

# Use of Municipal Resources for Personal Purposes

By Jessie Beller

## Introduction

Use of municipal resources in New York State is governed by the New York State Constitution, which contains a provision specifically regulating gifts or loans of public monies to private entities. Specifically, the law states, in part, that “[n]o county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking. . . .”<sup>1</sup> This provision, prohibiting use of municipal resources for non-governmental purposes, limits a municipality’s expenditures to ensure that the focus of municipal spending is the public good and that municipal resources are used only for government purposes. Therefore Article VIII, Section 1 of the State Constitution, the so-called “Gift and Loan Clause,” serves as a way to control the use of municipal monies and resources. It aims to ensure that private citizens do not use municipal resources for their own benefit and thereby helps to preserve government resources for the public.



## History of the Gift and Loan Clause

“[I]ntended to curb raids on the public purse for the benefit of favored individuals or enterprises furnishing no corresponding benefit,”<sup>2</sup> the Gift and Loan Clause was enacted in 1874 as a result of the widespread diversion of municipal funds to certain private entities that occurred in New York during the height of railroad building. Its purpose was to prevent the possibility of municipalities enriching private entities, as had repeatedly occurred during that era with sales of town bonds for the benefit of private railway companies in return for railway stock that often proved worthless.<sup>3</sup> Note, however, that even though the Gift and Loan Clause is, by its language, a broad prohibition, it is not designed to regulate the price or adequacy of consideration in sales of public property made in good faith and on fair terms.<sup>4</sup> Instead, the Gift and Loan Clause is intended to ensure that municipal resources are used only for public purposes. Anything else would be an impermissible gift from the municipality to the private beneficiary. The applicability of the Gift and Loan Clause in a particular case therefore rests on a determination of public purpose.

## What Is a Public Purpose?

The Gift and Loan Clause’s prohibition on gifting requires that municipalities use their funds and their resources to perform their designated governmental functions, that is, to serve the public. A public purpose is defined as “something ‘necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens [and] public in character.’”<sup>5</sup> If municipal resources are used to provide a purely private benefit, they are not being used for a governmental purpose.<sup>6</sup> The result would be an unconstitutional gift from the municipality to a private entity, the very outcome this law was intended to prevent. The Gift and Loan Clause prevents such gifts by prohibiting a municipality from spending money to benefit a private individual except where the expenditure is in furtherance of a public purpose and the municipality is contractually or statutorily required to do so.<sup>7</sup>

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*“No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking. . . .”*

—N.Y.S. Const., Art. VIII, § 1

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While the presence of a private benefit does not automatically render the action invalid, the primary beneficiary of the municipal spending or use of municipal resource must be the public.<sup>8</sup> For example, a municipality may not use public funds to improve and maintain a private road.<sup>9</sup> In that case, the primary purpose is private benefit, so the municipality would be providing an unconstitutional gift. However, an incidental private benefit resulting from a municipal action does not violate the Gift and Loan Clause, so long as the primary purpose is for the public good.<sup>10</sup>

The question of whether a particular use or expenditure is for a public purpose is the key determination of whether an action is permissible or prohibited by the Gift and Loan Clause. Various court opinions, informal Attorney General’s Opinions, and informal Comptroller’s Opinions provide guidance and suggest that defining public purpose relies on the touchstone of whether the primary beneficiary is the public or a private entity. There are some bright-line prohibitions, where municipal resources are being used for obvious

non-governmental purposes. Other violations of the Gift and Loan Clause are less obvious, if not counterintuitive. For example, a school district may not expend municipal resources to exhort the public to vote in favor of the proposed school budget.<sup>11</sup> Thus, as the decisions and opinions suggest, each case is evaluated on its own merits based on whether the use of the municipal funding or resource furthers a municipal obligation; and the outcome in the particular case will depend on how the court or opining agency answers that question. If the answer is that the intended use of municipal resources is seen to conflict with or otherwise inhibit the performance of governmental obligations, then there is no public purpose, and the action violates the Gift and Loan Clause.

### What Is Prohibited?

As noted, guidance as to what constitutes prohibited use of municipal resources may be found in examples and situations determined by case law and informal opinions not to further a municipal obligation but rather to benefit private entities at the expense of the public. These cases and opinions have focused on two categories of prohibited use: actions taken by the municipality itself and actions taken by a municipal employee using municipal resources.

When a municipality spends public funds or expends municipal resources, it must do so in furtherance of a public purpose. Thus, municipalities cannot pay vendors or contractors a bonus or any form of additional compensation in excess of the fixed contract amount, even to reward outstanding performance,<sup>12</sup> because the payment of supplementary compensation is considered beyond the contractual duty of the municipality, so the municipality would be voluntarily providing the additional funding. In other words, the municipality would be gifting the supplementary payment to the private vendor. Such an action, which is beyond the municipality's obligation, has been deemed not for a public purpose and therefore prohibited by the Gift and Loan Clause. The public resource, municipal funding, is being spent to enrich a private entity. Thus, as the Court of Appeals has held, "a governmental entity may not compensate a person who performs an act which the government had no duty to undertake."<sup>13</sup> Additionally, a municipality cannot accept payment of less than adequate consideration in a transaction with a private citizen.<sup>14</sup> Just as providing overpayment is a gift to a private citizen, permitting underpayment is also considered a gift to a private citizen. When a municipality sells a municipal asset to a private entity for less than its value, the municipality is giving the private entity the benefit of a lower price, at a cost to the public, which receives less than what it is owed for the sale.<sup>15</sup> Informal opinions have found in such cases that there is no government purpose where

the primary beneficiary is a private citizen, so there is no public purpose to such a transaction.

Further, a municipality cannot use its resources to maintain private property. As noted above, the Attorney General has determined, in several informal opinions, that a municipality cannot use public resources to maintain a private street. The reasoning remains the same in each issued opinion: the provision of these services would afford a private entity an unconstitutional gift of public funds, in violation of the Gift and Loan Clause. Although a municipality may establish standards for the maintenance of private roads, unless the road is itself public, a municipality has no authority over such a road, and therefore no responsibility to maintain it. Therefore, without the legal obligation to maintain, there is no governmental purpose and no permissible use of public funding and resources in maintaining the private road. The intended beneficiary in that case would be private property.<sup>16</sup>

Where public servants themselves use municipal resources, the same rules apply. Municipal resources and funding cannot be used for non-governmental purposes, meaning that public servants are not permitted to use public resources for private benefit. For example, while town equipment and town personnel could be used to perform work on private property if the primary purpose of such work furthers a "proper town purpose," the Comptroller has opined that municipal equipment is acquired for municipal purposes only.<sup>17</sup> Therefore, if a public servant uses a municipal resource, such as the town snow plow, for his own personal use, including running his own snow-clearing business, such use would be inconsistent with the pronouncement from the Comptroller limiting use of municipal equipment for a public purpose. Further, a municipal employee may not use the services of the county attorney for personal legal representation, as this would be considered a prohibited use of public resources in violation of the Gift and Loan Clause.<sup>18</sup> These examples all present the same issue, that of a municipal employee co-opting municipal resources for private use, thereby receiving a personal benefit from public resources in violation of the Gift and Loan Clause. Court decisions and informal opinions have consistently found that use of municipal funding or resources to benefit a private citizen or entity is a prohibited unconstitutional gift. Since the primary purpose in each circumstance was to provide a private benefit, there was no governmental purpose to permit use of the municipal resource. The actions of these municipal employees did not further the function of the municipality, but instead furthered the personal interest of the employee himself or herself.

An examination of cases and opinions on impermissible uses of municipal resources reveals a common thread: the presence or absence of a governmental

purpose. Though a municipality's role may be broad, and in some cases include actions which provide an incidental private benefit, the limitation imposed by the Gift and Loan Clause provides a check on the ability of a municipality and its officers and employees to use municipal resources for private purposes. Such a restriction preserves municipal resources for the benefit of the public rather than allowing these resources to be used for the advantage of a select few.

### What Is Permitted?

As discussed above, the Gift and Loan Clause is designed to prevent the use of municipal resources for private purposes. What is permissible is use of municipal resources for municipal purposes. So, for example, a municipality properly uses its municipal resources to repair public roads and properly uses municipal funds to buy property from a private citizen to construct a town hall (provided the consideration for the purchase is not excessive).

While courts have determined that municipal payment of compensation beyond what is fixed by law or contract is prohibited by the Gift and Loan Clause,<sup>19</sup> compensation consistent with the terms and conditions of employment is not considered conferring a gift on a public employee.<sup>20</sup> Specifically, compensation has been defined to include an employee's base pay, earned sick leave benefits, accrued vacation time, and fringe benefits,<sup>21</sup> as well as health and life insurance benefits, military leave, and pensions.<sup>22</sup> Whether payment is held to be proper compensation or unjust advantage depends upon the terms and conditions of employment. If the payments are outside of the compensation package, then they are a prohibited gift; if they are not outside of the package, then they are not a gift and are permitted under the Gift and Loan Clause. Once again, the key question is whether the municipality is using public funds to meet an agreed-upon obligation or to bestow a gift. If the municipality goes beyond the boundaries of its obligation, or acts in situations where it has no obligation, it is performing an act it had no duty to undertake. This, by definition, is not a governmental obligation. The same is true when a municipal employee acts purely in his or her own interest or entirely in the interest of a private entity. The beneficiary receives a gift from the municipality, which is precisely the evil the Gift and Loan Clause was intended to prevent. But when a municipality, or a municipal employee acting on behalf of the municipality, uses municipal resources to provide a public service or for a governmental purpose, the use is permissible, as the beneficiary is the public and the municipality is properly using its own resources to further its own obligations to serve the public. Therefore, a finding of a municipal obligation appears to be the determining factor in such cases.

### Remedy

When a taxpayer believes that a municipality or a municipal official has wrongfully used or spent, or is about to wrongfully use or spend, municipal property in violation of the Gift and Loan Clause, the taxpayer may challenge that improper action through a suit brought pursuant to Section 51 of the General Municipal Law. To maintain a Section 51 action, the proponent must: 1) establish his or her status as a taxpayer, and 2) "allege an official act which causes waste or injury, imperils the public interest or is calculated to work public injury or to produce some public mischief."<sup>23</sup> A contract or a transaction that violates the Gift and Loan Clause may form the basis of a Section 51 action.<sup>24</sup> Section 51, therefore, offers a legal remedy to enforce the prohibitions of the Gift and Loan Clause and may be used to void a particular transaction or action as wasteful and illegal.<sup>25</sup> Taxpayers can also sue under Section 51 to prevent official acts that are either fraudulent or a waste of public property, in violation of the Gift and Loan Clause.<sup>26</sup> Likewise, a Section 51 action may be brought to recover municipal funds unlawfully expended in violation of the Gift and Loan Clause.<sup>27</sup> However, to maintain a Section 51 action, the taxpayer must demonstrate that the protested action is more than just illegal; it must also be injurious to municipal and public interests and "if permitted to continue it will in some manner result in increased burdens upon and dangers and disadvantages to the municipality and to the interests represented by it and so to those who are taxpayers."<sup>28</sup> This standard is thus higher than the standard set forth in the Gift and Loan Clause itself.

Accordingly, while both the Gift and Loan Clause and Section 51 are intended to provide checks on the exercise of municipal power and have been enacted to ensure that municipalities remain within the bounds of their governmental duties, Section 51 may be seen as a sharper tool than the Gift and Loan Clause and therefore requires a more strenuous inquiry. Section 51 enables taxpayers to prevent an illegal official act, effectively nullifying a municipal action or otherwise restraining the ability of the municipality to act. Such power of restraint, in the form of injunctive relief, serves as a reminder that taxpayers have the authority, where they meet the requirements of Section 51, to directly regulate the actions of their municipality.

### Conclusion

The Gift and Loan Clause constitutes an important limitation on municipal power because it regulates use of municipal resources, prohibiting uses that are not for the public good. By helping to ensure that municipalities use their resources for public purposes, the Gift and Loan Clause prevents depletion of government

property and funds by private entities and preserves municipal resources for the functions of government. The Gift and Loan Clause also serves as a reminder to private citizens that they are not permitted to use governmental resources for their own benefit or enrich themselves at municipal expense. The touchstone of the Gift and Loan Clause is public purpose, so any application of this constitutional provision must focus on the intended use of the municipal resource. While an incidental private benefit is permissible, the primary beneficiary must be the public at large. A municipality therefore makes an unconstitutional gift when an action is not based on a governmental obligation or when an action is intended to enrich a private interest. The same is true for the actions of municipal employees using municipal resources, who cannot waste public property by using it to benefit private interests. Informal opinions and case law provide guidelines on permissible and prohibited uses of municipal resources, and these examples are instructive for their explanation of what a municipality can and cannot do and how municipal employees should and should not act.

Ultimately, the limitations imposed by the Gift and Loan Clause provide a reminder of the role of municipal government: to serve the public rather than special interests. Courts and agencies such as the Comptroller's Office and the Attorney General's Office help clarify the role of municipal government through fact-specific interpretations of the Gift and Loan Clause, defining public purpose and determining the extent to which a municipality may, and may not, expend its resources. Taxpayers, through the declaratory, injunctive, and restorative relief offered by Section 51 of the General Municipal Law, can take action to prevent misuse of municipal resources and serve as a further check on misuse of municipal power, acting as well to define the role of municipalities and the meaning of public purpose.

Further, an analysis of the Gift and Loan Clause permits an examination of the role of government. As the touchstone of this constitutional provision is public purpose, interpretation of the Gift and Loan Clause necessarily involves an investigation into and definition of governmental purpose to establish whether a particular use of municipal resources is permissible or prohibited. Therefore, the Gift and Loan Clause is a lens through which we can view the function of a municipality, using the examples provided by case law and interpretive opinions as a way to understand (and define) the responsibility of government. More than just a limitation on municipal power, the Gift and Loan Clause is itself a way to define municipal function.

## Endnotes

1. N.Y. CONST. ART. VIII, § 1. N.Y. CONST. ART. VII, § 8(1) similarly prohibits use of State funds for private purposes. Cases decided under one of these provisions inform interpretation of the other. See, e.g., *Union Free School Dist. No. 3 of Town of Rye v. Town of Rye*, 280 N.Y. 469 (1939) ("section 1 of article VIII was formulated for the protection of the finance of local units, and similar provision made in article VII to protect the finances of the State"); *Markovics v. Eckert*, 166 Misc. 2d 989, 638 N.Y.S.2d 278 (Sup. Ct. Monroe County 1996) (applying Article VII case (*Schulz v. State of New York*, 86 N.Y.2d 225, 630 N.Y.S.2d 978 (1995)) to interpret Article VIII); *Schulz v. State of New York*, 198 A.D.2d 554, 603 N.Y.S.2d 207 (3d Dep't 1993) (applying Article VIII cases to interpret Article VII); *In re United Nations Development Dist.*, 72 Misc. 2d 535, 339 N.Y.S.2d 292 (Sup. Ct., N.Y. County 1972) (same).
2. *New Windsor Volunteer Ambulance Corps., Inc. v. Myers*, 442 F.3d 101, 112 (2d Cir. 2006) (citation omitted).
3. *Sun Printing & Pub. Ass'n v. Mayor of City of New York*, 152 N.Y. 257 (1897).
4. *Landmark West! v. City of New York*, 9 Misc. 3d 563, 571, 802 N.Y.S.2d 340, 348 (Sup. Ct., N.Y. County 2005).
5. *Schulz v. Warren County Bd. of Supervisors*, 179 A.D.2d 118, 122, 581 N.Y.S.2d 885, 887 (3d Dep't 1992), quoting *Sun Printing*, 152 N.Y. at 265.
6. See, e.g., *Town of Rye*, 280 N.Y. at 474, holding that "[p]ublic moneys should be used for public purposes; therefore, gifts or loans of public money or property may not be made to an individual or private corporation or association or private undertaking" (emphasis in original). Note, however, that "there is no prohibition against gifts of moneys to a public corporation for a public purpose, at least where the local unit does not borrow the money so given or loaned." *Id.* (emphasis original). By contrast, Article VIII § 1 does prohibit a municipality from using its *credit* to aid even a public corporation or association. *Id.*
7. *Landmark West!*, 9 Misc. 3d at 568-69, citing, *inter alia*, *Schulz v. Warren County Bd. of Supervisors*, 179 A.D.2d 118, 121-22, 581 N.Y.S. 2d 885, 887 (3d Dep't 1992).
8. *Schulz v. Warren County Bd. of Supervisors*, 179 A.D.2d at 122.
9. Op. Att'y. Gen. (Inf.) No. 92-30.
10. *Landmark West!*, 9 Misc. 3d at 569.
11. See *Phillips v. Maurer*, 67 N.Y.2d 672, 499 N.Y.S.2d 675 (1986) (so holding under N.Y. Educ. Law §§ 1709(33) and 1716); *Schulz v. State of New York*, 86 N.Y.2d at 235 (holding that the guidelines set forth in *Phillips* "express the constitutional line of demarcation under article VII, § 8(1)").
12. Cf. Op. State Compt. (Inf.) 80-752 (concluding that payments of salaries to village employees in excess of amount set in collective bargaining agreement would violate the Gift and Loan Clause); *Lecci v. Nickerson*, 63 Misc. 2d 756, 313 N.Y.S.2d 474 (Sup. Ct., Nassau County 1970) (concluding that the "termination pay" provided for in a collective bargaining agreement is a form of earned compensation, not a reward or gratuity granted at retirement, and therefore not a violation of the Gift and Loan Clause).
13. *Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 353, 422 N.Y.S.2d 932, 935 (1979) (citation omitted). The Court in *Corning* held that, in the absence of authorizing legislation, a municipality could not reimburse municipal officers for legal expenses incurred in the successful defense of a civil rights action brought against them for acts performed in their official capacity, as such reimbursement "would constitute a gift of

public funds for a purely private purpose, a matter expressly forbidden by our Constitution.” 48 N.Y.2d at 350 (citation omitted). See also Op. Att’y Gen. (Inf.). No. 2002-4, where the Attorney General similarly determined that without “express or implied authority” to commence a lawsuit, a municipality may not reimburse an individual member of a legislative body for litigation expenses incurred in bringing an unsuccessful legal action.

14. See Op. State Compt. (Inf.) 81-228.
15. The New York State Comptroller has held that a transfer of property is a gift if it is given “without or for only nominal consideration.” *Id.*
16. See Op. Atty. Gen. (Inf.) 87-2, 92-30, 99-17.
17. Op. State Compt. (Inf.) 92-42 (“[I]t is a general rule that, because town equipment is acquired for town purposes, and town personnel is hired to perform services for the town, a town may not perform work on private property in furtherance of purely private purposes even if fair and adequate consideration is paid to the town under a contract. It is not an improper use of town equipment and personnel, however, to perform work on private property if the work primarily furthers a proper town purpose and is undertaken pursuant to a statutory or contractual obligation, although the work may also provide an incidental private benefit.” (citations omitted)).
18. See Op. Att’y Gen. (Inf.) 97-20.
19. See, e.g., *Corning*, 48 N.Y.2d at 354.
20. *Id.* (“This is not to question the power of the municipality to enact an ordinance empowering it to defend its officials who in the future may be charged with violating the law in the performance of their duties. Such a considered policy decision would raise no constitutional objections, for the cost of the defense would simply be considered additional remuneration.” (citations omitted)); *Local 456 Intern. Broth. of Teamsters v. Town of Cortlandt*, 68 Misc. 2d 645, 649, 327 N.Y.S.2d 143, 149 (Sup. Ct., Westchester County 1971) (holding that an agreement to pay health and life insurance benefits constitutes compensation as one of the terms and conditions of employment, permissible under the Gift and Loan Clause).
21. See *Taylor v. McGuire*, 100 Misc. 2d 834, 837, 420 N.Y.S.2d 248, 251 (Sup. Ct., N.Y. County 1979).
22. *Local 456*, at 649–650.
23. *Schulz v. Warren Cty.*, 179 A.D.2d at 121 n.2, citing, *inter alia*, *Korn v. Gulotta*, 72 N.Y.2d 363, 534 N.Y.S.2d 108 (1988).
24. See *Schulz v. Warren Cty.*, 179 A.D.2d 118.
25. See, e.g., *id.* See generally *Korn*, 72 N.Y.2d 363 (non-Gift and Loan Clause Section 51 declaratory judgment action).
26. *Landmark West!*, 9 Misc. 3d 563. See generally *Gerzof v. Sweeney*, 16 N.Y.2d 206, 264 N.Y.S.2d 376 (1965) (non-Gift and Loan Clause Section 51 action seeking injunction restraining village trustees from performing a contract).
27. *Miller v. Town of Gorham*, 163 Misc. 2d 250, 254, 620 N.Y.S.2d 735 (Sup. Ct., Ontario County 1994) (Section 51 “also provides for other kinds of relief [in addition to restitution], such as a declaratory judgment or injunction”). See generally *Stetler v. McFarlane*, 230 N.Y. 400 (1921) (Cardozo, J.) (non-Gift and Loan Clause Section 51 action for restitution).
28. *Western New York Water Co. v. City of Buffalo*, 242 N.Y. 202, 207 (1926).

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