUNT OF $1,200.00

WHEREAS, the City of Newburgh has acquired title to several parcels of real property by foreclosure *In Rem* pursuant of Article 11 Title 3 of the Real property Tax law of the State of New York; and

WHEREAS, pursuant to Section 1166 of the Real Property Tax Law the City may sell properties acquired by foreclosure *In Rem* at private sale; and

WHEREAS, the City of Newburgh desires to sell 69 Courtney Avenue, being more accurately described as Section 48, Block 11, Lot 1 on the official tax map of the City of Newburgh; and

WHEREAS, the prospective buyer has offered to purchase this property at private sale; and

WHEREAS, this Council has determined that it would be in the best interests of the City of Newburgh to sell said property to the prospective buyer for the sum as outlined below, and upon the same terms and conditions annexed hereto and made a part hereof,

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York, that the sale of the following property to the indicated purchaser be and hereby is confirmed and the City Manager is authorized and directed to execute and deliver a quitclaim deed to said purchaser upon receipt of the indicated purchase price in money order, good certified or bank check, made payable to **THE CITY OF NEWBURGH,** such sums are to be paid on or before March 14, 2016, being ninety (90) days from the date of this resolution; and

Property Address	Section, Block, Lot	Purchaser	Purchase Price
69 Courtney Avenue	48 – 11 – 1	Howard Elder	$1,200.00

BE IT FURTHER RESOLVED, by the Council of the City of Newburgh, New York, that the parcel is not required for public use.

Terms and Conditions Sale
69 Courtney Avenue, City of Newburgh (48-11-1)

STANDARD TERMS:

1. City of Newburgh acquired title to this property in accordance with Article 11 of the Real Property Tax Law of the State of New York, and all known rights of redemption under said provisions of law have been extinguished by the tax sale proceedings and/or as a result of forfeiture.
2. For purposes of these Terms and Conditions, parcel shall be defined as a section, block and lot number.
3. All real property, including any buildings thereon, is sold "AS IS" and without any representation or warranty whatsoever as to the condition or title, and subject to: (a) any state of facts an accurate survey or personal inspection of the premises would disclose; (b) applicable zoning/land use/building regulations; (c) water and sewer assessments are the responsibility of the purchaser, whether they are received or not; (d) easements, covenants, conditions and rights-of-way of record existing at the time of the levy of the tax, the non-payment of which resulted in the tax sale in which City of Newburgh acquired title; and (e) for purposes of taxation, the purchaser shall be deemed to be the owner prior to the next applicable taxable status date after the date of sale.
4. The property is sold subject to unpaid 2015-2016 School Taxes and any subsequent levies. The purchaser shall reimburse the City for 2015-2016 School Taxes and any subsequent levies. Upon the closing, the property shall become subject to taxation. Water and sewer charges and sanitation fees will be paid by the City to the date of closing.
5. All purchasers are advised to personally inspect the premises and to examine title to the premises prior to the date upon which the sale is scheduled to take place. Upon delivery of the quitclaim deed by the City of Newburgh to the successful purchaser, any and all claims with respect to title to the premises are merged in the deed and do not survive.
6. No personal property is included in the sale of any of the parcels owned by City of Newburgh, unless the former owner or occupant has abandoned same. The disposition of any personal property located on any parcel sold shall be the sole responsibility of the successful purchaser following the closing of sale.
7. Notice is hereby given that the property lies within the East End Historic District as designated upon the zoning or tax map. This parcel is being sold subject to all provision of law applicable thereto and it is the sole responsibility of the purchaser to redevelop such parcel so designated in accordance with same.
8. The City makes no representation, express or implied, as to the condition of any property, warranty of title, or as to the suitability of any for any particular use or occupancy. Property may contain paint or other similar surface coating material containing lead. Purchaser shall be responsible for the correction of such conditions when required by applicable law. Property also may contain other environmental hazards. Purchaser shall be responsible for ascertaining and investigating such conditions prior to bidding. Purchaser shall be responsible for investigating and ascertaining from the City Building Inspector's records the legal permitted use of any property prior to closing. Purchaser acknowledges receivership of the pamphlet entitled "Protecting Your Family from Lead in Your Home." Purchaser also acknowledges that he/she has had the opportunity to conduct a risk assessment or inspection of the premises for the presence of lead-based paint, lead-based paint hazards or mold.
9. The entire purchase price and all closing costs/fees must be paid by money order or guaranteed funds to the City of Newburgh Comptroller's Office on or before March 14, 2016. *The City of Newburgh does not accept credit card payments for the purchase price and closing costs/fees.* **The City is not required to send notice of acceptance or any other notice to a purchaser.** At closing, purchaser, as grantee, may take title as a natural person or as an entity wherein purchaser is an officer or managing member of said entity. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to close title of up to, but not to exceed, sixty (60) additional days. No request shall be entertained unless in writing, stating the reasons therefor, and unless accompanied by a fee of $250.00 per parcel for which a request is submitted. The fee shall be in addition to all other fees and deposits and shall not be credited against the purchase price and

shall not be returnable. Any additional request made thereafter shall be made in writing and placed before the City Council for their consideration.

10. In the event that a sale is cancelled by court order, judgment, the Comptroller or the Newburgh City Council, the successful bidder shall be entitled only to a refund of the purchase money paid with interest. Purchaser agrees that he shall not be entitled to special or consequential damages, attorney's fees, reimbursement for any expenses incurred as a result of ownership, improvements of property, or for taxes paid during period of ownership, and this agreement by the purchaser is a material condition of the sale.
11. Sale shall be final, absolute and without recourse once title has closed and the deed has been recorded. In no event, shall City of Newburgh be or become liable for any defects in title for any cause whatsoever, and no claim, demand or suit of any nature shall exist in favor of the purchaser, his heirs, successors or assigns, against City of Newburgh arising from this sale.
12. Conveyance shall be by quitclaim deed only, containing a description of the property as it appeared on the tax roll for the year upon which the City acquired title or as corrected up to date of deed. The deed will be recorded by the City upon payment in full of the purchase price, buyer's premium, and closing fees/costs. Possession of property is forbidden until the deed is recorded conveying title to the purchaser. **Title vests upon recording of deed.**
13. Upon closing, the City shall deliver a quitclaim deed conveying all of its right, title and interest in the subject property, which deed shall be drawn by the City Corporation Counsel. The City shall not convey its interest in any street, water, sewer or drainage easement, or any other interest the City may have in the property. The City shall only convey that interest obtained by the City pursuant to the judgment rendered in an *in rem* tax foreclosure action filed in the Orange County Clerk's Office.
14. The description of the property shall be from the City of Newburgh Tax Map reference or a survey description certified to the City of Newburgh and provided to the City Corporation Counsel by the purchaser at least thirty (30) days in advance of closing title and approved by the City's Engineer.
15. Evictions, if necessary, are solely the responsibility of the successful bidder after closing and recording of the deed.
16. By acknowledging and executing these Terms & Conditions, the purchaser certifies that he/she is not representing the former owner(s) of the property against whom City of Newburgh foreclosed and has no intent to defraud City of Newburgh of the unpaid taxes, assessment, penalties and charges which have been levied against the property. The purchaser agrees that neither he/she nor his/her assigns shall convey the property to the former owner(s) against whom City of Newburgh foreclosed within 24 months subsequent to the auction date. If such conveyance occurs, the purchaser understands that he/she may be found to have committed fraud, and/or intent to defraud, and will be liable for any deficiency between the purchase price at auction and such sums as may be owed to City of Newburgh as related to the foreclosure on the property and consents to immediate judgment by City of Newburgh for said amounts.

RESOLUTION NO.: _____- 2015

OF

DECEMBER 14, 2015

A RESOLUTION TO AUTHORIZE THE CONVEYANCE OF REAL PROPERTY KNOWN AS 199 SOUTH STREET (SECTION 18, BLOCK 1, LOT 3) AT PRIVATE SALE TO DAVID FISHEL FOR THE AMOUNT OF $3,800.00

WHEREAS, the City of Newburgh has acquired title to several parcels of real property by foreclosure *In Rem* pursuant of Article 11 Title 3 of the Real property Tax law of the State of New York; and

WHEREAS, pursuant to Section 1166 of the Real Property Tax Law the City may sell properties acquired by foreclosure *In Rem* at private sale; and

WHEREAS, the City of Newburgh desires to sell 199 South Street, being more accurately described as Section 18, Block 1, Lot 3 on the official tax map of the City of Newburgh; and

WHEREAS, the prospective buyer has offered to purchase this property at private sale; and

WHEREAS, this Council has determined that it would be in the best interests of the City of Newburgh to sell said property to the prospective buyer for the sum as outlined below, and upon the same terms and conditions annexed hereto and made a part hereof,

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York, that the sale of the following property to the indicated purchaser be and hereby is confirmed and the City Manager is authorized and directed to execute and deliver a quitclaim deed to said purchaser upon receipt of the indicated purchase price in money order, good certified or bank check, made payable to **THE CITY OF NEWBURGH,** such sums are to be paid on or before March 14, 2016, being ninety (90) days from the date of this resolution; and

Property Address	Section, Block, Lot	Purchaser	Purchase Price
199 South Street	18 – 1 – 3	David Fishel	$3,800.00

BE IT FURTHER RESOLVED, by the Council of the City of Newburgh, New York, that the parcel is not required for public use.

Terms and Conditions Sale
199 South Street, City of Newburgh (18-1-3)

STANDARD TERMS:

1. City of Newburgh acquired title to this property in accordance with Article 11 of the Real Property Tax Law of the State of New York, and all known rights of redemption under said provisions of law have been extinguished by the tax sale proceedings and/or as a result of forfeiture.
2. For purposes of these Terms and Conditions, parcel shall be defined as a section, block and lot number.
3. All real property, including any buildings thereon, is sold "AS IS" and without any representation or warranty whatsoever as to the condition or title, and subject to: (a) any state of facts an accurate survey or personal inspection of the premises would disclose; (b) applicable zoning/land use/building regulations; (c) water and sewer assessments are the responsibility of the purchaser, whether they are received or not; (d) easements, covenants, conditions and rights-of-way of record existing at the time of the levy of the tax, the non-payment of which resulted in the tax sale in which City of Newburgh acquired title; and (e) for purposes of taxation, the purchaser shall be deemed to be the owner prior to the next applicable taxable status date after the date of sale.
4. The property is sold subject to unpaid 2016 City/County Taxes and 2015-2016 School Taxes and any subsequent levies. The purchaser shall reimburse the City for 2016 City/County Taxes and 2015-2016 School Taxes and any subsequent levies. Upon the closing, the property shall become subject to taxation. Water and sewer charges and sanitation fees will be paid by the City to the date of closing.
5. **WARNING: FAILURE TO COMPLY WITH THE TERMS OF THIS PARAGRAPH MAY RESULT IN YOUR LOSS OF THE PROPERTY AFTER PURCHASE**. **The deed will contain provisions stating that the purchaser is required to rehabilitate any building on the property and bring it into compliance with all State, County and Local standards for occupancy within thirty-six (36) months of the date of the deed. Within such thirty-six (36) month time period the purchaser must either: obtain a Certificate of Occupancy for all buildings on the property; make all buildings granted a Certificate of Occupancy before the date of purchase fit for the use stated in such Certificate of Occupancy; or demolish such buildings. The deed shall require the purchaser to schedule an inspection by City officials at or before the end of the thirty-six (36) month period. If the purchaser has not complied with the deed provisions regarding rehabilitation of the property and obtained a Certificate of Occupancy or Certificate of Compliance by that time, then the title to the property shall revert to the City of Newburgh. The deed shall also provide that the property shall not be conveyed to any other person before a Certificate of Occupancy or Certificate of Compliance is issued. A written request made to the City Manager for an extension of the thirty-six (36) month rehabilitation period shall be accompanied by a non-refundable fee of $250.00 per parcel for which a request is submitted. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to rehabilitate of up to, but not to exceed, three (3) months. Any additional request thereafter shall be made in writing and placed before the City Council for their consideration**.
6. All purchasers are advised to personally inspect the premises and to examine title to the premises prior to the date upon which the sale is scheduled to take place. Upon delivery of the quitclaim deed by the City of Newburgh to the successful purchaser, any and all claims with respect to title to the premises are merged in the deed and do not survive.
7. Notice is hereby given that the property lies within the East End Historic District as designated upon the zoning or tax map. This parcel is being sold subject to all provision of law applicable thereto and it is the sole responsibility of the purchaser to redevelop such parcel so designated in accordance with same.
8. Notice is hereby given that the property is vacant and unoccupied. This parcel is being sold subject to the City's Vacant Property Ordinance and all provisions of law applicable thereto. At closing, the

purchaser will be required to register the property and remit the vacant property fee. It is the sole responsibility of the purchaser to redevelop such parcel in accordance with same.

9. No personal property is included in the sale of any of the parcels owned by City of Newburgh, unless the former owner or occupant has abandoned same. The disposition of any personal property located on any parcel sold shall be the sole responsibility of the successful purchaser following the closing of sale.
10. The City makes no representation, express or implied, as to the condition of any property, warranty of title, or as to the suitability of any for any particular use or occupancy. Property may contain paint or other similar surface coating material containing lead. Purchaser shall be responsible for the correction of such conditions when required by applicable law. Property also may contain other environmental hazards. Purchaser shall be responsible for ascertaining and investigating such conditions prior to bidding. Purchaser shall be responsible for investigating and ascertaining from the City Building Inspector's records the legal permitted use of any property prior to closing. Purchaser acknowledges receivership of the pamphlet entitled "Protecting Your Family from Lead in Your Home." Purchaser also acknowledges that he/she has had the opportunity to conduct a risk assessment or inspection of the premises for the presence of lead-based paint, lead-based paint hazards or mold.
11. The entire purchase price and all closing costs/fees must be paid by money order or guaranteed funds to the City of Newburgh Comptroller's Office on or before March 14, 2016. *The City of Newburgh does not accept credit card payments for the purchase price and closing costs/fees.* **The City is not required to send notice of acceptance or any other notice to a purchaser.** At closing, purchaser, as grantee, may take title as a natural person or as an entity wherein purchaser is an officer or managing member of said entity. The City Manager may, in his sole discretion and for good cause shown, grant one extension of time to close title of up to, but not to exceed, sixty (60) additional days. No request shall be entertained unless in writing, stating the reasons therefor, and unless accompanied by a fee of $250.00 per parcel for which a request is submitted. The fee shall be in addition to all other fees and deposits and shall not be credited against the purchase price and shall not be returnable. Any additional request made thereafter shall be made in writing and placed before the City Council for their consideration.
12. In the event that a sale is cancelled by court order, judgment, the Comptroller or the Newburgh City Council, the successful bidder shall be entitled only to a refund of the purchase money paid with interest. Purchaser agrees that he shall <u>not</u> be entitled to special or consequential damages, attorney's fees, reimbursement for any expenses incurred as a result of ownership, improvements of property, or for taxes paid during period of ownership, and this agreement by the purchaser is a material condition of the sale.
13. Sale shall be final, absolute and without recourse once title has closed and the deed has been recorded. In no event, shall City of Newburgh be or become liable for any defects in title for any cause whatsoever, and no claim, demand or suit of any nature shall exist in favor of the purchaser, his heirs, successors or assigns, against City of Newburgh arising from this sale.
14. Conveyance shall be by quitclaim deed only, containing a description of the property as it appeared on the tax roll for the year upon which the City acquired title or as corrected up to date of deed. The deed will be recorded by the City upon payment in full of the purchase price, buyer's premium, and closing fees/costs. Possession of property is forbidden until the deed is recorded conveying title to the purchaser. **Title vests upon recording of deed.**
15. Upon closing, the City shall deliver a quitclaim deed conveying all of its right, title and interest in the subject property, which deed shall be drawn by the City Corporation Counsel. The City shall not convey its interest in any street, water, sewer or drainage easement, or any other interest the City may have in the property. The City shall only convey that interest obtained by the City pursuant to the judgment rendered in an *in rem* tax foreclosure action filed in the Orange County Clerk's Office.
16. The description of the property shall be from the City of Newburgh Tax Map reference or a survey description certified to the City of Newburgh and provided to the City Corporation Counsel by the purchaser at least thirty (30) days in advance of closing title and approved by the City's Engineer.
17. Evictions, if necessary, are solely the responsibility of the successful bidder after closing and recording of the deed.

18. By acknowledging and executing these Terms & Conditions, the purchaser certifies that he/she is not representing the former owner(s) of the property against whom City of Newburgh foreclosed and has no intent to defraud City of Newburgh of the unpaid taxes, assessment, penalties and charges which have been levied against the property. The purchaser agrees that neither he/she nor his/her assigns shall convey the property to the former owner(s) against whom City of Newburgh foreclosed within 24 months subsequent to the auction date. If such conveyance occurs, the purchaser understands that he/she may be found to have committed fraud, and/or intent to defraud, and will be liable for any deficiency between the purchase price at auction and such sums as may be owed to City of Newburgh as related to the foreclosure on the property and consents to immediate judgment by City of Newburgh for said amounts.

Agenda Item 16.

Resolution authorizing the City to apply for a Municipal Sewage System Asset Management Pilot Program Grant from the NYSDEC

A resolution authorizing the City Manager to apply for, and accept if awarded, a grant from the New York State Department of Environmental Conservation for participation in a three-year municipal sewage system asset management pilot program. (Jason Morris)

Una resolución autorizando al Gerente de la Ciudad a aplicar y aceptar si es otorgado, una beca del Departamento de Conservación del Estado de Nueva York para la participación en un programa piloto del Manejo de Propiedad del Alcantarillado Municipal por tres años. (Jason Morris)

Background:

RESOLUTION NO.: _____ - 2015

OF

DECEMBER 14, 2015

A RESOLUTION AUTHORIZING THE CITY MANAGER TO APPLY FOR AND ACCEPT IF AWARDED A GRANT FROM THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL PROTECTION FOR PARTICIPATION IN A THREE YEAR MUNICIPAL SEWAGE SYSTEM ASSET MANAGEMENT PILOT PROGRAM

WHEREAS, the New York State Department of Environmental Conservation has announced a New York State Municipal Sewage System Asset Management (MSSAM) Pilot Program for the purpose of providing municipalities the opportunity to provide valuable input in shaping the final guidance and approach that will be set forth in the State's new MSSAM Program; and

WHEREAS, the Pilot program requires a three-year commitment from a maximum of 20 municipalities selected to participate, which at the conclusion of the program can expect to have a completed Asset Management Plan for their sewage system and the tools to implement the program; and

WHEREAS, selection for the MSSAM requires a commitment of in-kind services from the municipality without any out-of-pocket expenses; and

WHEREAS, this Council has determined that applying to and accepting entry into the MSSAM if selected is in the best interests of the City of Newburgh and its residents;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York that the City Manager be and he is hereby authorized to apply for and accept if awarded a grant from the New York State Department of Environmental Conservation for participation in New York State Municipal Sewage System Asset Management (MSSAM) Pilot Program; and to execute all such

further contracts and documentation and take such further actions as may be appropriate and necessary to accept such grant and participate in and administer the programs funded thereby.

ATTACHMENTS:

Description	Upload Date	Type
NYSDEC Asset Management Pilot Program Guide	12/1/2015	Cover Memo
NYSDEC Asset Management Pilot Program Application	12/1/2015	Cover Memo

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

MUNICIPAL SEWAGE SYSTEM ASSET MANAGEMENT (MSSAM) PILOT PROGRAM

Guidelines for Participating Municipalities

November 2015

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER

625 Broadway, Albany NY 12233
P: (518) 402-8233 | F: (518) 402-9029 | MSSAM@dec.ny.gov

www.dec.ny.gov

MUNICIPAL SEWAGE SYSTEM ASSET MANAGEMENT (MSSAM) PILOT PROGRAM

Guidelines for Participating Municipalities

Pilot Program Overview

Municipalities that participate in the New York State Municipal Sewage System Asset Management (MSSAM) Pilot Program have the unique opportunity to provide valuable input in shaping the final guidance and approach that will be set forth in the state's new MSSAM Program under the direction and guidance of the NYS Department of Environmental Conservation (DEC).

The pilot is expected to run for three years, and will have up to 20 municipalities who volunteered to participate. Municipalities should be aware that filing an application does not guarantee that they will be selected for the program. The DEC will evaluate all complete applications and will select municipalities to participate. The DEC will notify all applicants as to whether they have been selected or not. Applicants with questions can contact the DEC through the municipal sewage system asset management mailbox: MSSAM@dec.ny.gov

The state will select and hire an environmental engineering firm(s) to work with each selected municipality to develop and begin the implementation of their asset management plan (AMP). The state will develop a work plan for the firm(s) to complete within the given timeframes.

At the conclusion of the pilot, the participating municipalities can expect to have a completed AMP for their sewage system and the tools (e.g. computerized asset management system) to implement the program. The AMP will be based on the framework outlined in the DEC's draft Municipal Sewage System Asset Management Guide. For municipalities that have already developed an AMP, this pilot can help them to enhance their plan and to fill in the gaps between their existing plan and the state's guide.

Municipal Contribution

This is a voluntary program, and there will be no out-of-pocket costs to participating municipalities for developing their AMP. However, municipalities that participate will be expected to commit staff resources and time to the process for the entire three years.

Staff Commitments

The municipality will be responsible for committing staff to work with the environmental engineering firm to prepare and implement the AMP. The state will be asking the participating municipalities to assign their chief operator and the operator's back-up to work on the pilot and to allow a portion of their time to be dedicated to the program. These staff will be the liaison between the municipality, the environmental engineering firm(s) and the state.

The staff should have the following qualifications and characteristics:

- Willing to provide descriptive feedback to the state.
- Able to give presentations and talk with others about how the AMP is working in their municipality and for their wastewater treatment facility.
- Daily access to the internet and email.

Other Resource Commitments

The municipality will be expected to supply meeting space (e.g., conference room), and provide the environmental engineering firm with facility records and site access.

Anticipated Activities

Below is a breakdown of the activities that the state expects each municipality to complete during the pilot program.

Year 1

- The municipality will work with the environmental engineering firm to complete an AMP for the municipal sewage system.
- As part of preparing the AMP, the municipality will be responsible for providing information to the state and the environmental engineering firm about the municipal sewage system. Below is a list of the types of information the environmental engineering firm <u>may</u> request from the municipality. Municipalities who do not have all the information are still eligible to volunteer for the pilot program.

Examples of background information that may be requested:

- Existing service area agreements and policies, design and performance standards, sewer development guidelines
- Existing municipal ordinances
- Related municipal development plan updates in progress
- Most current size and location of system infrastructure (e.g., GIS, CAD files, or record drawings)
- Flow monitoring data collected by the municipality
- Staff certifications and municipal organizational chart, with specific focus on those individuals with both direct and indirect involvement with the operation and management of the sewage system
- System operation maintenance and control, including routine operations current FTEs, preventive maintenance, inventories of equipment and supplies, and related information
- Existing Capital Improvement Plan (CIP) and ranking criteria
- Recent construction cost data for municipal projects
- Sewage system operating costs. Current and anticipated future budgets
- Available revenue sources (e.g., fees for service and connection charges)
- Municipal policies related to level of reserves and debt service coverage targets

- The municipality will be responsible for providing feedback to the state about the AMP and the process. Municipal staff will be required to:
    - Meet with the state in advance of the pilot program to review the environmental engineering firm's asset management program work plan.
    - Participate in meetings with the state to discuss program status and any outstanding questions or concerns. The exact frequency of these meetings has not been determined.
    - Respond in a timely manner to the state's questions.
- The municipality will be responsible for notifying their community of the facility's participation in the pilot program.
- The municipality will be responsible for providing the state with a copy of the municipality's asset inventory and system maps in the format prescribed by the

state at the end of the plan development process. The engineering firm will assist with this task.

Years 2 and 3

- The municipality will work toward implementing the first two years of their AMP. The municipality will be responsible for committing staff to this task and to implement the plan to the maximum extent practicable. The state and the environmental engineering firm will be available to provide advice. The environmental engineering firm and the state will provide an assessment and feedback on the development and implementation of the AMP.
- The municipality will be responsible for providing constructive and descriptive feedback to the state on a regular basis about implementing the AMP. Methods of feedback will include phone calls, emails, meeting and written reports.
- The municipality will conduct outreach to the public regarding progress on implementing the AMP. Some examples of outreach include flyers, webpage updates, and public meetings. The environmental engineering firm will provide assistance with preparing the outreach materials, including a presentation template for the municipal staff to use for public meetings.
- The municipality will work with the environmental engineering firm to provide the state with a Final Assessment Report based on their participation in the pilot program.

Opting Out of the Program

DEC is looking to work with municipalities who are committed to all three years of the program. However, DEC recognizes that there may be extenuating circumstances that cause a municipality to need to opt-out of the pilot. In these rare instances, the municipality will be required to notify DEC in writing of their decision to end their participation in the Program. Within 30 days of the date of the notification, the municipality will be required to set up a meeting for all municipal staff that participated in the pilot to discuss with DEC staff and the engineering firm staff their part in the pilot and why the municipality choose to opt-out.

Municipal Sewage System Asset Management

Pilot Program Application

NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

To volunteer for the opportunity to be a part of the Municipal Sewage System Asset Management Pilot Program, municipalities must fill out and electronically ***submit this form by January 20th, 2016****. Municipalities should be aware that filing an application does not guarantee that they will be selected for the program. The DEC will notify all applicants as to whether they have been selected or not.*

After filling out all mandatory fields on the application, submit the application by using the Submit button at the end of the application, or email the saved completed application to MSSAM@dec.ny.gov. All submissions will receive acknowledgment of receipt. Please do not email a scanned copy of the application.

Municipal Information

1. Name of Municipality: _____

2. Mailing Address: _____
   Street Address *Unit #*
   _____
   City *State* *ZIP Code*

3. Contact Name: _____
   Last *First* *M.I.*

4. Contact Title: _____

5. Contact Phone: _____
   (###) ###-#### *Ext.*

6. Contact Email: _____

Certification of Applicant

The person listed below certifies that he/she is authorized to submit this application on behalf of the applicant and that to the best of his/her knowledge, information and belief, all statements in the application are true and accurate:

1. Applicant Name: _____
   Last *First* *M.I.*

2. Applicant Title: _____

3. Applicant Phone: _____
   (###) ###-#### *Ext.*

4. Applicant Email: _____

Municipal Agreement

To participate in this pilot program, municipalities must agree to the Municipal Sewage System Asset Management (MSSAM) Pilot Program: Guidelines for Participating Municipalities, which can be found on DEC's Municipal Sewage System Asset Management Pilot Program web page at the following address: http://www.dec.ny.gov/chemical/101419.html

1. I have read and agree to the Guidelines for Participating Municipalities:

☐ Yes ☐ No

Additionally, municipalities must submit responses to both of the following data surveys for each wastewater treatment facility in their sewage system to be eligible:

- *Wastewater Treatment Plant Rating Worksheet for Wastewater Treatment Plant Certification (Ref: Part 650.3, 650.6)*
- *Collection System Survey*

The surveys can be found on DEC's Municipal Sewage System Asset Management Pilot Program web page at the following address: http://www.dec.ny.gov/chemical/101419.html.

If you have questions about the surveys, please contact the Division of Water's Bureau of Water Compliance at (518) 402-8177.

2. Responses to both data surveys have been submitted electronically to MSSAM@dec.ny.gov:

☐ Yes ☐ No

Statement of Need

1. Provide a brief explanation why your municipality should be selected to be part of this pilot program. Include how participating in the pilot program would help your municipality maintain and improve its level of service and long-term sustainability.

Sewage System Information

1. List the facility name and SPDES number for each wastewater treatment facility in your sewage system. If your system is a satellite system, provide the name and SPDES number of the treatment facility that your sewer system is connected to.

Facility Name	SPDES Number

2. Does your municipality have a dedicated funding source for Operations and Maintenance (O&M)?

☐ Yes

☐ No

3. Briefly describe the municipality's current and planned sources of funding for its sewage system.

4. List the number of staff and certification level of the chief operator and assistant or shift operator for each wastewater treatment facility in the system.

5. Does your municipality currently offer regular training opportunities for wastewater facility staff?

☐ Yes ☐ No

6. If your municipality has worked with an engineering firm to develop and implement a municipal sewage system asset management plan, list the name of the firm.

Name of Firm: _____ ☐ Not Applicable

7. Does your municipality have maps of the wastewater treatment facility and sewage collection system?

☐ Yes ☐ No

a. If yes, what type of maps are primarily used?

☐ Paper maps

☐ Geographic Information System (GIS)-based maps

☐ Computer-Aided Design (CAD)-based maps

☐ Other (include a description) _____

Submit

Agenda Item 17.

Ordinance No. 2015 - Chapter 248 Sewers

ORDINANCE NO.: _____ - 2015 OF DECEMBER 14, 2015
An Ordinance amending Section 248-39(B) entitled "Pretreatment" of the Code of the City of Newburgh to comply with the Annual Industrial Pretreatment Report prepared by the U.S. Environmental Protection Agency. (Jason Morris)

DECRETO Num.:_____-2015 DEL14 DE DICIEMBRE DEL 2015

Un Decreto enmendando Sección 248- 39(B) titulado “Tratamiento Previo” del Código de la Ciudad de Newburgh para cumplir con el Reporte Anual de Tratamiento Previo Industrial preparado por la Agencia de Protección Ambiental de los Estados Unidos.

Background:

ORDINANCE NO.: _____ - 2015

OF

DECEMBER 14, 2015

**AN ORDINANCE AMENDING SECTION 248-39(B)
ENTITLED “PRETREATMENT” OF THE CODE OF THE CITY OF NEWBURGH TO
TO COMPLY WITH THE ANNUAL INDUSTRIAL PRETREATMENT REPORT PREPARED BY
THE U.S. ENVIRONMENTAL PROTECTION AGENCY**

BE IT ORDAINED, by the Council of the City of Newburgh, New York that Chapter 248, entitled “Sewers”, Article III, entitled “Wastewater Discharge”, Section 248-39, entitled “Pretreatment” of the Code of the City of Newburgh be and is hereby amended to read as follows:

Section 1. Chapter 248. Sewers

Article III. Wastewater Discharge

§ 248-39. Pretreatment.

A. Users shall provide necessary wastewater treatment to make wastewater acceptable under the limitations established herein and shall achieve compliance with all Federal Categorical Pretreatment Standards within the time limitations as specified by the Federal Pretreatment Regulations before discharging into any community sewer. Any facilities required to pretreat wastewater to a level acceptable to the City shall be provided, operated and maintained at the user's expense. Detailed plans showing the pretreatment facilities and operating procedures shall be submitted to the City for review and shall be acceptable to the City before construction of the facility. The review of such plans and operating procedures will in no way relieve the user from the responsibility of modifying the facility as necessary to produce an effluent acceptable to the City under the provisions of this article. Any subsequent changes in the pretreatment facilities or

method of operation shall be reported to and be acceptable to the City prior to the user's initiation of the changes.

~~B. The City shall publish annually in the official newspaper of the City a list of the users who were not in compliance with any pretreatment requirements or standards at least once during the 12 previous months. The notification shall also summarize any enforcement actions taken against the user(s) during the same 12 months.~~

B. The City shall publish annually in the official newspapers of the City of Newburgh, a list of the industrial users, which at any time during the previous twelve months, were in significant noncompliance with applicable pretreatment requirements. For the purposes of this provision, an industrial user is in significant noncompliance if its violation meets one or more of the following criteria:

1. Chronic violations of wastewater discharge limits, defined here as those in which sixty-six percent or more of all measurements taken during a six-month period exceed (by any magnitude) the daily maximum limit or the average limit for the same pollutant parameter.
2. Technical Review Criteria (TRC) violations defined here as those in which thirty-three percent or more of all the measurements for each pollutant parameter taken during a six-month period equal or exceed the product of the daily maximum limit or the average limit or the average limit multiplied by the applicable TRC (TRC=1.4 for biologic oxygen demand [BOD], total suspended solids [TSS], fats oil and grease and 1.2 for all other pollutants except pH).
3. Any other violation of a pretreatment effluent limit (daily maximum or longer-term average) that the City of Newburgh determines has caused, alone or in combination with other discharges, interference or pass through (including endangering the health of Point of Treatment Works [POTW] personnel or the general public).
4. Any discharge of a pollutant that has caused imminent endangerment to human health, welfare or to the environment or has resulted in the POTW's exercise of its emergency authority under Section 248-50 through Section 248-53 of this Article to halt or prevent such a discharge.
5. Failure to meet, within 90 days after the schedule date, a compliance schedule milestone contained in a local control mechanism or enforcement order for starting construction, completing construction or attaining final compliance.
6. Failure to provide, within 30 days after the due date, required reports such as baseline monitoring reports, 90-day compliance reports, periodic self-monitoring reports and reports on compliance with compliance schedules.
7. Failure to accurately report noncompliance.
8. Any other violation or group of violations which the City of Newburgh determines will adversely affect the operation or implementation of the local pretreatment program.

C. All records relating to compliance with pretreatment standards shall be made available to officials of the City, the Environmental Protection Agency or approval authority upon request.

Section 2. This ordinance shall take effect immediately.

Underlining denotes additions
~~Strikethrough~~ denotes deletions

Additional Information:
Revision to Section 248-39 Pre -treatment as per the attached documents.

ATTACHMENTS:

Description	Upload Date	Type
Chapter 248-39 Sewers (Existing Pretreatment Ordinance)	12/2/2015	Cover Memo
Chapter 248-39 Sewers (proposed amendment)	12/4/2015	Backup Material

City of Newburgh, NY
Wednesday, December 2, 2015

Chapter 248. Sewers

Article III. Wastewater Discharge

§ 248-39. Pretreatment.

[Amended 12-28-1981]

A. Users shall provide necessary wastewater treatment to make wastewater acceptable under the limitations established herein and shall achieve compliance with all Federal Categorical Pretreatment Standards within the time limitations as specified by the Federal Pretreatment Regulations before discharging into any community sewer. Any facilities required to pretreat wastewater to a level acceptable to the City shall be provided, operated and maintained at the user's expense. Detailed plans showing the pretreatment facilities and operating procedures shall be submitted to the City for review and shall be acceptable to the City before construction of the facility. The review of such plans and operating procedures will in no way relieve the user from the responsibility of modifying the facility as necessary to produce an effluent acceptable to the City under the provisions of this article. Any subsequent changes in the pretreatment facilities or method of operation shall be reported to and be acceptable to the City prior to the user's initiation of the changes.

B. The City shall publish annually in the official newspaper of the City a list of the users who were not in compliance with any pretreatment requirements or standards at least once during the 12 previous months. The notification shall also summarize any enforcement actions taken against the user(s) during the same 12 months.

C. All records relating to compliance with pretreatment standards shall be made available to officials of the City, the Environmental Protection Agency or approval authority upon request.

Chapter 248. Sewers

Article III. Wastewater Discharge

§ 248-39. Pretreatment.

~~B. The City shall publish annually in the official newspaper of the City a list of the users who were not in compliance with any pretreatment requirements or standards at least once during the 12 previous months. The notification shall also summarize any enforcement actions taken against the user(s) during the same 12 months.~~

B. The City shall publish annually in the official newspapers of the City of Newburgh, a list of the industrial users which, at any time during the previous twelve months, were in significant noncompliance with applicable pretreatment requirements. For the purposes of this provision, an industrial user is in significant noncompliance if its violation meets one or more of the following criteria:

(1) Chronic violations of wastewater discharge limits, defined here as those in which sixty-six percent or more of all of the measurements taken during a six-month period exceed (by any magnitude) the daily maximum limit or the average limit for the same pollutant parameter.

(2) Technical Review Criteria (TRC) violations, defined here as those in which thirty-three percent or more of all of the measurements for each pollutant parameter taken during a six-month period equal or exceed the product of the daily maximum limit or the average limit multiplied by the applicable TRC (TRC=1.4 for BOD, TSS, fats, oil, and grease, and 1.2 for all other pollutants except pH.

(3) Any other violation of a pretreatment effluent limit (daily maximum or longer-term average) that the City of Newburgh determines has caused, alone or in combination with other discharges, interference or pass through (including endangering the health of POTW personnel or the general public).

(4) Any discharge of a pollutant that has caused imminent endangerment to human health, welfare or to the environment or has resulted in the POTW's exercise of its emergency authority under paragraph (f)(1)(vi)(B) of this section to halt or prevent such a discharge.

(5) Failure to meet, within 90 days after the schedule date, a compliance schedule milestone contained in a local control mechanism or enforcement order for starting construction, completing construction, or attaining final compliance.

(6) Failure to provide, within 30 days after the due date, required reports such as baseline monitoring reports, 90-day compliance reports, periodic self-monitoring reports, and reports on compliance with compliance schedules.

(7) Failure to accurately report noncompliance.

(8) Any other violation or group of violations which the City of Newburgh determines will adversely affect the operation or implementation of the local pretreatment program.

Agenda Item 18.

Resolution No. 2015 - Approval of Various Insurance Policies

A resolution authorizing approval of various insurance Policies for the period of January 1, 2016 to December 31, 2016. (Michelle Kelson)

Una resolución autorizando la aprobación de varias pólizas de seguro por el periodo comenzando el 1 de Enero del 2016 hasta el 31 de Diciembre del 2016. (Michelle Kelson)

Background:

ATTACHMENTS:

Description	Upload Date	Type
Res. Various Insurance Policies 2016	12/11/2015	Cover Memo

RESOLUTION NO.: _____ - 2015

OF

DECEMBER 14, 2015

A RESOLUTION AUTHORIZING APPROVAL OF VARIOUS INSURANCE POLICIES FOR THE PERIOD OF JANUARY 1, 2016 TO DECEMBER 31, 2016

WHEREAS, the City of Newburgh has solicited proposals for insurance coverage for the fiscal year 2016; and

WHEREAS, Arthur J. Gallagher of New York, Inc. and Gallagher Bassett Services, Inc. have recommended a package of insurance coverage for property and liability insurance coverage for Fiscal Year 2016;

NOW, THEREFORE, BE IT RESOLVED, that the Council of the City of Newburgh, New York hereby approves the insurance coverage for the term beginning January 1, 2016 through December 31, 2016 with the self-insured retention amounts and premium rates as set forth in the attached Insurance Quotation; and

BE IT FURTHER RESOLVED, by the Council of the City of Newburgh, New York, that the City Manager be and he is hereby authorized and directed to execute agreements with Arthur J. Gallagher of New York, Inc. and Gallagher Bassett Services, Inc. to provide for insurance coverage and third-party claims administration services, respectively, for the period of January 1, 2016 to December 31, 2016.

RESOLUTION NO.: _____-2015

OF

DECEMBER 14, 2015

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWBURGH, NEW YORK AUTHORIZING THE TRANSFER OF A PORTION OF 141 ELLIS AVENUE IN EXCHANGE FOR A PORTION OF 139 ELLIS AVENUE

WHEREAS, the City of Newburgh and Donald A. Whitfield, Robert McCoy, Aziz Mureebe and Girardo Tojino, also known as The Overview Partnership, own adjacent properties located at 141 Ellis Avenue and 139 Ellis Avenue, identified as Section 42, Block 2, Lot 4 and Section 42, Block 2, Lot 6.22 on the official Tax Map of the City of Newburgh; and

WHEREAS, as a survey prepared by Daniel J. O'Brien, Professional Land Surveyor, indicates that the construction of a water storage tank owned by the City of Newburgh encroaches upon the property owned by Donald A. Whitfield, Robert McCoy, Aziz Mureebe and Girardo Tojino; and

WHEREAS, Mr. Witfield, on behalf of the The Overview Partnership, appeared before the City of Newburgh Planning Board on July 21, 2015 with an application requesting a lot line revision to alleviate the encroachment and the Planning Board approved the lot line revision; and

WHEREAS, by Resolution No. 202 -2015 of August 10, 2015, the City Council consented to and supported the application of Mr. Witfield to the City of Newburgh Planning Board for a lot line revision at the boundary of Section 42, Block 2, Lot 4 and Section 42, Block 2, Lot 6.22 on the official Tax Map of the City of Newburgh and the Planning Board's approval of said lot line revision; and

WHEREAS, upon the completion of the lot line revision, it is in the best interests of the City of Newburgh and its further development for the City and Donald A. Whitfield, Robert McCoy, Aziz Mureebe and Girardo Tojino to exchange portions of the Ellis Avenue parcels so that the City is the record owner of the entire parcel on which the water storage tank is constructed and The Overview Partnership will own its parcel free of any encroachments;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York, that the City Council hereby authorizes the transfer of that portion of 141 Ellis Avenue, Section 42, Block 2, Lot 4 on the official Tax Map of the City of Newburgh as described in the "City of Newburgh & Witfield McCoy Murebe & Tojino Map" reflecting the boundary lot line change filed with the Orange County Clerk on October 9, 2015 to Donald A. Whitfield, Robert McCoy, Aziz Mureebe and Girardo Tojino in exchange for that portion of 139 Ellis Avenue, Section 42, Block 2, Lot 6.22 on the official Tax Map of the City of Newburgh as described in the "City of Newburgh & Witfield McCoy Murebe & Tojino Map" reflecting the boundary lot line change filed with the Orange County Clerk on October 9, 2015; and

BE IT FURTHER RESOLVED, that the City Manager is hereby authorized to execute any documents necessary in order to effectuate the transfer and exchange of the portions of said parcels.

Courses and distances along Water Tank Parcel

1) N 39^37'58" W 85.00'
2) N 05^45'02" E 30.89'
3) N 42^31'58" W 6.70'
4) N 46^58'32" E 228.75'

Subject to All Utility Company Easements

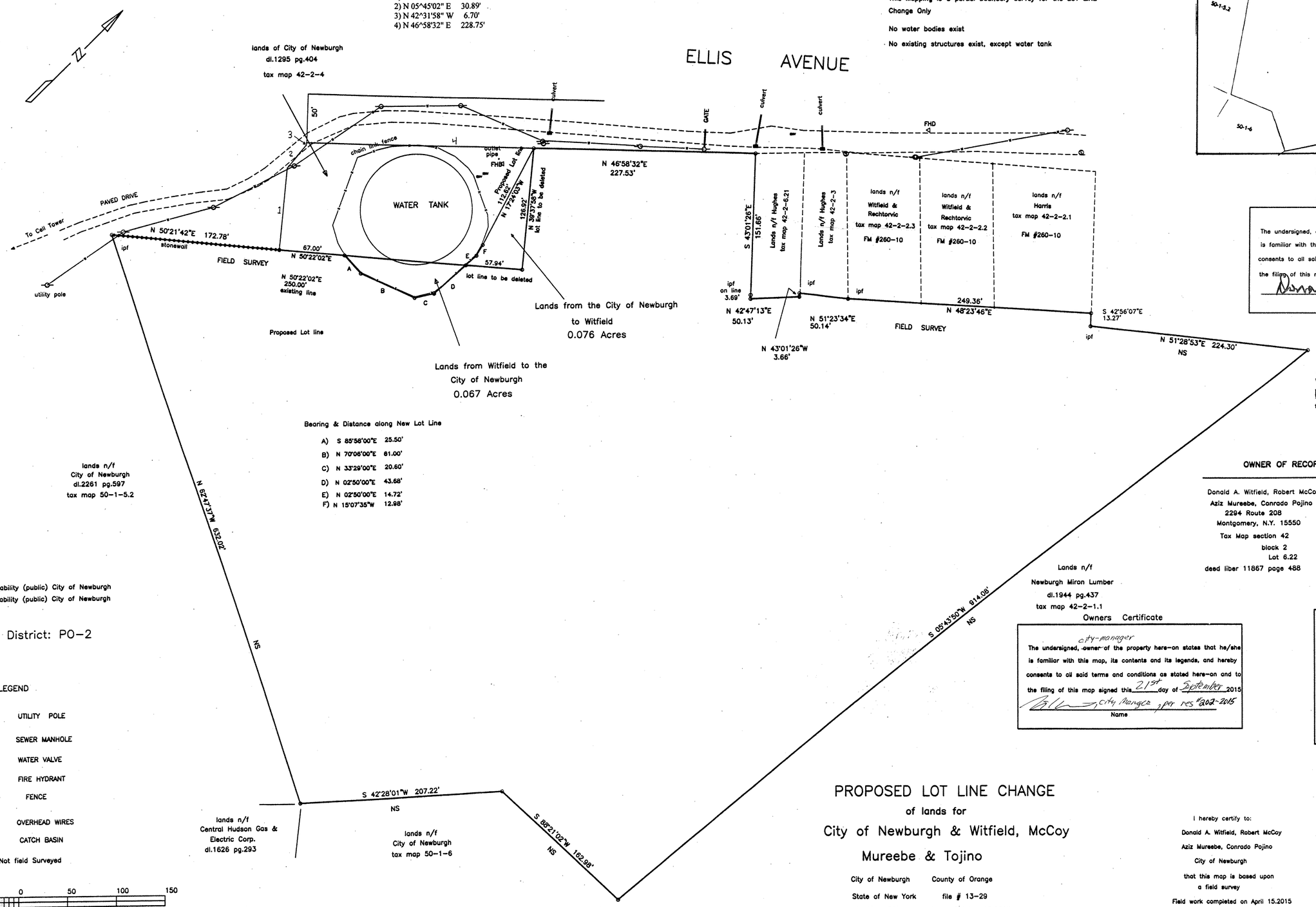
No underground improvements and structures shown

No Buried Utility Lines Shown

This Mapping is a partial boundary survey for the LOT LINE Change Only

No water bodies exist

No existing structures exist, except water tank



Bearing & Distance along New Lot Line

A) S 85°58'00"E 25.50'
B) N 70°06'00"E 61.00'
C) N 33°29'00"E 20.60'
D) N 02°50'00"E 43.68'
E) N 02°50'00"E 14.72'
F) N 15°07'35"W 12.98'

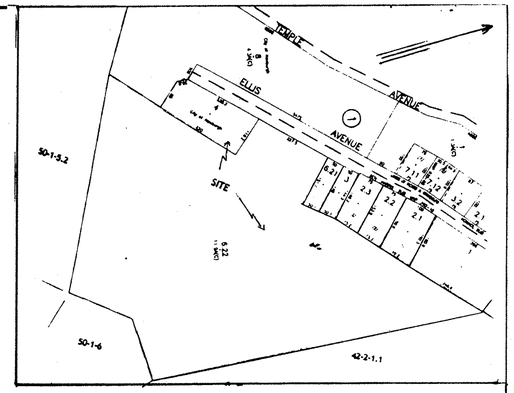
Sewer Availability (public) City of Newburgh
Water Availability (public) City of Newburgh

Zoning District: PO-2

LEGEND

- UTILITY POLE
- SEWER MANHOLE
- WATER VALVE
- FIRE HYDRANT
- FENCE
- OVERHEAD WIRES
- CATCH BASIN
- NS: Not field Surveyed

50 0 50 100 150
GRAPHIC SCALE - FEET



LOCATION PLAN

Owners Certificate

The undersigned, owner of the property here-on states that he/she is familiar with this map, its contents and its legends, and hereby consents to all said terms and conditions as stated here-on and to the filing of this map signed this 17 day of SEPT, 2015

Donald A. Witfield
Name

Map # 236-15 Sheet 1 of 1
Filed On 10/9/15
ORANGE COUNTY CLERK'S OFFICE

OWNER OF RECORD / APPLICANTS

Donald A. Witfield, Robert McCoy
Aziz Mureebe, Conrado Pojino
2294 Route 208
Montgomery, N.Y. 15550
Tax Map section 42
block 2
Lot 6.22
deed liber 11867 page 488

City of Newburgh
83 Broadway City Hall
Newburgh, N.Y. 12550
Tax Map section 42
block 2
lot 4

Owners Certificate

The undersigned, ~~owner~~ city-manager of the property here-on states that he/she is familiar with this map, its contents and its legends, and hereby consents to all said terms and conditions as stated here-on and to the filing of this map signed this 21st day of September 2015

city manager, per res #202-2015
Name

APPROVED
CITY OF NEWBURGH
PLANNING BOARD
Lisa Daly 9/18/15
Chairman Date

Planning Board Approval Box

PROPOSED LOT LINE CHANGE

of lands for

City of Newburgh & Witfield, McCoy

Mureebe & Tojino

City of Newburgh County of Orange

State of New York file # 13-29

scale 1" = 50' dated: October 15,2012

Revised: September 08,2015
Planning board comments

I hereby certify to:

Donald A. Witfield, Robert McCoy
Aziz Mureebe, Conrado Pojino
City of Newburgh

that this map is based upon a field survey

Field work completed on April 15,2015

Unauthorized Alteration Or Addition To This Map Is A Violation Of Sec. 7209(2) Of The New York State Education Law. Copies Of This Map Not Having The Embossed Seal Of The Land Surveyor Shall Not Be Valid. Guarantees Or Certifications Are Not Transferable To Additional Institutions Or Subsequent Owners.

DANIEL J. O'BRIEN
PROFESSIONAL LAND SURVEYOR
239 MILLSBURG ROAD
MIDDLETOWN, N.Y. 10940

DANIEL J. O'BRIEN NYS LIC. #049820-1

RESOLUTION NO.: _____ - 2015

OF

DECEMBER 14, 2015

A RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE A DIRECT AGREMENT WITH TAYLOR-MONTGOMERY LLC AND CITIBANK, N.A. IN CONNECTION WITH THE SOLID WASTE DISPOSAL AND PROCESSING AGREEMENT BETWEEN THE CITY OF NEWBURGH AND TBE-MONTGOMERY LLC

WHEREAS, by Resolution No. 121-2011 of July 11, 2011, the City of Newburgh authorized an agreement with TBE-Montgomery LLC for the disposal of municipal solid waste through a renewable electrical energy process at a substantially lower cost than the City currently pays for disposal of solid waste at the Orange County Transfer Station; and

WHEREAS, by Resolution No. 25-2015 of January 28, 2015, the City of Newburgh authorized the City Manager to enter into an extension agreement to extend the term of the start-up period of the agreement for a new three year period to December 31, 2017 with all remaining terms of the agreement to continue; and

WHEREAS, the financing requirements of the project and Section 16.07 "Further Assurances" of the City's agreement with TBE-Montgomery, LLC, require a Direct Agreement between Citibank, N.A., Taylor-Montgomery LLC, as the successor to TBE-Montgomery, LLC, which permits the lender to assume rights and obligations under the City's agreement with TBE-Montgomery, LLC if it becomes necessary under the financing agreements; and

WHEREAS, the Direct Agreement extends the term of the City's agreement with TBE-Montgomery, LLC for one additional year until December 31, 2018; and

WHEREAS, this Council has reviewed terms of the Direct Agreement extension offer and agreement and finds that the execution of such agreement is in the best interests of the City of Newburgh;

NOW, THEREFORE, BE IT RESOLVED, that the Council of the City of Newburgh, New York that the City Manager be and he is hereby authorized to execute a Direct Agreement between the City of Newburgh, Taylor-Montgomery, LLC, as successor to TBE-Montgomery LLC, and Citibank, N.A. as annexed hereto pursuant to Section 16.07 of the City's agreement with TBE-Montgomery, LLC for the disposal of municipal solid waste.

DIRECT AGREEMENT

among

CITY OF NEWBURGH
a New York municipality and political subdivision of the State of New York
(Contracting Party)

TAYLOR-MONTGOMERY, LLC
a New York limited liability company
(Borrower)

and

CITIBANK, N.A.
(Trustee)

Dated as of December __, 2015

This DIRECT AGREEMENT, dated as of December __, 2015 (this "Agreement"), is entered into by and among the CITY OF NEWBURGH, a New York municipality and political subdivision of the State of New York (the "Contracting Party"), TAYLOR-MONTGOMERY, LLC, a New York limited liability company and successor in interest to TBE-MONTGOMERY LLC (the "Borrower"), and CITIBANK, N.A., a national banking association in its capacity as trustee pursuant to the Indenture, as defined below (together with its successors, designees and assigns in such capacity, the "Trustee").

RECITALS

A. The Borrower intends to develop, construct, install, finance, own, operate and maintain a mixed solid waste separation and recycling facility which will convert the organic biomass portion of mixed solid waste to electricity through gasification, to be located in the Town of Montgomery, Orange County, New York (the "Project").

B. The Contracting Party and the Borrower have entered into that certain Solid Waste Processing and Disposal Agreement, dated July 22, 2011 (the "Supply Contract") relating to the supply of mixed solid waste and related services with respect to the Project, as such may be amended, amended and restated, supplemented or otherwise modified from time to time in accordance with the terms thereof and hereof, are referred to herein jointly as (the "Assigned Agreements").

C. In order to finance the Project, the Borrower will enter into certain documents providing for the borrowing of funds by, and the performance of certain other obligations of, the Borrower (the "Secured Obligations"), and the securing of the repayment of and satisfaction of such Secured Obligations, by the Borrower, and such documents include the Loan Agreement, dated as of December 1, 2015, by and between the Borrower and the Town of Montgomery Capital Resource Corporation (the "Issuer"), as amended, amended and restated, supplemented or otherwise modified from time to time (the "Financing Agreement"), and the Indenture of Trust, dated as of December 1, 2015, by and between the Issuer and the Trustee, as amended, amended and restated, supplemented or otherwise modified from time to time (the "Indenture"). Pursuant to the Indenture, the Issuer is issuing $_____ of its Municipal Solid Waste Bonds (Taylor-Montgomery, LLC Project) Series 2014 (the "Series 2015 Bonds") and the proceeds of the Series 2015 Bonds are being loaned to the Borrower pursuant to the Financing Agreement. Unless otherwise defined herein, capitalized terms used in this Agreement shall have the meanings ascribed to them in the Indenture.

D. Pursuant to the Security Agreement, dated as of December 1, 2015, entered into between the Borrower and the Trustee (as amended, amended and restated, supplemented or otherwise modified from time to time, the "Security Agreement"), the Borrower will agree, among other things, to assign, as collateral security for the Secured Obligations, all of its right, title and interest in, to and under the Assigned Agreement to the Trustee.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the parties hereto hereby agree, notwithstanding anything in the Assigned Agreements to the contrary, as follows:

1. Assignment and Agreement.

1.1 Consent to Assignment. The Contracting Party (a) is hereby notified and acknowledges that the Issuer will enter into the Financing Agreement in reliance upon, among other things, the execution and delivery by the Contracting Party of this Agreement, (b) consents to the collateral assignment under the Security Agreement of all of the Borrower's right, title and interest in, to and under the Assigned Agreements, including, without limitation, all of the Borrower's rights to receive performance, benefits and all payments (if any) due and to become due to the Borrower under or with respect to the Assigned Agreements (collectively, the "Assigned Interests"), and (c) acknowledges the right (but not the obligation) of the Trustee (or its designee), in the exercise of its rights and remedies pursuant to, and in accordance with, the Security Agreement, upon written notice to the Contracting Party, to make all demands, give all notices, take all actions and exercise all rights of the Borrower under the Assigned Agreements and agrees that in such event the Contracting Party shall continue to perform its obligations under the Assigned Agreements.

1.2 Subsequent Borrower. The Contracting Party agrees that, if the Trustee notifies the Contracting Party in writing that, pursuant to the Security Agreement, it has assigned, foreclosed or sold the Assigned Interests or any portion thereof to a purchaser or assignee of the Borrower's right, title and interest in, to and under the Project, then (a) the Trustee, if in possession of the Project, or any purchaser or assignee of the Project (such purchaser or assignee, a "Subsequent Borrower") shall be substituted for the Borrower under the Assigned Agreements, and (b) the Contracting Party shall (i) recognize the Trustee or the Subsequent Borrower, as the case may be, as its counterparty under the Assigned Agreements, and (ii) continue to perform its obligations under or in connection with the Assigned Agreements in favor of the Trustee or the Subsequent Borrower, as the case may be; provided, however, that the Trustee or the Subsequent Borrower, as the case may be, has assumed in writing, and shall perform, all of the Borrower's rights and obligations (including, without limitation, the obligation to cure any then existing payment and performance defaults within a reasonable time after such assumption, but excluding any obligation to cure any then existing performance defaults which by their nature are incapable of being cured) under the Assigned Agreements.

1.3 Performance of the Borrower's Obligations. The Trustee or any Subsequent Borrower, may, but shall have no obligation (other than as set forth in Section 1.2 above) to, perform one or more of the obligations of the Borrower under the

Assigned Agreements and the Contracting Party will accept such performance, if otherwise in accordance with the terms of the Assigned Agreements and this Agreement, in lieu of performance by the Borrower and in satisfaction of the obligations of the Borrower under the Assigned Agreements.

1.4 Right to Cure. The Trustee or any Subsequent Borrower shall have the right (without the obligation) to cure any default or event of default which is capable of being cured under or in respect of the Assigned Agreements and/or make any payments listed in any notice from the Contracting Party. Without prejudice to the generality of the foregoing, if the Borrower defaults in the performance of any of its obligations under any Assigned Agreement, or is otherwise in material breach of any of its obligations thereunder, or upon the occurrence or non-occurrence of any event or condition under the Assigned Agreement which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable the Contracting Party to terminate or suspend any benefits to the Borrower pursuant to, under, in connection with, or in respect of, the Assigned Agreement, to terminate, discontinue or suspend its performance under the Assigned Agreement, or to terminate any of the Assigned Agreements (each hereinafter a "default"), the Contracting Party shall, notwithstanding anything in the Assigned Agreements to the contrary, not terminate, discontinue or suspend such benefits, such performance, or any of the Assigned Agreements until it first gives written notice of such default to the Trustee and affords the Trustee the opportunity to cure such default within the later of (a) thirty (30) days from receipt of such notice, or (b) if such default is a nonmonetary default, such longer period (not to exceed ninety (90) days) as may be required so long as the Trustee or any Subsequent Borrower has commenced and is diligently pursuing appropriate action to cure such default; provided, however, that (i) if possession of the Project is necessary to cure such nonmonetary default and the Trustee has commenced foreclosure proceedings, the Trustee shall be allowed a reasonable time to complete such proceedings, and (ii) if the Trustee is prohibited from curing any such nonmonetary default by any process, stay or injunction issued by any governmental authority or pursuant to any bankruptcy or insolvency proceeding or other similar proceeding involving the Borrower, then the time periods specified herein for curing a default shall be extended for the period of such prohibition. The Contracting Party shall not hinder the Trustee's or any Subsequent Borrower's efforts, as the case may be, to cure and shall provide reasonable cooperation to the Trustee or any Subsequent Borrower, as the case may be, in effecting any cure of any default under the Assigned Agreements.

1.5 Replacement Agreements. If any Assigned Agreement is rejected or terminated as a result of any bankruptcy, insolvency, reorganization or similar proceeding affecting the Borrower, the Contracting Party shall, at the option of the Trustee exercised within one hundred and twenty (120) days after such rejection or termination, enter into a new agreement with the Trustee or any Subsequent Borrower having identical terms as the Assigned Agreement (subject to any conforming changes necessitated by the substitution of parties and other changes as the parties may mutually agree); provided, however, that (a) the term under such new agreement shall be no longer than the remaining balance of the term specified in the Assigned Agreement, and (b) upon execution of such new agreement, the Trustee or any Subsequent Borrower cures

any outstanding payment and performance defaults under the Assigned Agreement within a reasonable time, excluding any performance defaults which by their nature are incapable of being cured.

1.6 Limitations on Liability. The Contracting Party acknowledges and agrees that the Trustee shall not have any liability or obligation under the Assigned Agreements as a result of this Agreement, the Assigned Agreements or otherwise (other than pursuant to Section 1.2 or any agreement entered into pursuant to Section 1.5), nor shall the Trustee be obligated or required to (a) perform any of the Borrower's obligations under the Assigned Agreements, except during any period in which the Trustee has assumed the Borrower's rights and obligations under the Assigned Agreements pursuant to Section 1.2 above, or (b) take any action to collect or enforce any claim for payment assigned under the Assigned Agreements. If the Trustee or a Subsequent Borrower succeeds to the interest of the Borrower or enters into a new Assigned Agreement and such person is for any reason required to acquire title to the Project in its own name (i.e., is not able to vest ownership of the Project in a special purpose entity whose purpose is ownership of the Project), then such person acquiring such title shall have no personal liability to the Contracting Party for the performance of such obligations, and the only recourse of the Contracting Party in recovering damages for the breach of default of such obligations against such person shall be to such person's interest in the Project.

1.7 Delivery of Notices. The Contracting Party shall deliver to the Trustee concurrently with the delivery thereof to the Borrower, a copy of each document, notice, request or demand given by the Contracting Party to the Borrower pursuant to, in respect of, or in connection with, the Assigned Agreements relating to (a) a default or other breach by the Borrower under any Assigned Agreement, and (b) an "Uncontrollable Circumstance" event as described in any Assigned Agreement, in each case to the addresses set forth in and further in accordance with Section 5.2 hereof.

1.8 Transfer. The Trustee shall have the right to assign all or a portion of its interest in the Assigned Agreements or a new agreement entered into pursuant to the terms of this Agreement; provided, however, that such transferee assumes in writing the obligations of the Borrower or the Trustee, as applicable, under the Assigned Agreements or such new agreement. Upon such assignment, the Trustee shall be released from any further liability under the Assigned Agreements or such new agreement to the extent of the interest assigned.

2. Payments under the Assigned Agreements.

2.1 Payments. The Contracting Party shall pay all amounts payable by it under, in connection with, or in respect of, the Assigned Agreements in the manner and as and when required by the Assigned Agreements directly into the account specified on Exhibit A hereto, or to such other person, entity or account as shall be specified from time to time by the Trustee to the Contracting Party in writing. Notwithstanding the foregoing, if any entity or person has become a Subsequent Borrower pursuant to the terms hereof, then the Contracting Party shall pay all such amounts directly to such

Subsequent Borrower or an account designated by the Subsequent Borrower. Nothing in this Section 2.1 shall impose an obligation upon the Contracting Party to make payments under the Assigned Agreements other than such obligations as may arise under, or in respect of, or in connection with the Assigned Agreements.

2.2 No Offset, Etc. All payments required to be made by the Contracting Party under, in connection with, or in respect of, the Assigned Agreements shall be made without any offset, recoupment, abatement, withholding, reduction or defense whatsoever.

3. Representations and Warranties of the Contracting Party. The Contracting Party hereby represents and warrants, in favor of the Trustee, as of the date hereof, that:

(a) the Contracting Party (i) is a [corporation][municipality and political subdivision of the State of New York] duly organized and validly existing under the laws of the State of New York, (ii) is duly qualified, authorized to do business and in good standing in every jurisdiction necessary to perform its obligations under the Assigned Agreements and this Agreement, and (iii) has all requisite power and authority to enter into and to perform its obligations hereunder and under the Assigned Agreements, and to carry out the terms hereof and thereof and the transactions contemplated hereby and thereby;

(b) the execution, delivery and performance by the Contracting Party of this Agreement and the Assigned Agreements have been duly authorized by all necessary corporate or other action on the part of the Contracting Party and do not require any permits, approvals, filings with, or consents of any entity or person (including any government body, agency, subdivision or other government authority) which have not previously been obtained or made;

(c) each of this Agreement and the Assigned Agreements is in full force and effect, has been duly executed and delivered on behalf of the Contracting Party, and constitutes the legal, valid and binding obligations of the Contracting Party, enforceable against the Contracting Party in accordance with its terms, except as the enforceability thereof may be limited by (i) bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally, and (ii) general equitable principles (whether considered in a proceeding in equity or at law);

(d) there is no pending or threatened (in writing) action, suit, proceeding or investigation by a governmental authority, of any kind, before or by any court, administrative agency, arbitrator or governmental authority, body or agency which, individually or in the aggregate, (i) could reasonably be expected to materially and adversely affect the performance by the Contracting Party of its obligations hereunder or under the Assigned Agreements, or to modify or otherwise adversely affect any required approvals, filings or consents which have previously been obtained or made, (ii) could reasonably be expected to have a material adverse effect on the condition (financial or otherwise), business or operations of the Contracting Party, or (iii) questions the validity, binding effect or enforceability hereof or of the Assigned Agreements, any action taken

or to be taken pursuant hereto or thereto or any of the transactions contemplated hereby or thereby;

(e) the execution, delivery and performance by the Contracting Party of this Agreement and the Assigned Agreements, and the consummation of the transactions contemplated hereby and thereby, will not result in any violation of, breach of, or default under any term of its formation or governance documents, or of any contract or agreement to which it is a party or by which it or its property is bound, or of any license, permit, franchise, judgment, injunction, order, law, rule or regulation applicable to it, in each case other than any such violation, breach or default which could not reasonably be expected to have a material adverse effect on the rights and benefits of the Borrower, or the Contracting Party's ability to perform its obligations, under, in respect of, or in connection with, the Assigned Agreements;

(f) neither the Contracting Party nor the Borrower is in default of any of its obligations under the Assigned Agreements;

(g) to the best of the Contracting Party's knowledge, (i) no "Uncontrollable Circumstance" event (as such term is defined in any Assigned Agreement) exists, and (ii) no event or condition exists which would either immediately or with the passage of any applicable grace period or the giving of notice, or both, enable either the Contracting Party or the Borrower to terminate, discontinue or suspend its obligations under any Assigned Agreement; and

(h) the Assigned Agreements and this Agreement are the only agreements between the Borrower and the Contracting Party, and all of the conditions precedent to effectiveness thereunder have been satisfied or waived.

Each of the representations and warranties set forth in this Section 3 shall survive the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby and by the Assigned Agreements.

4. Additional Covenants and Agreements.

(a) The Contracting Party and the Borrower further covenant and agree that notwithstanding anything to the contrary in the Assigned Agreement (i) neither party has previously provided thirty (30) days' prior written notice to the other party, to terminate the Assigned Agreement pursuant to Section 9.02 thereof; (ii) the obligations of the Borrower under Section 4.01(a) of the Assigned Agreement have been satisfied; and (iii) the date in Section 9.02 thereof shall be changed to December 31, 2018.

5. Miscellaneous.

5.1 Inconsistencies or Conflicts. Notwithstanding anything herein or in the Assigned Agreements to the contrary, in the event of any inconsistency or conflict between any provisions herein and any provisions in the Assigned Agreements, the provisions herein shall govern in all cases, without exception.

5.2 Notices. Any communications between the parties hereto or notices provided herein to be given shall be in writing and shall be deemed to have been duly given on the date of receipt by the applicable party hereto if personally delivered; when transmitted by the applicable party hereto if transmitted by telecopy, electronic or digital transmission method, subject to the sender's facsimile machine receiving the correct answerback of the addressee and confirmation of uninterrupted transmission by a transmission report or the recipient confirming by telephone to sender that he has received the facsimile message; and when received by the applicable party hereto, if sent for next day delivery to a domestic address by recognized overnight delivery service or if sent by certified or registered mail, return receipt requested. Either party may change its notification address or person at any time, by notice given in writing.

Notices shall be given:

If to Borrower:

Taylor-Montgomery, LLC
350 Neelytown Road
Montgomery, New York 12549-9900
Attn: James W. Taylor, Jr.
Telephone: (845) 457-4021
Facsimile: (845) 457-1917
Email: jim.taylor@taylorbiomassenergy.com

With a copy to:

Catania, Mahon, Milligram & Rider, PLLC
One Corwin Court
Newburgh, New York 12550
Telephone: (845) 565-1100
Facsimile: (845) 565-1999
Attn: Michelle F. Rider, Esq.
Email: mrider@cmmrlegal.com

If to Contracting Party:

City Manager
City of Newburgh
83 Broadway
Newburgh, New York 12550

With a copy to:

Corporation Counsel
City of Newburgh
83 Broadway
Newburgh, New York 12550

If to the Trustee:

Citibank, N.A.
Agency & Trust
388 Greenwich Street, 14th Floor
New York, New York 10013
Attn: Agency Trust – Taylor-Montgomery LLC
Phone (212) _____
Email: _____

5.3 Governing Law; Waiver of Jury Trial. This Agreement shall be governed and construed in accordance with the substantive laws of the State of New York. Each of the parties hereto hereby irrevocably (a) consents and submits to the non-exclusive jurisdiction of any federal or state courts of the State of New York, as any party may elect, in any suit, action or proceeding arising out of or relating to this Agreement and (b) WAIVES THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY ACTION IN WHICH ANY OF THE PARTIES HERETO ARE PARTIES RELATING TO OR ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT.

5.4 Counterparts. This Agreement may be executed in any number of counterparts and by the different parties hereto on separate counterparts, each of which when so executed and delivered shall be an original, but all of which shall together constitute one and the same instrument. Executed counterparts transmitted by facsimile shall be binding on the parties hereto.

5.5 Headings Descriptive. The headings of the several sections and subsections of this Agreement are inserted for convenience only and shall not in any way affect the meaning or construction of any provision of this Agreement.

5.6 Severability. In case any provision in or obligation under this Agreement shall be invalid, illegal or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

5.7 Amendment, Waiver. Neither this Agreement nor any of the terms hereof may be terminated, amended, supplemented, waived or modified except by an instrument in writing signed by the Contracting Party and the Trustee.

5.8 Successors and Assigns. This Agreement shall bind and benefit the Contracting Party, the Trustee, and their respective successors and assigns.

5.9 Entire Agreement. This Agreement and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior

writings between the parties hereto in respect of the subject matter hereof. In the event of any conflict or inconsistency between the terms, conditions and provisions of this Agreement and any such agreement, document or instrument (including, without limitation, the Assigned Agreement), the terms, conditions and provisions of this Agreement shall prevail.

5.10 Rights of Trustee. All rights, privileges, indemnities, immunities, benefits and protections given to the Trustee in the Indenture shall apply to all actions taken or omitted to be taken by the Trustee pursuant to this Agreement.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto, by their officers duly authorized, intending to be legally bound, have caused this Agreement to be duly executed and delivered as of the date first above written.

TAYLOR-MONTGOMERY, LLC

By: _____

Name:

Title:

Date:

CITY OF NEWBURGH

By: _____

Name:

Title:

Date:

Accepted and Agreed to:

CITIBANK, N.A.,
as Trustee

By: _____

Name:

Title:

Date:

Exhibit A to
Direct Agreement

PAYMENT INSTRUCTIONS.

Any and all amounts owed to the Borrower shall be paid to the following account:

Revenue Fund pursuant to Indenture

Citibank, N.A.
ABA: _____
Account Name: _____
Account Number: _____
Reference: _____

The Contracting Party acknowledges that the Trustee shall be permitted to modify the account information set forth above upon written notice to the Contracting Party and the Borrower.

The City of Newburgh
Office of the Corporation Counsel

City Hall – 83 Broadway
Newburgh, New York 12550

Michelle Kelson
Corporation Counsel

Tel. (845) 569-7335
Fax. (845) 569-7338

Tiffany Reis
Assistant Corporation Counsel

MEMORANDUM

TO: Elizabeth Evans, Executive Assistant to the City Manager
Cheryl Gross, City Comptroller
George Garrison, Superintendent of Public Works
Lorene Vitek, City Clerk

FROM: Michelle Kelson, Corporation Counsel

RE: The City of Newburgh with TBE-Montgomery
Resolution No.: 121-2011

DATE: July 25, 2011

Attached is a copy of the fully executed agreement between the City of Newburgh and TBE-Montgomery, which was authorized by the City Council via Resolution No.: 121-2011 of July 11, 2011.

The original agreement is attached to the City Clerk's copy of this memorandum for filing in her office.

Thank you for your assistance.

MICHELLE KELSON

MK/dt
Attachment

RESOLUTION NO.: 121 - 2011

OF

JULY 11, 2011

A RESOLUTION AUTHORIZING THE CITY MANAGER
TO NEGOTIATE AND ENTER INTO AN AGREEMENT WITH
TBE-MONTGOMERY LLC FOR SOLID WASTE PROCESSING AND DISPOSAL

WHEREAS, the City of Newburgh seeks to better manage the disposal of its solid waste; and

WHEREAS, TBE-Montgomery LLC has developed a process for sorting, separating and collection solid waste and using such waste to generate renewable electrical energy; and

WHEREAS, TBE-Montgomery LLC has presented a proposal to collect and dispose of the City's solid waste to use in its renewable electrical energy process; and

WHEREAS, TBE-Montgomery LLC has presented a proposal to collect the City's solid waste at a substantially lower cost than the City currently pays for disposal of solid waste at the Orange County Transfer Station; and

WHEREAS, this Council has reviewed such agreement and finds that the execution of such agreement is in the best interests of the City of Newburgh;

NOW, THEREFORE, BE IT RESOLVED, that the Council of the City of Newburgh, New York that the City Manager be and he is hereby authorized to enter into an agreement with TBE-Montgomery LLC, in substantially the same form as annexed hereto and subject to such other terms and conditions as may be required by the Corporation Counsel, for the disposal of solid waste.

I, Lisette ~~Williams,~~ Acosta-Ramirez Deputy Clerk of the City of Newburgh, hereby certify that I have compared the foregoing with the original resolution adopted by the Council of the City of Newburgh at a regular meeting held 7-19-2011 and that it is a true and correct copy of such original.

Witness my hand and seal of the City of Newburgh this 21st day of July 2011

Lisette Acosta-Ramirez

Deputy City Clerk

SOLID WASTE PROCESSING AND DISPOSAL AGREEMENT

THIS SOLID WASTE PROCESSING AND DISPOSAL AGREEMENT is made and dated as of July 22, 2011, between the City of Newburgh, NEW YORK, 83 Broadway, Newburgh, NY 12550, a municipality and political subdivision of the State of New York, (referred to herein as the "MUNICIPALITY"), and TBE-MONTGOMERY LLC, 340 Neelytown Road, Montgomery, NY 12549, (referred to herein as the "CONTRACTOR").

RECITALS

1. The Contractor intends to construct, own and operate a solid waste receiving and recycling, biomass fuel preparation and waste power production facility located in Montgomery, Orange County, New York (the "Facility"). The Municipality and private collectors doing business in the Municipality will collect or cause to be collected acceptable Municipal Solid Waste ("Acceptable Waste"), and will deliver or cause to be delivered such Acceptable Waste directly to the Facility Site, where the Contractor will sort and separate such Acceptable Waste and gasify biomass to generate renewable electric energy.

2. To assist the Municipality to meet the State policy and goals for reduction of disposal into landfills and to reduce the costs of modifying and operating landfills, and pursuant to N.Y. Gen. Mun. Law Article 6 - § 120-W(2), the Municipality has agreed to deliver and Contractor has agreed to receive and utilize Acceptable Waste for sorting and separating and the production of electric energy from the Facility.

I. DEFINITIONS AND INTERPRETATIONS.

"Acceptable Waste" shall have the meaning set forth in the Recitals.

"Base Fee" has the meaning set forth in Section 6.01 herein.

"Calendar Week" means a period of seven (7) consecutive days beginning on Sunday.

"Calendar Year" means a period of three hundred sixty-five consecutive days beginning on January 1.

"Commencement Date" shall mean the date that the Facility achieves commercial operation.

"Contract Year" means the twelve month period commencing on the Commencement Date and each twelve month period thereafter.

"Contractor" has the meaning set forth in the Preamble, and its permitted successors and assigns.

"Credit Institution" means a bank or other financial institution, or a group of "banks or financial institutions, acting through an agent, severally, or otherwise, providing debt

and/or equity financing, including tax equity financing, or credit support for debt financing, for the Facility.

"Designee" or "Designees" shall mean a Person or Persons authorized by the Municipality at any time to collect solid waste generated within the Municipality.

"Escalation Rate" shall mean an annual rate of two and 25/100 percent (2.25%).

"Environmentally Acceptable" means meeting all applicable federal government, State of New York, and Municipality laws, ordinances and regulations relating to disposal of Solid Waste.

"Expected Revenues" has the meaning set forth in Section 8.01(b)(ii).

"Facility" has the meaning set forth in the Recitals.

"Facility Site" means the site on which the Facility is located and the location of the intended delivery of Acceptable Waste by the Municipality to the Contractor, 340 Neelytown Road, Montgomery, New York 12549.

"Hazardous Waste" means any material defined as a hazardous substance pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §§ 9601 et seq.), or applicable state laws and the rules, regulations, policies and guidelines promulgated thereunder, as each may be amended from time to time, or any waste which, by reason of its composition or characteristics is a toxic substance or hazardous waste as defined in the Resource Conservation and Recovery Act, (42 U.S.C. § 6901 et seq.), as amended, and related federal, state and county laws and regulations, or in any future additional or substitute federal, state or county laws and regulations pertaining to the identification, treatment, storage or disposal of toxic substances or hazardous wastes; any source, special nuclear or by-product material within the meaning of the Atomic Energy Act of 1954, as amended, and related regulations; low level radioactive waste, or any other regulated material posing a threat to health or safety or causing injury to or adversely affecting the operation of the Facility, including, without limitation, regulated pathological, medical or biological wastes, septic, cesspool or other human wastes, human and animal remains, cleaning fluids, crankcase oils, cutting oils, paints, acids, caustics, poisons, explosives and drugs. If any governmental agency having appropriate jurisdiction shall determine that substances which are not, as of the date hereof, considered harmful, toxic, or dangerous, are in fact harmful, toxic, or dangerous, or are hazardous or harmful to health, then any such substance shall thereafter constitute Hazardous Waste for purposes of this Agreement. If all government agencies having appropriate jurisdiction shall determine that a given substance which, as of the date hereof, was deemed to be a Hazardous Waste, is no longer harmful, toxic or dangerous, then any such substance shall thereafter no longer constitute Hazardous Waste for purposes of this Agreement.

"Maximum Delivery Amount" shall have the meaning set forth in Section 3.02.

"Municipal Solid Waste" means commercial, residential, industrial and institutional nonhazardous Solid Waste, but does not include Recyclables.

"Municipality" has the meaning set forth in the Preamble.

"Person" means any individual, corporation, partnership, trust, government agency or other legal entity.

"Planned Outage" means a planned interruption of or reduction in the Facility's ability to produce electricity or an interruption or reduction in the Facility's production of electricity for the purpose of inspection, testing or other routine maintenance that requires such planned interruptions.

"Recyclables" means Solid Waste that exhibits the potential to be used repeatedly in place of a virgin material.

"Solid Waste" means all putrescible and non-putrescible materials or substances that are discarded as being spent, useless, worthless or in excess to the owners at the time of discard.

"State" means the State of New York.

"Ton" means a "short ton" of 2,000 pounds.

"Unacceptable Waste" means (i) Hazardous Waste, other hazardous chemicals or materials, radioactive materials, motor vehicles, liquid and semi-liquid wastes, other than such insignificant quantities of the foregoing as are customarily found and are incidentally included in normal household and commercial waste and as are permitted by law to be treated and disposed of in facilities not specifically permitted or licensed to treat or dispose of such materials; (ii) any item either smoldering or on fire; (iii) any items of waste which, at the time of delivery to Facility Site, would normally not be disposed of in a sanitary landfill; and (iv) any items of waste which are prohibited by any judicial decision, order or action of any federal, State or county government or any agency thereof, or any other regulatory authority, or any applicable law or regulation, from being used in the Facility.

"Uncontrollable Circumstances" shall have the meaning assigned in Article V of this Agreement.

"Unplanned Outage" means an unplanned component failure (immediate, delayed, postponed, or start-up failure) or other condition that requires or causes the Facility to be removed from service immediately, in advance of the next Planned Outage, or any other unplanned interruption or reduction in electricity generation from the Facility for any reason.

II. DUTIES OF CONTRACTOR.

2.01 ACCEPTANCE OF ACCEPTABLE WASTE.

(a) After the Commencement Date, the Contractor shall accept and process all Acceptable Waste delivered to the Facility Site by the Municipality or its Designees regardless of the mechanical status of the Facility, unless the Facility is unable to operate due to factors constituting Uncontrollable Circumstances; provided, however, that in any particular Contract Year the Contractor shall not be required to accept more than the Maximum Delivery Amount.

(b) The Contractor shall identify and shall have the right to reject or separate and dispose of Unacceptable Waste delivered by the Municipality or its Designees to the Facility then serving the Municipality and shall do so in an Environmentally Acceptable manner subject to reimbursement by the Municipality for any costs and expenses of rejection, separation or disposal.

(c) Upon acceptance of the Acceptable Waste, such Acceptable Waste shall become the property of the Contractor and may be used by the Contractor in any lawful manner.

2.02 **RIGHT OF CONTRACTOR TO REJECT CERTAIN WASTE; HANDLING OF UNACCEPTABLE WASTE.** The Contractor shall have the right to reject, and shall have no obligation to dispose of, any of the following waste brought by any Person to the Facility Site and shall have the right to prevent the unloading of any vehicle bringing such waste if such waste is properly rejected:

(a) Unacceptable Waste (it being agreed that in the event the Contractor determines that a load contains both Acceptable Waste and Unacceptable Waste, it shall be entitled to reject and prevent the unloading of the entire load);

(b) Acceptable Waste brought to the Facility Site at times other than the hours designated for delivery by the Contractor, which hours shall be set out in Schedule 2;

(c) Acceptable Waste brought to the Facility Site in excess of the Maximum Delivery Amount, if the Facility is unable for any reason to receive and process such amounts; and

(d) Solid Waste brought to the Facility Site by a Person who is not the Municipality or its Designee.

2.03 **RIGHT OF CONTRACTOR TO ACCEPT SOLID WASTE FROM OTHER PERSONS.** The Contractor may accept, either under contract or on a spot market basis, Acceptable Waste from any other Person.

2.04 REGULATORY REQUIREMENTS.

(a) **Permits and Licenses.** The Contractor shall be responsible, at its own expense, for obtaining and maintaining compliance under, and obtaining any necessary extensions of, all permits, licenses, zoning ordinances, and other federal, state, county and local

approvals, including those related to air and water pollution, solid waste, siting, land use, wetlands, flood plain, noise, odor, and building, which may be necessary for the construction, operation, maintenance and repair of the Facility. If an administrative agency, department, authority, political subdivision or other instrumentality to which an application for a permit required for the operation, maintenance or repair of the Facility fails to take action, whether or not a specific time limitation for such action is prescribed by law, the failure to act shall, so long as the application therefore has been timely filed and is being diligently pursued, be treated as an Uncontrollable Circumstance if the failure to act has a material adverse effect on the ability of the Contractor or the Municipality to satisfy their obligations under this Agreement. Any applicable time limitation shall be deemed to have commenced on the date when the appropriate application and all related information called for by the application and/or permitting agency have been filed and any other prerequisites established by the applicable statutes and regulations have been met.

(b) **Adherence to Law**. The Contractor shall (i) design, construct and operate the Facility and (ii) utilize the Acceptable Waste in a manner which complies in all material respects with any applicable law, ordinance, rule, regulation, order, permit, or license of any federal, state or county agency, court or other governmental body, notwithstanding any change in law, and shall be responsible for any fines or penalties resulting from any failure to do so.

2.05 **SAFETY PRECAUTIONS**. In compliance with applicable federal, state, county, and local regulations, the Contractor shall initiate, maintain and supervise safety precautions and programs in connection with the operation and maintenance of the Facility.

2.06 **TRANSPORTATION**. The Municipality shall arrange and pay for transportation of all Acceptable Waste accepted by the Contractor at the Facility Site.

2.07 **UNPLANNED OUTAGES**. In the event of an Unplanned Outage, Contractor shall: (i) use all commercially reasonable efforts to resume normal operations of the Facility as quickly as possible, and (ii) if necessary, arrange for interim processing or disposal of all Acceptable Waste in an Environmentally Acceptable manner and deliver to such interim processing or disposal site Acceptable Waste delivered to the Facility Site and paid for by the Municipality, at such cost as provided in Article VI.

2.08 **RECORDS**.

(a) The Contractor or its designee shall operate and maintain (including periodic accuracy testing) a motor truck scale at the Facility Site, calibrated to the accuracy required by Orange County for public weighing facilities, to weigh all vehicles delivering Acceptable Waste to the Facility. The Municipality shall cause its vehicles, and those of any Designees, to have identification permanently indicated and conspicuously displayed thereon. Each vehicle will be weighed before entering and prior to departing such Facility Site, with the date, time, truck identification and weights (loaded and unloaded) to be entered on a weight record. The scale records will be used as a basis for calculating fees, charges and credits under this Agreement. If the weighing facility at the Facility Site is out of service, the Contractor shall, subject to any applicable state regulation, either obtain alternate temporary weighing capability

or estimate the quantity of Acceptable Waste delivered on the basis of truck volumes and data based on pertinent historical information.

(b) The Contractor or its designee shall maintain daily records of the total Acceptable Waste tonnage delivered by the Municipality and its Designees. Such daily records shall include detailed and summary listings of tonnage delivered by the Municipality and its Designees to the Facility Site, the estimated amount of such waste rejected as being other than Acceptable Waste, and such other records as are necessary to implement the provisions of this Agreement. Summary information for each month shall be provided to the Municipality within ten (10) business days after the end of such month. Copies of all daily records and weight tickets shall be maintained by the Contractor for a period of at least three (3) years, or for such longer period required by law, and shall be made available for inspection by the Municipality during normal business hours upon reasonable notice. In the event the Municipality is required by applicable law or regulation to file reports pertaining to the operation of the Facility, the Contractor shall provide the Municipality with the information required to compile such reports.

2.09 **INDEMNIFICATION.** The Contractor will protect, indemnify and hold the Municipality, its employees and its Designees harmless from and against all liabilities, actions, damages, claims, demands, judgments, losses, defense costs, expenses or suits against the Municipality by third parties including reasonable attorneys' fees, and will, if requested, defend the Municipality in any suit, including appeals, for personal and bodily injury to, or death of, any person or persons, loss or damage to property (including environmental damage), or civil or criminal fines or penalties, to the extent caused by the willful misconduct or negligent acts, errors or omissions of the Contractor or its agents or employees acting on behalf of the Contractor. The Municipality shall promptly notify the Contractor of the assertion of any claim against which it asserts a right to be indemnified hereunder; shall, at its option, give the Contractor the opportunity to defend such claim; and shall not settle such claim without the approval of the Contractor, which approval shall not be unreasonably withheld. These indemnification provisions are for the protection of the Municipality only, do not apply to claims of the Municipality itself against the Contractor under this Agreement or any related agreement, and shall not create any benefit or liability to third parties.

III. DUTIES OF THE MUNICIPALITY.

3.01 DELIVERY OF ACCEPTABLE WASTE.

(a) Commencing on the Commencement Date and continuing throughout the term of this Agreement, the Municipality shall, at a rate of at least two (2) deliveries per Calendar Week (unless an alternative rate of delivery has been agreed to by the Contractor and the Municipality and set out on Schedule 2), deliver or cause to be delivered to the Contractor at the Facility Site all Acceptable Waste collected for disposal by the Municipality and its Designees during each Contract Year subject to the Contractor's right to reject the Municipality's deliveries in excess of the Maximum Delivery Amount.

(b) The parties intend that all Acceptable Waste collected for disposal by the Municipality be delivered to the Contractor at the Facility Site, and, accordingly, unless the

Contractor otherwise elects, the Municipality shall not deliver or provide any such Acceptable Waste to any other disposal sites or Persons.

(c) In the event the Contractor determines there is a need for Acceptable Waste during start-up and testing operations prior to the Commencement Date, the Municipality has the obligation to deliver to the Facility Site all Acceptable Waste collected by the Municipality or its Designee at times that are mutually agreed to by the Contractor and the Municipality. The Contractor shall give the Municipality at least sixty (60) days prior written notice of the commencement of start-up and testing operations at the Facility and its request for the receipt of Acceptable Waste quantities from the Municipality required for such limited operations. During start-up and testing operations, the Contractor shall give the Municipality at least two (2) weeks prior written notice of any change in such quantities.

(d) In delivering or causing to be delivered Acceptable Waste to the Facility Site, the Municipality shall comply with all applicable state, county and local rules and regulations.

(e) The Parties shall carry out the obligations under this Section in accordance with the provisions of Schedule 2, which may be modified from time to time.

3.02 **MAXIMUM DELIVERY AMOUNT**. For purposes of Sections 2.01(a) and 3.01(a), the Maximum Delivery Amount for any Contract Year shall be one hundred twenty percent (120%) of the total number of Tons of Acceptable Waste delivered to the Facility Site during the first Contract Year following the Commencement Date.

3.03 **PAYMENT OF FEES.** The Municipality shall pay the Contractor all Fees as set forth in Article VI.

3.04 **INDEMNIFICATION**. The Municipality will, to the extent permitted by applicable law, protect, indemnify and hold the Contractor harmless from and against all liabilities, actions, damages, claims, demands, judgments, losses, defense costs, expenses or suits of third parties against the Contractor including reasonable attorneys' fees, and will defend the Contractor, at the Contractor's option, in any suit, including appeals, for personal and bodily injury to, or death of, any person or persons, loss or damage to property, or civil or criminal fines or penalties, to the extent caused by the willful misconduct or negligent acts, errors or omissions of the Municipality, its agents or employees acting within the scope of their employment or caused by or resulting from the handling or disposal of Unacceptable Waste by the Contractor in the performance of its duties hereunder. The Contractor shall promptly notify the Municipality of the assertion of any claim against which it asserts a right to be indemnified hereunder; shall give the Municipality the opportunity to defend such claim; and shall not settle such claim without the approval of the Municipality, which approval shall not be unreasonably withheld. The above provisions are for the protection of the Contractor only, do not apply to claims of the Contractor against the Municipality under this Agreement or any related agreements, and shall not create any benefit or liability to third parties.

IV. CONDITIONS PRECEDENT TO DUTIES OF CONTRACTOR AND DUTIES OF THE MUNICIPALITY.

4.01 The obligations of the Municipality to commence delivery, and of the Contractor to commence receipt, of Acceptable Waste are conditional upon the occurrence of all of the following:

(a) The Contractor shall have received a written commitment from a Credit Institution for a loan, bond or equity securities underwriting or other similar type of non-recourse financing (or credit support for such financing), repayable during the term of this Agreement and on such terms and conditions as are satisfactory to the Contractor in its sole discretion;

(b) The Contractor shall have received all necessary federal, state and local approvals necessary to permit disposal of Acceptable Waste at the Facility; and

(c) The Contractor shall have advised the Municipality in writing that the Facility Site is ready to receive the Municipality's Acceptable Waste.

4.02 Section 9.02 shall apply if the above conditions precedent are not met or waived.

V. UNCONTROLLABLE CIRCUMSTANCES.

5.01 Any act, event or condition, shall be deemed an Uncontrollable Circumstance to the extent that it materially and adversely affects the ability of any party to perform its obligations hereunder, if such act, event, or condition is beyond the reasonable control of and is not also the result of the willful or negligent action or inaction, principally of the party relying thereon as justification for not performing an obligation or complying with any condition required of such party under this Agreement. The good faith contesting of, or the failure to contest, action or inaction of a third party, shall not be construed as willful or negligent action or lack of reasonable diligence by the party claiming that such third party action or inaction constitutes Uncontrollable Circumstances. Acts or events constituting Uncontrollable Circumstances include, but shall not be limited to, the following:

(a) An act of God, such as hurricane, landslide, lightning, earthquake or flood; fire, explosion, or similar occurrence; acts of a public enemy, extortion, sabotage or civil disturbance;

(b) The failure of any federal, state, county or city public agency or private utility having jurisdiction in the area in which the Facility Site is located to provide and maintain utilities, services, water and sewer lines and power transmission lines to the Facility Site, which are required for the construction, start-up, testing, operation or maintenance of such facilities;

(c) The failure of any subcontractor or supplier to furnish labor, services, materials or equipment on the dates agreed to if such failure is caused by an Uncontrollable Circumstance and the affected party is not reasonably able to obtain substitute labor, services, materials or equipment on terms and conditions no less favorable to the affected party;

(d) Governmental pre-emption of materials or services in connection with a public emergency, any act or omission of the Municipality in their governmental capacity or any condemnation or other taking by eminent domain of any portion of the Facility Site; or

(e) Any change in law which is (i) legally binding with respect to the design, construction, testing, utilization, operation or maintenance of the Facility Site, (ii) occurs subsequent to the date hereof, and (iii) has the effect of temporarily or permanently preventing a party from performing any of its obligations hereunder including the following: any change in, or adoption of, any constitution, charter, act, statute, law, ordinance, code, rule, regulation or order; or any change in the standards or criteria contained in a permit, which standards or criteria must be met in order for the Facility Site to be operated lawfully at the levels specified in this Agreement; any denial of an application for, delay in the review, issuance or renewal of or suspension, termination, interruption, imposition of a new condition in connection with the renewal of or failure of renewal, on or after the date hereof of any governmental permit, license, consent, authorization or approval, or any other legislative or administrative action or refusal to act of the United States of America or the State of New York or any agency, department, authority, political subdivision or other instrumentality thereof (except that no action of the Municipality or any instrumentality thereof shall excuse the performance of the Municipality under this Agreement); or any decree, judgment or order of a court. Any change of law which requires the Facility to install or upgrade equipment shall qualify hereunder as a change of law, and the time required to install or upgrade equipment, if it requires a shutdown or slowdown of the operation of the Facility, shall qualify as an Uncontrollable Circumstance.

5.02 Any party shall be excused from performance hereunder when its nonperformance was caused directly or indirectly by Uncontrollable Circumstances. The party whose performance is affected shall give to the other parties prompt written notice of the Uncontrollable Circumstances, and thereupon the obligations of the party giving the notice, so far as such obligations are affected by the Uncontrollable Circumstances, shall be suspended during such Uncontrollable Circumstances and for a reasonable time thereafter as required to remedy any physical damage or otherwise overcome the effect of such Uncontrollable Circumstances.

5.03 Any party excused from performing any obligation pursuant to Section 5.02 above shall promptly, diligently and in good faith take all reasonable action required for it to be able to commence or resume performance of its obligations hereunder.

VI. FEES.

6.01 **BASE FEE.** The Municipality shall pay the Contractor a base fee of sixty-six dollars and no cents ($66.00) per Ton of Acceptable Waste delivered by the Municipality or its Designees to the Facility Site and accepted by the Contractor (as provided in Article II) ("Base Fee").

6.02 **ESCALATION.** The Base Fee shall escalate annually, commencing January 1, 2014], at the Escalation Rate.

6.03 **INCREASE IN DEDUCTIONS AND FEES DUE TO INCREASED ENVIRONMENTAL LAW COMPLIANCE.** The Municipality recognizes that the Contractor

has entered into this Contact based upon law and governmental regulations in effect as of the date of this agreement. In the event that, from time to time after the Commencement Date, because of a change in any applicable environmental laws, regulations or ordinances, the operating costs of the Facility increase, then Contractor shall be entitled to recoup from the Municipality the increased operating costs by increasing the Base Fee; provided, however, that (a) thirty (30) days prior to the effective date of the increase, Contractor shall provide to the Municipality information, data and analysis supporting such increase, (b) the amount of any such increase shall be that amount which is sufficient to place the Contractor in a position with respect to financial consequence which shall be substantially equivalent to that in which the Contractor would have been had the change(s) in applicable environmental laws, regulations or ordinances requiring the increase not occurred, and (c) the increased cost to the Contractor will be apportioned equally among all municipalities with which Contractor has a Solid Waste Processing and Disposal Agreement with respect to the Facility.

6.04 **METHOD OF PAYMENT.**

(a) In accordance with Article VI, not earlier than the tenth day of each month after the Commencement Date, the Contractor shall invoice the Municipality for services rendered by the Contractor under this Agreement during the preceding month. The total amount of the invoice shall be the sum of the following: the number of Tons of Acceptable Waste delivered by the Municipality and its Designees and accepted by the Contractor during such month, multiplied by the then applicable fee per Ton including the applicable Escalation Rate.

(b) All invoices shall be delivered by hand, by commercial delivery service (such as Federal Express) or mailed first class, postage prepaid to the Municipality at the address set forth in Article XIII, and such invoices shall be paid within thirty (30) days after the date of the invoice.

(c) The Municipality may supply other addresses at its discretion at any time.

6.05 **ALTERNATE DISPOSAL COSTS.** Subject to Article V, in the event that the Contractor is unable to perform services in the manner contemplated by this Agreement, and the Contractor is forced to use alternate disposal methods for Acceptable Waste delivered and paid for by the Municipality, any resulting increase in the Contractor's costs shall be borne by the Contractor.

VII. INSURANCE, LETTER OF CREDIT BOND REQUIREMENTS.

7.01 **INSURANCE.** The Contractor shall obtain at its own cost and expense the types of insurance listed herein.

Without limiting the Contractor's indemnification requirements, it is agreed that the Contractor accepts the following conditions and shall maintain in force at all times during the performance of this agreement the following policy or policies of insurance covering its operations, and require subcontractors to procure and maintain these same policies:

(a) COMPREHENSIVE GENERAL LIABILITY OR COMMERCIAL GENERAL LIABILITY, via the Occurrence Form, with minimum Combined Single Limits of $5,000,000 per Occurrence, and $5,000,000 Aggregate including:

(i) Premises - Operations Coverage

(ii) Completed Operations

(iii) Contractual Liability

(iv) Broad Form Property Damage

(v) Independent Contractors'

(vi) Protective Liability

Coverage may be written in layers, as long as each layer is on a "Following Form" basis, provided that the aggregate policy limits are not reduced. The policy must specifically state. by endorsement or otherwise, that this insurance applies to bodily injury, property damage, or personal injury arising out of premises and/or operations necessary or incidental to the project described herein, or any expansion thereof. The Municipality shall be named as an additional insured on such policies.

(b) AUTOMOBILE LIABILITY, with minimum limits of $1,000,000 for any one accident, including all Owned, Non-Owned and Hired Motor Vehicles. The Municipality shall be named as additional insured on such policy.

(c) WORKERS' COMPENSATION: Statutory Limits.

(d) EMPLOYERS' LIABILITY: $500,000 each accident or disease.

(e) The Contractor may incur such deductibles as are standard in the industry.

The parties acknowledge that during the term of this Agreement certain Forms and types of coverage described in this Section 7.01 may change or may cease to be available on a commercially reasonable basis. In such event, the Contractor shall use reasonable efforts to obtain the closest equivalent Form or type of coverage then available.

7.02 **ACCEPTABILITY OF INSURERS.** Insurance shall be placed with insurance companies with an A.M. Best rating of no less than "A," unless proper financial information relating to the company is submitted to and approved by the Municipality prior to coverage being placed with such insurance company.

7.03 **EVIDENCE OF INSURANCE.** The Contractor shall procure and maintain insurance policies as described herein and shall furnish to the Municipality duplicate copies of all policies, including applicable endorsements. Since policies will expire before the completion of this Agreement, renewal certificates of insurance shall be furnished to the Municipality by the Contractor before the expiration date of each policy, for the term of this Agreement.

7.04 **EFFECT OF APPROVAL OF INSURANCE.** Approval of the insurance by the Municipality shall not in any way relieve or decrease the liability of the Contractor hereunder. It is expressly understood that the Municipality does not in any way represent that the specified limits of liability or coverage or policy forms are adequate to protect the interest or satisfy all liabilities of the Contractor.

VIII. DEFAULT, DISPUTE RESOLUTION AND TERMINATION.

8.01 REMEDIES FOR DEFAULT.

(a) **Default by Contractor.**

(i) Upon the occurrence of an Event of Default by the Contractor under this Agreement, and subject to the further provisions of this Article VIII, the remedies of the Municipality shall include compensatory damages, specific performance, and termination.

(ii) Termination by the Municipality shall be limited as set forth in Section 8.02 hereof.

(iii) Termination by the Municipality shall be subject to any applicable extension or Cure Period and to the rights of the Credit Institution under Section 8.09 hereof.

(b) **Default by Municipality.**

(i) Upon the occurrence of an Event of Default by the Municipality under this Agreement, the remedies of the Contractor shall include compensatory damages, specific performance and termination of this Agreement.

(ii) In the event this Agreement is terminated pursuant to Section 8.03(a)(v), the Contractor shall be entitled to receive from the Municipality liquidated damages in an amount equal to thirty percent (30%) of the Contractor's Expected Revenues, to be calculated as described below.

(A) If such termination occurs prior to the Commencement Date, the Contractor's Expected Revenues shall be calculated by (I) multiplying the amount of Solid Waste delivered or provided by the Municipality to Orange County or to another municipal or private facility or site for waste collection/disposal during the 12-month period immediately preceding termination of the Agreement by the Fees applicable to such 12-month period, and then (II) multiplying the amount determined in (I) by 20.

(B) If such termination occurs after the Commencement Date, but before the end of the first full Contract Year, the Contractor's Expected Revenues shall be calculated by (I) multiplying the amount of Solid Waste delivered or provided by the Municipality to Orange County or to another

municipal or private facility or site for waste collection/disposal during the 12-month period immediately preceding termination of the Agreement by the Fees applicable to such 12-month period, and then (II) multiplying the amount determined in (I) by the number of Contract Years remaining in the Agreement.

(C) If such termination occurs after the Commencement Date and after the end of the first full Contact Year, the Contractor's Expected Revenues shall be calculated by (I) multiplying the total Fees paid by the Municipality to the Contractor during the Contract Year preceding the termination of the Agreement by the amount of Acceptable Waste delivered by the Municipality during that Contract Year, and then (II) multiplying the amount determined in (I) by the number of Contract Years remaining in the Agreement.

(iii) Termination by the Contractor shall be limited as set forth in Section 8.03 hereof.

(iv) Termination by the Contractor shall be subject to any applicable extension or Cure Period.

8.02 **EVENTS OF DEFAULT BY THE CONTRACTOR.**

(a) Each of the following shall constitute an Event of Default on the part of the Contractor, for which the Municipality may seek compensatory damages, specific performance, or termination of this Agreement, using the procedures set out herein.

(i) Contractor failure (which is not excused by Uncontrollable Circumstances), occurring at any time after the Commencement Date, to receive Acceptable Waste delivered by the Municipality or its Designee (up to the limits set forth in Sections 2.01(a)), for a continuous period of thirty (30) days.

(ii) Should the Contractor, its agents or employees acting in the scope of their employment be proven to have violated any law or regulation and such violation results in substantial liability to the Municipality which is not reimbursed by the Contractor within 30 days of the liability being payable.

(iii) Contractor failure to obtain and maintain the insurance required by Article VII.

(iv) A failure to pay or credit any amount of monies due by the Contractor to the Municipality under this Agreement when such amount becomes due and payable, and when such amount remains unpaid for thirty (30) days after written notice to the Contractor that such payment is past due; provided, however, that if the payment or credit is disputed, such thirty (30) day period shall begin at such time as a written finding of the amount due is issued by an arbitrator under the procedures set forth in Section 8.05.

(v) A failure by the Contractor to initiate receipt of Acceptable Waste from the Municipality within 180 days after the Commencement Date.

(vi) The failure or refusal by the Contractor substantially to fulfill any of its material obligations (other than the material obligations set forth in Section 8.02(a)) in accordance with this Agreement, unless such failure or refusal shall be excused or justified as provided under Article V hereof.

(vii) If, at any time, any material written representation or warranty made by the Contractor herein shall be determined to have been untrue or incorrect when made and such condition is shown to have a continuing material adverse impact on the Contractor's ability to perform its obligations under this Agreement.

(b) No failure or refusal under this Section 8.02 shall constitute an Event of Default unless and until:

(i) the Municipality shall have given prior written notice of the alleged Event of Default (describing such default in reasonable detail) to the Contractor and to the Credit Institution, as identified on Schedule 1, which may be modified by the Contractor from time to time; and

(ii) the circumstance creating the default (if it is a default involving other than a failure to pay a liquidated and undisputed sum payable to the Municipality) shall not have been corrected nor shall reasonable steps have been initiated to correct the same within a reasonable period of time (which shall, in any event, be not less than sixty (60) days from the date of the notice given pursuant to Subsection 8.02(c)). If reasonable steps shall have been commenced to correct such default within such reasonable period of time, the same shall not constitute an Event of Default for as long as reasonable steps are continuing to correct such default with due diligence. For the purposes of this Section 8.02, "reasonable steps" shall be deemed to include the initiation by the Contractor of actions or planning (followed within a reasonable time with action) to remedy the Event of Default, such as communication with parties capable of aiding the Contractor in remedying the Event of Default, securing assessment of costs to remedy the Event of Default, and discussions with the Municipality, the Credit Institution or other interested parties of the means by which the Event of Default may be cured.

(c) No correction of a default of the Contractor by or on behalf of the Municipality, or reasonable steps taken by the Municipality to correct a default of the Contractor, shall cause the Contractor's default to cease to be an Event of Default; provided, however, that the Contractor and the Credit Institution (pursuant to Section 8.09) shall have the prior right and opportunity to effect any correction or cure of a default or Event of Default.

8.03 **EVENTS OF DEFAULT BY THE MUNICIPALITY.**

(a) Each of the following shall constitute an Event of Default on the part of the Municipality for which the Contractor may terminate this Agreement using the procedures set out herein, or, in any case, seek compensatory damages or specific performance against the Municipality:

(i) The failure by the Municipality to pay any amount of monies due to the Contractor under this Agreement when such amount becomes due and payable, and such amount remains unpaid for thirty (30) days after written notice to the Municipality that such payment is past due; provided, however, that if the payment demanded is disputed, such thirty (30) day period shall begin at such time as a written finding of the amount due is issued by an arbitrator under the procedures set forth in Section 8.05.

(ii) Should the Municipality, or its employees acting in the scope of their employment, be proven to have violated any law or regulation and such violation results in substantial liability to the Contractor which is not reimbursed by the Municipality within 30 days of the liability being payable.

(iii) The failure of the Municipality to fulfill any material obligation under this Agreement (other than the payment of monies governed by Section 8.03(a)(i)), unless such failure shall be excused or justified as provided in Article V hereof.

(iv) If, at any time, any representation or warranty made by the Municipality herein shall be determined to have been untrue or incorrect when made and such condition is shown to have a continuing material adverse impact on the Municipality's ability to perform its obligations under this Agreement.

(v) The diversion by the Municipality, prior to any Contract Year, or in any Contract Year of delivery of Acceptable Waste to other disposal sites or Persons; provided, however, if in any Contract Year, Contractor has exercised its right under Section 2.02(c) to reject Acceptable Waste in excess of the Maximum Delivery Amount, then the Municipality may deliver such rejected amounts of Acceptable Waste to other disposal sites or Persons during such Contract Year.

(b) No failure or refusal under this Section 8.03 shall constitute an Event of Default unless and until

(i) The Contractor shall have given prior written notice to the Municipality, describing such default in reasonable detail; and

(ii) The circumstance creating the default (if it is a default involving other than a failure to pay a liquidated and undisputed sum payable to the Contractor) shall not have been corrected nor shall reasonable steps have been initiated to correct the same within a reasonable period of time (which shall, in any event, be not less than sixty (60) days from the date of the notice given pursuant to Subsection 8.03(c)(i)). If the Municipality shall have commenced to take reasonable steps to correct such default within such reasonable period of time, the same shall not constitute an Event of Default as long as the Municipality is continuing to take reasonable steps to correct such default. For the purposes of this Section 8.03, "reasonable steps" shall be deemed to include the initiation by the Municipality of actions or planning (followed within a reasonable time with action) to remedy the Event of Default, such as communication with parties capable of aiding the Municipality in remedying the Event of Default, securing assessment of costs to remedy the Event of Default, and discussions with the Contractor, the Credit

Institution or other interested parties of the means by which the Event of Default may be cured.

(c) No correction of a default of the Municipality, by or on behalf of the Contractor, or reasonable steps taken by the Contractor to correct a default of the Municipality, shall cause the default of the Municipality to cease to be an Event of Default; provided, however, that the Municipality shall have the prior right and opportunity to effect any correction or cure of a default or Event of Default.

(d) Notwithstanding any other provision in this Section 8.03, if the Municipality is in default under Section 8.03(a)(v), the Municipality must cure such Event of Default within 30 days of receiving notice from the Contractor of such Event of Default. If the Municipality does not cure such Event of Default within 30 days of receiving notice, the Contractor may exercise its right to terminate this Agreement by providing notice as set forth in Section 8.04.

8.04 **NOTICE OF TERMINATION FOR DEFAULT.** If any party shall have a right of termination for cause in accordance with this Article VIII by virtue of the fact that an Event of Default exists, after all periods of grace and cure have then expired (including any cure period granted to the Credit Institution) the right of termination may be exercised by written notice of termination given to the party in default. The notice shall specify the termination date, which shall be no less than thirty (30) days from the date of such notice, except in the case of abandonment by the Contractor under Section 8.10 herein.

8.05 **DISPUTE RESOLUTION.**

(a) If a dispute arises from or relates to this contract or the breach thereof and if the dispute cannot be settled through discussions, the parties agree to endeavor first to settle the dispute in an amicable manner by mediation administered by the American Arbitration Association ("AAA") under its Commercial Mediation Rules before resorting to arbitration, Thereafter, any unresolved controversy or claim arising from or relating to this contractor breach thereof shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The AAA shall select a mediator or arbitrator, as the case may be, who shall be completely disinterested and possess relevant business experience in solid waste management.

(b) The location of any arbitration or mediation shall be in White Plains, New York. The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, all of its costs and fees. 'Costs and fees" mean all reasonable pre-award expenses of the arbitration, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys' fees. In addition, the arbitrators shall award interest on an award for money payable under this Agreement to the extent this Agreement provides for the payment of such interest.

(c) The Contractor and the Municipality shall, in good faith, take all reasonable measures necessary to facilitate an expeditious resolution of a dispute hereunder. To

the extent permitted by Applicable Law, if the arbitrator determines that a party has acted in bad faith in referring any dispute to arbitration, the party acting in bad faith shall pay all of the fees and expenses of the arbitrator and all attorney's fees incurred by the other party in connection with such proceedings.

(d) The Municipality agrees to consolidate any dispute it may have under this Agreement with that of any other similarly situated Municipality and to be bound by any decisions of the arbitrators with respect to such dispute.

(e) Pending final resolution of any dispute (except a dispute regarding the cause for terminating this Agreement), the parties shall continue to fulfill their respective obligations under the Agreement.

(f) Notwithstanding anything to the contrary in this Agreement, neither party shall be required to await the resolution of dispute proceedings regarding the reasons for terminating this Agreement before exercising such party's termination rights. The provisions of paragraph (g) below shall be applicable to any disputes regarding liabilities in connection with such termination.

(g) During any dispute concerning the payment of money or the set-off of amounts due under this Agreement, the amount in controversy shall not be paid or set-off (as the case may be) unless and until the dispute is resolved in favor of the party claiming entitlement to the disputed payment or right of set-off.

8.06 **SURVIVAL OF CERTAIN RIGHTS AND OBLIGATIONS.** The rights and obligations of the parties governing the ability of any party to terminate this Agreement and the manner of determining the rights of the parties with regard thereto shall survive any termination of this Agreement. No termination of this Agreement shall limit or otherwise affect the respective rights and obligations of any party accrued prior to the date of such termination, including any rights as the result of the breach of this Agreement by either party.

8.07 **RIGHT OF TERMINATION NOT EXCLUSIVE.** Any rights of termination upon an Event of Default by the Contractor or the Municipality, are not exclusive and may be exercised without prejudice to any right provided by law to any party to bring appropriate action, subject to the preemptory requirements of Section 8.05, to recover actual damages for failure in the performance by the defaulting party of its obligations pursuant to this Agreement.

8.08 **RIGHT TO CURE BY CREDIT INSTITUTION.**

(a) **Right to Cure.** If the Municipality alleges an Event of Default under this Agreement, then, provided the Contractor has provided the Municipality notice of the name and address of the Credit Institution on Schedule 1, the Municipality shall give written notice of the Event of Default to the Credit Institution at the same time that it gives written notice to the Contractor as required under Section 8.02(c)(i). The Credit Institution shall have the same right as the Contractor to arrange for the cure of the Event of Default and shall also have the right (if and when granted to the Credit Institution pursuant to the agreements between it and the Contractor) to substitute for the Contractor a responsible new operator acceptable to the Municipality (referred to herein as "Replacement Contractor"), which right the Credit Institution

may invoke upon fourteen (14) days written notice at any time during the period stipulated under Section 8.09(b) to the Municipality and the Contractor. While the Credit Institution shall be entitled to appoint a Replacement Contractor, its right to cure an Event of Default shall apply regardless of whether a Replacement Contractor is appointed. Any Replacement Contractor shall use its best efforts to effect a Successful Cure as soon as possible, but in no event shall such substitute performance by the Replacement Contractor exceed the cure period set forth in Section 8.09(b)(i).

(b) **Cure Period**. If the Credit Institution invokes its right to cure an Event of Default under Section 8.09(a), there shall be a period within which the Event or Events of Default may be cured (referred to herein as the "Cure Period"), which shall end upon the earliest of:

(i) one (1) year from the date on which the default first occurred or such longer period as is required for the delivery and start up of equipment to cure the default, but in no event longer than two years;

(ii) the date the Credit Institution gives notice to the Municipality that cure is no longer being attempted, or

(iii) the date that all Events of Default have been cured, and, in the event a Replacement Contractor has been appointed, the Replacement Contractor has assumed in writing the obligation to resume full compliance with the terms of this Agreement (herein called a "Successful Cure").

(c) **Operations During Cure Period**. During the Cure Period, neither the Replacement Contractor, if any, nor the Credit Institution shall be liable to the Municipality for damages caused by the Contractor in excess of cash available to Contractor from revenues from the operation of the Facility after payment of obligations to Credit Institutions and operating costs.

(d) **Revenues During Cure Period**. During any Cure Period, the Municipality shall pay to the Credit Institution or Replacement Contractor, if any, as instructed by the Credit Institution, all fees required by Article VI. The operator of the Facility then serving the Municipality (including either the Credit Institution or Replacement Contractor, if any) shall document and provide to the Municipality the information required by this Agreement to be furnished by the Contractor to the Municipality.

(e) **Subsequent to Cure Period**. If a Successful Cure is achieved, upon termination of the Cure Period, the Replacement Contractor, in the event a Replacement Contractor is appointed, shall be subject to all the terms and conditions of this Agreement from the end of the Cure Period to the expiration of the Agreement.

IX. TERM.

9.01 **TERM**. Subject to the further provisions of this Article IX and the provisions of Article VIII, the term of this Agreement shall commence upon signature by the parties and shall remain in effect for a term of twenty (20) Contract Years from the Commencement Date (the

"Initial Term"). Following the Initial Term, this Agreement shall be automatically extended for four five-year terms (each such five-year term an "Extension Term"), unless one of the parties gives the other notice of an intent to terminate the Agreement, which notice must be provided no later than one year prior to the expiration of the Initial Term or any Extension Term.

9.02 **TERMINATION FOR FAILURE TO MEET CONDITIONS PRECEDENT.** In the event that all conditions precedent stated in Article IV are not satisfied or waived by the December 31, 2014, this Agreement may be terminated by any party hereto upon thirty (30) days' prior written notice by such party to the other party, unless such failure to satisfy all such conditions precedent is caused by an Uncontrollable Circumstance, in which case the date stipulated above shall be extended by that number of days during which an Uncontrollable Circumstance occurred.

X. REPRESENTATIONS AND WARRANTIES.

10.01 **REPRESENTATIONS AND WARRANTIES OF THE MUNICIPALITY.** As of the date of execution of this Agreement, the Municipality represents and warrants to the Contractor as follows:

(a) The Municipality is a body politic and corporate, constituting a public instrumentality and political subdivision of the State. The Municipality has agreed to implement solid waste disposal, and to provide solid waste management services to the public.

(b) The Municipality has all requisite power, authority and capacity to enter into and deliver this Agreement and related documents, to engage in the transactions contemplated hereby and to perform its obligations hereunder in accordance with the terms hereof.

(c) The execution, delivery and performance of this Agreement by the Municipality has been duly and effectively authorized by all necessary Municipality action, and the officers of the Municipality who are here undersigned have been empowered by all necessary authorizations and resolutions to execute and deliver this Agreement on its behalf.

(d) This Agreement has been duly and validly executed and delivered on behalf of the Municipality, and assuming due authorization, execution and delivery of this Agreement by the Contractor, this Agreement constitutes the valid and legally binding obligation of the Municipality, enforceable against the Municipality in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of the parties hereto generally.

(e) There is no action, proceeding or governmental investigation pending or, to the knowledge of the Municipality, threatened against the Municipality which could materially and adversely affect consummation of any of the transactions contemplated hereunder, or which could materially and adversely affect the performance of any of the obligations of the Municipality under this Agreement.

(f) The execution, delivery and performance of this Agreement by the Municipality is not in conflict with and will not result in a breach of, or constitute a default under

any provisions of any indenture, contract, agreement or other instrument to which the Municipality is a party or by which the Municipality is bound. The execution, delivery and performance of this Agreement by the Municipality will not violate any provision of law applicable to the Municipality or any order, writ, injunction, judgment or decree of any court or governmental authority by which the Municipality is bound.

(g) No further order, consent, approval, authorization of, or declaration or filing with any governmental or public body is required in order for the Municipality to execute and deliver this Agreement. No such further order, consent, approval, authorization, declaration or filing is required in order for the Municipality to perform its obligations under this Agreement.

10.02 **REPRESENTATIONS AND WARRANTIES OF THE CONTRACTOR.** As of the date of execution of this Agreement, the Contractor represents and warrants to the Municipality as follows:

(a) The Contractor is a limited liability company partnership duly organized, validly existing and in good standing under and by virtue of the laws of the State of New York, and is duly authorized to do business in and is in good standing in the State of New York. The copies of its organizational documents heretofore furnished to the Municipality are true, correct and complete copies of such documents.

(b) The Contractor has all requisite power, authority and capacity under the laws of the State of New York, and its organizational documents to enter into and deliver this Agreement and all referenced Exhibits, to engage in the transactions contemplated hereby and to perform its obligations hereunder in accordance with the terms hereof.

(c) Except as provided on Schedule 3, there is no action, proceeding or governmental investigation pending or, to the knowledge of the Contractor, threatened against the Contractor which could materially and adversely affect the design, construction, start-up, testing, or performance requirements of the Facility or which could materially and adversely affect consummation of any of the transactions contemplated hereby or which could materially and adversely affect the performance of any of the obligations of the Contractor under this Agreement.

(d) The execution, delivery and performance of this Agreement by the Contractor have been duly and effectively authorized by all necessary Contractor action.

(e) This Agreement has been duly and validly executed and delivered on behalf of the Contractor and assuming due authorization, execution and delivery of this Agreement by the Municipality, this Agreement constitutes the valid and legally binding obligation of the Contractor, enforceable against the Contractor in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of the parties hereto generally.

(f) The execution, delivery and performance of this Agreement by the Contractor are not in conflict with, and will not result in any breach of, or cause a default under, any of the terms of the Contractor's organizational documents, or with any provisions of any

indenture, contract, agreement or other instrument to which the Contractor is a party or by which the Contractor is bound.

(g) The execution, delivery and performance of this Agreement by the Contractor will not violate any provision of law applicable to the Contractor or any order, writ, injunction, judgment or decree of any court or governmental authority by which the Contractor is bound.

(h) No further order, consent, approval, authorization of, or declaration or filing with, any governmental or public body, is required in order for the Contractor to execute and deliver this Agreement or perform its obligations hereunder, except for the licenses, permits, and other approvals set out on Schedule 4 which the Contractor is required to obtain hereunder relating to the design, construction, start-up, testing and operation of any facility.

(i) With respect to Acceptable Waste, and provided that no notice of non-compliance has been issued by Contractor and there is no event of default hereunder, the Municipality shall pay with respect to Acceptable Waste the lower of (i) the amounts assessed pursuant to Article VI , or (ii) the per-ton tip fee, inclusive of all additional fees or surcharges charged under any other contract with the same or substantially the same terms and conditions, including the same length of term, executed by Contractor after the Effective Date with a municipality for the disposal of Acceptable Waste, other than Spot Waste, to the Facility. In addition, if after the Effective Date, provided that no notice of non-compliance has been issued by Contractor and there is no event of default hereunder, Contractor executes a contract with a municipality for the disposal of Acceptable Waste for the same or similar length of term and provides terms and conditions that are substantially more favorable to the municipality than the terms hereof, Contractor agrees to execute an amendment to this contract to incorporate such terms into this contract.

XI. PARTIES TO AGREEMENT.

The Municipality and the Contractor are independent parties under this Agreement and no party is the servant, agent or employee of the other, nor are they partners or coventurers and none shall share with the others in any risk or liability which arises out of any act of commission or omission in carrying out the provisions of this Agreement or the transactions arising therefrom; provided, however, that each party shall be entitled to enforce this Agreement against the others and seek remedies available at law or in equity and each shall be responsible for its own negligence in carrying out or for breach of the provisions of this Agreement.

The rights and obligations created under this Agreement shall apply exclusively to the parties hereto and their successors and permitted assigns and no rights shall be created in any other party by reason of this Agreement or any separate act or action taken independently by any party hereto. Nothing contained in this Agreement is intended to nor shall it confer upon any person, firm or corporation not a party hereto or referred to herein or consenting hereto or being bound by any obligation hereunder, any right, or vest any cause of action in, or to authorize any

such other person to institute, join or maintain any suit or suits, claim or claims against any party hereto.

XII. ENTIRE AGREEMENT.

This Agreement contains the entire agreement and understanding between the Municipality and the Contractor, and there are no other terms, obligations, covenants, representations, or statements or conditions, oral or otherwise, of any kind whatsoever, except as to related documents referred to herein or which are Exhibits hereto. No extension or indulgence granted by either the Municipality or the Contractor; no alteration, change or modification of this Agreement consented to or agreed to by any party; and no act or omission of any party or its agents shall constitute an amendment to, or modification of, this Agreement (nor shall same be interposed as a defense against the enforcement of any party's rights under this Agreement or give rise to an implied waiver of any rights or any equitable estoppel); rather, this Agreement may be modified or amended only by a document in writing which is duly executed by the Municipality and the Contractor. This Agreement shall be binding upon and inure to the benefit of the parties hereto, and their respective legal representatives, successors and permitted assigns.

XIII. NOTIFICATION.

All notices, demands or other communications permitted or required herein to be given by any party to the others shall be in writing and shall be postage prepaid, return receipt requested, or personally delivered.

In the case of the Municipality, notice to designated parties shall be sent as follows:

CITY MANAGER
CITY OF NEWBURGH
83 BROADWAY
NEWBURGH, NY 12550

With a copy to:

CORPORATION COUNSEL
CITY OF NEWBURGH
83 BROADWAY
NEWBURGH, NY 12550

In the case of the Contractor, notice to designated parties shall he sent as follows:

TBE-Montgomery, LLC
Attention: James W. Taylor, Jr.
340 Neelytown Road
Montgomery, NY 12549

With a copy to: _____
_____
_____
_____

Notice shall be sent to such other person or persons and/or addresses as the parties may from time designate in writing to each other.

XIV. AUDIT.

The Contractor shall maintain during the time this Agreement is effective and retain not less than two years after completion thereof, or for such longer period as may be required by law, complete and accurate records of wastes processed by the Contractor at the Facility Site under this Agreement, and the Municipality shall have the right, at any reasonable time, to inspect and audit project records by authorized representatives of its own, or of any public accounting firm it selects. The records to be thus maintained and retained by the Contractor shall include, without limitation, accounting records of the amounts of all solid waste and hazardous waste, identified by source, delivered to the Facility Site.

XV. AFFIRMATIVE ACTION, EMPLOYMENT POLICY.

15.01 **AFFIRMATIVE ACTION.** The Contractor shall have an affirmative action plan at the facilities operated by it pursuant to this Agreement.

15.02 **DISCRIMINATION IN EMPLOYMENT.** The Contractor agrees that in the performance of this Agreement with the Municipality, it will not discriminate against any worker because of race, creed, color, religion, national origin, handicap or sex, in violation of any applicable federal, state and local laws and regulations.

XVI. MISCELLANEOUS PROVISIONS.

16.01 **MULTIPLE COUNTERPARTS.** This Agreement may be executed in counterparts, each of which shall be deemed an original, and it shall not be necessary in making proof of this Agreement or the terms hereof to produce or account for more than one of such Counterparts provided that the counterpart produced bears the signature of the party sought to be bound.

16.02 **GOVERNING LAW; INTERPRETATION.** This Agreement shall be governed, construed, interpreted and enforced, in all respects, in accord with the laws of the State of New York. Any approval, consent or affirmation required by any party under the terms of this Agreement shall not be unreasonably withheld. The parties hereto agree that each party will perform its obligations and enforce its rights hereunder in good faith. No right, benefit or obligation of the Contractor under this Agreement may be materially and adversely affected by ordinance, regulation or other legislation of the Municipality unless (a) such regulation involves

the health and safety of its residents, or (b) the economic effect of such legislation is, as part of such legislation, reflected in an amendment hereto that makes the Contractor whole.

16.03 **SEVERABILITY.** The headings used in this Agreement are solely for ease of reference and shall not be considered in the interpretation or construction of this Agreement. In the event that any provision of this Agreement shall, for any reason, be determined to be invalid, illegal, or unenforceable in any respect, the parties hereto shall negotiate in good faith and agree to such amendments, modifications, or supplements of or to this Agreement or such other appropriate actions as shall, to the maximum extent practicable in light of such determination, implement and give effect to the intentions of the parties as reflected herein, and the other provisions of this Agreement shall, as so amended, modified, or supplemented, or otherwise affected by such action, remain in full force and effect. Without limiting the foregoing provision, the parties agree that in the event this Agreement is determined by a court of law to be franchise, then the term of the Agreement shall be deemed to be the maximum franchise term legally permissible.

16.04 **BINDING EFFECT.** This Agreement shall be binding on and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

16.05 **ASSIGNMENT.**

(a) The Contractor shall have the right at any time to assign this Agreement and the Contractor's rights hereunder to an affiliated entity, including, without limitation, to a corporation whose shareholders include the Contractor, its partners or other entities affiliated with the Contractor or to a general or limited partnership whose general partners include the Contractor, its partners or other entities affiliated with the Contractor. Upon the Contractor's execution of any such assignment and delivery of notice of such assignment to the Municipality, such assignee shall be deemed to be the "Contractor" for all purposes of this Agreement. The Contractor shall also have the right to collaterally assign this Agreement to a Credit Institution. In the event of any permitted assignment, the Municipality shall certify, if required, that such assignment is permitted and accepted.

(b) Except as set forth in paragraph (a), the Contractor may not assign this Agreement without the prior written consent of the Municipality. This Agreement may not be assigned by the Municipality without the prior written consent of the Contractor. No assignment shall relieve any party of any of its obligations under any provision of this Agreement.

16.06 **FAILURE OR INDULGENCE NOT WAIVERS; CUMULATIVE REMEDIES.** Except as expressly provided herein, no failure to exercise and no delay in exercising any right, power or remedy hereunder on the part of either party shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. No express waiver shall affect any Event of Default other than the Event of Default specified in such waiver; and any such waiver, to be effective, must be in writing and shall be operative only for the time and to the extent expressly provided therein by the waiving party. A waiver of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. All the rights, powers and remedies of any party shall be cumulative and shall be in addition to any and all other rights, powers and

remedies provided at law, in equity, by statute or otherwise, except as expressly limited in this Agreement. The exercise of any right, power or remedy by any party shall not in any way constitute a cure or waiver of any Event of Default by the other parties, or prejudice such party in the exercise of any of its rights, powers or remedies.

16.07 **FURTHER ASSURANCES.** The Municipality and the Contractor each shall use all reasonable efforts to provide such information, execute such further instruments and documents and take such actions, not inconsistent with the provisions of this Agreement and not involving the assumption of obligations or liabilities in excess of or in addition to those expressly provided for in this Agreement, as may be reasonably requested by the other parties to carry out the intent of this Agreement.

Approved as to form:

MICHELLE KELSON
Corporation Counsel

CHERYL A. GROSS
Comptroller

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers as of the day and year set forth below.

City of Newburgh, NY

Richard F Herbek

By: Richard F Herbek

Name:

Acting City Manager

Title:

TBE-Montgomery, LLC

By:

James W. Taylor, Jr.

Title: President

DATE: July 22, 2011

SCHEDULE 1

CREDIT INSTITUTION

1. For purposes of Sections 8.02 and 8.08 of this Agreement, the name and address of the Credit Institution is:

[TBA by Contractor]

2. Contractor may change the Credit Institution identified in 1, above, and must provide a revised Schedule 1 to the Municipality within seven (7) Calendar Days of the change.

SCHEDULE 2

WASTE DISPOSAL OPERATIONS

1. The hours of operation of the Facility and the Facility Site shall be Monday through Friday from 7 A.M. until 4:30 P.M. and Saturday from 7 A.M. until 12 P.M.

SCHEDULE 3

PENDING ACTIONS, PROCEEDINGS OR GOVERNMENTAL INVESTIGATIONS

With respect to Section 10.02(c)

1) Statement of Findings and Decision issued pursuant to 6 NYCRR 617.11(a) of the New York State Environmental Quality Review Act (SEQRA) by the Town Board of the Town of Montgomery as Lead Agency for SEQRA, dated November 22, 2010 (litigation pending).

2) Amendment to Town of Montgomery Code to rezone 13.3 acres within the Project Site and to create a Biomass Gasification-To-Energy Floating Zone on 95 acre Project Site, dated November 22, 2010 (litigation pending).

3) Biomass Gasification-to-Energy Special Use Permit issued by the Town Board of the Town of Montgomery, dated December 2, 2010 (litigation pending).

4) Master Site Plan (Phase I) Approval, issued by Town of Montgomery Town Board, dated December 2, 2010 (litigation pending).

5) Permit for Solid Waste Management Facility issued pursuant to 6 NYCRR Part 360 by the New York State Department of Environmental Conservation, dated December 3, 2010 (litigation pending)

SCHEDULE 4

LICENSES, PERMIT AND OTHER APPROVALS

With respect to Section 10.02(h), the following are the licenses, permits and other approvals which the Contractor is required to obtain relating to the design, construction, start-up, testing and operation of the Facility.

A. Licenses, Permits and Approvals That Have Been Obtained

1. Statement of Findings and Decision issued pursuant to 6 NYCRR 617.11(a) of the New York State Environmental Quality Review Act (SEQRA) by the Town Board of the Town of Montgomery as Lead Agency for SEQRA, dated November 22, 2010 (litigation pending).

2. Amendment to Town of Montgomery Code to rezone 13.3 acres within the Project Site and to create a Biomass Gasification-To-Energy Floating Zone on 95 acre Project Site, dated November 22, 2010 (litigation pending).

3. Referral and recommendation on Zoning Amendment pursuant to N.Y. General Municipal Law § 239-m by the Orange County Planning Department, dated November 22, 2010.

4. Biomass Gasification-to-Energy Special Use Permit issued by the Town Board of the Town of Montgomery, dated December 2, 2010 (litigation pending).

5. Master Site Plan (Phase I) Approval, issued by Town of Montgomery Town Board, dated December 2, 2010 (litigation pending).

6. Stormwater Pollution Prevention Program Approval issued by the Town of Montgomery, dated December 6, 2010.

7. Referral and recommendation on Applications for Biomass Gasification-to-Energy Special Use Permit and Master Site Plan (Phase I) Approval, made pursuant to N.Y. General Municipal Law § 239-m by the Orange County Planning Department, dated November 29, 2010.

8. Statement of Findings and Decision issued pursuant to 6 NYCRR 617.11(a) of SEQRA by the New York State Department of Environmental Conservation as an Involved Agency for SEQRA, dated December 3, 2010.

9. Amended Statement of Findings and Decision issued pursuant to 6 NYCRR 617.11(a) of SEQRA by the New York State Department of Environmental Conservation as an Involved Agency for SEQRA, dated December 7, 2010.

10. Permit for Solid Waste Management Facility issued pursuant to 6 NYCRR Part 360 by the New York State Department of Environmental Conservation, dated December 3, 2010 (litigation pending)

11. Notice of Intent for coverage under the SPDES General Permit for Stormwater Discharges from Construction Activity (Permit No. GP-0-10-001) issued by New York State Department of Environmental Conservation, dated December 6, 2010.

12. Notice of Intent for coverage under the SPDES Multi-Sector General Permit Associated with Industrial Activity (Permit No. GP-0-06-002) issued by New York State Department of Environmental Conservation, dated October 26, 2010.

13. State Air Facility Permit issued pursuant to 6 NYCRR Part 201 by the New York State Department of Environmental Conservation, dated December 3, 2010.

14. Chemical Bulk Storage Certificate (Permit No. 3-000480) issued pursuant to 6 NYCRR Part 596 by the New York State Department of Environmental Conservation, dated January 1, 2011.

15. Petroleum Bulk Storage Certificate (Permit No. No. 3-600142) issued pursuant to 6 NYCRR 612 by the New York State Department of Environmental Conservation, dated October 3, 2007.

16. Nationwide Permits No. 39 issued by the Department of the Army for Application No. 2010-00691, dated October 19, 2010.

17. Water Quality Certification issued by the New York State Department of Environmental Conservation pursuant to Section 401 of the Clean Water Act, dated October 22, 2010.

18. Opinion Letter – No Impact to Cultural Resources issued by New York State Office of Parks, Recreation and Historic Preservation issued pursuant to Section 14.09 of the New York Parks, Recreation and Historic Preservation Law, dated June 15, 2010.

19. Notice of Proposed Construction or Alteration under 49 USC 44718 and Title 14 of the Coode of Federal Regulations, Part 77, provided to the Federal Aviation Administration, dated March 29, 2011.

20. Building permit for site work and foundations

B. Licenses, Permits and Approvals Not Yet Obtained

1. Approval of water supply and proposed modifications to existing subsurface wastewater treatment system to be issued by the Orange County Department of Health.

2. Title V Air Operating Permit to be issued by the New York State Department of Environmental Conservation within one year of the commencement of operation.

3. Site Plan (Phase II-IV) Approval to be issued by Town of Montgomery Town Board. The Master Site Plan (Phase I) Approval, issued by Town of Montgomery Town Board, dated December 2, 2010 allows certain construction to commence while the Project Company completes detailed engineering design for the remaining phases of construction. Construction of the later phases will require Town Board approval over the design. Application for the approvals will be submitted as the information becomes available.

4. Registration for a SPDES General Permit for Wastewater Discharge (Permit No. GP-0-05-001), issued by New York State Department of Environmental Conservation for a subsurface sanitary discharge to be filed prior to commencement of operation.

5. Building permits for remainder of construction.

6. The Part 360 Permit requires during the period of construction and prior to operation the submission of additional engineering design plans and details regarding methods of operation.

The City of Newburgh
Office of the Corporation Counsel

MAR 02 2015
DMN

City Hall – 83 Broadway
Newburgh, New York 12550

Michelle Kelson
Corporation Counsel

Tel. (845) 569-7335
Fax. (845) 569-7338

Timothy W. Kramer
Assistant Corporation Counsel

February 25, 2015

James W. Taylor, Jr.
President & CEO
336 Neelytown Road
Montgomery, NY 12549

Re: City of Newburgh with TBE-Montgomery LLC
Resolution No.: 25-2015

Dear Mr. Taylor:

Enclosed for your records is a copy of the fully executed Extension Amendment in connection with the above matter which was authorized by the City Council by Resolution No.: 25-2015 of January 28, 2015.

Very truly yours,

MICHELLE KELSON
Corporation Counsel

MK/ar
Enclosure

Cc: Lorene Vitek, City Clerk (w/original)
George Garrison, Public Works Superintendent
John J. Aber, Comptroller

RESOLUTION NO.: 25-2015

OF

JANUARY 28, 2015

A RESOLUTION AUTHORIZING THE CITY MANAGER TO ENTER INTO AN EXTENSION AGREEMENT WITH TBE-MONTGOMERY LLC FOR SOLID WASTE DISPOSAL

WHEREAS, by Resolution No. 121-2011 of July 11, 2011, the City of Newburgh authorized an agreement with TBE-Montgomery LLC for the disposal of municipal solid waste through a renewable electrical energy process at a substantially lower cost than the City currently pays for disposal of solid waste at the Orange County Transfer Station; and

WHEREAS, the original agreement provided for a start-up period of three years, which ended on December 31, 2014, and TBE-Montgomery LLC has presented a proposal to extend the term of the start-up period of the agreement for a new three year period with all remaining terms of the agreement to continue; and

WHEREAS, this Council has reviewed terms of the extension offer and agreement and finds that the execution of such agreement is in the best interests of the City of Newburgh;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York that the City Manager be and he is hereby authorized to enter into an extension agreement with TBE-Montgomery LLC, in substantially the same form as annexed hereto and subject to such other terms and conditions as may be required by the Corporation Counsel, for the disposal of municipal solid waste.

I, Lorene Vitek, City Clerk of the City of Newburgh, hereby certify that I have compared the foregoing with the original resolution adopted by the Council of the City of Newburgh at a regular meeting held: 1/28/15 and that it is a true and correct copy of such original.

Witness my hand and seal of the City of Newburgh this 4 day of Jan 20 15

City Clerk

November 10, 2014

City Manager
City of Newburgh, New York
83 Broadway
Newburgh, NY 12550

AND

Corporation Counsel
City of Newburgh
83 Broadway
Newburgh, New York, 12550

Re: Amendment of the Solid Waste Processing and Disposal Agreement (this "Amendment")

Ladies and Gentlemen:

Reference is made to the Solid Waste Processing and Disposal Agreement by and between the City of Newburgh, New York (the "Municipality"), and TBE-Montgomery, LLC (name changed to Taylor-Montgomery, LLC on November 15, 2013) (the "Contractor") dated July 22, 2011 (the "Agreement"), in connection with a proposed solid waste receiving and recycling, biomass fuel preparation and waste power production facility to be located in Montgomery, Orange County, New York. Capitalized terms used but not defined herein have the meanings provided in the Agreement.

By signing this Amendment, the Municipality and the Contractor agree to amend the Agreement by deleting "December 31, 2014" in Section 9.02 and replacing such date with "December 31, 2017".

Except as expressly amended hereby, all terms and conditions of the Agreement remain in full force and effect. This Amendment shall be governed by the laws of the State of New York (without regard to the principles of conflict of laws).

Signature page follows:

336 Neelytown Road Montgomery, NY 12549 845.457.4021 FAX 845.457.1917
www.taylorbiomassenergy.com

Very truly yours,

TBE-MONTGOMERY, LLC (now known as)
Taylor-Montgomery, LLC

By: _____
Name: James W. Taylor Jr.
Title: President & CEO
Date: November 14, 2014

AGREED AND ACCEPTED:

CITY OF NEWBURGH, NY

By: _____
Name: Michael G. Ciaravino
Title: City Manager
Date: 2/20/15
Pursuant to Resolution No. 25-2015

336 Neelytown Road Montgomery, NY 12549 845.457.4021 FAX 845.457.1917
www.taylorbiomassenergy.com

RESOLUTION NO.: _____ - 2015

OF

DECEMBER 14, 2015

RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE AN EXTENSION UNTIL JANUARY 31, 2017 TO THE FIRST AMENDED AGREEMENT OF LEASE WITH MEMORARE REALTY HOLDING CORP. FOR THE CONTINUED LEASE VACANT REAL PROPERTY KNOWN AS SECTION 31, BLOCK 5, LOTS 13.2 AND 14 FOR THE PURPOSE OF PROVIDING PARKING FOR THE NEWBURGH-BEACON FERRY COMMUTERS AND OTHER PARKERS DURING NON-COMMUTING HOURS AND AUTHORIZING THE CITY MANAGER TO EXECUTE A MEMORANDUM OF UNDERSTANDING WITH METRO-NORTH COMMUTER RAILROAD COMPANY TO PROVIDE REIMBURSEMENT OF PARKING LOT LEASE PAYMENTS RELATED TO THE NEWBURGH-BEACON FERRY SERVICE

WHEREAS, the City of Newburgh ("City") and Memorare Realty Holding Corp. ("Memorare") executed a Lease on July 30, 2004 for the lease and use of approximately 3.65 acres of vacant real property situated on the Hudson River known as Section 31, Block 5, Lots 13.2 and 14, for the purpose of providing parking for users of the Newburgh-Beacon Ferry and other parkers during non-commuting hours, with the City being reimbursed by New York State for the rental payments and improvements provided under such Lease; and

WHEREAS, by Resolution No. 142 - 2010 of June 14, 2010, the City Council authorized the City Manager to execute a First Amended Agreement of Lease with Memorare to accord with the amended reimbursement agreement with New York State that was effective April 21, 2010; and

WHEREAS, by Resolution No. 169 - 2014 of July 14, 2014, the City Council authorized an extension of the renewal term of the First Amended Lease for a four month period from August 1, 2014 until November 30, 2014; by Resolution No. 308-2014 of December 15, 2014, the City Council authorized an extension of the renewal term of the First Amended Lease for an additional six month period from December 1, 2014 to May 3, 2015; and by Resolution No.75 - 2015 of April 13, 2015 the City Council authorized an additional extension from May 4, 2015 to December 31, 2015; and

WHEREAS, the parties desire to continue the lease for parking to be used for ferry service between the City of Newburgh and Beacon and uses associated therewith and the parties agree that it is necessary to further extend the renewal term of the First Amended Lease for the period January 1, 2016 through January 31, 2017; the same being in the best interests of the City of Newburgh; and

WHEREAS, by Resolution No. 111-2015 of May 11, 2015, the City Council authorized a Memorandum of Understanding with Metro-North Commuter Railroad (MNR) to provide reimbursement to the City of Newburgh for payments made under the First Amended Lease for

the purpose of providing parking for users of the Newburgh-Beacon Ferry and other parkers during non-commuting hours; and

WHEREAS, the City and MNR wish to working cooperatively to ensure the continuation of the ferry service between the Cities of Newburgh and Beacon by providing continued reimbursement to the City for payments under the First Amended Lease consistent with the term of the proposed extension of said Lease; the same being in the best interests of the City of Newburgh;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York that the City Manager on behalf of the City of Newburgh, be and he is hereby authorized to execute an additional extension from January 1, 2016 to January 31, 2017 to the First Amended Agreement of Lease with Memorare in substantially the same form as annexed hereto with other provisions as Corporation Counsel may require; and

BE IT FURTHER RESOLVED, by the Council of the City of Newburgh, New York that the City Manager on behalf of the City of Newburgh, be and he is hereby authorized to execute an MOU coterminous with the period of extension to the First Amended Lease with such other terms and conditions as may be recommended by the Corporation Counsel, for Metro-North Commuter Railroad to provide reimbursement to the City of Newburgh for payments made under the First Amended Lease for the purpose of providing parking for users of the Newburgh-Beacon Ferry and other parkers during non-commuting hours.

MEMORANDUM OF UNDERSTANDING

MEMORANDUM OF UNDERSTANDING ("MOU") dated May 26, 2015, by and between Metro-North Commuter Railroad Company ("Metro-North"), a public benefit corporation of the State of New York and a subsidiary of the Metropolitan Transportation Authority ("MTA"), with its principal offices at 420 Lexington Avenue, 11th floor, New York, New York 10170 and the City of Newburgh ("City"), a municipal corporation with its principal offices located at City Hall, 83 Broadway, Newburgh, New York 12550 (collectively, the "Parties").

WHEREAS, the Parties entered into an Agreement dated August 16, 2004 (the "Agreement"), concerning the mooring, docking and use of facilities in the City in connection with commuter ferry service to be operated by Metro-North or its contractor between the City of Beacon and the City of Newburgh ("Ferry Service"); and

WHEREAS, the Agreement states that the City will enter into a lease with the owner of certain premises to provide a docking facility and 250 space parking lot for the Ferry Service (the "Lease"), and the City did enter into such Lease, beginning July 30, 2014 and superseded by a First Amended Lease effective April 21, 2010 and extended through December 31, 2015 (the "Amended Lease"); and

WHEREAS, the City and the New York State Department of Transportation ("NYSDOT") had entered into a contract dated July 12, 2006, by which NYSDOT reimbursed the City for the rent payments under the Lease, but this contract has expired; and

WHEREAS, the City represents that it lacks funding to make the rent payments under the Amended Lease for the period from May 2015 through December 2015 ("May-December Period") and has requested that Metro-North reimburse the City for the rent payments under the Lease for the May-December Period; and

WHEREAS, NYSDOT has indicated to the City that it will reimburse the City for the rent payments under the Lease up to and including April 2015, and thereafter has committed to provide Congestion Mitigation and Air Quality ("CMAQ") funds to Metro-North, which can be used to reimburse Metro-North for assistance payments made to the City by Metro-North to fund the Lease for the May-December Period; and

WHEREAS, unless the rent payments under the Amended Lease are made to the landlord for the May-December Period, the Ferry Service is in danger of being discontinued; and

WHEREAS, the Ferry Service is important to the City as well as being an important part of Metro-North's provision of commuter service to its ridership, especially for commuters from Orange and Dutchess Counties; and

WHEREAS, the Parties desire to prevent the discontinuance of the Ferry Service.

NOW THEREFORE, in consideration of the benefits accruing to each of the Parties hereto, the Parties agree as follows:

1. Supplement. Unless otherwise stated herein, this MOU supplements the terms set forth in the Agreement.

2. Lease Rent Payments: Metro-North agrees to reimburse the City for the rent payments made by the City under the Ameneded Lease for the May-December Period only, at the rate of $ 21,278 per month. For the May-December Period, the City will make timely monthly rent payments to the lessor under the Lease. The City will submit proof of each timely monthly rent payment along with an invoice for that monthly rent payment to Metro-North within ten (10) days of making the rent payment. Metro-North agrees to pay the City within thirty (30) days of receipt of the City's invoice for the monthly rent payment and proof of timely payment of the monthly rent payment under the Lease.

3. During the May-December Period, the City agrees to comply with all terms under the Amended Lease, not to terminate the Amended Lease and not cause the landlord to terminate the Lease.

4. Metro-North is not required to reimburse the City for any late fees, interest or other charges under the Lease.

5. This MOU does not create any obligations for Metro-North in connection with the Lease, or create any landlord-tenant relationship between the Parties.

6. Assignment: Neither party shall assign, transfer or delegate any of its rights or obligations under this MOU without the written consent of the other party, provided that Metro-North may so assign, transfer or delegate to the MTA any such right or obligation upon written notice to the City.

7. Personal Liability: No officer, director, member or employee of either of the parties hereto shall be liable personally or be sued individually for damages under or by reason of this MOU.

8. Notices: (a) Any notice, request, approval, demand or other communication under this MOU shall be in writing and given by (i) hand delivery, (ii) mailing the same by registered or certified mail, return receipt requested, (iii) reputable overnight courier service, or (iv) facsimile transmission with an original sent by any manner above described, addressed in each case as follows:

If to Metro-North:

Metro-North Commuter Railroad Company
420 Lexington Avenue, 11th floor
New York, New York 10170
Attention: General Counsel
(Fax No. 212-697-9079)

If to the City:

City of Newburgh
City Hall
83 Broadway
Newburgh, New York 12550
Attn: City Manager
(Fax No. 845-569-7370)

With a copy to:

City of Newburgh
City Hall
83 Broadway
Newburgh, New York 12550
Attn: Corporation Counsel
(Fax No. 845-569-7338)

(b) Any party may by notice to the other change the addresses to which notice to such party or copies of such notices shall thereafter be sent. Notices shall be deemed to have been given (i) immediately upon acknowledgement of receipt when delivered by personal service on the person(s) designated to receive notice, (ii) on the fourth (4th) business day after the same shall have been deposited in the United States mails as aforesaid, (iii) on the next business day after the same shall have been sent by overnight courier service and (iv) upon receipt of the telecopy; provided that no notice shall be deemed to have been given until a copy thereof has been given to each person entitled thereto as set forth above.

(c) The Notice provision in the Agreement for Metro-North is hereby changed to the address set forth above.

9. No Third-Party Rights. No provision of this MOU shall create or give to third-parties any claim or right of action against the Parties hereto.

10. Board Approval Necessary. This MOU will only become effective upon approval of the Boards of the respective parties.

9. Miscellaneous:

a) This MOU contains the entire agreement of the Parties respecting the subject matter hereof.

b) This MOU may be amended, modified or supplemented only by an instrument in writing signed by the Parties hereto.

c) The headings of the various paragraphs, exhibits and attachments of this MOU are for the convenience of reference only and do not in any way define or limit the scope of intent of any provision hereof.

d) If any provision of this MOU is to any extent invalid or unenforceable, the remainder of this MOU, and the application of such provision to matters as to which it is not invalid or unenforceable, shall not be affected thereby.

e) This MOU shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective successors and permitted assigns.

f) This MOU may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

g) This MOU shall be governed by and construed in accordance with the laws of the State of New York.

h) Either party may terminate this MOU upon sixty (60) days written notice, provided that any obligations incurred by either party prior to the termination date, shall survive such termination.

IN WITNESS WHEREOF, Metro-North and the City have caused this Memorandum of Understanding to be duly executed as of the date first above written.

METRO-NORTH COMMUTER RAILROAD COMPANY

Catherine Rinaldi for Joseph Giglietti

BY:

APPROVED
AS TO FORM

CITY OF NEWBURGH

BY: Michael G. Ciaravino, City Manager

Per Resolution No. 111-2015

RESOLUTION NO.: 75 - 2015

OF

APRIL 13, 2015

RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE AN EXTENSION UNTIL DECEMBER 31, 2015 TO THE FIRST AMENDED AGREEMENT OF LEASE WITH MEMORARE REALTY HOLDING CORP. FOR THE CONTINUED LEASE OF APPROXIMATELY 3.65 ACRES OF VACANT REAL PROPERTY KNOWN AS SECTION 31, BLOCK 5, LOTS 13.2 AND 14 FOR THE PURPOSE OF PROVIDING PARKING FOR USERS OF THE NEWBURGH-BEACON FERRY AND OTHER PARKERS DURING NON-COMMUTING HOURS

WHEREAS, the City of Newburgh ("City") and Memorare Realty Holding Corp. ("Memorare") executed a Lease on July 30, 2004 for the lease and use of approximately 3.65 acres of vacant real property situated on the Hudson River known as Section 31, Block 5, Lots 13.2 and 14, for the purpose of providing parking for users of the Newburgh-Beacon Ferry and other parkers during non-commuting hours, with the City being reimbursed by New York State for the rental payments and improvements provided under such Lease; and

WHEREAS, by Resolution No. 142 - 2010 of June 14, 2010, the City Council authorized the City Manager to execute a First Amended Agreement of Lease with Memorare to accord with the amended reimbursement agreement with New York State that was effective April 21, 2010; and

WHEREAS, by Resolution No. 169 - 2014 of July 14, 2014, the City Council authorized an extension of the renewal term of the First Amended Lease for a four month period from August 1, 2014 until November 30, 2014, and by Resolution No. 308-2014 of December 15, 2014, the City Council authorized an extension of the renewal term of the First Amended Lease for an additional six month period from December 1, 2014 to May 3, 2015; and

WHEREAS, the parties desire to continue the lease for parking to be used for ferry service between the City of Newburgh and Beacon and uses associated therewith and the parties agree that it is necessary to further extend the renewal term of the First Amended Lease for the period May 4, 2015 through December 31, 2015; the same being in the best interests of the City of Newburgh;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York that the City Manager on behalf of the City of Newburgh, be and he is hereby authorized to execute an additional extension from May 4, 2015 to December 31, 2015 to the First Amended Agreement of Lease with Memorare in substantially the same form as annexed hereto with other provisions as Corporation Counsel may require.

I, Lorene Vitek, City Clerk of the City of Newburgh, hereby certify that I have compared the foregoing with the original resolution adopted by the Council of the City of Newburgh at a regular meeting held 4/13/15 and that it is a true and correct copy of such original.

Witness my hand and seal of the City of Newburgh this 15 day of April 2015

City Clerk

THIRD ADDENDUM TO FIRST AMENDED AGREEMENT OF LEASE

THIS THIRD ADDENDUM TO FIRST AMENDED AGREEMENT OF LEASE ("Addendum"), made as of this 8th day of April, 2015, by and between Memorare Realty Holding Corp., a New York business corporation, having an address of 2 Washington Street, P.O. Box 3231, Newburgh, New York 12550, ("Landlord"), and the City of Newburgh, a New York municipal corporation with principal offices at 83 Broadway, City Hall, Newburgh, New York 12550 ("Tenant").

W I T N E S S E T H:

WHEREAS, the Landlord and Tenant executed a First Amended Agreement of Lease dated as of April 21, 2010, to accord with the amended reimbursement agreement with New York State that was effective April 21, 2010; and

WHEREAS, the First Amended Lease expired on July 1, 2013, and the renewal term was duly exercised to extend the Term to July 31, 2014; and

WHEREAS, pursuant to the First Addendum to First Amended Agreement of Lease dated as of December 23, 2014 ("First Addendum"), the parties agreed to extend the renewal term of the First Amended Lease for a four month period from August 1, 2014 until November 30, 2014, and pursuant to the Second Addendum to First Amended Agreement of Lease dated as of December 23, 2014 ("Second Addendum"), the parties agreed to extend the renewal term of the First Amended Lease for an additional six month period from December 1, 2014 to May 3, 2015; and

WHEREAS, Tenant desires to continue to lease from Landlord the Premises for use in connection with a project (the "Project") for parking to be used for ferry service between the City of Newburgh and Beacon and uses associated therewith and Landlord desires to lease to Tenant the Premises therefor and the parties agree that it is necessary to further extend the renewal term of the First Amended Lease for the period May 4, 2015 through December 31, 2015:

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. The renewal term set forth in Paragraph 5 of the First Amended Lease, as amended by Paragraph 1 of the First Addendum and Paragraph 1 of the Second Addendum, shall be extended for an additional renewal term commencing on May 4, 2015 and terminating on December 31, 2015 ("Third Amended Renewal Term").
2. For the balance of the Third Amended Renewal Term, rent shall be payable monthly in advance in equal monthly installments of Twenty-One Thousand Two Hundred SeventyEight ($21,278) Dollars, provided however that Tenant shall have the right to terminate this lease if the Tenant has not received reimbursement from state sources,

including but not limited to the Metropolitan Transportation Authority, Metro-North Railroad and/or The New York State Department of Transportation, of the full amount of the rent under the First Amended Lease, as amended by the First Addendum, the Second Addendum and this addendum, and in no event shall Tenant's obligation to pay rent to Landlord exceed Tenant's reimbursement from such other sources.

3. All other terms and conditions set forth in the First Amended Lease, as amended by the First Addendum and the Second Addendum, shall remain in full force and effect during the Third Amended Renewal Term.
4. It is the intention of the parties and their successor(s) in interest to begin negotiations for a long term lease in the month of September, 2015.

IN WITNESS WHEREOF, the Landlord and the Tenant have duly executed this Lease in duplicate as of the day and year first above written.

MEMORARE REALTY HOLDING CORP., Landlord

By _____
Ralph Risio
President

CITY OF NEWBURGH, Tenant

By _____
Michael G. Ciaravino
City Manager
per 75-2015

STATE OF NEW YORK)
) ss:
COUNTY OF ORANGE)

On the 8th day of APRIL in the year 2015, before me, the undersigned, a Notary Public in and for said State, personally appeared RALPH RISIO, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted; executed the instrument.

_____
MICHELLE KELSON
Notary Public, State Of New York
Sullivan County Clerk's #2564
Commission Expires: March 20, 2018

STATE OF NEW YORK)
) ss:
COUNTY OF ORANGE)

On the 27 day of APRIL in the year 2015, before me, the undersigned, a Notary Public in and for said State, personally appeared MICHAEL G. CIARAVINO, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in her capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted; executed the instrument.

MICHELLE KELSON
Notary Public, State Of New York
Sullivan County Clerk's #2564
Commission Expires: March 20, 2018

Conservation Advisory Council | City of Newburgh, New York
123 Grand Street, Newburgh, New York, 12550
Phone: (845) 569-7366

Council Members:
Richard Harper, Chairman
Chuck Thomas
Deborah Dresser
Gail Fulton
Karen Eberle-McCarthy
Kippy Boyle
Phil Prinzivalli

MEMORANDUM

DATE: December 4, 2015

TO: Mayor Kennedy and Fellow Councilpersons

FROM: Richard Harper, *AICP*, Chairman

RE: CAC Vacancies and Appointments

The City of Newburgh Conservation Advisory Council is notifying the City Council of four vacancies that expired officially on November 30, 2015. Those positions are currently held by Richard Harper, Kippy Boyle, Chuck Thomas, and Karen Eberle-McCarthy.

All four of these members wish to continue for another two-year term and stated so at our last regularly scheduled meeting on November 5, 2015, and again on December 3, 2015. If they can be confirmed for re-appointment at the next city council workshop and meeting, we will appreciate it. This will ensure continuity, so important to a new land board, formed in 2013 and seated officially with full membership in early 2014. Their new terms would be from 12-01-2015 to 11-30-2017.

If there are questions or we can be of assistance in any other way, please don't hesitate to contact me. Your consideration of this memo is greatly appreciated.

RESOLUTION NO.: _____ - 2015

OF

DECEMBER 14, 2015

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWBURGH, NEW YORK, OBJECTING TO THE THRUWAY AUTHORITY AS LEAD AGENCY AND RECOMMENDING THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION SERVE AS LEAD AGENCY FOR THE PILGRIM PIPELINE PROJECT

WHEREAS, by Resolution No. 27-2015 of February 9, 2015, the City of Newburgh unanimously objected and opposed the proposed Pilgrim Pipeline project; called upon the New York State Thruway Authority to reject use of its right-of-way for the purpose of transporting oil or gas by pipeline; and further called upon the New York State Department of Transportation to deny an exception to its Accommodation Plan for said purpose; and urged Governor Cuomo and the State Legislature to oppose construction of the Pilgrim Pipeline in New York State; and

WHEREAS, the Pilgrim Pipeline project will be considered a State Environmental Quality Review Act (SEQRA) Type 1 action under 6 NYCRR Part 617: and,

WHEREAS, the City of Newburgh is an "Involved" agency in SEQR, which means that the City of Newburgh will be able to have a voice in determining who is Lead Agency of this project; and,

WHEREAS, the Thruway Authority is considering SEQRA lead agency status for this project; and

WHEREAS, the City of Newburgh declines to consent to the Thruway Authority's SEQRA lead agency status for this project; and

WHEREAS, this is a timely matter as a decision on lead agency will be made once comments have been received and after the 30-day review period ends on December 16, 2015; and,

WHEREAS, more than 20 New York municipalities, including the City of Newburgh, have passed resolutions (both memorializing and otherwise) of opposition to this project after concluding that the risks and costs to our communities far outweigh any potential benefits, and that the project contradicts local and State energy goals; and,

WHEREAS, the proposed pipeline threatens important resources of statewide concern, including the Hudson River and important surface water resources, including Gidneytown Creek, Chadwick Lake and the Quassaick Creek on the northern-most lateral line; and Muchattoes Lake and Quassaick Creek on the southern-most lateral line, State-regulated wetlands and other resources that the New York State Department of Environmental Conservation (DEC) is responsible for

protecting and is best equipped to ensure a full and adequate evaluation of environmental impacts; and,

WHEREAS, the DEC is one of the State agencies responsible for State efforts to mitigate climate change, and is best positioned to lead an evaluation of this project's potential impacts on climate; and,

WHEREAS, the DEC, as the state environmental agency, is best suited to guide the environmental review of this large, multi-jurisdictional project that has the potential to impact environmental resources in 6 New York counties and 29 towns, and is the agency with the power and the expertise to ensure a comprehensive and coordinated review; and,

WHEREAS, the pipeline will traverse and impact private lands and resources outside of the Thruway right-of-way, including lands within the City of Newburgh, and it is therefore more appropriate for the DEC than the Thruway Authority to play the lead role in evaluating the impacts to those lands and resources; and,

NOW THEREFORE BE IT RESOLVED, by the City Council of the City of Newburgh, New York, that the City Council of the City of Newburgh declines to consent to the NY Thruway Authority to serve as lead agency in the SEQR review of the proposed Pilgrim Pipeline Project, and further strongly recommends DEC Acting Commissioner Basil Seggos and the NYS Department of Environmental Conservation serve as lead agency; and

BE IT FURTHER RESOLVED, that the City Clerk of the City of Newburgh, New York forward copies of this resolution by overnight mail service for delivery on December 16, 2015 to the NYS Thruway Authority Chair Howard P. Milstein, NYS DOT Commissioner Joan McDonald, U.S. Senators Charles Schumer and Kirsten Gillibrand and U.S. Representative Sean Patrick Maloney, Governor Andrew Cuomo, N.Y. Public Service Commission Chairwoman Audrey Zibelman, N.Y. Assembly Member Frank Skartados, N.Y. Senator William Larkin, and NY State DEC Acting Commissioner Basil Seggos and Executive Deputy Commissioner Marc Gerstman.

RESOLUTION NO.: 27 - 2015

OF

FEBRUARY 11, 2015

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWBURGH OPPOSING THE PILGRIM PIPELINE

WHEREAS, Pilgrim Pipeline Holdings, LLC is proposing to build a 178 mile bi-directional pipeline in close proximity to the NY State Thruway, through Rockland, Orange, Ulster, Greene, and Albany counties, that would transport crude oil and refined petroleum products between Albany, NY and Linden, NJ; and

WHEREAS, two (2) lateral offshoots from the proposed pipeline are planned to travel east from the NY State Thruway right-of-way to the Hudson River, north and south of the City of Newburgh; and

WHEREAS, the proposed northern-most lateral will travel east through the Town of Newburgh, along existing electric transmission line right-of-way, to the Buckeye Oil Storage Facility on the Hudson River in the Town of Newburgh, NY; and

WHEREAS, the proposed southern-most lateral will travel in a north-easterly direction from the NY State Thruway right-of way near the New Windsor Cantonment and the National Purple Heart Hall of Honor, along the CSX rail line right-of-way, through the Town of New Windsor and the City of Newburgh, to the New Windsor Global Oil facility at the mouth of the Quassaick Creek; and

WHEREAS, it has been difficult to ascertain a clear indication from Pilgrim Pipeline Holdings, LLC as to the type of crude oil that is being proposed for transport in the south-bound pipeline, it is highly likely that there are plans to transport Bakken Shale crude oil; and

WHEREAS, crude oil from the Bakken Shale region of North Dakota, extracted through a process of hydraulic fracturing, or "fracking," has been found to contaminate clean water resources, create toxic air emissions and radioactive waste, and release large quantities of methane gas into the atmosphere; and

WHEREAS, data collected by the Capline Pipeline in Louisiana, which tested crude from 86 locations worldwide, indicates that crude oil from Bakken Shale has a far higher vapor pressure than crude from dozens of other locations, making it much more likely to throw off combustible gases; and

WHEREAS, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a safety alert on January 2, 2014, to the general public, emergency first responders, and shippers and carriers regarding the particular flammability of Bakken crude oil; and

WHEREAS, according to PHMSA, pipeline operators reported 1,880 crude oil spills nationwide between 2003 and 2013, or nearly one spill every other day, resulting in over 44 million gallons of oil

being spilled; and the most recent spill, which occurred in the Yellowstone River in Montana, poured some 50,000 gallons of crude oil into the river, the second occurrence in the Yellowstone in 4 years; and

WHEREAS, 80 percent of these spills were the result of corrosion, equipment failure, incorrect operation or material and weld failures; and

WHEREAS, according to Public Employees for Environmental Responsibility, PHMSA only has 135 inspectors to oversee 2.6 million miles of pipeline, and only a fifth of that pipeline system has been inspected by PHMSA or its state partners since 2006; and

WHEREAS, any rupture or compromise of the pipeline, even without an explosion or fire, will require extraordinary cleanup efforts, could force residents from their homes, and place a large number of residents in close proximity to hazardous materials; and

WHEREAS, City of Newburgh residents depend on ground water and public community water systems for potable water supplies, the integrity and safety of which may be jeopardized by the pipeline; and

WHEREAS, the Pilgrim Pipeline is proposed to be laid in areas containing sensitive aquifers upon which residents depend for drinking water; and

WHEREAS, the Pilgrim pipeline also threatens important surface water resources, including Gidneytown Creek, Chadwick Lake and the Quassaick Creek on the northern-most lateral line; and Muchattoes Lake and Quassaick Creek on the southern-most lateral line; and

WHEREAS, the pipeline will carry a large volume of Bakken crude oil through residential areas in the Towns of New Windsor and the City of Newburgh, which will place residents in harm's way should an explosion or spill occur; and

WHEREAS, the City Council of the City of Newburgh finds that the proposed Pilgrim Pipeline potentially threatens the health, safety, and welfare of the community; could decrease the values of homes located along its route and in surrounding neighborhoods; and could negatively impact future development in the City of Newburgh; and

WHEREAS, the City of Newburgh qualifies as a Potential Environmental Justice Area in accordance with the NY State Department of Environmental Conservation Commissioner Policy 29 on Environmental Justice and Permitting (CP-29), as an area that had populations that met or exceeded at least one of the following statistical thresholds:

1. At least 51.1% of the population in an urban area reported themselves to be members of minority groups; or
2. At least 33.8% of the population in a rural area reported themselves to be members of minority groups; or
3. At least 23.59% of the population in an urban or rural area had household incomes below the federal poverty level; and

WHEREAS, Environmental Justice is defined as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies; and

WHEREAS, Environmental Justice efforts focus on improving the environment in communities, specifically minority and low-income communities, and addressing **disproportionate adverse environmental impacts that may exist in those communities.**"; and

WHEREAS, the Mid-Hudson Regional Sustainability Plan calls for becoming less energy and fossil fuel intensive while strengthening the regional economy, expanding renewable energy generation exponentially across the Region, and improving the resilience of the energy delivery system; and

WHEREAS, construction of the Pilgrim Pipeline to support and expand markets for fossil fuels is directly contrary to these clean energy goals;

NOW THEREFORE BE IT RESOLVED, by the City Council of the City of Newburgh, New York, that the City Council formally objects to and opposes the proposed Pilgrim Pipeline project; and

BE IT FURTHER RESOLVED, that the City Council of the City of Newburgh, New York calls upon the New York State Thruway Authority to reject use of its right-of-way for the purpose of transporting oil or gas by pipeline; and further calls upon the New York State Department of Transportation (DOT) to deny an exception to its Accommodation Plan for said purpose; and

BE IT FURTHER RESOLVED, that the City Council of the City of Newburgh, New York urges Governor Cuomo and the State Legislature to oppose construction of the Pilgrim Pipeline in New York State; and

BE IT FURTHER RESOLVED, that the City Clerk of the City of Newburgh, New York forward copies of this resolution to the NYS Thruway Authority Chair Howard P. Milstein, NYS DOT Commissioner Joan McDonald, U.S. Senators Charles Schumer and Kirsten Gillibrand and U.S. Representative Sean Patrick Maloney, Governor Andrew Cuomo, N.Y. Public Service Commission Chairwoman Audrey Zibelman, N.Y. Assembly Member Frank Skartados, N.Y. Senator William Larkin, and NY State DEC Commissioner Joseph Martens.

I, Lorene Vitek, City Clerk of the City of Newburgh, hereby certify that I have compared the foregoing with the original resolution adopted by the Council of the City of Newburgh at a regular meeting held 2/11/15 and that it is a true and correct copy of such original.

Witness my hand and seal of the City of Newburgh this 13 day of Feb. 2015

City Clerk

NEW YORK STATE OF OPPORTUNITY. | Thruway Authority | Canal Corporation

ANDREW M. CUOMO
Governor

JOANNE M. MAHONEY
Chair

ROBERT L. MEGNA
Executive Director

November 16, 2015

Mayor Judy Kennedy
City of Newburgh
City Hall
83 Broadway
Newburgh, NY 12550

Subject: SEQR Lead Agency Coordination
Pilgrim Transportation of New York, Inc.
Pilgrim Pipeline Project

Dear Mayor Kennedy:

The New York State Thruway Authority (Authority) has received an application from Pilgrim Transportation of New York, Inc. (Pilgrim) to construct, operate and maintain two pipelines from Linden, New Jersey to Albany, New York, as depicted in the enclosed figure. Such application was submitted by Pilgrim's consultant, Spectra Environmental Group, Inc. The following provides the proposed project description that was submitted to the Authority for review:

"Pilgrim is proposing to construct, operate and maintain two new 169.89 mile-long pipelines (the mainline) in a single ditch that is about 6 feet deep and 6 feet wide. One of the pipelines would carry crude oil southbound from Albany, New York to one or more existing refineries and marine terminals in the vicinity of Linden, Carteret and Port Reading, New Jersey (collectively referred to herein as "Linden"): A second parallel pipeline would carry refined products (gasoline, diesel, heating oil, kerosene) northbound from Linden for delivery to existing terminals in Albany, New York and intermediate points in between. Each of two pipelines (the mainline) would be a maximum of 20 inches in diameter and capable of transporting approximately 200,000 barrels per day (bpd) . . . "

"In addition to the mainline pipeline, Pilgrim proposes to construct five laterals in New York to intermediate delivery points (existing terminals): the approximately 1.03 mile-long Buckeye Lateral (BL); 0.71 mile long IPT Product Lateral (IPTL); 0.33 mile-long Citgo and Apex Lateral (CAL); 7.01 mile-long Roseton Product Lateral (RPL); and the 4.44 mile-long Newburgh Product Lateral (NPL). Other Project facilities would include four pump stations and ten meter stations. Pilgrim would lease or purchase space in an existing facility for its operations center.
The majority (79 percent) of the mainline in New York would be located within the New York State Thruway Authority (NYS Thruway) right-of-way (ROW) and another approximately 7.5 percent of the mainline would be within or adjacent to other existing corridors (e.g. roads, utility, railroad). With the exception of the Harriman Pump

Station, which would be adjacent to the NYS Thruway, the pump stations and meter stations would all be located at existing terminals or distribution facilities.

As part of construction, Pilgrim would lease space for seven contractor and pipe yards interspersed throughout the Project Area in New York. Pilgrim would construct the Project in five sections or "spreads." Numerous access roads are proposed to enable the delivery of supplies, equipment and workers to the pipeline spreads. To the extent possible, Pilgrim has identified existing roads for use, but would require some preparation of new access roads as well. A total of 35 access roads would be permanently maintained for access to Project facilities during operation, the balance of access roads would be restored generally to preconstruction conditions upon completion of Project construction."

Pilgrim's proposed activities would occur over an approximate 10 month period. The construction schedule is subject to the completion of all regulatory reviews, issuance of related approvals, and the granting of authorization relative to the occupation of the Authority's real property.

This project would be considered a State Environmental Quality Review Act (SEQRA) Type 1 action under 6 NYCRR Part 617. As Pilgrim's consultant has prepared and submitted to the Authority for its review a preliminary "Draft Environmental Impact Statement (DEIS)," the Authority is obligated to start the review process relative to the requested occupancy permit. The preliminary DEIS evaluates those alternatives considered with the associated environmental, social, and economic impacts.

Your agency has been identified as a potential involved agency in the SEQRA process due to your possible approval responsibilities within the project area. In addition, there are other agencies that may have project interest. These additional federal, state and local agencies would be identified as interested agencies. If you know of any potential interested agencies, please have them contact the Authority for listing. Project notifications should be made to all involved and interested agencies as appropriate.

Pilgrim is proposing much of the work will be on/within the Authority's property. Consequently, the Authority is considering SEQRA lead agency status for this project. Upon receipt of all necessary approvals, a decision on lead agency will be made once comments have been received and after the 30-day review period. If no other agency claims themselves as lead agency, designation of the Authority as lead agency may be necessary in order to initiate the environmental review process, which must be completed prior to the Authority's potential issuance of an occupancy permit and/or the possible conveyance of an interest in real property. The environmental review process, which will commence after lead agency status is established, will entail a thorough evaluation of all environmental and socio-economic considerations. Therefore, comments on the project documents are not being solicited at this time. During the environmental review process, pursuant to applicable regulations, all involved and interested agencies, the public and any interested stakeholders will have the opportunity to provide comments.

The preliminary DEIS and application for an Authority occupancy permit submitted by Pilgrim can be found on the enclosed compact disc and also online at: www.pilgrimpipeline.com.

Please indicate your agency's consent or desire to become lead agency by December 16, 2015. You may E-mail the Thruway Authority at: public.info@thruway.ny.gov. When responding, please use the subject line of: "Pilgrim Pipeline Lead Agency Reply" for reference purposes. A failure to respond using this subject line by December 16, 2015 shall be construed as an indication that your agency does not desire to become lead agency. Thank you.

Sincerely,

Robert L. Megna

Robert L. Megna
Executive Director

Enclosure

cc: Federal Highway Administration (FHWA)
U.S. Army Corps of Engineers (USACE)
U.S. Fish and Wildlife Service (USFWS)
U.S. Department of Treasury – Bureau of Alcohol, Tobacco and Firearms
U.S. Department of Transportation (USDOT), Pipeline & Haz. Materials Safety Admin. (PHSMA), Office of Pipeline Safety (OPS)
New Jersey Department of Environmental Protection (NJDEP)
New Jersey Department of Transportation (NJDOT)
Pilgrim Transportation of New York, Inc.

RESOLUTION #255 of 2015

RESOLUTION OF THE COMMON COUNCIL OF THE CITY OF KINGSTON, NEW YORK, DENYING THE THRUWAY AUTHORITY LEAD AGENCY AND RECOMMENDING THE NYS DEC SERVE AS LEAD AGENCY FOR THE PILGRIM PIPELINE PROJECT

WHEREAS, in January of 2015, the City of Kingston unanimously passed a memorializing resolution #21 of 2015 'in support of the Kingston Conservation Advisory Council's Recommendation to Oppose the Proposed Pilgrim Pipeline" that was sponsored by the Council's Public Safety Committee and that passed unanimously; and,

WHEREAS, this project will be considered a State Environmental Quality Review Act (SEQRA) Type 1 action under 6 NYCRR Part 617: and,

WHEREAS, the City of Kingston is an 'Involved' agency in SEQR, which means that Kingston will be able to have a voice in determining who is Lead Agency of this project; and,

WHEREAS, the Thruway Authority is considering SEQRA lead agency status for this project; and

WHEREAS, the City of Kingston denies the Thruway Authority SEQRA lead agency status for this project; and

WHEREAS, this is a timely matter as a decision on lead agency will be made once comments have been received and after the 30-day review period ends on December 16, 2015; and,

WHEREAS, more than 20 New York municipalities, including the City of Kingston, have passed resolutions (both memorializing and otherwise) of opposition to this project after concluding that the risks and costs to our communities far outweigh any potential benefits, and that the project contradicts local and State energy goals; and,

WHEREAS, the proposed pipeline threatens important resources of statewide concern, including the Hudson River and major tributaries, such as the Rondout, Esopus, and Catskill Creeks and Wallkill River, State-regulated wetlands and other resources that the DEC is responsible for protecting and is best equipped to ensure a full and adequate evaluation of environmental impacts; and,

WHEREAS, the NYS Department of Environmental Conservation (DEC) is one of the State agencies responsible for State efforts to mitigate climate change, and is best positioned to lead an evaluation of this project's potential impacts on climate; and,

WHEREAS, the DEC, as the state environmental agency, is best suited to guide the environmental review of this large, multi-jurisdictional project that has the potential to impact environmental resources in 6 New York counties and 29 towns, and is the agency with the power and the expertise to ensure a comprehensive and coordinated review; and,

WHEREAS, the pipeline will traverse and impact private lands and resources outside of the Thruway right-of-way, including lands within the City of Kingston, and it is therefore more appropriate for the DEC than the Thruway Authority to play the lead role in evaluating the impacts to those lands and resources; and,

NOW THEREFORE BE IT RESOLVED as follows:

SECTION 1. That the Common Council of the City of Kingston is in opposition to the consent of the NY Thruway Authority to serve as lead agency in the SEQR review of the proposed Pilgrim Pipeline Project, and to request to Commissioner Basil Seggos that the NYS DEC serve as lead agency.

SECTION 2. That the City Clerk is hereby directed to forward copies of this resolution to the NYS Thruway Authority Chair Joanne Mahoney, NYS DOT Commissioner Matthew Driscoll, U.S. Senators Charles Schumer and Kirsten Gillibrand and U.S. Representative Chris Gibson, Governor Andrew Cuomo, N.Y. Public Service Commission Chairwoman Audrey Zibelman, N.Y. Assembly Member Kevin Cahill, N.Y. Senator John Bonacic, NYS DEC Acting Commissioner Basil Seggos and Executive Deputy Commissioner Marc Gertsmann.

SECTION 3. That this resolution shall take effect immediately

Submitted to the Mayor this ____

day of _____, 2015

_____

CARLY WILLIAMS, CITY CLERK

Approved by the Mayor this ____

day of _____, 2015

_____

SHAYNE R. GALLO, MAYOR

Adopted by Council on December 1, 2015

CITY OF KINGSTON

OFFICE OF THE MAYOR
CITY HALL
420 BROADWAY
KINGSTON, NEW YORK 12401
www.kingston-ny.gov
mayorgallo@kingston-ny.gov

SHAYNE R. GALLO
MAYOR

Phone (845) 334-3902
Fax (845) 334-3904

November 20, 2015

Robert L Megna
Executive Director
NYS Thruway Authority
200 Southern Boulevard
P.O. Box 189
Albany, NY 12201-0189

Re: Pilgrim Pipeline Lead Agency Reply

Dear Mr. Megna:

I am writing to you to express our preference that the NYS Department of Environmental Conservation serve as lead agency in the SEQR review of the Pilgrim Pipeline Project and to deny consent to the Thruway Authority to serve as lead agency.

Please contact my office if you have any questions or concerns regarding this matter.

Sincerely,

Shayne R. Gallo

Mayor

CITY OF KINGSTON

OFFICE OF THE MAYOR
CITY HALL
420 BROADWAY
KINGSTON, NEW YORK 12401
www.kingston-ny.gov
mayorgallo@kingston-ny.gov

SHAYNE R. GALLO
MAYOR

Phone (845) 334-3902
Fax (845) 334-3904

November 20, 2015

Marc Gerstman
Executive Deputy Commissioner
NYS Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, NY 12233-1010

Re: SEQR Lead Agency Coordination for the Pilgrim Pipeline Project

Dear Executive Deputy Commissioner Gerstman:

I am writing to you to urge the NYS DEC to seek lead agency status in the SEQR review of the Pilgrim Pipeline Project based the following points that we believe make for a strong rationale for DEC serving as lead agency:

1) More than 20 New York municipalities, including the City of Kingston, have passed resolutions of opposition to this project after concluding that the risks and costs to our communities far outweigh any potential benefits, and that the project contradicts local and State energy goals;

2) The proposed pipeline threatens important resources of statewide concern, including the Hudson River and major tributaries, such as the Rondout, Esopus, and Catskill Creeks and Wallkill River, State-regulated wetlands and other resources that the DEC is responsible for protecting and is best equipped to ensure a full and adequate evaluation of environmental impacts.

3) The DEC is one of the State agencies responsible for State efforts to mitigate climate change, and is best positioned to lead an evaluation of this project's potential impacts on climate.

4) DEC, as the state environmental agency, is best suited to guide the environmental review of this large, multi-jurisdictional project that has the potential to impact environmental resources in six New York counties and 29 towns, and is the agency with the power and the expertise to ensure a comprehensive and coordinated review,

5) The pipeline will traverse and impact private lands and resources outside of the Thruway right-of-way, and it is therefore more appropriate for the DEC than the Thruway Authority to play the lead role in evaluating the impacts to those lands and resources.

Thank you very much for your careful consideration of our request.

Sincerely,

Shayne R. Gallo
Mayor

CITY OF KINGSTON

OFFICE OF THE MAYOR
CITY HALL
420 BROADWAY
KINGSTON, NEW YORK 12401
www.kingston-ny.gov
mayorgallo@kingston-ny.gov

SHAYNE R. GALLO
MAYOR

Phone (845) 334-3902
Fax (845) 334-3904

November 20, 2015

Peter Walke
Assistant Secretary for the Environment
Office of the Governor
State Capitol
Albany, NY 12224

Re: SEQR Lead Agency Coordination for the Pilgrim Pipeline Project

Dear Assistant Secretary Walke:

I am writing to you to urge the NYS DEC to seek lead agency status in the SEQR review of the Pilgrim Pipeline Project based the following points that we believe make for a strong rationale for DEC serving as lead agency:

1) More than 20 New York municipalities, including the City of Kingston, have passed resolutions of opposition to this project after concluding that the risks and costs to our communities far outweigh any potential benefits, and that the project contradicts local and State energy goals;

2) The proposed pipeline threatens important resources of statewide concern, including the Hudson River and major tributaries, such as the Rondout, Esopus, and Catskill Creeks and Wallkill River, State-regulated wetlands and other resources that the DEC is responsible for protecting and is best equipped to ensure a full and adequate evaluation of environmental impacts.

3) The DEC is one of the State agencies responsible for State efforts to mitigate climate change, and is best positioned to lead an evaluation of this project's potential impacts on climate.

4) DEC, as the state environmental agency, is best suited to guide the environmental review of this large, multi-jurisdictional project that has the potential to impact environmental resources in six New York counties and 29 towns, and is the agency with the power and the expertise to ensure a comprehensive and coordinated review,

5) The pipeline will traverse and impact private lands and resources outside of the Thruway right-of-way, and it is therefore more appropriate for the DEC than the Thruway Authority to play the lead role in evaluating the impacts to those lands and resources.

Thank you very much for your careful consideration of our request.

Sincerely,

Shayne R. Gallo
Mayor

RESOLUTION NO.: _____ - 2015

OF

DECEMBER 14, 2015

A RESOLUTION TO RESCIND THE VOTE TO START THE SEARCH FOR A NEW CITY MANAGER

WHEREAS, the decision to start a search for a new city manager is one of utmost importance to the entire City and pro and cons should be carefully discussed; and

WHEREAS, amendments to Article V of the City Charter addressing the selection, appointment and removal of the City Manager were adopted by a referendum of the City electors on November 8, 2011; and

WHEREAS, the purpose of the referendum of November 8, 2011 was to ensure greater stability in city government and prevent a few Council members from firing City Managers because of personal agendas; and

WHEREAS, the commencement of a City Manager search was introduced as a new agenda item at the end of the November 9, 2015 Council meeting under new agenda items; then pushed to a vote the same night; and

WHEREAS, this topic was not considered at a work session before the November 9, 2015 Council meeting and was not listed on the written agenda of said meeting; the public had no opportunity to give input and it did not follow the standard process; and

WHEREAS, Rule III(D) of the City Council Rules and Order of Procedure requires the Council, first, to vote to allow the new item to be introduced, considered, and then second, to vote on the substance of the new item; and

WHEREAS, it is recommended that the method and means of a City Manager search be discussed by the City Council at a work session or regular meeting to ensure the entire Council and the public understand the process; and

WHEREAS, Section C5.00(A) of the City Charter now provides that the City Council shall appoint a City Manager by a majority plus one vote of the entire membership; and

WHEREAS, the City Manager of the City of Newburgh is a public officer and therefore Public Officers Law Section 5 applies where the City Manager is appointed for a definite term with or without an employment contract and the City Manager's term expires without the City Council reappointing the City Manager for a new term or appointing a

new City Manager by a vote of a majority plus one of the Council members and the incumbent City Manager will hold over and continue to perform the duties of the position until such time as the Council makes a proper reappointment or new appointment pursuant to City Charter Section C5.00.

WHEREAS, three council members strongly disagree that grounds for starting a new search have merit and moreover approve of the work by the current City Manager thus preventing a majority plus one vote for the appointment of a new City Manager; and

WHEREAS, there is no vacancy in the City Manager position at this time; and

WHEREAS, new council members will be joining in January; and

WHEREAS, no budget has been determined for the City Manager search; and

WHEREAS, it would be a waste of taxpayer dollars; a waste of employee time and energy; and a waste of applicant time and energy to pursue a City Manager search under the above conditions;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Newburgh that the November 9, 2015 motion and vote to start a search for a new City Manager be rescinded.

The City of Newburgh
Office of the Corporation Counsel

City Hall – 83 Broadway
Newburgh, New York 12550

Michelle Kelson
Corporation Counsel

Tel. (845) 569-7335
Fax. (845) 569-7338

Timothy W. Kramer
Assistant Corporation Counsel

MEMORANDUM

TO: Mayor Judy Kennedy
Councilwoman Genie Abrams
Councilwoman Regina Angelo
Councilman Cedric Brown
Councilwoman Cindy Holmes
Councilwoman Gay Lee
Councilwoman Karen Mejia

FROM: Michelle Kelson, Corporation Counsel

RE: Appointment & Removal of City Manager
City Manager search

DATE: December 1, 2015

At the November 9, 2015 City Council meeting, the commencement of a City Manager search was raised as an item of New Business. Questions concerning a vote on a motion to commence a City Manager search and other issues related to the appointment and removal of the City Manager have been raised by several Council members as well as by the public. In response to an email exchange concerning the commencement of a City Manager search, the undersigned Corporation Counsel has prepared this memorandum concerning the appointment and removal of the City Manager and the commencement of a City Manager search.

Amendments to Article V of the City Charter addressing the selection, appointment and removal of the City Manager were adopted by a referendum of the City electors on November 8, 2011. Section C5.00(A) of the City Charter now provides that the City Council shall appoint a City Manager by a majority plus one vote of the entire membership. The City Council is comprised of 7 members and therefore a majority plus one vote requires the affirmative vote of 5 City Council members.

Section C5.00(B) provides that the City Manager may be appointed in three ways. The categories of appointment include appointment for an indefinite term to serve at the will of the Council; for a definite term not to exceed two years after the expiration of such term, the Council may

reappoint for additional terms but no term of appointment may exceed two years; and for a definite term not to exceed two years under a written contract of employment which contract may be renewed by the Council but no renewal period may exceed two years.

Reading Section C5.00(A) and Section C5.00(B) together and to maintain consistency within the provisions, the initial appointment of the City Manager and any reappointment for a new two-year term or renewal of an employment contract for a new two-year term requires the affirmative vote of a majority plus one of City Council members which currently is 5 City Council members.

The current City Manager was appointed by Resolution No. 115-2014 of April 28, 2014 for a two-year term under a written contract of employment. Article 4 of the City Manager's current contract specifically provides that the term of the agreement shall not be extended except by a majority plus one vote by the entire Council membership in accordance with City Charter Section C5.00(A)(2). Therefore, a majority plus one vote of the entire City Council membership (5) will be required to reappoint the current City Manager and to renew the employment contract for a period not to exceed two years.

The City Charter does not address the circumstances under which a City Manager is appointed for a definite term, with or without a contract, and the term expires without the City Council having voted to reappoint the City Manager or to appoint a new City Manager. New York State Public Officers Law Section 5 applies to the situation where the term of a public officer expires and no reappointment or new appointment has been made. It is intended to prevent lapse in or disruption of essential government services and to ensure a continuance of government. Foley v. McNab, 42 Misc2d 460, 248 NYS2d 352 (Sup. Ct. Suffolk Co. 1964). Public Officers Law Section 5 states as follows:

> Every officer except a judicial officer, a notary public, a commissioner of deeds and an officer whose term is fixed by the constitution, having duly entered on the duties of his office, shall, unless the office shall terminate or be abolished, hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified; but after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor. An officer so holding over for one or more entire terms, shall, for the purpose of choosing his successor, be regarded as having been newly chosen for such terms. An appointment for a term shortened by reason of a predecessor holding over, shall be for the residue of the term only.

The City Manager of the City of Newburgh is a public officer. A public officer is defined as a person whose position is created and whose powers and duties are prescribed by legislation and who exercises a high degree of initiative and independent judgment. O'Day v. Yeager, 308 NY 580, 127 NE 585 (1955). City Charter Section C5.05 establishes the City Manager's duties which include but are not limited to ensuring the enforcement of all New York State laws and City ordinances; appointing and removing department heads, board members and subordinate City

employees; and to supervise and control the administrative departments of the City. Accordingly, the position of City Manager meets all the requirements of a public officer. See, Hansell v. City of Long Beach, 61 AD2d 84, 401 NYS2d 271 (2d Dept. 1978) (finding City Manager of City of Long Beach to be a public officer based on duties prescribed by City Charter including chief executive officer of the City).

Absent any other New York State Law, local law or court ruling to the contrary, Public Officers Law Section 5 applies to the City Manager position. Therefore, where the City Manager is appointed for a definite term with or without an employment contract and the City Manager's term expires without the City Council reappointing the City Manager for a new term or appointing a new City Manager by a vote of a majority plus one of the Council members, the incumbent City Manager will hold over and continue to perform the duties of the position until such time as the Council makes a proper reappointment or new appointment pursuant to City Charter Section C5.00.

Public Officers Law Section 5 further provides that in the situation where the public officer holds over after the expiration of the term, the office is deemed "vacant" for the purposes of choosing a successor for appointment to the office. In this regard, the City Council may determine to reappoint the incumbent/holdover City Manager or appoint a new City Manager. However, if the incumbent City Manager continues after the expiration of term as a holdover, the Council may appoint new City Manager as a successor by complying with the provisions for the appointment of a City Manager in City Charter Section C5.00(A) but would not be required to follow the procedures for removal of the holdover City Manager provided in City Charter Section C5.00(D). See, for example, Enos v. Village of Seneca Falls, 288 AD2d 853, 732 NYS2d 785 (4th Dept. 2001). In the Village of Seneca Falls case, the Fourth Department found that the individual was serving as both Village Clerk and Village Administrator for specific terms as provided in the New York State Village Law. The terms of both positions expired and the Village Board reappointed the individual as Village Clerk but not as Village Administrator. Subsequently, the Village Board terminated the individual from both positions. The Court found that the position of Village Administrator is a public office and Public Officers Law Section 5 applied. Thus, the Court held that because the Village Board failed to reappoint the individual or appoint a successor, the individual continued to hold the position of Village Administrator after the expiration of term until a successor was properly appointed. The Court also found that the individual having been reappointed as Village Clerk could not be removed without complying with the provisions of Public Officers Law Section 36, which provide the procedures for the removal of village officers before the expiration of term.

Public Officers Law Section 5 also provides that the appointment for a term where a predecessor is holding over is for the residue of the term. Applying this portion of Public Officers Law Section 5 to the situation of a City Manager holding over after the expiration of a two year term, with or without a contract, the City Council's reappointment of the incumbent City Manager or appointment of a new City Manager for a new term under City Charter Section C5.00(A)(2)(b) and (c) only can be for the balance remaining on a new two year term from the date of reappointment or new appointment. This portion of Public Officers Law Section 5 would not

apply if the Council reappointed the City Manager or appointed a new City Manager for an indefinite period to serve at the will of the Council pursuant to City Charter C5.00(A)(2)(a).

The City Charter contains only one reference to commencing a search for a City Manager and that reference is found in City Charter Section C5.01(B) and provides that in the event of a vacancy in the office of City Manager due to death, resignation or otherwise, the Council shall immediately commence the process for selecting a new City Manager in accordance with the requirements of Section C5.00 of the Charter. The Charter is silent as to the method and procedures by which the selection process shall be commenced and substance of the selection process. The City Council, as legislative body, makes decisions and acts by approving a resolution of the body. The determination to commence a City Manager search is assigned to the entire Council by the City Charter and should be accomplished by an act of the Council such as passing a resolution. The Law Department finds examples of such resolutions, such as Resolution No. 105-2009 of July 13, 2009 which authorized an agreement with the Mercer Group to provide professional services to conduct a City Manager search on behalf of the City Manager and Resolution No. 201-2012 of November 13, 2012 authorizing the commencement of a City Manager search, which also included a budget amendment to allocate funds to the pay for the cost of such search. The Law Department has no further information regarding the implementation of Resolution No. 105-2009 of July 13, 2009 or Resolution No. 201-2012 of November 13, 2012 and the method or means by which any subsequent City Manager search was conducted. As a matter of practice, it is recommended that the method and means of a City Manager search be discussed by the City Council at a work session or regular meeting to ensure that the entire Council and the public understand the process.

By Resolution No. 9-2013 of January 14, 2013, the City Council adopted a policy entitled "Best Practices in Hiring". The first sentence of the policy provides, "The City Manager shall direct the recruitment, advertising, interviewing and selection process of all City of Newburgh employees." This sentence appears to conflict with the City Charter provision requiring the City Council to commence the process of selecting a City Manager. The policy provides some basic guidelines to promote uniformity in the method by which City positions are created and filled but it is not comprehensive or exhaustive. Concerning the position of City Manager, the policy references the City Manager position only in paragraph 3 addressing "Job Postings" and in paragraph 5 addressing "Interviews". Paragraph 3 refers to the position of City Manager as an example of an unclassified position and sets forth the locations where the job of City Manager shall be posted and advertised. It does not identify the City department or position responsible for placing the advertisement or the content of posting. City Charter Section C5.00(B)(1) provides the qualifications for the position of City Manager. The City Council cannot alter the qualifications of the City Manager as set forth in the City Charter. Paragraph 5 of the hiring policy provides for minimum standards for the conduct of applicant interviews and states that the City Council may invite "subject matter experts" in the fields of municipal government, executive management, contract and labor negotiations or similarly related fields to participate in the recruitment and interview process of selected prospective candidates. However, there is no provision for the review of applications received and the identification of applicants to be scheduled for interviews. The selection process of the City Manager is a critical decision of the City Council and again, it is

recommended that the process be accomplished by a method that is approved by the Council and readily transparent to the public.

By Resolution No. 2-2014 of January 13, 2014, the City Council adopted Rules of Order and Procedure for City Council meetings. The Rules of Order and Procedure are intended to provide order and decorum during City Council meetings. Rule II contains the Order of Business for City Council meetings which is taken directly from Section 20-3 of the City Code of Ordinances. Rule III addresses voting during City Council meetings. Rule III(D) provides, as follows:

> No resolution, ordinance, or local law may be introduced at a meeting unless the resolution, ordinance or local law has been considered at a work session of the Council prior to the Council meeting or is listed on the written agenda for said meeting. Notwithstanding the foregoing, by majority vote, an item not discussed at a work session or appearing on the written agenda may introduced, considered, and voted upon.

Rule III(D) contemplates a procedural vote of the Council to approve the introduction of the item to the agenda for consideration before addressing the substance of an item that was not discussed at a prior work session and which does not appear on the written agenda. If an item was not discussed at a prior work session and does not appear on the written agenda, Rule III(D) requires the Council, first, to vote to allow the new item to be introduced, considered and then second, to vote on the substance of the new item. If a majority of the Council votes to add the item to be introduced, considered and voted on to the agenda, then a second vote would be required to approve the substance of the item being introduced and considered.

The commencement of a City Manager search was not considered at a work session before the November 9, 2015 Council meeting and it did not appear on the written agenda for that meeting. The commencement of a City Manager search was raised under the heading of new business. Before a substantive vote to approve the commencement of a City Manager search, Rule III(D) requires a majority vote of the Council to add the item for introduction, consideration and a vote on the substance. After the commencement of a City Manager search was raised, only one vote occurred. It should have been a procedural vote to allow the item to be introduced, considered and voted on. However, such procedural vote did not occur. Rather, the minutes of the City Clerk, approved by the City Council on November 23, 2015, as well as my notes from the November 9, 2015 meeting reflect that a motion to commence a City Manager search was made by Councilwoman Lee with a second by Councilwoman Holmes and a roll call vote resulting in an approval of the motion by a 4-3 vote. It seemed to be understood by all those present that the vote was a substantive vote on whether to commence a City Manager search.

Rule XI of the Council's Rules and Order of Procedure is entitled "Robert's Rules of Order" and provides as follows:

> In the event any question in procedure shall arise that is not provided for by these rules, then, in that event, Robert's Rules of Order, Newly Revised, 10th Edition, shall be followed.

In this regard, the Council's Rules are silent on addressing the procedure where a particular rule is not followed. Robert's Rules of Order Section 23 provides the proper procedures where a member of body believes that a rule was violated. The appropriate method by which to enforce the rules is through a "point of order". At the November 9, 2015 meeting, the Mayor, as the meeting's chair, attempted to correct the rule violation and a parliamentary inquiry was made to the Corporation Counsel who read back the applicable rule of procedure at least twice as recorded on pages 50-52 of the City Council minutes of the November 9, 2015 meeting. The parliamentarian provides advice but the ruling is entirely within the authority of the chair. The Mayor attempted to make a ruling but without clear parliamentary advice was unable to do so with certainty. There were 3 options available in this situation. The Mayor could have ruled that the proposed motion to conduct a City Manager search was in order and continued. The Mayor could have ruled the proposed motion to conduct a City Manager search was out of order and moved on in the proceedings. The Mayor could have put the point of order to a vote of the body. The first two options which are rulings by the chair on the point of order are appealable by any two members of the body. The result of the vote on the point of order by the body is not appealable. It appears that if any vote was taken either on an appeal of the Mayor's ruling on the point of order or the point of order itself, the outcome would have resulted in a continuation to a vote on the substantive motion by the same 4 to 3 vote as along the same alliances as the vote on the substantive motion. The opportunity to raise the point of order has now passed unless the breach of the rule is continuing in nature, which is not the case in connection with this particular vote.

Robert's Rules of Order Section 35 provides a mechanism to rescind something previously adopted but such motion must be made when no other item is being considered and must be seconded. The motion is debatable and can be amended. If the motion is made without prior notice to the body, it requires a 2/3 majority to pass which in the case of a 7 member City Council is 5 votes. However, if prior notice of the intent to make the motion to rescind is given to the entire body, the motion requires a simple majority to pass which in the case of a 7 member City Council is 4 votes. Such prior notice could be given at a prior work session that a member intends to make a motion to rescind at the next regular Council meeting.

Attached for your reference are the following documents:

- City Charter Section C5.00
- City Charter Section C5.01
- City Charter Section C5.05
- Resolution No. 115-2014 of April 28, 2014
- Public Officers Law Section 5
- Foley v. McNab, 42 Misc2d 460, 248 NYS2d 352 (Sup. Ct. Suffolk Co. 1964)
- O'Day v. Yeager, 308 NY 580, 127 NE 585 (1955).
- Hansell v. City of Long Beach, 61 AD2d 84, 401 NYS2d 271 (2d Dept. 1978)
- Enos v. Village of Seneca Falls
- Resolution No. 105-2009 of July 13, 2009

- Resolution No. 201-2012 of November 13, 2012
- Resolution No. 9-2013 of January 14, 2013
- Resolution No. 2-2014 of January 13, 2014
- City Code Section 20-3

Please contact the undersigned with additional questions or if you require more information.

MICHELLE KELSON

MK/bhs
Attachments

City of Newburgh, NY
Wednesday, November 25, 2015

Chapter C. Charter

Article V. City Manager

§ C5.00. Selection; qualifications; removal from office.

[Amended 5-5-1941 by L.L. No. 1-1941; 2-19-1945 by L.L. No. 1-1945; 2-24-1953 by L.L. No. 1-1953; L. 1953, c. 878; 11-8-2011]

A. Selection.

(1) The Council, by a majority plus one vote of its entire membership, shall appoint a City Manager, who shall be the chief administrative and executive officer of the City.

(2) The City Manager may be appointed:

(a) For an indefinite period to serve at the will of the Council;

(b) For a definite term not to exceed two years, at the expiration of which term the City Manager may be reappointed from time to time in the discretion of the Council, but in no event shall any one period of appointment be for more than two years; or

(c) For a definite term not to exceed two years under a written contract of employment, which contract shall contain such terms and conditions as may be specified by the Council. Nothing in such contract of employment shall conflict with the provisions and requirements of this Charter. In the event of any such conflict, the provisions and requirements of this Charter shall be controlling. Such contract of employment may be renewed from time to time in the discretion of the Council, but no one renewal period shall be for a period in excess of two years.

B. Qualifications.

(1) The City Manager shall be appointed solely on the basis of executive, administrative and professional qualifications. The City Manager shall have:

(a) A master's degree with a concentration in public administration, public affairs or public policy, or an equivalent graduate degree, and two years' experience in an appointed managerial or administrative position in a local government or other related experience; or

(b) A bachelor's degree with a concentration in public administration, public affairs or public policy, or an equivalent degree, and five years of experience in an appointed managerial or administrative position in a local government or other related experience.

(2) No elected official of the City shall be eligible for the position of City Manager until the expiration of at least one year after separation from the City government.

C. Residency. The City Manager shall be subject to the residency requirements set forth in § C3.11 of the Charter; provided, however, upon initial appointment, the City Manager shall be permitted to establish residency in the City within 120 days of appointment. The Council, where circumstances warrant, may grant one sixty-day extension of this period.

D. Removal. Notwithstanding whether the City Manager is appointed for an indefinite period or a definite term, and without any requirement that cause be demonstrated, the Council may remove the City Manager from office in accordance with the following procedures:

(1) The Council shall adopt by affirmative vote of a majority plus one of all its members a preliminary resolution for removal, which must state the reasons for removal, and which may suspend the City Manager from duty for a period not to exceed 30 days. Such suspension shall not deprive the City Manager of salary for such period, but no reimbursable expenses may be charged to the City or to a City department by the suspended City Manager for the term of such suspension. A copy of the resolution shall be delivered to or served upon the City Manager personally or by leaving it at the office of the City Manager in the City within five days after its adoption.

(2) The City Manager, within five days of the service or delivery of the preliminary removal resolution, shall have the right to file a written request with the Council for an opportunity to be heard at a public meeting of the Council. In the event that the City Manager makes such request, the opportunity to be heard shall be afforded at a regular or special meeting of the Council to be held within 15 days of the Council's receipt of such request. The Council may adopt a final resolution of removal, which may be made effective immediately, by affirmative vote of a majority plus one of all its members at any time after the City Manager is afforded the opportunity to be heard at a Council meeting or, if no opportunity to be heard is timely requested, after five days from the date when a copy of the preliminary resolution was delivered to or served upon the City Manager.

(3) The City Manager shall continue to receive salary until the effective date of the final resolution of removal. The action of the Council in suspending or removing the City Manager shall be final and binding.

§ C5.01. Acting or Interim City Manager.

[Amended 2-24-1953 by L.L. No. 1-1953; 1-23-1956 by L.L. No. 1-1956; 4-28-1958 by L.L. No. 1-1958; 11-8-2011]

A. The City Manager may designate any appointed officer of the City to act as City Manager during the absence or disability of the City Manager; and the person so designated, during the continuance of such absence or disability, shall perform all the duties and have all the powers of the City Manager. In the absence of a designation by the City Manager, the Council may make such designation.

B. In the event that a vacancy occurs in the office of City Manager due to death, resignation or otherwise, the Council shall immediately commence the process for selecting a new City Manager in accordance with the requirements of § C5.00 of the Charter. Within 10 days of the occurrence of the vacancy, the City Council shall designate an appointed officer of the City to serve as Interim City Manager. The Interim City Manager shall serve in that position until a new City Manager is appointed; provided, however, the Interim City Manager may not serve more than six months unless the Council, by resolution, certifies the necessity for the continuation of the Interim City Manager and sets forth the reasons why a new City Manager has not been appointed. Upon the adoption of such resolution, the Interim City Manager may continue to serve for no more than an additional six months.

City of Newburgh, NY
Tuesday, December 1, 2015

Chapter C. Charter

Article V. City Manager

§ C5.05. Duties of City Manager.

[Added 2-24-1953 by L.L. No. 1-1953]
The City Manager shall be responsible to the Council for the administration of all City affairs. Specifically, it shall be his duty:

A. To see that the laws of the State of New York and the ordinances of the Council are enforced within the City.

B. To appoint and to remove the heads of all departments, the members of all boards and commissions and all subordinate officers and employees of the City, except as otherwise provided herein.

C. To exercise supervision and control over the administrative departments of the City government, comprising a Law Department, a Finance Department, a Public Works Department, a Fire Department, a Police Department and a Water Department and such other officers, employees, bureaus, agencies and departments as may be added from time to time.
[Amended 9-14-1987 by L.L. No. 4-1987]

D. To attend all meetings of the Council.

E. To recommend to the Council such measures as he may deem necessary or expedient.

F. To keep the Council at all times fully advised as to the financial condition and needs of the City.

G. To prepare and to submit to the Council the annual City budget.

H. To see that all terms and conditions imposed in favor of the City in any public utility franchise are faithfully performed.

I. To execute all deeds and all contracts on behalf of the City and to sign all warrants, certificates, licenses and other instruments issued by or in behalf of the City, except as otherwise provided by law or by ordinance.

J. To perform such other duties as may be required of him by the Council.

RESOLUTION NO.: 115 - 2014

OF

APRIL 28, 2014

A RESOLUTION APPOINTING MICHAEL G. CIARAVINO
AS CITY MANAGER OF THE CITY OF NEWBURGH

BE IT RESOLVED, by the Council of the City of Newburgh, New York that Michael G. Ciaravino be and hereby is appointed as City Manager of the City of Newburgh effective as of 8:30 A.M. on May 19, 2014 pursuant to City Charter Section C.5.00(A)(3). The terms and conditions of the appointment shall be memorialized in a written contract of employment as follows:

1. The term of the agreement shall be two (2) years.
2. He shall receive an annual salary gross salary of $145,000.00 in the first year of the contract with a performance-based increase to an annual gross salary of $150,000.00 in the second year of the contract.
3. He shall establish residence within the City of Newburgh as required by City Charter Section C.5.00(C) and the Public Officers Law within 120 days of the commencement date of employment as provided above. He shall be entitled to reimbursement for relocation expenses incurred in connection with this appointment in an amount not to exceed $5,000.00. Residency shall be established within 120 days of the date of this Resolution in accordance with City Charter Section C.5.00(C).
4. He shall be entitled to four (4) weeks of vacation in each year of the contract.
5. Except for vacation covered above, he shall be entitled to the same paid leave policies as other non-bargaining unit managerial employees as set forth in Resolution No. 163-2007 of August 20, 2007.
6. He shall be entitled to the same paid holidays as other non-bargaining unit managerial employees as set forth in Resolution No. 163-2007 of August 20, 2007.
7. He shall be entitled to the same health, dental, optical, life and disability insurances as other non-bargaining unit managerial employees as set forth in Resolution No. 163-2007 of August 20, 2007.
8. He shall be entitled to participate in the New York State and Local Employees' Retirement System and the New York State Deferred Compensation Plan as provided to all City employees to the extent provided by New York State law.
9. He shall be entitled to the exclusive use of a vehicle provided to him by the City at all times while he is employed as City Manager for both business and personal use subject to the City Vehicle Usage Policy.

10. The City Council shall make an annual budget appropriation for the cost of courses, conferences and seminars for the purposes of education and professional development; to pay for dues and membership fees in the International City/County Management Association and other professional and local civic organizations relevant to the duties of City Manager; and to pay the cost of travel expenses associated with professional and official travel to meetings, conferences and other events for the purposes of carrying out the duties of City Manager.
11. He shall be entitled to defense and indemnification of legal claims arising out of the scope of his employment as City Manager as provided to all other public officers and non-bargaining unit managerial employees as provided by Section 18 of the Public Officers Law and City Charter Section C.3.92.
12. Termination shall be in accordance with City Charter Section C.5.00(D). Upon separation from service for any reason, he shall be entitled to the same severance as provided to other non-bargaining unit managerial employees as set forth in Resolution No. 163-2007 of August 20, 2007.

BE IT FURTHER RESOLVED, by the City Council of the City of Newburgh, New York that the Mayor be and she hereby is authorized to execute a written employment agreement for the services as City Manager with Michael G. Ciaravino incorporating and consistent with the terms and conditions provided in this Resolution and with applicable law.

I, Lorene Vitek, City Clerk of the City of Newburgh, hereby certify that I have compared the foregoing with the original resolution adopted by the Council of the City of Newburgh at a regular meeting held 11/08/14 and that it is a true and correct copy of such original.

Witness my hand and seal of the City of Newburgh this 12 day of Nov 2014

City Clerk

EMPLOYMENT AGREEMENT

THIS AGREEMENT, entered into as of this 19 day of May, 2014, by and between THE CITY OF NEWBURGH, a municipal corporation organized and existing under the laws of the State of New York and having its principal office for the transaction of business at City Hall, 83 Broadway, Newburgh, New York, hereinafter referred to as ("the City") and MICHAEL G. CIARAVINO currently residing at 17328 Falling Water Rd., Strongsville OH, 44136, hereinafter referred to as ("Mr. Ciaravino") for the employment of Mr. Ciaravino as City Manager of the City of Newburgh pursuant to the terms and conditions set forth in Resolution No. 115-2014 of April 28, 2014:

In consideration of the mutual promises hereinafter set forth, the parties do hereby agree as follows:

Article 1. Appointment.

A. The City agrees to employ Mr. Ciaravino as the City Manager of the City of Newburgh (hereinafter "City Manager") for a two (2) year term to commence performing the duties of said position as of 8:30 a.m. on May 19, 2014, on a full-time basis. The parties acknowledge that the duties and responsibilities of City Manager may require performance of work starting before 8:30 a.m., or ending after 4:00p.m., including work on Saturdays, Sundays or Holidays. The days and hours of work to be performed shall be determined by Mr. Ciaravino, but, in no event, shall be less than thirty-five (35) hours per week.

B. Mr. Ciaravino agrees to accept employment as City Manager of the City of Newburgh and to perform the duties and responsibilities of the position faithfully, competently and to his best ability. Mr. Ciaravino agrees that his employment as City Manager shall be his exclusive full time employment for the term of this agreement and that he shall not be employed full time for any other employer unless or until his employment as City Manager is terminated as provided in City Charter Section C.5.00 (D), City Council Resolution No. 115-2014 of April 28, 2014 and this Agreement. For purposes of this Agreement, other full time employment shall be defined as the performance of services for compensation for another person or entity on an average of thirty-five (35) hours or more per week. Mr. Ciaravino shall not engage in any professional activity on behalf of any party other than the City without the express prior consent of the City Council.

Article 2. Residence.

The parties acknowledge the residency provisions in City Charter Section C.3.00 and C.5.00(C). Mr. Ciaravino shall establish residence within the City as required by the City Charter and the Public Officers Law within 120 days of the commencement date of employment as set forth is City Council Resolution No. 115-2014 of April 28, 2014 and

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Article 1(A) of this Agreement. The City shall reimburse Mr. Ciaravino for relocation expenses incurred in connection with his appointment to the position of City Manager in an amount not to exceed $5,000.00.

Article 3. Scope of Work.

Mr. Ciaravino agrees to perform the duties and responsibilities of the position of City Manager as set forth in City Charter Section C.5.05 and Section C.5.06 and to perform other legally permissible duties and functions as the City Council may assign from time to time.

Article 4. Term of Agreement.

The term of the appointment of Mr. Ciaravino shall commence on May 19, 2014 and end on May 18, 2016. The term of this Agreement shall not be extended except by a majority plus one vote by the entire City Council membership in accordance with City Charter Section C.5.00 (A) (2).

Article 5. Compensation.

In consideration for his agreement to serve as the City Manager, Mr. Ciaravino shall be paid an annual salary of $145,000.00 in the first year of this Agreement. In the second year of this Agreement, the annual salary may be increased to $150,000.00 by the City Council upon Mr. Ciaravino achieving certain goals to be identified.

Article 6. Paid Leave and Benefits.

A. Paid Leave.

1. Mr. Ciaravino shall be entitled to four (4) weeks of vacation in each year of this Agreement.
2. Except for vacation covered in Article 6, Section A(1) above, Mr. Ciaravino shall be entitled to the same leave policies as other non-bargaining unit managerial employees as set forth in Resolution No. 163-2007 of August 20, 2007.
3. Mr. Ciaravino shall be entitled to the same paid holidays as other non-bargaining unit managerial employees as set forth in Resolution No. 163-2007 of August 20, 2007.

B. Insurances. Mr. Ciaravino shall be entitled to the same health, dental, optical, life and disability insurances on the same terms as other non-bargaining unit managerial employees as set forth Resolution No. 163-2007 of August 20, 2007.

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C. Retirement. Mr. Ciaravino shall be entitled to participate in the New York State and Local Employees' Retirement System and the New York State Deferred Compensation Plan as provided to all City employees to the extent provided by New York State Law. The parties shall continue to negotiate the subject of the City making matching contributions to Mr. Ciaravino's deferred compensation plans to the extent permitted under New York State and Federal Law.

D. Vehicle. The City shall provide Mr. Ciaravino with exclusive use of a motor vehicle at all times while he is employed as City Manager for official business and personal use, subject to the City of Newburgh Vehicle Usage Policy.

E. Expenses.

1. Education. The City Council shall make an appropriation in the City's annual budget to pay the cost of such courses, conferences and seminars as Mr. Ciaravino may attend for the purpose of education and professional development. The City Council shall make an appropriation in the City's annual budget to pay for Mr. Ciaravino's membership in the International City County Management Association (ICMA) and other professional organizations or local civic organizations relevant to his duties as City Manager.
2. Travel Expenses. The City Council shall make an appropriation in the City's annual budget to pay for the expenses associated with conferences, educational and other professional courses and networking meetings, such as meals-lodging, fuel, tolls and parking.
3. Defense and Indemnification. Defense and Indemnification for any and all claims, demands, actions, causes of action, liabilities, losses, judgments, fines, costs and expenses ,including reasonable attorney's fees and settlement expenses, arising out of any alleged act or alleged omission which occurred or allegedly occurred while Mr. Ciaravino was acting within the scope of his employment by the City shall be in accordance with the requirements set forth in Section 18 of the Public Officers Law and City Charter Section C.3.92. The City represents that to its knowledge no bonding is presently required under law or ordinance, but the City shall pay the cost of all bonds required of Mr. Ciaravino as city manager if legislation requires same in the future, or if discovered to be required by existing law or ordinance.

Article 7. Conflict of Interest.

Mr. Ciaravino represents and warrants that he has no interest nor shall he acquire any interest, directly or indirectly which would or may conflict in any manner or degree with the performance or rendering of the Services herein provided. Mr. Ciaravino acknowledges the provisions of Section 806 of the New York State General Municipal Law and the Ethics Law of the City of Newburgh, Chapter 34 of the Code of Ordinances of the City of Newburgh and acknowledges his continuing duty to comply with the same. The

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parties acknowledge that Mr. Ciaravino may be permitted to participate in the Newburgh Community Land Bank pursuant to all applicable laws, ordinances, policies and by-laws.

Article 8. Confidential Information.

In the course of his employment, Mr. Ciaravino may acquire knowledge or come into possession of confidential, sensitive or proprietary information belonging to City. Mr. Ciaravino agrees that he will keep and maintain such information securely and confidentially, and not disclose such information to any third parties to the same extent that the New York State Freedom of Information Law exempts such information from disclosure unless a court order compels disclosure of such information. Mr. Ciaravino's obligations under this clause to maintain the confidentiality of such information and to refrain from using such information in any manner without the prior written approval of the City shall survive the termination or expiration of this Agreement. In no event shall this article be construed to prevent disclosure of information, documents, or other things pursuant to lawful requests for same.

Article 9. Separation from Service.

A. Termination shall be in accordance with the procedure provided in City Charter Section C.5.00 (D).

B. Upon separation from service for any reason, Mr. Ciaravino shall be entitled to the same severance as provided to other non-bargaining unit managerial employees as set for the in Resolution No. 163-2007 of August 20, 2007.

Article 10. Construction, Governing Law and Dispute Resolution.

A. Construction. Nothing in this Agreement shall conflict with the City Charter of the City of Newburgh. If any term or provision of this Agreement varies from the requirements of the City Charter then the provisions of the City Charter shall govern.
B. Governing Law. This Agreement is entered into under and pursuant to, and is to be construed and enforceable in accordance with the laws of the State of New York, without regard to its conflict of laws principles.
C. Dispute Resolution. Mr. Ciaravino shall render all Services under this Agreement in accordance with applicable provisions of all federal, state and local laws, rules and regulations as are in effect at the time such Services are rendered. All claims, disputes and other matters in question between the parties to this Agreement arising out of or relating to this Agreement or the breach thereof, shall be decided by binding arbitration in accordance with New York law and the rules of the American Arbitration Association. Each party shall bear their own attorney's fees, costs and disbursements in connection with such arbitration. The award rendered

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by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law of the State of New York.

Article 11. Entire Agreement.

This Agreement contains the entire agreement between the parties with respect to the subject matter hereof and supersedes and replaces all prior negotiations, correspondence, conversations, agreements, understandings concerning the subject matter hereof. Accordingly, the parties agree that no deviation form the terms hereof shall be predicated upon any prior representations, agreements or understandings, whether oral or written.

This Agreement may be executed in any number of counter-parts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Article 12. Modification.

No changes, amendments or modifications of any of the terms and/or conditions of this Agreement shall be valid unless reduced to writing and signed by the party to be bound.

Article 13. Severability.

If any clause, sentence, paragraph, section, provision, or any portion thereof, contained in this Agreement shall be adjudged by any court of competent jurisdiction to be unconstitutional, invalid or unenforceable, such judgment shall not affect, impair or invalidate the remainder of this Agreement, or portion thereof, shall be shall be confined in its operation to the clause, sentence, paragraph, section, provision or part thereof directly involved in the controversy in which such judgment shall have been rendered and such judgment shall not affect the remainder of this Agreement, which and shall remain in full force and effect.

Article 14. Titles.

The titles of the paragraphs of this agreement are for convenience only and shall not affect the meaning or interpretation of the paragraphs.

Article 15. Notice.

All notices or other communication required or permitted to be given pursuant to the Agreement shall be in writing and shall be deemed given when delivered by hand or five (5) business days if sent by certified mail, return receipt requested or the next business day if sent by generally recognized, pre-paid overnight mail service.

JKW

If to the City:

Judith L. Kennedy, Mayor
City of Newburgh
83 Broadway
Newburgh, NY 12550

If to Mr. Ciaravino

17328 Falling Water Rd
Strongsville, Ohio
44136

With a copy to:

Michelle Kelson, Corporation Counsel
City of Newburgh
83 Broadway
Newburgh, NY 12550

With a copy to:

Article 16. Waiver.

The failure of either party to enforce any rights hereunder shall not be deemed to be a waiver of such rights, unless such waiver is an express written waiver, which has been signed by the party to be charged. Waiver of any one breach shall not be deemed to be a waiver of any other breach of the same or any other provision hereof.

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IN WITNESS THEREOF, the parties hereto have executed this Agreement as of the date set forth above.

THE CITY OF NEWBURGH

BY: _____
JUDITH L. KENNEDY,
Mayor

BY: _____
MICHAEL G. CIARAVINO

Approved as to form:

_____
MICHELLE KELSON
Corporation Counsel

Witnessed:

_____
~~LORENE VITEK~~ KATRINA COTTON
DEP. City Clerk

_____
JOHN J. ABER
Comptroller

Seal

McKinney's Consolidated Laws of New York Annotated
Public Officers Law (Refs & Annos)
Chapter 47. Of the Consolidated Laws
Article 2. Appointment and Qualification of Public Officers (Refs & Annos)

McKinney's Public Officers Law § 5

§ 5. Holding over after expiration of term

Currentness

Every officer except a judicial officer, a notary public, a commissioner of deeds and an officer whose term is fixed by the constitution, having duly entered on the duties of his office, shall, unless the office shall terminate or be abolished, hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified; but after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor. An officer so holding over for one or more entire terms, shall, for the purpose of choosing his successor, be regarded as having been newly chosen for such terms. An appointment for a term shortened by reason of a predecessor holding over, shall be for the residue of the term only.

Credits

(L.1909, c. 51.)

Notes of Decisions (107)

McKinney's Public Officers Law § 5, NY PUB OFF § 5
Current through L.2015, chapters 1 to 417.

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42 Misc.2d 460
Supreme Court, Suffolk County, New York, Special Term, Part I.

John J. FOLEY, Petitioner,
v.
Everett F. McNAB and Arthur M. Weiss, as Commissioners of the Board of Elections, etc., Charles R. Dominy, Clarence L. Hough, David Weisberger and George Fuchs, Howard Rowland and Frank Coveney, being the Supervisor and Councilmen other than petitioner of the Town of Brookhaven and Edwin A. Arnzen, Clerk of the Town of Brookhaven and Francis C. Giaccone, Respondents.

Feb. 19, 1964.

Proceeding to determine eligibility to hold office. The Supreme Court, Special Term, Munder, J., held that the office of councilman to which candidate receiving third highest number of votes in field of six candidates for three council seats would have been elected had he been eligible became vacant on first day of term and would remain vacant until filled by appointment of town board and qualification of appointee, and incumbent who received fourth highest vote was not entitled to office even though the incumbents receiving fifth and sixth highest number of votes resigned their offices just prior to expiration of term.

Petition dismissed.

West Headnotes (9)

[1] **Common Law**
Adoption and Repeal

The common law is never abrogated by implication.

Cases that cite this headnote

[2] **Election Law**
Number of votes necessary to choice

The common law rule is that no one may be declared elected unless he receives a majority or a plurality of the legal votes cast at an election.

Cases that cite this headnote

[3] **Election Law**
Counting of votes

That a plurality or majority of votes were cast for ineligible candidate does not result in election of candidate receiving next highest number of votes.

Cases that cite this headnote

[4] **Election Law**
Counting of votes

Where ineligible candidate receives highest number of votes, or sufficient to elect him if he were eligible, the result is a failure of election and a vacancy in the office upon expiration of term of incumbent.

1 Cases that cite this headnote

[5] **Election Law**
Counting of votes
Mandamus
Title to and Possession of Office
Quo Warranto
Exclusiveness of remedy by quo warranto

Commissioners of Board of Election properly certified election to town council of ineligible candidate receiving enough votes to elect him if he were eligible; the Commissioners' duty was ministerial and they could not determine eligibility; in the first instance eligibility should be determined by a court in an action in nature

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of quo warranto if facts were at issue or in Article 78 proceeding if there were no disputed fact questions. CPLR § 7801 et seq.

Cases that cite this headnote

[6] **Officers and Public Employees**
Holding over after expiration of term
Officers and Public Employees
Occurrence and Existence of Vacancy

Whether vacancy in office arises by ineligibility of candidate receiving enough votes to elect him if he were eligible or by his failure to qualify, the incumbent would ordinarily hold over and the office would be deemed vacant only for purpose of appointing a successor. Public Officers Law, §§ 5, 30, subd. 1, par. h.

1 Cases that cite this headnote

[7] **Officers and Public Employees**
Holding over after expiration of term

Ordinarily where there is a vacancy by expiration of term, the incumbent holds over until his successor is chosen and qualified. Public Officers Law, § 5.

Cases that cite this headnote

[8] **Officers and Public Employees**
Holding over after expiration of term

The purpose of the statute relating to holding over after expiration of term of office is to ensure a continuance of government where a vacancy occurs by expiration of time and there is a failure of election or appointment; the statute can be employed whenever the office vacated can be identified with a particular incumbent. Public Officers Law, § 5.

1 Cases that cite this headnote

[9] **Election Law**
Counting of votes
Municipal Corporations
Term of Office, Vacancies, and Holding Over
Municipal Corporations
Term of office in general

The office of councilman to which candidate receiving third highest number of votes in field of six candidates for three council seats would have been elected had he been eligible became vacant on first day of term and would remain vacant until filled by appointment and qualification of appointee, and incumbent who received fourth highest vote was not entitled to office even though the incumbents receiving fifth and sixth highest number of votes resigned their offices just prior to expiration of term. Public Officers Law, § 5; Town Law §§ 23, 64, 85.

1 Cases that cite this headnote

Attorneys and Law Firms

****355 *461** Robert G. Bauer, Patchogue, for petitioner.

George W. Percy, Jr., Riverhead, for respondents, Commissioners of Elections.

Robert Cedar, Selden, for respondents Dominy, Hough, Weisberger, Fuchs and Arnzen.

O'Rourke & Jordan, Central Islip, for respondent Giaccone.

Opinion

FRED J. MUNDER, Justice.

There is no factual dispute in this matter. In the town election in Brookhaven Town in November 1963 three councilmen were to be elected. There were six candidates of whom the three receiving the highest number of votes would be elected. The respondent Francis C. ****356**

Giaccone received the third highest number of votes, a fact certified by the board of elections. However, it is claimed that Mr. Giaccone, not being an owner of record of real property, was ineligible. (§ 23, Town Law). The petitioner John J. Foley, seeking reelection, received the fourth highest number of votes.

On December 31, 1963 at 11:57 P.M. Mr. Foley's co-councilmen, whose terms were to expire by operation of law at midnight and who running for reelection received the fifth and sixth highest number of votes, resigned their offices.

Mr. Giaccone has conceded his ineligibility on Election Day leaving the sole question to be determined whether Mr. Foley is entitled to the office either by ignoring as a nullity Mr. Giaccone's candidacy and election and declaring Mr. Foley the elected candidate or by declaring Mr. Foley a holdover incumbent.

The petitioner agrees that if the election in question had been a village election rather than a town election the construction of Section 53 of the Village Law by the court in People ex rel. Stalter v. Lynch, 219 App.Div. 1, 219 N.Y.S. 52, aff'd 245 N.Y. 534, 157 N.E . 847, would make his position, that he must be declared to be the elected candidate, untenable. But he says there is no section of the Town Law that is comparable to Section 53 of the Village Law. The latter section provides that 'The person eligible and receiving the highest number of votes for an office shall be elected thereto'. The court in construing that sentence in the Stalter case said: '[I]n a case where the person receiving the highest number of votes is ineligible, to declare the person receiving the next highest number of votes elected would be subversive of the popular will'. (219 App.Div. at 1, 3, 219 N.Y.S. at 54).

[1] ***462** The petitioner argues that the Stalter decision should be limited in its effect to village elections and that the absence of comparable language in the Town Law implies a legislative intention to employ a contrary rule in town elections. The defect in this reasoning is the fact that the Village Law, Section 53, is simply declaratory of the common law (29 C.J.S. Elections § 243) and the common law is never abrogated by implication. Even 'When * * * a statute is intended to abrogate a common law right or to confer a right not vested by the common law, it will be so construed as not to go beyond the letter; and not even to that extent unless it appears to be according to the spirit and intention of the act'. (§ 301, McKinney's Cons.Laws of N. Y., Book 1, Statutes).

[2] [3] [4] The common law rule is that no one may be declared elected unless he receives a majority or a plurality of the legal votes cast at an election. That such a plurality or majority of the votes were cast for an ineligible candidate does not result in the election of the candidate receiving the next highest number of votes (People ex rel. Furman v. Clute, 50 N.Y. 451, 465; See also 133 A.L.R. 334). Such a result ****357** would be subversive of the popular will (People ex rel. Stalter v. Lynch, supra). Where an ineligible candidate receives the highest number of votes, or sufficient to elect him if he were eligible, the result is a failure of election and a vacancy in the office upon the expiration of the term of the incumbent. Whether or not a different result would obtain in the event the electorate had prior knowledge of the ineligibility of the candidate (People ex rel. Furman v. Clute, supra, at 461) need not here be considered. There is no suggestion that such was the case in this election.

[5] The respondents Commissioners of the Board of Elections as the canvassing board properly certified the election of Mr. Giaccone . Theirs is a ministerial duty only and they may make no determination of the eligibility of a candidate. That determination is to be made in the first instance by a court (In re Funkhouser, 157 Misc. 400, 284 N.Y.S. 777), in an action in the nature of *quo warranto* if the facts are at issue or in an Article 78 proceeding where there is no disputed fact question. (Mapes v. Swezey, 278 App .Div. 959, 105 N.Y.S.2d 489).

[6] Technically, in our situation the vacancy was not occasioned by ineligibility for that had not yet been declared by a court. Apparently Mr. Giaccone, realizing his ineligibility made no effort to qualify by filing his official oath (§ 30, subd. 1, par. h, Public Officers Law and § 25, Town Law). The result however is the same for whether the vacancy arises by ineligibility or by failure to qualify the incumbent would ordinarily hold over and ***463** the office would be deemed vacant only for the purpose of appointing a successor (§ 5, Public Officers Law).

[7] In the instant case the situation is complicated by the fact that the terms of three councilmen were expiring on December 31, 1963, and that no candidate was running to fill any particular vacancy. Ordinarily where there is a vacancy by expiration of term the incumbent will hold over until his successor is chosen and qualifies. (§ 5, Public Officers Law). Here, in order that there would be but one councilman who might be considered to be the incumbent entitled to hold over, the other two, of the three councilmen whose terms were expiring, resigned.

However, there is no efficacy in the maneuver. It may appear reasonable that the vacant office should be continued to be filled by the highest vote getter of the

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defeated candidates but there is no authority for the employment of the device used here or any other method of selection to determine who should fill the vacancy in a situation of this kind.

[8] [9] The purpose of Section 5, Public Officers Law is to insure a continuance of government where a vacancy occurs by expiration of term and there is a failure of election or appointment. If can be employed whenever the office vacated can be identified with a particular incumbent. In such a case the result would follow automatically. That would have **358 been the situation if the Town of Brookhaven had established the ward system for the election of councilmen. (§ 85, Town Law). Where, as here, the office vacated cannot so be identified it cannot be said that any of three incumbents is entitled to hold over (Mazzotti v. Swezey, 199 Misc. 987, 103 N.Y.S.2d 956) nor can they choose among themselves or effect the same result by all but one resigning. Because they perform no duties independently of the town board (apart from delegated duties by direction of the board) and the town board can function with less than its full complement, there will be no interruption of government where only one councilmanic office is vacant.

It is concluded that the office of councilman to which Mr. Giaccone would have been elected had he been eligible became vacant on January 1, 1964 and remains vacant until filled by appointment by the town board pursuant to Section 64, subdivision 5 of the Town Law and the qualification of the appointee.

The petition is dismissed without costs.

All Citations

42 Misc.2d 460, 248 N.Y.S.2d 354

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308 N.Y. 580
Court of Appeals of New York.

In the Matter of John I. O'DAY, Respondent,
v.
Charles T. YEAGER, as Surrogate of Erie County, Appellant, and Robert W. McNulty, Intervenor-Appellant.

June 9, 1955.

Proceeding for reinstatement of petitioner as clerk of Surrogate's Court of Erie County. The Erie Special Term, Alger A. Williams, J., dismissed petition for reinstatement, and petitioner appealed. The Supreme Court, Appellate Division, 284 App.Div. 754, 134 N.Y.S.2d 806, reversed the order and granted relief, and defendants appealed. The Court of Appeals, Fuld, J., held that in view of statutory duties imposed upon clerk, despite facts that some duties were more or less ministerial and clerical and subject to surrogate's review, clerk was an 'independent officer' rather than a 'subordinate employee', and was subject to removal at pleasure despite Civil Service Law provision limiting power of removal of honorably discharged veterans.

Appellate Division's order reversed and Special Term's order reinstated.

Dye, J., dissented.

West Headnotes (1)

[1] Officers and Public Employees
⇐Preference of Discharged Soldiers, Sailors, or Marines in Making Removals

In view of statutory duties imposed upon clerk of Surrogate's Court of Erie County, despite facts that some duties were more or less ministerial and clerical and subject to surrogate's review, clerk was an "independent officer" rather than a "subordinate employee", and was subject to removal at pleasure despite Civil Service Law provision limiting power of removal of honorably discharged veterans. Civil Practice Act, § 1283 et seq.; Civil Service Law, § 22, subd. 1; Surrogate's Court Act, § 20, subd. 9; §§ 21, 29, 31, 32, subds. 1, 2, 4, 6, 8, 10; § 144; Judiciary Law, § 177(2); Civil Service Law, § 13, subd. 1.

29 Cases that cite this headnote

Attorneys and Law Firms

****585 *581** Elmer R. Weil, County Atty., Buffalo (Wortley B. Paul, Buffalo, of counsel), for Charles T. Yeager, Surrogate of Erie County, appellant.

***583** Michael Catalano, Buffalo, for intervenor-appellant.

John I. O'Day, Buffalo, respondent, in person.

Opinion

***584** FULD, Judge.

On January 1, 1950, petitioner, an honorably discharged veteran of World War II, was appointed clerk of the Surrogate's Court of Erie County by Surrogate Buscaglia at a salary of $9,200 a year. Following gubernatorial appointment of Charles T. Yeager as surrogate to fill the vacancy that had occurred in that office, petitioner's appointment was revoked, pursuant to section 21 of the Surrogate's Court Act, by the new surrogate on December 31, 1953. In this article 78 proceeding, brought to effect his reinstatement, petitioner, claiming the protection accorded veterans by section 22 of the Civil Service Law, McK.Consol.Laws, c. 7, alleges that his removal was illegal and void for noncompliance with its provisions.

It is section 21 of the Surrogate's Court Act which provides both for the appointment and discharge of the clerk; it reads, in part, as follows: 'By a written order filed and recorded in ***585** his office, which he may in like manner revoke at pleasure, a surrogate may appoint a clerk of the surrogate's court'.[1] The fact that the surrogate ****586** is given the power to remove 'at pleasure' does not render section 22 of the Civil Service Law inapplicable or prevent the veteran from asserting his rights under that section, if its coverage otherwise extends to him. See Mercer v. Dowd, 288 N.Y. 381, 384, 43 N.E.2d 452, 453; Bennett v. Robbins, 240 N.Y. 553, 148 N.E. 701; Seeley v. Stevens, 190 N.Y. 158, 165, 166, 82 N.E. 1095, 1097, 1098; see, also, Byrnes v. Windels, 265 N.Y. 403, 193

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N.E. 248; People ex rel. Hoefle v. Cahill, 188 N.Y. 489, 496, 81 N.E. 453, 455.

The Civil Service Law provision recites, in subdivision 1, that no person, 'holding a position by appointment or employment' in the state or in the several counties or in any branch of the public service, who is an honorably discharged war veteran, 'shall be removed from such position except for incompetency or misconduct shown after a hearing upon due notice upon stated charges'. The protection, however, does not extend to all veterans, for it is explicitly declared that 'Nothing in this subdivision shall be construed to apply to the position of private secretary, cashier or deputy of any official or department.' The courts have held that section 22 'was intended to apply only to those holding positions of a subordinate nature,' and, consequently to the list of persons specifically excluded from the protective coverage of the statute must be added those who are officials filling independent positions. Mylod v. Graves, 274 N.Y. 381, 384, 9 N.E.2d 18; see, also, People ex rel. Jacobus v. Van Wyck, 157 N.Y. 495, 504, 52 N.E. 559, 561.

The court at Special Term dismissed the petition upon the ground, among others, that the petitioner is an independent officer, to whom specific 'duties were granted' by statute. The Appellate Division reversed, 284 App.Div. 754, 134 N.Y.S.2d 806, directing that petitioner have the relief sought; it was that court's conclusion that the clerk is a 'subordinate employee,' always subject, in the exercise of his ***586** powers and duties, to the approval and direction of the surrogate.

Whether a particular person is an independent officer or a subordinate employee 'is not always an easy matter to determine.' Mylod v. Graves, supra, 274 N.Y. 381, 387, 9 N.E.2d 18, 20. No automatic rule, no definitive signpost, is at hand, for it may fairly be said that each case must be decided upon its own facts. Compare, e. g., Mercer v. Dowd, supra, 288 N.Y. 381, 43 N.E.2d 452, with Pinkus v. Village of Hempstead, 294 N.Y 719, 61 N.E.2d 453; see, also, Bergerman v. Byrnes, 305 N.Y. 811, 113 N.E.2d 557; Mafera v. Pasta, 265 N.Y. 552, 193 N.E. 316. The decisions do, however, contain certain guides and, if we were to attempt a formulization, it would be this he is an independent officer whose position is created, and whose powers and duties are prescribed, by statute and who exercises a high degree of initiative and independent judgment. See Mylod v. Graves, supra, 274 N.Y. 381, 9 N.E.2d 18; Christey v. Cochrane, 211 N.Y. 333, 105 N.E. 419; People ex rel. Jacobus v. Van Wyck, supra, 157 N.Y. 495, 52 N.E. 559; see, also, Bergerman v. Byrnes, supra, 305 N.Y. 811, 113 N.E.2d 557.
With that in mind, we turn to the Surrogate's Court Act, from which the clerk of the court derives his authority to function, his powers and his duties. As already stated, it is section 21 of that statute which creates the office, providing that it shall be filled by appointment by the surrogate. And it is section 32 which prescribes most of the clerk's powers, to be exercised by him, it is worthy of note, 'concurrently with the surrogate'. Thus, he may 'certify and sign * * * any of the records of the ****587** court,' s 32, subd. 1, including records and papers, 'left uncompleted or unsigned' by another surrogate, s 20, subd. 9.[2]
He may 'issue any citation, subpoena or other mandate to which a party is entitled as of course, either unconditionally or on the filing of any paper', s 32, subd. 2. He may 'adjourn' for a period not to exceed thirty days 'any matter, when the surrogate is absent from his office, or unable * * * to attend to the same', s 32, subd. 4, and he may 'charge and receive' certain specified fees 'to the use of the county', s 29. The ***587** existence of powers such as these was stressed by Judge Cullen later Chief Judge of the Court of Appeals as demonstrating that the clerk of another court, a district police court, was an independent officer. See People ex rel. Earl v. England, 16 App.Div. 97, 100, 45 N.Y.S. 12, 13; People ex rel. Wren v. Goetting, 55 Hun 611, opinion in 8 N.Y.S. 742, affirmed on other grounds 133 N.Y. 569, 30 N.E. 968.

Nor does this specification exhaust the powers conferred by the statute. Included among the clerk's most important functions, and they certainly are not the attributes of a mere subordinate employee, is the power 'to take proof of a will', s 32, subd. 8, as well as the power 'to take * * * and report the testimony in any proceeding', s 32, subd. 10. It is true that he may not pass upon the issues involved, s 32, subd. 10, or take testimony bearing on proof of a will if demand is made for examination of subscribing witnesses or if objections to probate are pending, s 32, subd. 8. But, when we consider the impressive number of wills probated in Erie County, it is clear that the duties of the clerk encompass a vast range of responsibility, since, quite obviously, the surrogate himself could not possibly investigate all of the wills filed and considered in his court. See Surrogate's Court Act, s 144.

No less significant is the further power of the clerk to 'authorize or deputize' other clerks, with the surrogate's approval, 'to sign his made, and exercise such of the other powers conferred upon him by * * * (section 32), as he shall designate.' s 32, subd. 6. And, although the surrogate may prohibit the clerk from exercising any of those powers, the statute specifically announces, 'the prohibition does not affect the validity of any act of the clerk or deputy clerk done in disregard of the prohibition.' Not only does this particular provision, subdivision 6,

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furnish legislative confirmation of the broad authority and extensive discretion vested in the clerk, but the statute, taken as a whole, manifests the heavy responsibility granted to him and the high confidence reposed in him, and goes far toward marking him as the one who has charge of the administrative work and machinery of the court. See, also, Surrogate's Court Act, ss 31, 33.

Petitioner attempts to minimize the importance of the powers thus assigned to the clerk by urging that they are all subject to the supervision and control of the surrogate. However, even ***588** though it is undoubtedly true that the surrogate has the final say in matters calling for a judicial decision, it is equally plain that the statute itself authorizes the clerk to perform many vital tasks on his own responsibility, not subject to the surrogate's direction and, indeed, even in his absence.

As a matter of fact, one's status as an independent officer is not affected because some of the duties entrusted to him may be 'more or less ministerial and clerical.' Mylod v. Graves, supra, 274 N.Y. 381, 387, 9 N.E.2d 18, 20. It is only necessary that he exercise 'some portion of the sovereign power, whether great or small.' People ex rel. Hoefle v. Cahill, supra, 188 N.Y. 489, 494, 81 N.E. 453, 454. Moreover, the power of review which the surrogate has over ****588** some of the clerk's actions does not in and of itself render him a subordinate employee. Many who have been denominated independent officers have been subject to some such control, see Mylod v. Graves, supra, 274 N.Y. 381, 9 N.E.2d 18; Christey v. Cochrane, supra, 211 N.Y. 333, 105 N.E. 419; People ex rel. Jacobus v. Van Wyck, supra, 157 N.Y. 495, 52 N.E. 559; cf. Bergerman v. Byrnes, supra, 305 N.Y. 811, 113 N.E.2d 557; in Mylod, for instance, the determinations made by the tax appraiser for Dutchess County were subject to review and modification by the surrogate; in Jacobus, the decisions of the assessors of the City of New York were subject to correction by the board of revision; and, in Matter of Bergerman, the duties of the commissioner of records of the City Court of the City of New York consisting almost entirely of the keeping of records were to be 'performed under such conditions and regulations as may be approved by the presiding justice,' Judiciary Law, McK.Consol.Laws, c. 30, s 177, subd. (2), and yet that fact was held not to alter the commissioner's status as a 'principal executive officer' within the meaning of subdivision 1 of section 13 of the Civil Service Law.

As solicitious as the courts have ever been on behalf of the veteran in civil service, we find it impossible to conclude that the clerk of a court, whose position, powers and duties stem from statute and who functions in a tribunal as busy and important as that of the Surrogate's Court of Erie County, may be stamped a subordinate employee, so as to entitle him to the protection of section 22 of the Civil Service Law. Petitioner's removal from office was not, therefore, regulated or controlled by the provisions of that statute.

***589** The order of the Appellate Division should be reversed and that of Special Term reinstated, without costs.

DYE, Judge.

I dissent and vote to affirm. I am unable to agree with the holding of the majority that petitioner, as clerk of the Surrogate's Court of Erie County, was an 'independent officer' rather than a 'subordinate employee' and that, consequently, he is excluded from the protection from removal without charges or a hearing afforded to veterans in subordinate positions, Civil Service Law, s 22; Mylod v. Graves, 274 N.Y. 381, 9 N.E.2d 18; People ex rel. Jacobus v. Van Wyck, 157 N.Y. 495, 52 N.E. 559; People ex rel. Fonda v. Morton, 148 N.Y. 156, 42 N.E. 538.

We are all in agreement that if we were to decide that the post in question is a subordinate position rather than an independent office, petitioner would be entitled to reinstatement. We are also in agreement that the marks or tests which distinquish an excluded independent officer from a covered employee are: (1) that he exercise some portion of the sovereign power, People ex rel. Hoefle v. Cahill, 188 N.Y 489, 8s N.E. 453; and (2) that his office and his duties be prescribed by statute and that in the performance of his major duties he be not subject to the direction and control of a superior officer or, stated affirmatively, that he be subject only to such directions as the statute gives, Mylod v. Graves, supra, 274 N.Y. 381, 384, 9 N.E.2d 18; People ex rel. Jacobus v. Van Wyck, supra, 157 N.Y. 495, 52 N.E. 559. It matters not how important and responsible his duties be nor how much trust and confidence is placed in him, he is not an independent officer within the meaning of our decisions if he does not exercise some portion of the sovereign power or if he is subject to the direction and control of a superior officer. The mere statement of these well-grounded principles should be sufficient to refute the proposition that the usual clerk of a court is an independent officer. Cf. Cappon v. Cleere, 177 Misc. 1027, 32 N.Y.S.2d 845.

I now turn to the sections of the Surrogate's Court Act which the majority point to as conferring upon this petitioner the status of an independent officer. As I read the statutes the contrary is manifest for nowhere is the

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petitioner authorized to exercise **589 any of the surrogate's powers of sovereignty and in every definition of power it is clear that he is subject to the direction and control of the surrogate at all times.

*590 Section 33 requires the clerk of the Surrogate's Court to keep a book and make entries in it purely ministerial acts. Section 31 requires the parties to pay the travel and other expenses incurred in holding hearings away from the surrogate's regular quarters.

Section 29 imposes a duty upon the clerk to collect fixed fees for the county for specified services. An examination of the details of this section discloses that there is left in the clerk no more discretion and independent judgment than there is in a parking meter. He is merely the name of the pipe through which the fees are channeled.

Section 32 defines the grant of power to the clerk and since main reliance is had on this section for the holding of the majority, that section must be carefully examined having in mind the realities of the everyday business of a busy Surrogate's Court. Powers are conferred upon the clerk and the deputy clerk of the Surrogate's Court of Erie County in 9 of the 11 subdivisions of section 32 and, it should be noted at the outset that the first paragraph of this section reads: 'The clerk and the deputy clerk of the surrogate's court may severally exercise, concurrently with the surrogate, the following powers of the surrogate'.

Under subdivision 1 the clerk may certify and sign any records of the court including all records or papers which a surrogate completed after having found them left uncompleted by his predecessor. By no reasonable interpretation of the language of subdivision 1 of section 32 and subdivision 9 of section 20 when read together can it be fairly said that power is conferred on the clerk to complete a record or paper left incomplete by a former surrogate. The clerk is authorized only to certify and sign. The power is the usual power given to a clerk of a court to sign a paper as clerk evidencing some action of the court and in so doing the clerk is acting merely as a scrivener. The clerk of the Court of Appeals certifies and signs all of the judgments of this court.

Under subdivision 2 the clerk is empowered to issue any citation, subpoena or other mandate to which a party is entitled as of course and he may sign as clerk and affix the seal of the court to any letters or mandates issued from this court. Since *591 the only mandate the clerk is empowered to issue is one to which a party is entitled as of course and the only letters or mandates he may sign and seal as clerk are those otherwise properly issued by the court, none, other than a ministerial power, is here conferred.

Under subdivision 3 the clerk may certify in the manner prescribed by law a copy of any paper on file in the surrogate's office In other words he may compare the copy with the original and in writing assure the world that it is a true and complete copy of the original on file.

Under subdivision 4 the clerk may, when the surrogate is absent or busy, adjourn any matter to a definite time not beyond thirty days. If the surrogate is absent or busy, the matters arising would adjourn themselves from day to day to the inconvenience of all concerned. Power is herein granted to the clerk merely to convey to the parties an assurance that, without fear of default, they need not again attend until a day certain within the thirty days specified. This cannot be the exercise of sovereignty.

Under subdivision 5 the clerk is authorized to perform the functions of a notary public, but, outside Erie County and within the State, only if the Surrogate's Court of Erie County has jurisdiction of the proceeding in which the oath is taken.

Under subdivision 6 the clerk may with the approval of the surrogate authorize one or more of the other clerks employed in the surrogate's office to exercise any of the **590 powers given to the clerk in this section. If the clerk is given no independent authority otherwise by this section, then, of course, the power to delegate his ministerial powers cannot make him an independent officer. The validating provision is merely the usual device to prevent reopenings, etc., on technical grounds similar to those applying to notaries public.

Subdivision 7 confers no powers and subdivision 9 does not apply in Erie County.

Under subdivision 8 the clerk, deputy clerk and others designated by the surrogate are empowered to take proof of an uncontested will. In plain words, this means that the clerk or practically anyone else employed in the surrogate's office may, where there is no contest, take the oath of the subscribing witnesses *592 to a will when they sign and swear to a statement on a printed blank describing the execution of the will. The surrogate complies with section 144 of the Surrogate's Court Act by designing a printed form with blanks to be filled in to elicit from the witnesses such information as he deems essential to prove a will where there is no objection or contest and no request to cross-examine the witnesses. The clerk does not become more of an independent officer whether he takes a few such oaths or many.

Under subdivision 10 the surrogate is empowered to direct the clerk and others to take under oath and report the testimony in any proceeding but without authority to

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pass on any of the issues. In Matter of Feit, 278 App.Div. 944, 104 N.Y.S.2d 857, and in Matter of Nowakowski, 284 App.Div. 655, 133 N.Y.S.2d 842, the Appellate Divisions have had occasion to examine the scope of the power conferred by this subdivision. In the latter case the Appellate Division said, 284 App.Div. at pages 656-657, 133 N.Y.S.2d at page 844: 'The surrogate is a judicial officer of a constitutional court. (N.Y.) Const. Art. 6, s 13. We know of no authority by which the surrogate may confer his judicial powers to hear, try and determine upon some appointed clerk in his office. * * * It is a basic duty of a judge, including surrogates, to see and hear all witnesses upon the trial of contested actions or proceedings. The abrogation of such duty is in conflict with the constitutional oath of office which each is required to take.'

If more than the ministerial powers to swear the witnesses and, a stenographer being present, to supervise the orderly questioning of witnesses by counsel in routine matters was intended, I think it is clear that the excess is unconstitutional.

Under subdivision 11 the surrogate is empowered to authorize the clerk and many others: (1) to sign the name of the surrogate to decrees in uncontested proceedings but only where the surrogate has decided the matter by a filed written decision and (2) to sign the surrogate's name to orders previously granted by the surrogate permitting safe-deposit boxes to be opened. Again, the clerk may put into writing what the court has authorized.

In summary, the statute says expressly that these enumerated powers are the powers of the surrogate and not independent ***593** powers. The clerk usually has no statutory duties of his own but is given some of the minor and clerical duties of the surrogate and none of these permit him the slightest exercise of sovereign power. Our courts have been able to keep abreast of the complexities of today's society as well as they have because they have been able to delegate the routine, ministerial and mechanical portion of their work to subordinates not as assistant judges but as clerks under the complete domination, direction and control of the courts. And in the instant case, that control and direction is not by way of judicial or administrative review but, rather, all of the power is in the surrogate and he directs and controls its exercise by his omnipresence. This is far different from review.

Next we should examine into the nonstatutory duties and powers of the clerk. In the present case the petitioner concededly ****591** directed the administrative processes of the everyday business of the surrogate's office as the clerks of all courts do. The word clerk itself comes from cleric a minor religious functionary who was educated to read and write at a time when not many of the lay citizenry were literate. His earliest functions were to make written minutes of the pronouncements of the courts and to make the same available in the form and at the time directed by the court. Even today, these are the basic functions of the clerk of the Surrogate's Court. In our populous cities, however, these basic and simple functions may be hidden by the embellishments of departmentalized staffs, under the immediate supervision and apparent administrative direction of the clerk. In this supervision the clerk does exercise as stated in the majority opinion, 'a high degree of initiative and independent judgment' and 'broad authority and extensive discretion' and there is 'heavy responsibility granted to him' and 'high confidence reposed in him'. I would remind you again that these are not statutory powers and duties and statutory powers are essential to the status of an independent officer. The only discretion which the clerk can possibly exercise depends solely upon the authority given him by the surrogate. But more important the clerk is not the court executive, the one who initiates and directs, but at most can do only that which is required of him by the surrogate. That subordinate status was ***594** intended is further borne out by the fact that prior to 1935 section 5 of the Surrogate's Court Act declared flatly that the surrogate was liable for any act of the clerk. That section has been repealed but none of the attributes of the relationship and none of the powers and duties of the petitioner have been changed. In such a state of the statute I cannot understand how this court may now say that the Legislature constituted the clerk the alter ego of the surrogate, or if you prefer, an independent officer.

As stated in the majority opinion, the rule is firmly established that each case must be decided upon its own facts. Reference to our prior decisions construing section 22 of the Civil Service Law in order to compare what positions we have held to be independent offices with those we have held to be subordinate employees would serve no useful purpose because we are all agreed that all of these cases stand four square for the proposition that a person cannot be excluded from the protection of the statute as an independent officer unless he exercises, pursuant to statute and without the direction or control of a superior officer, some portion of the sovereign power. It has been demonstrated, I think, that petitioner did not.

Bergerman v. Byrnes, 305 N.Y. 811, 113 N.E.2d 557, is cited and strongly relied upon as persuasive authority for the holding that petitioner is an independent officer. In that case we had before us a proceeding brought to review a determination of the municipal civil service commission holding the commissioner of records of the City of New York to be a 'principal executive officer' within the

meaning of subdivision 1 of section 13 of the Civil Service Law. There the Civil Service Commission had found from the statutory creation of the position and description of its duties that the office was one requiring independent judgment and discretion and if reasonable minds might differ in making that determination, the courts were precluded from upsetting it. The petitioner here may even may even be, in civil service language, a 'principal executive officer' insofar as his nonstatutory duties are concerned but, for the reasons stated above, it would not follow that he is an independent officer in the case before us.

***595** On this record we should not say that the status of this petitioner is that of an independent officer. The clear-cut distinction between the legal status of a subordinate employee and an independent officer is not a matter of expedience but represents the cumulative experience of many generations in dealing with government personnel. Fundamental as it is in our body politic that qualified veterans should not be whimsically removed from public service, Civil Service ****592** Law, s 22, it is equally important that the long-established concept of an independent officer should not be changed by judicial fiat in order to remove petitioner without charges and without a hearing.

The order appealed from should be affirmed, with costs, and the petitioner should be reinstated in his position and reimbursed for his back salary.

CONWAY, C. J., and FROESSEL, VAN VOORHIS and BURKE, JJ., concur with FULD, J.

DYE, J., dissents in an opinion.

DESMOND, J., taking no part.

Order reversed, etc.

All Citations

308 N.Y. 580, 127 N.E.2d 585

Footnotes

1 The section also empowers the surrogate of Erie County to appoint a deputy clerk and, in addition, provides that 'Each surrogate may appoint, and at pleasure remove, as many other clerks for his office, to be paid by the county, as the board of supervisors of his county authorize him so to appoint. * * * A surrogate may appoint, and at pleasure remove, as many additional clerks to be paid by him as he thinks proper.' In passing, it should be noted that, during petitioner's term of office, he was in charge, and supervised the work, of a staff of some twenty-five employees.

2 When read in conjunction with subdivision 1 of section 32, subdivision 9 of section 20 confers not only upon the surrogate, but upon the clerk too, power to complete as well as certify and sign all records and papers not completed by a predecessor of the sitting surrogate.

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61 A.D.2d 84
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Ruth HANSELL, Appellant,
v.
The CITY OF LONG BEACH et al., Respondents.

Jan. 23, 1978.

Taxpayer brought Article 78 proceeding challenging qualifications of city manager and one of the provisions of contract entered into between the city and the manager. The Supreme Court, Special Term, Nassau County, Andrew J. DiPaola, J., dismissed and taxpayer appealed. The Supreme Court, Appellate Division, Hopkins, J. P., held that: (1) hiring of the manager could not be challenged in Article 78 proceedings; (2) action was an appropriate one for declaratory judgment; (3) city manager met qualifications as set forth in city charter, but (4) agreement on the part of the city which, in effect, guaranteed the city manager two years' salary even if his employment were terminated before he had served two years violated the city charter and violated constitutional prohibition against gifts of public monies.

Reversed.

West Headnotes (7)

[1] **Certiorari**
Legislative Acts and Ordinances

Proceeding under Article 78 is not generally available to review a legislative act of a municipality. CPLR 7801 et seq.

Cases that cite this headnote

[2] **Declaratory Judgment**
Counties and Municipalities and Their Officers

Question of whether person hired as city manager properly met the requirements of the city charter and question of the legality of the contract entered into between the city and the manager were within the purview of an action for declaratory judgment.

Cases that cite this headnote

[3] **Municipal Corporations**
Eligibility

Person who had experience from assignments in the state budgetary process at the legislative levels met requirements of city charter that the city manager be chosen on the basis of his executive and administrative qualifications with special reference to his actual experience in or his knowledge of accepted practice in respect to the duties of his office.

Cases that cite this headnote

[4] **Municipal Corporations**
Powers and Functions of Local Government in General
Municipal Corporations
Powers Incident to Execution of Those Granted

Municipalities are legislatively created and possess only such authority as is granted to them, together with the powers reasonably incident to the authority conferred.

Cases that cite this headnote

[5] **Municipal Corporations**
Eligibility

Since city manager was a public officer, city was powerless to deviate, by agreement, from provisions of city charter governing the office.

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Cases that cite this headnote

[6] **Municipal Corporations**
Effect of Removal or Expiration of Term

Since city charter provided that the city manager could be removed by a majority of all councilmen upon 30 days' notice, contract in which the city agreed that if the manager were removed before the end of two years, he would receive the difference between twice his annual salary and the amount already paid to him was illegal.

Cases that cite this headnote

[7] **Municipal Corporations**
Donations, Gratuities, and Charitable Purposes

Provision of contract between city manager and city to the effect that, if the manager's employment were terminated less than two years after he was hired, he would be given the difference between twice his annual salary and the amount which he had already received violated constitutional prohibition against gifts of public monies. Const. art. 8, § 1.

2 Cases that cite this headnote

Attorneys and Law Firms

***85 **272** Bruce J. Bergman, Garden City, for appellant.

David Schlachter, Corp. Counsel, Long Beach, for respondents.

Before HOPKINS, J. P., and DAMIANI, MARGETT and O'CONNOR, JJ.

Opinion

HOPKINS, Justice Presiding.

In 1976 the City of Long Beach entered into a contract with Laurence Farbstein whereby he was employed as City Manager. The contract fixed his salary at $35,000 per annum. It then provided:

> "9. The City Manager may be removed from office in the manner provided by law. Should Farbstein be removed from the position of City Manager by the City Council ***86** before the end of two (2) years from the effective date of this agreement, Farbstein shall be entitled to receive from the City a lump sum payment equal to the difference between twice the annual salary specified in paragraph 3 above and the gross amount paid to him for services rendered prior to his removal, and, in addition, shall continue to receive health and medical benefits until May 31, 1978."

Following the appointment and contract, the petitioner brought this proceeding under CPLR article 78, in which it was alleged ****273** that Farbstein was not qualified to serve as City Manager under the provisions of the City Charter[1], and that the quoted paragraph of the contract was illegal and void, since it did not comply with the provisions of the City Charter.[2]

Special Term dismissed the petition, holding that the appointment of a City Manager is not reviewable under CPLR article 78, that conversion of the proceeding to an action for a declaratory judgment was not warranted, and that, in any event, the contractual provision for payment to Farbstein of two years' salary upon his removal from office before the end of the two years' employment was not illegal. This appeal ensued. We reverse. The proceeding should be converted into an action for a declaratory judgment, and judgment directed in favor of the plaintiff to the extent that the contractual provision is declared illegal and void.

I

[1] The petitioner is a resident and taxpayer of the City of Long Beach. A proceeding under CPLR article 78 is not generally available to review a legislative act (Matter of Lakeland Water Dist. v. Onondaga County Water Auth.,

24 N.Y.2d 400, 407, 301 N.Y.S.2d 1, 5, 248 N.E.2d 855, 858). "Whatever evils may exist in the government ***87** of cities that are due to mistakes, errors of judgment or the lack of an intelligent appreciation of official duty, must necessarily be temporary, compared with the mischief and inconvenience which judicial supervision, in all cases, would ultimately produce" (Talcott v. City of Buffalo, 125 N.Y. 280, 288, 26 N.E. 263, 265).

The nature of the duties and functions of the City Manager under the statutory scheme of the City Charter makes clear that he is a public officer (cf. People ex rel. Percival v. Cram, 164 N.Y. 166, 58 N.E. 112; Steinson v. Board of Educ. of City of N. Y., 165 N.Y. 431, 59 N.E. 300). "The indicia of a public officer, as opposed to an employee, are to be found in the nature of the office, the functions and duties performed, and the tenure of the occupant" (Matter of Haller v. Carlson, 42 A.D.2d 829, 346 N.Y.S.2d 108, 109). He is the chief executive officer of the city (Charter, art. 3, s 20, subd. 1), with extensive powers (Charter, art. 3, s 20, subds. 1, 5, 6). The exercise of discretion in the appointment of a City Manager by the City Council requires the consideration of many factors of policy and governmental expediency which characterize the legislative process.

However, the City Charter prescribes certain tests which must be regarded by the members of the City Council in making the appointment. The appointee "shall be chosen solely on the basis of his executive and administrative qualifications with special reference to his actual experience in, or his knowledge of, accepted practice in respect to the duties of his office" (Charter, art. 3, s 20, subd. 2). Admittedly, the tests are extremely broad, subject to the interpretation of elastic concepts and the individual appraisal by each member of the City Council of the background and qualification of the prospective appointee. That does not mean that the City Council could totally ignore the statutory tests; it means, rather, that the scope of judicial review is necessarily narrow.

[2] In any event, although CPLR article 78 may not afford the relief which the petitioner seeks, the question whether Farbstein properly meets the statutory ****274** standard, and the second question which is also presented by the petition the legality of the contract are properly within the purview of an action for a declaratory judgment (see Boryszewski v. Brydges, 37 N.Y.2d 361, 365, 372 N.Y.S.2d 623, 626, 334 N.E.2d 579, 581; Matter of Rapp v. Onondaga Community Coll., 45 A.D.2d 922, 923, 357 N.Y.S.2d 316, 317). Under these circumstances, we think that the proceeding should be converted to an action for a declaratory judgment and the allegations considered on the merits.

***88 II**

[3] Because the scope of our review of the action of the City Council in making the appointment, is, as we have said, necessarily limited, we do not find that the City Council proceeded illegally in determining that Farbstein was qualified under the City Charter for the office of City Manager. He had experience from assignments in the State budgetary process at the legislative level, and apparently the City Council laid particular emphasis on that kind of experience. The evaluation of the experience of the appointee was primarily a concern of the City Council, and we cannot say that the choice of Farbstein ran counter to the City Charter's prescriptions. Of course, the City Charter's standards must be satisfied. The views of Mr. Justice Frank in Matter of Bergerman v. Wagner (2 A.D.2d 398, 400-401, 156 N.Y.S.2d 616, 619, affd. 2 N.Y.2d 908, 161 N.Y.S.2d 434, 141 N.E.2d 823) have special relevance here:

> "Sufficient evidence was presented to Special Term, albeit for the first time, to support the commissioner's finding that his appointee possessed the minimal qualifications specified in the charter. Since, as already stated, the court may not review the commissioner's exercise of discretion beyond that point nor interfere with his power which is otherwise unlimited, there are no real issues of fact to be tried. The charter provisions which require specific aptitudes or professional licenses as a condition precedent to appointment to positions in the exempt class of city employees are designed to provide qualified persons for specialized service. There should be conscientious adherence to such provisos by those granted the power of appointment if the public service is to be benefited and the high standards intended are to be maintained. Anything less smacks of willful disregard of the legislative purpose."

Thus, we do not find any violation of the City Charter in the appointment of the City Manager.

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III

[4] The second question raised relates to the legality of the contract. The contract is challenged because it provides for payment to Farbstein in the event of his removal before the end of two years of a lump sum equal to the difference between twice the annual salary for the office and the gross amount paid to Farbstein prior to his removal. In effect, the contract guarantees the payment of two years' salary in the event of his removal before the period of two years' service as City Manager, less whatever he has received prior to the time ***89** of termination. It is fundamental that municipalities are legislatively created and possess only such authority as is granted to them, together with the powers reasonably incident to the authority conferred (Whittaker v. Village of Franklinville, 265 N.Y. 11, 14, 191 N.E. 716, 717; Matter of Torsoe Bros. Constr. Corp. v. Board of Trustees of Inc. Vill. of Monroe, 49 A.D.2d 461, 463, 375 N.Y.S.2d 612, 615). The City Charter here is explicit.

[5] Subdivision 2 of section 20 of article 3 provides for the appointment of the City Manager for an indefinite term. This, we take it, means at pleasure (see 4 McQuillin, Municipal Corporations (1968 rev.), s 12.193, pp. 74-80). That interpretation is strengthened by the language of subdivision 3 of section 20 of article 3, which states clearly that the City Manager may be removed "at any time for any reason or reasons the council may deem sufficient." There is no provision in the City Charter for the employment of the City Manager under a contract. ****275** As the City Manager is a public officer, the municipality is powerless to deviate by an agreement from the provisions of law governing the office (Matter of Sullivan v. Taylor, 279 N.Y. 364, 369-370, 18 N.E.2d 531, 532).

[6] Under a statute remarkably parallel in language and effect to the City Charter, it has been held that a school superintendent cannot enjoy the benefits of an employment contract. Section 2507 of the Education Law provides that the Board of Education may appoint a superintendent of schools for a five-year term, without conferring the right on the board to make a contract with the superintendent. We have said that the absence of a provision authorizing the making of a contract invalidates a contract with the superintendent (Smith v. Helbraun, 21 A.D.2d 829, 251 N.Y.S.2d 531; semble Downey v. Lackawanna City School Dist., 51 A.D.2d 177, 379 N.Y.S.2d 557).

[7] In addition, the contractual provision offends the constitutional prohibition against gifts of public moneys (N.Y.Const., art. VIII, s 1). As was said in Matter of Boyd v. Collins (11 N.Y.2d 228, 234, 228 N.Y.S.2d 228, 233, 182 N.E.2d 610, 613):

> "If school board members can avoid embarrassment by paying a year's salary to get rid of a teacher, then a board can pay such salary for 5 years or for life. Where would board members ever get such a power?"

IV

It follows that the judgment must be reversed, the proceeding converted to an action for a declaratory judgment, and judgment granted in favor of the plaintiff against the defendants ***90** to the extent of declaring that paragraph 9 of the contract dated June 3, 1976 is illegal and void.

Judgment of the Supreme Court, Nassau County, entered April 7, 1977, reversed, on the law, without costs or disbursements; proceeding converted to an action for a declaratory judgment; and it is declared that paragraph 9 of the contract between The City of Long Beach and Laurence Farbstein, dated June 3, 1976, is illegal and void.

DAMIANI, MARGETT and O'CONNOR, JJ., concur.

All Citations

61 A.D.2d 84, 401 N.Y.S.2d 271

Footnotes

1 Subdivision 2 of section 20 of article 3 of the Charter provides, in part: "The city manager shall be appointed by vote of a majority of all the councilmen for an indefinite term. He shall be chosen solely on the basis of his executive and administrative qualifications with special reference to his actual experience in, or his knowledge of, accepted practice in respect to the duties of his office as herein set forth."

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2 Subdivision 3 of section 20 of article 3 of the Charter provides, in part: "The city manager may be removed by a majority vote of all the councilmen at any time for any reason or reasons the council may deem sufficient. Before making such action final the council shall notify the city manager of its intention to remove him and shall give him a statement of reasons and notice of thirty days during which time he shall continue to receive his salary".

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288 A.D.2d 853
Supreme Court, Appellate Division, Fourth Department, New York.

Matter of Janet ENOS, Petitioner–Respondent,
v.
VILLAGE OF SENECA FALLS, Antonio Costantino, Mayor, and Village Board of Trustees of Village of Seneca Falls,
Respondents–Appellants. (Appeal No. 2.).

Nov. 9, 2001.

Former village clerk and administrator brought Article 78 proceeding alleging that village board of trustees improperly terminated her. The Supreme Court, Seneca County, Falvey, J., held that plaintiff was improperly discharged, and village appealed. The Supreme Court, Appellate Division, held that: (1) village administrator was "public office;" (2) village could not discharge employee from holdover position of village administrator without complying with Public Officers Law until vacancy was properly filled; and (3) village could not remove village clerk before expiration of her term without complying with Public Officers Law.

Affirmed.

West Headnotes (3)

[1] **Municipal Corporations**
Removal

Position of village administrator was "public office" within meaning of Public Officers Law provisions governing termination of officers. McKinney's Public Officers Law § 36; McKinney's Village Law § 3–301, subd. 2, par. c.

1 Cases that cite this headnote

[2] **Municipal Corporations**
Removal

Village administrator and clerk was entitled to hold post after expiration of her term until her successor was chosen and qualified, and thus village could not discharge her without complying with Public Officers Law until vacancy was properly filled. McKinney's Public Officers Law §§ 5, 36; McKinney's Village Law § 3–302, subd. 4.

1 Cases that cite this headnote

[3] **Municipal Corporations**
Removal

Village mayor and board of trustee could not remove village administrator and clerk before expiration of her term without complying with procedure set forth in Public Officers Law. McKinney's Public Officers Law § 36; McKinney's Village Law §§ 3–301, subd. 1, par. d, 3–302, subd. 3.

Cases that cite this headnote

Attorneys and Law Firms

**785 Dante M. Scaccia, for respondents-appellants.

Andrew V. Lalonde, for petitioner-respondent.

*855 PRESENT: PIGOTT, JR., P.J., PINE, HURLBUTT, BURNS and GORSKI, JJ.

Opinion

*853 MEMORANDUM:

Petitioner formerly held the combined positions of Village Administrator and Village Clerk for respondent Village of Seneca Falls (Village). At a meeting on April 3, 2000, new members of respondent Village Board of Trustees of Village of Seneca Falls (Board) and respondent Antonio Costantino, Mayor, were sworn in. At that meeting the Mayor and the Board reappointed

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petitioner to the position of Village Clerk but the position of Village Administrator was not then addressed. Petitioner continued in both positions. The working relationship between petitioner and the Board and Mayor began to **786 deteriorate, and on May 17, 2000 the Mayor and certain Board members scheduled a Board meeting for 9:00 A.M. the next day. At that meeting the Board went into executive session. After returning from executive session, the Mayor presented petitioner with a letter terminating her from both positions.

Petitioner commenced this CPLR article 78 proceeding, alleging, *inter alia,* that her termination was improper because the meeting on May 18, 2000 violated the Open Meetings Law (Public Officers Law art. 7) and because respondents failed to comply with Public Officers Law § 36 in terminating her. Supreme Court agreed with petitioner on both grounds and granted the petition, reinstating petitioner to both positions with back pay and benefits.

Respondents moved for reargument and renewal. The court determined that the motion was untimely insofar as it sought *854 reargument but granted the motion insofar as it sought renewal. Upon renewal, the court modified its original decision by determining that petitioner had not been reappointed to the position of Village Administrator but instead was continuing in that position as a holdover and therefore could discharge the duties of that office until the vacancy was properly filled. The court otherwise adhered to its original decision.

[1] Respondents contend that the court erred in determining that the position of Village Administrator is a public office. We disagree. Pursuant to Village Law § 3–301(2)(c), a village may create public offices in addition to those that are mandatory. The position of Village Administrator was created and the duties were defined by legislation (*see,* Seneca Falls Village Code ch. 55). In addition, we note that a public officer is defined as "a person whose position is created, and whose powers and duties are prescribed, by [legislation] and who exercises a high degree of initiative and independent judgment" (*Matter of Lake v. Binghamton Hous. Auth.,* 130 A.D.2d 913, 914, 516 N.Y.S.2d 324; *see, Matter of Stork v. Board of Trustees,* 179 A.D.2d 1058, 579 N.Y.S.2d 797; *see generally, Matter of O'Day v. Yeager,* 308 N.Y. 580, 586, 127 N.E.2d 585). Here, the duties of Village Administrator prescribed by section 55–3 of the Seneca Falls Village Code involve a high degree of initiative and independent judgment (*cf., Matter of Stork v. Board of Trustees, supra,* at 1058, 579 N.Y.S.2d 797). Thus, the court properly determined that the position is a public office.

[2] Upon renewal, the court properly determined that petitioner was a holdover in the position of Village Administrator. The term of Village Administrator is one official year or the remaining portion thereof (*see,* Village Law § 3–302[4]). The official year for the Village ended in March 2000 and, although petitioner was not reappointed to the position, a successor was not then appointed. Pursuant to Public Officers Law § 5, every officer, with certain exceptions not applicable here, "shall * * * hold over and continue to discharge the duties of [the] office after the expiration of the term * * * until [the] successor shall be chosen and qualified". Thus, although petitioner was not reappointed, she properly continued to discharge the duties of Village Administrator as a holdover and the court properly reinstated her to the position of Village Administrator until such time as the vacancy was properly filled.

[3] The court also properly reinstated petitioner to the position of Village Clerk. Petitioner was appointed to that position on April 3, 2000 and the position is a public office with a two-year term (*see,* Village Law § 3–301[1][d]; § 3–302[3]). Respondents **787 could not terminate her from that position without following the procedure set forth in Public Officers Law § 36. Because we conclude that petitioner was not properly terminated from either position at the May 18, 2000 meeting, we see no need to address the propriety of the court's further determination that the meeting was held in violation of the Open Meetings Law (Public Officers Law art. 7).

Petitioner has not appealed and thus we do not address her contentions that the court erred in invalidating an alleged two-year contract appointing her to the position of Village Administrator until March 31, 2002 and that the court erred in granting respondents' motion insofar as it sought renewal.

Appeal from judgment insofar as it denied reargument unanimously dismissed (*see, Empire Ins. Co. v. Food City,* 167 A.D.2d 983, 984, 562 N.Y.S.2d 5) and judgment affirmed without costs.

All Citations

288 A.D.2d 853, 732 N.Y.S.2d 785, 2001 N.Y. Slip Op. 08616

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RESOLUTION NO.: 105 - 2009

OF

JULY 13, 2009

A RESOLUTION AUTHORIZING THE ACTING CITY MANAGER

TO EXECUTE AN AGREEMENT WITH THE MERCER GROUP, INC.

TO RETAIN THE SERVICES OF SAID FIRM TO CONDUCT

A SEARCH AND RECRUITMENT PROCESS TO IDENTIFY

QUALIFIED SUITABLE CANDIDATES FOR THE POSITION

OF CITY MANAGER OF THE CITY OF NEWBURGH

WHEREAS, the City of Newburgh is conducting a search to identify a qualified candidate to serve as City Manager; and

WHEREAS, the City has received a proposal from The Mercer Group, Inc. to provide professional services to assist the City in recruiting such candidates from which an appointment may be made; and

WHEREAS, the City Council has identified The Mercer Group, Inc. as the firm best suited to provide such services after reviewing the qualifications and considering several such firms; and finding that entering into an agreement with The Mercer Group, Inc. is in the City's best interests to move forward with this important process;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York that the Acting City Manager be and he is hereby authorized to execute on behalf of the City of Newburgh a contract with The Mercer Group, Inc. to provide professional services upon the terms and conditions attached hereto and upon such other terms and conditions as may be appropriate and necessary and as required by law, same as being in the best interests of the City of Newburgh.

Councilwoman Bello commented that at the Work Session she asked if she could get a copy of this contract by Monday morning and she was assured by Corporation Counsel that he would have an e-mailed copy of this contract to her by Friday. She never received it Friday or Monday and this contract was just handed to her tonight as she sat down at this table . She thinks that it would be irresponsible for any one of them to vote on a contract that not one of them has had the opportunity to read and digest and suggested that it be tabled.

Councilwoman Dickinson said that it's the same old same old. This is

the same thing that happened when she asked for information on Leyland and she got it at the table as she was sitting. How are they supposed to have an intelligent discussion as they are reading through it?

Councilwoman Bell said that the amount that was originally specified has been capped and she thinks that we need to move forward with this. We need a City Manager and we need to get this search going. It has been one thing after another but we need to move forward. Mr. Douglas's time with us is not determined and there is a lot of concern about how much money he is being paid so let's get a City Manager in here and move this thing forward. She will definitely be voting "yes".

Councilwoman Bello said that she agrees that we need to move forward but to move forward without being able to protect the best interest of the City and not knowing the details of the contract would be irresponsible.

Mayor Valentine said that the only change that was made was that the expenses that were listed as $8,000 were lowered to $5,000 which was the $ 3,000 that we talked about the other night. Other than that there were no changes made to what was done as a presentation by Mr. Mercer a few months ago. We do need to move forward with this and it will coincide with an Election so there are a lot of concerns about hiring someone before this election cycle is completed. If we don't move on this now and you know there is a time frame then we will be moving into next year looking for a City Manager with a possible new City Council without the availability of Mr. Douglas. Our next resolution will extend his agreement through October 16th and that will be it. We can't keep going back to the Department Heads because we have to have something in place. He is asking that the majority of this Council move this forward tonight.

Councilwoman Angelo said that she is ready to vote "yes" on this. We have exhausted all of the candidates that we could find and she agrees that we need to move forward because we can't wait any longer.

Councilwoman Bello said that she would like to know what this is going to cost us in advertising and travel, food and lodging.

Interim City Manager, Dwight Douglas said that when the Election is over and the Council is clear on who will be making the final decisions, there will be five or six people brought in for interviews and their travel expenses would be additional. Since we are looking in a sub-regional area presumably those travel expenses shouldn't be that great so we are looking in the range of about $500 to $1000 per applicant.

Councilwoman Bello asked about the advertising costs.

Interim City Manager, Dwight Douglas said that he believes the advertising is included in the capped expenses.

Mayor Valentine said that we have never done this before. Even in our last City Manager search we didn't go to this extensive degree. He thinks that the public is looking for this and they want to know that someone will be on board next January for at least a two year period. To not have this will be very detrimental to the City and is not the way to

go. We are fortunate that we have an experienced person at the helm right now but it is not the person that will be permanent. We need to get someone that wants to be here and who is qualified to be here and from day one they will step in to the job. We certainly need to move forward on this.

Councilwoman Dickinson said that this $5,000 is capped and on top of that we might have to pay at the most maybe another $25,000 to $30,000.

Councilwoman Bell said that we had bound presentations from several search firms and if this hadn't languished for so long then it would still be fresh in our minds. We need to move forward and get a permanent City Manager in here and we need to do it by an executive search process so that we can get the most highly qualified person. We need this desperately and right now.

Councilwoman Dickinson said that she was in favor of the search firm to begin with but because of the economic times she is finding it difficult.

Councilwoman Bello moved and Councilwoman Dickinson seconded to table the resolution.

Ayes Councilwoman Bello, Councilwoman Dickinson 2

Nays Councilwoman Angelo, Councilwoman Bell, Mayor Valentine 3

DEFEATED

Councilwoman Angelo moved and Councilwoman Bell seconded that the resolution be adopted.

Ayes Councilwoman Angelo, Councilwoman Bell, Mayor Valentine- 3

Nays Councilwoman Bello, Councilwoman Dickinson 2

ADOPTED

RESOLUTION NO.: 201 - 2012

OF

NOVEMBER 13, 2012

A RESOLUTION AUTHORIZING THE COMMENCEMENT OF A SEARCH FOR THE POSITION OF CITY MANAGER OF THE CITY OF NEWBURGH WHICH WILL INCLUDE, BUT IS NOT LIMITED TO CREATING A JOB DESCRIPTION, ADVERTISING AND RECIEPT BY A DESIGNATED COUNCIL MEMBER OF LETTERS OF INTENT AND RESUMES

WHEREAS, Resolution No. 12-2012 of January 23, 2012 states the following under the Continuation clause: This agreement will continue on a month-to-month basis after January 23, 2013 until December 31,2013 unless either party notifies the other of its intent in writing to terminate this agreement; and

WHEREAS, a month-to-month agreement does not provide enough time to advertise and recruit a new City Manager, and

WHEREAS, it is the intention of this Council to maintain stability in City government during the transition of one city manager to another

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York to commence an immediate search for the position of City Manager of the City of Newburgh; and

BE IT FURTHER RESOLVED, by the Council of the City of Newburgh, New York, that Resolution No: 238-2011, the 2012 Budget of the City of Newburgh, is hereby amended as follows:

	Decrease	Increase
Special Items		
Contingency		
A.1900.1990	$5,000.00	
City Council		
Other Services		
A.1010.0448		$5,000.00

I, Katrina Cotten, Deputy City Clerk of the City of Newburgh hereby certify that I have compared the foregoing with the original resolution adopted by the Council of the City of Newburgh at a regular meeting held Nov. 13, 2012 and that it is a true and correct copy of such original.

Witness my hand and seal of the City of Newburgh this 14th day of Nov. 20 12

Deputy City Clerk

RESOLUTION NO.: 9 - 2013

OF

JANUARY 14, 2013

A RESOLUTION ADOPTING THE CITY OF NEWBURGH POLICY ON BEST PRACTICES IN HIRING

BE IT RESOLVED, that the Council of the City of Newburgh, New York hereby adopts the City of Newburgh Policy on Best Practices in Hiring, a copy of which is attached hereto and made a part of this Resolution; and

BE IT FURTHER RESOLVED, that this Resolution shall take effect immediately.

I, Lorene Vitek, City Clerk of the City of Newburgh, hereby certify that I have compared the foregoing with the original resolution adopted by the Council of the City of Newburgh at a regular meeting held JAN. 14, 2013 and that it is a true and correct copy of such original.

Witness my hand and seal of the City of Newburgh this 15 day of JAN. 20 13

City Clerk

CITY OF NEWBURGH
EMPLOYMENT HIRING PRACTICES AND POLICY

The City Manager shall direct the recruitment, advertising, interviewing and selection process of all City of Newburgh employees. Under his/her direction the following protocol must be met prior to any appointment.

1. **JOB DESCRIPTION**: All jobs offered by the city must have a written job description on file with the Newburgh Civil Service Commission. The job description must be reviewed to ensure that the minimum requirements are set to fully meet the needs of position. If modification is required, suggested amendments must be proposed to the Commission for adoption. If a new position is being created that does not have a current description, the City staff shall provide the Civil Service Commission with a New Position Duty Statement to assist the Commission with creating the job description. All employees must meet the minimum requirements of the job description for their position,

2. **FUNDING:** Before any job can be posted or advertised, proper funding must be allocated in the budget. The City Comptroller will verify if the position is currently funded. If not funded, a Council resolution may be required. Depending on the bargaining unit, additional steps may be required.

3. **JOB POSTINGS & ADVERTISEMENT**: How and when a job opportunity is advertised depends on the job classification. However, all advertisements should state that minority and bi-lingual candidates are encouraged to apply. **In addition, to the extent that city residents are qualified and eligible for the available job, they shall be given preference.** This applies to full, part-time and temporary positions. For the following classifications, job opportunities shall be posted or advertised in the following manner:

   Unclassified: These positions can be elected positions or appointed or serving for a term of office. Examples are City Council members, Board members and City Manager. Elected positions are self-explanatory; board members are recruited through various communications such as newspaper press releases, city website and other local venues. The city manager position shall be advertised in professional organizations such as ICMA and NYCOM as well as other appropriate newspapers, websites and appropriate venues.

   Exempt: These positions do not require a civil service exam and are classified as non-bargaining jobs. These jobs must be posted and advertised using all the means available for job advertisement such as city website and city bulletin board, NYS Department of Labor, professional and educational organizations as appropriate to the job, other job posting websites and local newspapers.

   Competitive: For all competitive jobs, a civil service exam is required. A list of qualified candidates is generated by the results of the exam. All candidates for appointment must be chosen from the list of qualified candidates determined by the exam. Therefore, it is essential that all civil service examination be adequately posted and advertised in order to solicit the best candidates. City residents shall receive preference in appointment from resulting eligible lists as provided by NYS Civil Service Law

Announcement of exams shall be posted on the City website and bulletin board, with all education and/or professional organizations, NYS Department of Labor, and as many other local media outlets as possible depending on the title. Announcements for higher-level management examinations shall also be advertised in at least two local newspapers.

Non-Competitive: These jobs do not require a civil service exam, however applicants must meet minimum experience and educational requirements as stated in the position job description. Although there is no civil service list from which to work, non-competitive positions should be advertised in the same manner as competitive positions. City residents shall receive preference in appointment among other qualified applicants.

Labor Class: These are entry level jobs that require few skills and very minimal education and experience. In order to provide fair access to all jobs, these positions still need to be adequately advertised. Positions shall be advertised on the City website and bulletin boards, NYS Department of Labor and other sites as identified. City residents shall receive preference in appointment to these positions.

4. **RESUMES & JOB APPLICATIONS:** All applications for employment with the City of Newburgh will be accepted and held on file with the Civil Service Office or Human Resources Department (CS/HR) for one year. Resumes, when required, shall be also be collected by the CS/HR and kept on file in one location for the City.

5. **INTERVIEWS:** Interviews of prospective selected candidates for all positions will be required and will vary depending upon the level of the position within the City's organizational chart. Listed below are the minimum requirements for conducting interviews.

   For the City Manager position, the Council may invite additional Subject Area Experts in the fields of municipal government, executive management, contract and labor negotiations or similarly related fields to participate in the recruitment and interview process of selected prospective candidates.

   For upper level management positions, an interview committee consisting of the City Manager and/or his/her designee, the CS/HR Dept, selected Department Heads and Subject Matter Expert(s) will be convened to conduct the interview. The Committee shall make recommendations to the City Manager for appointment.

   For middle management level positions, interview committees shall be established and consist of the City Manager and/or his/her designee, the CS/HR Dept., the Department Head and others as needed.

   For entry level positions, interview committees shall be established by the City Manager and shall consist of the CS/HR Department and the Department Head and/or his designee, who shall then make recommendations to the City Manager for appointment.

   For Board and Commission Members, resumes shall be submitted to the Civil Service/HR Department and provided to the City Manager and City Council for evaluation and selection for appointment.

6. **PRE-EMPLOYMENT MEDICAL EXAMS**: The City of Newburgh is a drug free workplace. With the exception of the members of the City Council and Boards and Commissions, all prospective new employees, including management positions, shall be subject to a pre-employment medical exam which shall include illegal drug screening. The department head shall be notified by the Civil Service Office when the candidate has been cleared for work. Temporary, Seasonal and Part-Time employees are included under this requirement unless specifically exempted, (i.e.; Summer Youth Programs). **Under no circumstances shall a new employee start prior to the results of the medical examination.**

7. **REPORT OF PERSONNEL CHANGE FORM (Pink Slips):** After clearance of the above, a Report of Personnel Change (Pink Slip) shall be prepared by the department. If the new employee is coming from an exam list, a certified list of eligibles should be requested from the civil service office, completed and forwarded with the pink slip. Pink Slips are to be sent to the Comptroller's Office first, then to the Civil Service Office and finally to the City Manager for approval. **A new employee cannot start until the Pink Slip has been signed and approved by the City Manager.** Therefore it is recommended that the Pink Slip is prepared and circulated at least two weeks in advance of the start date.

8. **ADDITIONAL REQUIREMENTS**: In addition to the above, all employees must complete an Application for Employment, W-4, I-9, and NYS Retirement application/declination forms before they can appear on the payroll. Health insurance enrollment forms are also required for covered employees as well as union affiliated forms.

All questions or concerns regarding any of the above procedures should be directed to the Department Head, Civil Service/HR Dept or Finance.

RESOLUTION NO.: 2 - 2014

OF

JANUARY 13, 2014

A RESOLUTION ADOPTING
RULES OF ORDER AND PROCEDURE
FOR THE COUNCIL OF THE CITY OF NEWBURGH
FOR THE YEAR 2014

BE IT RESOLVED, that the Council of the City of Newburgh, New York adopts for use during the year 2014 the Rules of Conduct and Procedure: By Laws, a copy of which is attached hereto and made a part of this Resolution; and

BE IT FURTHER RESOLVED, that this Resolution shall take effect immediately.

I, Lorene Vitek, City Clerk of the City of Newburgh, hereby certify that I have compared the foregoing with the original resolution adopted by the Council of the City of Newburgh at a regular meeting held 1/13/14 and that it is a true and correct copy of such original.

Witness my hand and seal of the City of Newburgh this 14 day of Jan. 20 14

City Clerk

City of Newburgh City Council
Rules of Order and Procedure

Rule I: General Rules of Procedure

A. The presiding officer shall preserve order and decorum and shall decide questions of order, subject to an appeal by motion to the City Council; the appeal to be taken without debate. The presiding officer may, if (s)he so desires, present motions and resolutions to the City Council, and (s)he may debate on any question which is being considered by it.

B. When a question is under consideration, no motion shall be entertained except as herein specified, which shall have precedence in the following order:

1. Motion for clarification; or to request reversal of ruling of the presiding officer, or limiting or extending discussion;
2. Recess the session;
3. Lay on table;
4. Postpone to a meeting of a certain date;
5. Refer to work session;
6. Amend;
7. Call the previous question, to be asked as follows: "Shall the main question be put now?" If answered in the negative, the main question remains before the Council.

C. A motion to lay a question on the table shall be decided without amendment or debate, and a motion to postpone shall be decided without debate.

D. A motion to adjourn shall always be in order and shall be decided without debate.

E. Every member desiring to speak shall address the presiding officer. All council members shall confine him/herself to the question under debate and avoid personalities. A member once recognized shall not be interrupted when speaking.

F. No question or motion shall be debated or put, unless it is seconded. It shall then be stated by the presiding officer.

G. A motion to reconsider any action taken by the Council may be made on the day such action was taken, either immediately during the session or at a recessed or adjourned session. Such motion must be made by a member on the prevailing side, but may be seconded by any member. The motion is subject to debate. This rule shall not prevent any member of the Council from making or re-making the same or any other motion at a subsequent meeting of the Council.

H. No member of the Council shall by conversation or otherwise delay or interrupt the proceedings or the peace of the Council nor disturb any member while speaking or refuse to comply with these rules, or the orders of its presiding officer. The Presiding Officer, subject to appeal by motion to the Council, may direct a member who is acting in violation of this section to leave the meeting or call for a recess or adjournment.

I. As the sergeant-at-arms of the meetings, the Police Chief shall carry out all order and instructions given by the presiding officer, for the purpose of maintaining order and decorum at the meetings, subject to an appeal by motion, to the Council.

J. Any motion may be withdrawn by the maker before it has been amended or voted upon, but in such case any other member may renew the motion at that time.

Rule II. Order of Business

A. The Order of Business shall be in conformity with section 20-3 of the Code of Ordinances.

B. The Order of Business may be departed from by majority vote of the members present.

Rule III. Voting

A. The order of voting shall be by alphabetical order of the last name of each Council member with the Mayor voting last.

B. All votes shall be by roll call. It shall be the duty of the City Clerk to enter on the minutes the names of the members voting for or against the question. Once a question has been put and the vote is being taken, the members of the Council shall confine themselves to voting and shall not resume discussion or make further comments on the question.

C. Every resolution or motion must be seconded before being put to a vote. An abstention, silence or absence shall be considered a negative vote for the purposes of determining the final vote on a matter.

D. No resolution, ordinance or local law may be introduced at a meeting unless the resolution, ordinance or local law has been considered at a work session of the Council prior to the Council meeting or is listed on the written agenda for said meeting. Notwithstanding the foregoing, by majority vote, an item not discussed at work session or appearing on the written agenda may be introduced, considered, and voted upon.

Rule IV. Executive Session

Whenever the Council shall determine to transact business in an executive session, it shall do so in accordance with the provisions of the New York State Open Meetings Law. All executive sessions shall be commenced at the public meeting. Proposals, discussions, statements and transactions in executive session are intended to be and shall be held and maintained in confidence and shall not be disclosed. The presiding officer shall direct all persons except members and designated officers and employees of the City to withdraw.

Rule V. Participation of City Manager and Staff

The City Manager shall be permitted to address the Council and participate in discussions. Heads of Departments shall be permitted to address the Council. Any other City officer or employee shall be permitted to address the Council with permission of the presiding officer, subject to an appeal by motion to the City Council, the appeal to be taken without debate.

Rule VI. Suspension of the Rules

In order to hear persons other than members of the City Council, the Mayor, and members of City staff, it shall be necessary to pass a motion suspending the rules of order. A motion to suspend the rules may be made at any time during the meeting and shall be decided without debate. Any such person speaking shall confine himself/herself to the subject and shall spend not longer than three (3) minutes, unless the time is extended by the presiding officer. This rule shall not apply to public hearings.

Rule VII. Guidelines for Public Comment

A. The public shall be allowed to speak only during the Public Comment periods of the meeting or at such other time as the presiding officer may allow, subject to appeal by motion to the Council.

B. Speakers must adhere to the following guidelines:

1. Speakers must be recognized by the presiding officer.
2. Speakers must step to the front of the room.
3. Speakers must give their name, address and organization, if any.
4. Speakers must limit their remarks to 3 minutes on a given topic. The City Clerk shall keep a record of the time and shall inform the presiding officer when the 3 minutes has expired.
5. Speakers may not yield any remaining time they may have to another speaker.

6. Council members may, with the permission of the presiding officer, , interrupt a speaker during their remarks, but only for the purpose of clarification or information.
7. All remarks shall be addressed to the Council as a body and not to any specific member or to staff.
8. Speakers shall observe the commonly accepted rules of courtesy, decorum, dignity and good taste. No profanities shall be used. No personal, slanderous, boisterous remarks shall be made. Council members, the Mayor and staff shall be treated with respect. The presiding officer, subject to appeal by motion to the Council, or the Council, may, by majority vote, request that the presiding officer direct that a speaker violating this provision or any other rule yield the floor and in the event the speaker fails to obey, (s)he may be escorted from the meeting by the sergeant-in-arms.
9. Interested parties or their representatives may address the Council by written communications. Written communications shall be delivered to the Clerk or their designee. Speakers may read written communications verbatim.

C. Members of the public not speaking shall observe commonly accepted rules of courtesy and decorum. They shall not annoy or harass others or speak when another speaker is being heard by the Council.

Rule VIII. Use of Recording Equipment

All members of the public and all public officials are allowed to audio or video record public meetings. Recording is not allowed during executive sessions. The recording should be done in a manner which does not interfere with the meeting. The presiding officer, subject to appeal by motion to the Council, may make the determination that the recording is being done in an intrusive manner, taking into consideration, but not limited to, brightness of lights, distance from the deliberations of the Council, size of the equipment, and the ability of the public to still participate in the meeting. If the presiding officer makes the determination that the recording is intrusive and has the effect of interfering with the meeting, (s)he may request an accommodation to avoid the interference and if not complied with, may ask the individual to leave the meeting room.

Rule IX. Rules for Public Hearings

The following rules shall apply to a legally required public hearing held before the City Council:

(a) Speakers shall register in writing prior to the beginning of the hearing by providing their name, address, and organization, if any. Individuals arriving after the commencement of the hearing shall be permitted to register upon arrival as long as the Chairperson has not closed the hearing.

(b) The Presiding Officer shall recognize each speaker, in the order registered, when the hearing is commenced. Speakers shall identify themselves, their address and organization, if any, prior to the remarks.

(c) Speakers must limit their remarks to five (5) minutes. Remarks shall be addressed only to the hearing issues. Speakers may not yield any remaining time they may have to another speaker. The City Clerk shall time speakers and advise the presiding officer when the time has expired.

(d) All remarks shall be addressed to the Council as a body and not to any individual member thereof.

(e) Speakers shall observe the commonly accepted rules of courtesy, decency, dignity and good taste. Any loud, boisterous individual shall be asked to leave by the Presiding Officer and may be removed at the request of the Presiding Officer, subject to appeal by motion to the Council. Speakers addressing issues outside the scope of the hearing shall be asked to cease their comments.

(f) Interested parties may address the Council by written communication. The statements may be read at the hearing, but shall be provided to all Council members and entered in the minutes of the hearing by the City Clerk.

(g) The City Clerk shall include in the minutes of the hearing the name, address and organization, if any, of each speaker, a summary of the remarks, and written statements submitted to the Council.

Rule X. Work Sessions

There shall be regular work sessions of the Council to be held each Thursday preceding a Monday evening Council meeting. The work sessions shall be held at 6:00 p.m. in City Hall, 83 Broadway, Third Floor Council Chambers, unless the Council by majority vote cancels or changes the time or place of such session. The Rules IV, V, VI, and VIII of the Rules of Order of the Council shall apply to all work sessions.

Rule XI. Robert's Rules of Order

In the event any question in procedure shall arise that is not provided for by these rules, then, in that event, Robert's Rules of Order, Newly Revised, 10th Edition, shall be followed.

Rule XII. Adoption of Ordinances

Provided the proposed adoption of an ordinance has been placed on an agenda for a meeting of the Council at which the public is afforded the opportunity to comment on

agenda items before Council action, a formal public hearing will not be conducted prior to the adoption of such ordinance, unless otherwise required by federal, state, or local law, ordinance, rule or regulation.

This rule shall not be construed to prevent the Council from holding a public hearing on any ordinance at its discretion, provided a majority of the members of the Council in attendance at a meeting, upon a motion or resolution duly introduced, vote to conduct such public hearing.

Date Adopted: May 14, 2001
Amended: February 25, 2002 (Rule XII added)
January 10, 2014 (Rule IV)

City of Newburgh, NY
Tuesday, December 1, 2015

Chapter 20. Council, City

§ 20-3. Order of business.

[Amended 11-8-1999 by Ord. No. 13-99[1]]
The business of the Council shall be conducted in the following order:

A. Roll call.

B. Approval of minutes of previous meeting.

C. Communications.

D. Public hearings.

E. Public comments regarding report of City Manager and items of old business and new business.

F. Comments from the Council.

G. Report of City Manager.

H. Old business.

I. New business.

J. Public comments regarding general matters of City business.

K. Further comments from the Council.

[1] *Editor's Note: This ordinance provided that it would take effect at the next City Council meeting subsequent to its adoption.*

RESOLUTION NO.: _____ - 2015

OF

DECEMBER 14, 2015

A RESOLUTION AUTHORIZING THE SETTLEMENT OF LITIGATION REGARDING THE IN REM TAX FORECLOSURE OF LIENS FOR THE YEAR 2013 RELATIVE TO 123 WILLIAM STREET (SECTION 45, BLOCK 15, LOT 15)

WHEREAS, The City of Newburgh commenced proceedings for the foreclosure of certain tax liens, such action being designated as Orange County Index Number 2013-10248; and

WHEREAS, the property owner has advised the City that he is prepared to settle such action; and

WHEREAS, this Council has determined that it would be in the best interests of the City of Newburgh to settle this matter without the need for litigation;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York, that the Director of Finance and Enforcing Officer be and he is hereby authorized to withdraw all liens on the property located at 123 William Street (Section 45, Block 15, Lot 15), in the City of Newburgh, from the Lists of Delinquent Taxes, provided that the sum of Thirty Nine Thousand Five Hundred Fifty And 84/100 ($39,550.84) Dollars representing the past due tax liens, together with all interest and penalties accruing thereon, together with all currently due taxes and charges, including but not limited to all open 2014-2015 school taxes, water charges and sewer charges, are all paid in full by certified or bank check on or before December 31, 2015.

RESOLUTION NO.: _____ - 2015

OF

DECEMBER 14, 2015

A RESOLUTION AUTHORIZING THE SETTLEMENT OF LITIGATION REGARDING THE IN REM TAX FORECLOSURE OF LIENS FOR THE YEAR 2013 RELATIVE TO 23 S. MILLER STREET (SECTION 30, BLOCK 1, LOT 18) AND 25 S. MILLER STREET (SECTION 30, BLOCK 1, LOT 17)

WHEREAS, The City of Newburgh commenced proceedings for the foreclosure of certain tax liens, such action being designated as Orange County Index Number 2013-10248; and

WHEREAS, the property owner has advised the City that he is prepared to settle such action; and

WHEREAS, this Council has determined that it would be in the best interests of the City of Newburgh to settle this matter without the need for litigation;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Newburgh, New York, that the Director of Finance and Enforcing Officer be and he is hereby authorized to withdraw all liens on the properties located at 23 S. Miller Street (Section 30, Block 1, Lot 18) and 25 S. Miller Street (Section 30, Block 1, Lot 17), in the City of Newburgh, from the Lists of Delinquent Taxes, provided that the sum of Sixty Four Thousand Four Hundred Thirty One And 33/100 ($64,431.33) Dollars representing the past due tax liens, together with all interest and penalties accruing thereon, together with all currently due taxes and charges, including but not limited to all open 2014-2015 school taxes, water charges and sewer charges, are all paid in full by certified or bank check on or before December 31, 2015.