



The Town of Franklin

P.O. Box 209, Route 3, Vermontville, NY 12989 • 518-891-2189 • Fax: 518-891-6389 • www.townoffranklin.com



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Town of Franklin Board Meetings

**Town Board Meeting
Monday, April 21, 2008 - 5:00 pm**

The Town of Franklin Town Board held a Regular Town Board Meeting on Monday, April 21, 2008 at 5:00 pm at the Franklin Town Hall in Vermontville, NY.

Board members present:

Supervisor Mary Ellen Keith
Councilman Allen Berg
Councilman Clifford Smalley
Councilwoman Janet Ordway

Board members absent:

Councilman Walt Kretser

Others Present:

Kahlil Bair - Architect, Deputy Highway Superintendent James Perry, Town Clerk Sandra Oliver

CALL TO ORDER

Supervisor Keith called the meeting to order at 5:00 pm; the Pledge of Allegiance was recited, and the Town Clerk called the roll, stating the full board was present.

NEW BUSINESS

OPEN BIDS FOR SWEEPER

The following bids were received and opened by the Town Clerk:

Mid-State Industrial Supply

Sweepster Tow Behind Sweeper

\$20,275.00

Available May 2nd

Burke Farm Supply

| | | |
|------------------------------|-------------|--------------------------------|
| TBH Sweepster Pull Broom | \$21,878.00 | Available 45 bus. days |
| Tracey Road Equipment | | |
| TBH Tow-Behind Power Sweeper | \$22,407.00 | No availability date mentioned |
| Anderson Equipment Co. | | |
| TBH7 Sweepster - diesel | \$22,924.00 | No availability date mentioned |
| TBH7 Sweepster - Gas | \$21,416.00 | No availability date mentioned |

The bids submitted were reviewed and discussed by the Board. Because Mid-State Industrial Supply price was the lowest and it could deliver its sweeper by May 2nd, the Board determined to accept the bid of Mid-State Industrial.

Motion for resolution awarding bid for tow-behind sweeper to Mid-State Industrial (J.Ordway-A.Berg m/s/p) ALL AYE

RESOLUTION NO. 23: ACCEPT BID OF MID-STATE INDUSTRIAL FOR TOW- BEHIND SWEEPER AND AUTHORIZE SUPERVISOR TO PAY INVOICE

WHEREAS, the tow-behind sweeper used on the tractor must be replaced; and

WHEREAS, specifications for a tow-behind broom were drawn by the Highway Department and Highway Committee; and

WHEREAS, requests for bids on same were advertised; and

WHEREAS, Mid-State Industrial submitted a bid for a Sweepster Model TBH tow behind sweeper in delivered price of \$20,275.00; and

WHEREAS, Mid-State Industrial submitted the lowest bid; NOW, THEREFORE,

BE IT RESOLVED, that the Town Board does hereby accept the bid of Mid-State Industrial; and BE IT

FURTHER RESOLVED, that the Supervisor is hereby authorized to pay for same from the Capital Projects Highway Fund.

THOSE VOTING AYE:

Supervisor Mary Ellen Keith
Councilperson Janet Ordway
Councilman Al Berg
Councilman Cliff Smalley

THOSE ABSENT:

Councilman Walt Kretser

THOSE VOTING NAY:

None

AWARD BID FOR CONSTRUCTION OF FUEL TANK COVER

At the April 14, 2008 Board meeting bids for construction of a fuel tank cover were opened. The Board reviewed and discussed the bids submitted:

| | |
|-----------------------|-------------|
| Douglas Snickles | \$5,300.00 |
| Lavarway Construction | \$8,900.00 |
| Lisa Almekinder | \$11,000.00 |

The Board determined it would award the bid to Douglas Snickles in the amount of \$5,300.00, the lowest bid submitted. Mr. Snickles had constructed the fuel tank cover for the town of St. Armand, the design of which the Board approved.

Motion for resolution accepting bid of Douglas Snickles (C.Smalley-A.Berg m/s/p) ALL AYE

RESOLUTION NO. 24: ACCEPT BID OF DOUGLAS SNICKLES FOR CONSTRUCTION OF FUEL TANK COVER AND AUTHORIZE SUPERVISOR TO PAY INVOICE

WHEREAS, the Board and the Highway Department designed a 3-sided structure for use as a cover for fuel tanks at the Garage; and

WHEREAS, requests for bids were advertised; and

WHEREAS, Douglas Snickles submitted the lowest bid in the amount of \$5,300.00, to be paid in two installments of \$2,650.00; NOW, THEREFORE,

BE IT RESOLVED, that the Board accepts the bid of Douglas Snickles for said construction; and BE IT

FURTHER RESOLVED, that the Supervisor is authorized to pay the invoices of Mr. Snickles in two installments of \$2,650.00 each.

THOSE VOTING AYE:

Supervisor Mary Ellen Keith
Councilperson Janet Ordway

Councilman Al Berg
Councilman Cliff Smalley

THOSE ABSENT:

Councilman Walt Kretser

THOSE VOTING NAY:

None

HIGHWAY MATTERS

1. PROGRESS OF THE DEPARTMENT.

a. **Equipment Failure.** Mr. Perry indicated the current tow-behind sweeper is 10 years old and experienced engine failure this day.

b. **Road Sweeping.** The Department has been sweeping road intersections to remove sand build-up, as well as near houses at Franklin Falls, Rock Street, lower Fletcher Farm Road and Cold Brook Road.

2. PERSONNEL.

a. **Need for Summer Laborer.** Deputy Highway Supt. James Perry indicated a need to hire a summer laborer for the department to assist with road work. Hiring a laborer at \$9.00 per hour instead of an MEO at \$14.00 per hour would save the Town money. Supv. Keith noted the Town could only employ the laborer for 120 days, after which time he would be required to join the Teamsters Union. Mr. Perry said the department had several applications for laborer on file. The department will still need to hire an MEO for the winter.

b. **Resignation.** Tim Reyell resigned without notice to join the St. Armand Highway Dept.

3. **SECURITY.** The Town Clerk was requested to contact Skeels Locksmith to change the locks at the Garage.

4. **ROAD SIGNS.** Coun. Smalley commented new speed limit signs for Co. Rte. 26, Cold Brook Road, Fletcher Farm Road, and Swinyer Road should be ordered. Supv. Keith noted the State Police would instruct the Town on placement.

DATE FOR ROADSIDE CLEANUP

Supv. Keith indicated each year the Franklin County Solid Waste Authority schedules a week in the late spring for roadside cleanup and will give the Town a lower rate for disposal of roadside waste. Dep. Hwy. Supt. James Perry and Supv. Keith agreed that a Town truck would be parked in the back lot of the Town Hall on Friday, May 30 and Saturday May 31, 2008 for disposal of roadside refuse. No tires or household waste will be accepted.

LANDFILL MATTERS

1. **Fewer Inspections.** F.X. Browne submitted an application for a variance to NYS DEC which would eliminate the need for quarterly inspections and sampling of the closed Town landfill. It is anticipated the variance will be granted.

2. **New Contract with F.X. Browne.** Supv. Keith requested the Board accept the contract with F.X. Browne and authorize execution of same.

Motion for resolution accepting terms of contract with F.X. Browne (C.Smalley-A.Berg m/s/p) ALL AYE

RESOLUTION NO. 25: ACCEPT TERMS AND CONDITIONS OF CONTRACT WITH F.X. BROWNE FOR LANDFILL MONITORING

WHEREAS, F.X. Browne, Inc. monitors the Town's closed landfill; and

WHEREAS, a new contract has been prepared by F.X. Browne; NOW, THEREFORE,

BE IT RESOLVED, that the Town Board accepts the terms and conditions of the contract with F.X. Browne; and BE IT

FURTHER RESOLVED, the Supervisor is authorized to execute same.

THOSE VOTING AYE:

Supervisor Mary Ellen Keith
Councilperson Janet Ordway
Councilman Al Berg
Councilman Cliff Smalley

THOSE ABSENT:

Councilman Walt Kretser

THOSE VOTING NAY:

None

3. **Signage at Landfill.** Coun. Ordway reported snowmobile tracks over the closed landfill all winter. She requested that the General Fund employee order and post more "no trespassing" signs.

INFRASTRUCTURE PROJECT MATTERS

1. **New Furnaces Approved.** Supv. Keith distributed copies of a letter from National Historic Preservation authorizing the installation of new furnaces, one for the Town Hall and one for the Garage. A grant has been awarded to the Town for purchase of same.

2. **Site Plan for Kate Mtn. and Contract with Earth Science Engineering.** Kahlil Bair, Architect for the Infrastructure Project reviewed with the Board the contract with Earth Science Engineering ("ESE") for development of a site plan for the proposed building at Kate Mountain Recreation Park.

Coun. Smalley asked whether sites other than the current parking lot would be considered, as well as when the work on the plan would start.

Mr. Bair replied secondary sites would be evaluated but that the proposed structure would best be located where the pavilion is currently. If the contract were approved this afternoon, the work would begin tomorrow.

Coun. Smalley asked whether a new survey would be required as the Town already had one prepared by Glenn Odone.

Mr. Bair responded it was possible that a new survey would be required, as improvements to the Park had been made since Mr. Odone's survey. In addition, there would be copyright problems using the Odone survey as Stacy Allott of Geomatics purchased Mr. Odone's business upon his death.

The Board suggested Mr. Bair contract with Geomatics for an update of the survey as the Town had used them in the past.

Supv. Keith requested a motion for a resolution accepting the contract with ESE in the following estimated amounts:

Low Range to High Range

| | |
|--------------------------------|-----------------------------------|
| Task 1-Survey to CAD file | \$900.00 to \$2,000.00 |
| Task 2-Subsurface research | \$3,900.00 to \$4,900.00. |
| Task 3-Master Plan development | \$9,900.00 to \$10,900.00 |
| Task 4-Scale model | \$3,900.00 to \$4,900.00 |
| Total | \$18,600.00 to \$22,700.00 |

Motion for resolution accepting terms of contract with ESE (J.Ordney-C.Smalley m/s/p) ALL AYE

RESOLUTION NO. 26: ACCEPT TERMS AND CONDITIONS OF CONTRACT WITH EARTH SCIENCE ENGINEERING FOR DEVELOPMENT OF MASTER AND SITE PLANS

WHEREAS, the Town Board requested Architect Kahlil Bair and Earth Science Engineering ("ESE") to develop a master plan and a site plan for the proposed building at Kate Mountain Recreation Park; and

WHEREAS, ESE has submitted a contract for same; NOW, THEREFORE,

BE IT RESOLVED, that the Town Board of the Town of Franklin accepts the terms and conditions of the contract with ESE in the following estimated amounts:

Low Range to High Range

| | |
|--------------|-----------------------------------|
| Task 1 | \$900.00 to \$2,000.00 |
| Task 2 | \$3,900.00 to \$4,900.00. |
| Task 3 | \$9,900.00 to \$10,900.00 |
| Task 4 | \$3,900.00 to \$4,900.00 |
| Total | \$18,600.00 to \$22,700.00 |

AND BE IT FURTHER RESOLVED, that the Supervisor is authorized to execute same and pay the estimated contract amounts.

THOSE VOTING AYE:

- Supervisor Mary Ellen Keith
- Councilperson Janet Ordway
- Councilman Al Berg
- Councilman Cliff Smalley

THOSE ABSENT:

- Councilman Walt Kretser

THOSE VOTING NAY:

None

3. Response to Mr. Symonds. Copies of Mr. Bair's email in response to a letter from Roger Symonds were distributed to the Board.

FRANKLIN COUNTY BICENTENNIAL CELEBRATION

Supv. Keith stated the County of Franklin scheduled a parade to celebrate its bicentennial on Saturday, June 14, 2008 and the County offered a car for the Town Board to ride in. She asked for volunteers from the Board. Coun. Smalley indicated he would do so if his calendar permitted.

OLD BUSINESS

STATUS OF HIGHWAY SUPERINTENDENT The elected highway superintendent of the town, James Rascoe, is currently on medical leave. Allegations were made concerning possible misconduct of the highway superintendent. These allegations were referred to the NYS Comptroller's Office, which recommended referral to the district attorney. Supv. Keith telephoned the district attorney this date for an update, and Mr. Champagne indicated he would check with the State Police. In response to questions and concerns expressed at the April 14th Board meeting by several residents, Supv. Keith requested the Attorney for the Town, James E. Maher, Esq., to clarify the Town's legal position with respect to the elected Highway Superintendent and whether the town board could take action to withhold his salary or remove him from office. The letter and attachments follow.

"April 18, 2008
Town of Franklin
Mary Ellen Keith, Town Supervisor
P O Box 209
Vermontville, NY 12989

Re: Questions Concerning Highway Superintendent

Dear Mary Ellen:

You have asked me to provide legal clarification about the status of the Town's Superintendent of Highways. I understand that he is presently not working, on the advice of his physician. As you and the board know, I am also aware that allegations of possible illegal actions concerning the highway department are being considered by the Franklin County District Attorney's office.

I have also read the recent report in the Daily Enterprise in which a local resident was quoted as saying that state law allows the town board to 'request a second opinion' as to the superintendent's medical condition, and that the town board 'can legally remove' the superintendent. That advice is not correct.

As an elected public official, the highway superintendent is subject to the rules set forth in the Public officer's law. Having been elected to the office of superintendent, the individually filling that office remains in office until the office becomes vacant. Public Officers Law Section 30 lists the events through which an elected office becomes vacant. Those are: the death of the incumbent; his resignation; his removal from office, his ceasing to be an inhabitant of New York State; his conviction of a felony; or the entry of a judgment of the State Supreme Court declaring him to be incompetent.

Public Officers Law Section 36 concerns the removal from office of town officers. Under that section a town officer can be removed from office only for 'misconduct, misadministration, malfeasance or malversation in office.' The courts have required those standards strictly. In almost all the cases I have researched the courts have required that the person whose removal is sought must have been convicted of a crime. A proceedings for removal under the section must be brought in the Appellate division of State Supreme Court (in our district, in Albany) and can only be brought by a 'citizen resident of the town' or by the district attorney of the county in which the town is located. A town board does not have the power to bring such a proceeding.

As to the matter of a public official's extended physical sickness that prevents him from working, the law is settled that an elected officer holds his or her office 'until the occurrence of an event that creates a vacancy', and that 'an elected officer receives the salary fixed for the office as an incident of the office the absence of the elected officer from his or her duties on account of sickness, vacation or personal reasons generally will not deprive the officer of his or her salary.'

I am enclosing a copy of Comptroller's Opinion #2006-6 which states the above language. I also enclose a copy of Comptroller's Opinion #90-62. which states that an elected town superintendent of highways who is physically unable to perform the duties of his office is entitled to continue in office and receive his salary, unless he is removed from office pursuant to Public Officers law Section 36 or unless the office becomes vacant under one of the criteria set forth in Public Officers Law Section 30.

Based on the above principles of law, it is apparent that the Town Board does not have the authority to require the highway superintendent to seek a 'second opinion' as to his medical condition. The board could certainly ask him to give it information about his condition or intentions, but there is no law I am aware of that would require him to comply with the request.

Likewise, the Town Board does not have the power to remove the highway superintendent from office. If the conditions for removal were present, a removal proceeding can only be commenced by the district attorney or an individual citizen or citizens. The Comptroller's opinions I am enclosing do seem to leave open the possibility that a public official's lengthy absence from performing his duties because of 'incapacitation due to illness' might constitute maladministration in office, but they state that the court would be required to decide such an issue in the context of a removal proceeding (brought by the district attorney or an individual citizen).

I ask that you please provide a copy of this letter, and of the enclosed Comptroller's opinions, to the individual board members, and please let me know if you or they have further questions.

Yours very truly,
James E. Maher
Encl."

ATTACHMENT #1 - EXCERPTS FROM NYS COMPTROLLER OPINION 2006-06

PUBLIC OFFICERS AND EMPLOYEES - Leave Time Generally (authority to provide leave of absence to elected official)

TOWN BOARD - Powers and Duties (authority to provide leave of absence to town supervisor)

TOWN SUPERVISOR - Compensation (leave of absence)

You ask whether a town supervisor may be granted a leave of absence to the town supervisor. Rather, the supervisor generally may determine to take time off for personal reasons in his or her discretion.

You ask whether a town supervisor may be granted a leave of absence by the town board

Section 92(1) of the General Municipal Law provides that the governing board of certain entities, such as a town, may grant vacations, sick leaves and leaves of absence, with or without pay, to its "officers or employees," and adopt rules and regulations in relation thereto. Section 92 does not, on its face, distinguish between elective and appointive officers. It is well established, however, that an elected officer receives the salary fixed for the office as an incident of the office, and the absence of the elected officer from his or her duties on account of sickness, vacation or personal reasons generally will not deprive the officer of his or her salary (see, e.g., *Bookout v Levitt*, 43 NY2d 612, 40e NYS2d 200; 19880 Opns St Comp No. 80-416, pg 121; compare 1991 Opns St Comp; No. 91-39, p 115, discussing the waiver of salary by a public officer). Further, an incumbent elected officer holds that office until the occurrence of an event that creates a vacancy (see Public Officers Law §30(1), (3); NY Const, art. XIII §6; *Bookout*, supra).

Based on these principles, the Court of Appeals . . . noted that "the subject of unused sick leave is inimical and not relevant to elected holders of public office such as petitioners who are heads of their own departments or offices and are permitted within broad limits to determine their own hours of work" (re NY2d at 618, 403 NYS2d at 203-204; citation omitted). Further, the Court stated that:

Sick leave...is not an attribute of or applicable to public offices held by elected officials. The very nature of petitioners' offices contemplate that the occupants generally were free to take as much or as little time off as they might wish under a schedule they controlled (see 24 Opns St Comp, 1961, pp 16, 148). (43 NY2d at 619, 403 NYS2d at 204).

We believe the court's reasoning applies equally to leaves of absence. As is the case with time off for illness, an elected town officer may determine to take time off for personal reasons. The decision to take such time off lies with the elected official, not the town board.

Accordingly, based on the rationale in *Bookout*, supra, it is our opinion that the leave of absence provision in section 92 of the General Municipal Law, which authorizes a town board to grant leaves of absence with or without pay, does not pertain to elected officials..."

ATTACHMENT #2 - NYS COMPTROLLER OPINION 90-62

"PUBLIC OFFICERS AND EMPLOYEES - Removal (of elected official physically unable to perform the duties of office)
SUPERINTENDENT OF HIGHWAYS - Removal (physically unable to perform duties).

PUBLIC OFFICERS LAW. §§30, 36; TOWN LAW §32: An elected town superintendent of highways who is physically unable to perform the duties of his office is entitled to continue in office and receive his salary, unless the superintendent is removed from office pursuant to Public Officers Law, §36, or a vacancy in the office is created under Public Officers Law, §30 or another provision of law.

You ask whether an elected town highway superintendent who is physically unable to perform his duties is entitled to remain in office and receive the salary fixed by the town board for his office for the balance of his term in office.

Public Officers Law, §30 sets forth events which create a vacancy in office. These include, among other things, resignation or removal of the incumbent; an incumbent's ceasing to comply with residency requirements fixed for the office; an entry of a judgment or order of a court of competent jurisdiction declaring the incumbent to be incompetent; and an incumbent's conviction of a felony or crime involving a violation of the oath of office (Public Officer's Law §30[1][b]-[f]). Physical inability to perform the duties of office, however is not listed as an event creating a vacancy in office (17 Opns St Comp, 1961, p 448; cf. Town Law §32[2], providing that a deputy town superintendent of highways shall act and be vested with all the powers of the town superintendent during the absence or inability of the superintendent to act).

Public Officers Law §36 provides statutory procedures for removal of a town highway superintendent duly elected to and holding office (see *Sullivan v Taylor*, 279 NY 364, 18 NE2d 531; cf. former Highway Law §160, repealed by L 1981, ch 183, which prescribed procedures for removal of town highway superintendents for malfeasance or misfeasance in office by the New York State Department of Transportation, upon written charges preferred by the town board or county highway superintendent). Section 36 provides that any town officer, except a town justice, may be removed by the Supreme Court for any misconduct, maladministration, malfeasance or malversation in office. An application for such removal may be made by any citizen resident of the town or by the county district attorney, and shall be made to the Appellate Division of the Supreme Court held within the judicial department embracing the town (see also Executive Law, §63-a authorizing the Attorney General to maintain an action against a public officer who has performed an act by which law works a forfeiture of his office). In this regard, we note that it has been stated by one court, as dicta, that the continued incapacitation of a public officer due to illness, with the consequent inability to perform the duties of office, might constitute maladministration in office (*Application of Baker*), 87 Misc 2d 592, 386 NYS2d 313, citing 17 Opns St Comp, 1961, supra). However, whether the continued non-performance of the duties imposed on the office of highway superintendent as a result of a superintendent's physical inability to perform, in any given situation, constitutes maladministration in office is a question which can only be resolved by the courts in the context of a removal proceeding (id).

Based on the foregoing, therefore, as a general rule, a superintendent who is physically unable to perform the duties of his office, is entitled to continue in office for the remainder of his term unless: (1) the superintendent is

removed from office pursuant to Public Officers Law §36; or (2) a vacancy in the office is created by the occurrence of one of the other events listed in Public Officers Law §30 or pursuant to another provision of law.

With respect to the superintendent's entitlement to continue to receive his salary, it is well-settled that the salary of an elected public officer is an incident of his office and, therefore, is well-settled that the salary of an elected public officer is an incident of his office and, therefore, unless otherwise provided by statute, such an officer is entitled to receive the salary fixed for the office so long as he or she holds that office (Matter of Bookhout v Levitt, 43 NY2d 612, 403 NYS2d 200; Fitzsimmons v Brooklyn, 102 NY 536; O'Leary v Board of Education, 93 NY1; Periconi v State, 91 Misc 2d 823, 398 NYS2d 959, 963; 19890 Opns St Comp No. 8-555, p 158). We are aware of no provision of law authorizing the withholding of salary of certain town officers and employees, including a highway superintendent, for the failure to submit to the town supervisor monthly reports of moneys received). Accordingly, the salary fixed for the office of highway superintendent may not be withheld solely because he is physically unable to perform the duties of his office."

LEGAL TERMS DEFINED. M The Clerk distributed copies of definitions for the following legal terms:

Malfeasance: Intentionally doing something either legally or morally wrong which one had no right to do. It always involves dishonesty, illegality or knowingly exceeding authority for improper reasons. Malfeasance is distinguished from "misfeasance", which is committing a wrong or error by mistake, negligence or inadvertence, but not by intentionally wrongdoing.

Example: a city manager putting his indigent cousin on the city payroll at a wage the manager knows is above that allowed and/or letting him file false time cards is malfeasance; putting his able cousin on the payroll which, unknown to him, is a violation of an anti-nepotism statute is misfeasance. This distinction can apply to corporate officers, public officials, trustees and others cloaked with responsibility. (LTN Free E-Discovery)

Official Misconduct: Improper and/or illegal acts by a public official which violate his/her duty to follow the law and act on behalf of the public good. Often such conduct is under the guise or "color" of official authority. (Law.com Dictionary)

Malversation: Misconduct in public office, corruption, misuse of public or other funds. The term may be related to other criminal terms, such as embezzlement or abuse of office. Malversation is French in origin. (US Legal)

Maladministration: Bad administration; bad management of any business, especially public affairs. (The Free Online Dictionary)

QUESTIONS AND COMMENTS.

None

ADJOURNMENT

There being no further business to conduct, the meeting adjourned at 6:30 pm. (J.Ordney-A.Berg m/s/p) ALL AYE
Respectfully submitted, Sandra J. Oliver, Town Clerk

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