# NEW YORK CITY CHARTER

AND

# ADMINISTRATIVE CODE

## ANNOTATED

**A complete text of the New York City Charter and the New York City Administrative Code with court decisions from the time of the enactment of the Code and Charter**

## VOLUME I

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# REPORT OF
# THE CHARTER REVISION COMMISSION
# OF THE CITY OF NEW YORK

## INTRODUCTION

The Charter Revision Commission of the City of New York, appointed by the Mayor pursuant to Chapter 87 of the Laws of 1961, will file on or before August 9, 1961 a proposed charter for submission to the voters at the general election to be held on November 7, 1961.

In this report, the Commission presents its findings and its tentative recommendations for improving the structure of the city government. The proposed charter, when filed, will reflect the final conclusions of the Commission. The publication of this report will afford an opportunity for public study and comment, which the Commission hereby invites. A public hearing on these recommendations will be held on July 20, 1961, at the Association of the Bar of the City of New York, 42 West 44th Street, New York City, at 10:00 A.M.

The Commission has studied the present Charter, the recent staff studies and recommendations of the State Commission on Governmental Operations of the City of New York, numerous reports and memoranda received from private citizens, civic and taxpayer groups, public officials, and political organizations, and other relevant material. It has drawn on the knowledge and experience of its counsel, leading public officials,* and its own membership. It has held public hearings in each of the five boroughs. It has deliberated at great length. Its findings, briefly, are these:

The City of New York is a single city composed of diverse political and geographical entities. It is divided as a city into five boroughs, as a part of the State into five counties. The structure of its government must, therefore, reconcile the need for administrative unity with the need for effective borough representation. The question was where to draw the necessary lines of authority.

The Commission finds that the basic structure provided in the present charter is sound. It believes in having a Mayor, a Board of Estimate, a Council, a Comptroller, and Borough Presidents. But it believes that there should be a reallocation of powers so that the executive power, the legislative power, the budgetary power and the power of fiscal control are clearly defined and separated.

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* The Mayor, the President of the Council, Minority Leader of the Council, the Comptroller, the Budget Director, several Borough Presidents, the Chairman of the City Planning Commission, the Chairman of the Triborough Bridge and Tunnel Authority, the Chief Engineer of the Board of Estimate, the City Register and the State Commissioner of Education.

To accomplish these ends, the Commission makes the following major recommendations:

The executive power of the Mayor should be increased, and the Mayor should be empowered to organize and staff an Executive Office with at least two Deputy Mayors, to enable him to discharge his increased responsibility. The Council should have sole legislative power, subject to the veto of the Mayor. The Board of Estimate should not participate in local legislation. The Board of Estimate, however, should not be changed to a body limited to planning and trusteeship functions (as recommended by the State Commission). It should retain its present composition and, except in the one instance hereafter noted, should also retain its present voting structure. It should share power with the Council in passing on the Mayor's Expense and Capital Budgets and in the approval or disapproval of major budgetary changes proposed by the Mayor during the fiscal year.

The Comptroller should retain his post on the Board of Estimate and his power of pre-audit and post-audit. He should continue to make an annual estimate of the general fund revenues, but the Mayor, after receiving the Comptroller's estimate, should be empowered to make the final estimate for budget-making purposes. The Comptroller, as one of the three major city-wide elected officials, should be in the line of succession to the mayoralty, after the President of the Council. A successor to the Mayor should be elected by the people in the first odd-numbered year after the occurrence of a vacancy.

The Expense Budget should be a program budget based upon but not incorporating line items. The Capital Budget should be an appropriating document, project-by-project, which need not come back for further action unless the appropriation is exceeded.

The substantive changes proposed herein, plus a broadening of its rule-making power, will greatly reduce the number of items on the Board of Estimate's calendars and thus contribute to the efficiency of the operations of the Board and the conduct of the City's business.

A more detailed statement of these and other recommendations is contained in the following sections of this report.

## I. THE MAYOR

To be the executive head of the city government, and to exercise all of the powers of the City except as otherwise provided by law. It is intended that the Mayor be the responsible directing head of the City.

To be vested with full power, subject to budgetary limitations, to organize and reorganize the Executive Office of the Mayor, and the several city departments.

To appoint and at pleasure remove all heads of departments, except as otherwise provided by law.

To appoint two or more Deputy Mayors. Except as otherwise directed by the Mayor, one Deputy shall be policy advisor and supervise the Executive Office, and one Deputy shall supervise the city departments and agencies.

To prepare and submit to the Board of Estimate and the Council the Expense and Capital Budgets. To administer the budgets and, with respect to the Expense Budget, modify or transfer items within departments. To estimate the general fund revenues available for purposes of the annual Expense Budget. To certify the maximum amount of debt which the City may incur for capital projects.

To administer career and salary plans.

## II. THE COUNCIL

To be the sole legislative body of the City.

To consist of a President elected city-wide and a member elected from each Senate District, as at present, with the addition of ten Councilmen to be elected borough-wide, two in each borough. The election of such borough-wide Councilmen may be by a system limiting each voter to vote for a single borough-wide candidate, thus making possible the election of minority representatives. The proposal for limited voting will be submitted to the voters as a separate proposition.

After public hearings, to consider and approve the Expense and Capital Budgets, subject to like action by the Board of Estimate. Either body will have the right to increase, decrease, add or eliminate items, subject to the veto of the Mayor as to any or all changes. The Council and the Board of Estimate shall have the right to override the veto of the Mayor as to any or all changed items by a two-thirds vote of each body.

## III. THE BOARD OF ESTIMATE

To be continued with its present composition and voting strength, except that the Mayor shall not vote on the overriding of a budget veto.

To have the right, after public hearings, to increase, decrease, add or eliminate budget items, subject to the veto of the Mayor as above noted.

To retain control over zoning, franchises, pier leases, the sale, leasing and assignment of property, regulations for letting contracts and related trusteeship functions.

To continue as trustee of the New York City Employees Retirement System.

To have power, by a two-thirds vote, to reverse a determination of the City Planning Commission rejecting a project proposed by the Mayor.

## IV. THE COMPTROLLER

To retain his present functions, including pre-audit and post-audit, except as noted herein.

To retain his membership on the Board of Estimate and to be added to the line of succession to the mayoralty in case of vacancy in that office.

To make an annual estimate of general fund revenues; the Mayor, after receiving the Comptroller's estimate, will make the final determination for budget-making purposes.

To report on the "operations, fiscal policies and financial transactions of the City."

To prepare and install a uniform system of accounting for all city funds.

To prepare and install public-utility type accounting systems in all departments where appropriate.

To maintain the accounts for supplies, materials and equipment now kept by the Department of Purchase.*

To settle and adjust claims for and against the City.

To be a member of the Site Selection Board as hereafter noted.

To retain his present broad powers of investigation as to all matters involving the performance of contracts and the receipt and expenditure of city moneys.

To retain his present powers with respect to the sinking and pension funds.

The duty of administering excise taxes is to be transferred to the Finance Department.

## V. THE EXPENSE BUDGET

To be prepared annually by the Budget Director under the direction of the Mayor, for submission by the Mayor to the Board of Estimate and the Council.

To be a program budget and not a line item budget. Line items shall be included in departmental requests and shall be published as explanatory but not incorporated in the budget.

To be administered subject to the Mayor's direction.

Transfers may be made by each department within a program; transfers within a department but between programs, by the Mayor; in either instance after due publication in the City Record but without further approval. Transfers between agencies or additional appropriations will require public hearing and approval of the Board of Estimate and the Council.

## VI. CAPITAL BUDGET

To be initially recommended by the City Planning Commission for the consideration of the Mayor, who with the assistance of the Budget Director and the City Planning Commission will prepare the Capital Budget for submission to the Board of Estimate and the Council.

To be a project-by-project appropriating document recommended and adopted as above set forth under Subdivision II hereof.

A Site Selection Board consisting of the Comptroller, the President or Presidents of the borough or boroughs in which a particular capital project is to be located, the Director of City Planning, the Commissioner of Real Estate and the Budget Director shall after public hearing select the site for each such project.

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* As he now does for all other departments.

## VII. THE BOROUGH PRESIDENT

To be members of the Board of Estimate.

Each to be a member of the Site Selection Board to select the sites for capital projects located wholly or partly within his borough.

Each to preside over a Borough Improvement Board—properly staffed—consisting of himself and the councilmen elected from his borough. Each Borough Improvement Board to hold hearings at stated intervals in its borough and report to the Board of Estimate, the Council, the Mayor and the City Planning Commission on borough programs and proposed capital projects.

The topographical bureaus in the several boroughs shall remain therein under the respective Borough Presidents.

Jurisdiction over highways and sewers to be transferred to a new Department of Highways and Sewers, which shall have a Commissioner appointed by the Mayor. Necessary deputies may be appointed by the Commissioner.

The Department shall maintain a main office in one borough and an office in each other borough.

The cleaning of streets not permanently paved in Queens and Richmond and the removal of encumbrances shall be transferred to the Department of Sanitation.

## VIII. ASSESSABLE IMPROVEMENTS

As of the effective date of the proposed charter, local improvements thereafter authorized shall be paid for by levying the cost by city-wide assessment collectible with the real estate taxes and not by local or borough assessment.

To prevent windfalls for land developers, the Board of Estimate, on the recommendation of the City Planning Commission, shall adopt regulations defining areas within which assessable improvements must be paid for by the owners benefited.

All unpaid assessments heretofore confirmed against abutting property, a borough or the City, and amounts charged to the State for arterial highways shall be collected and paid into the appropriate assessment funds. The cost of completed by unconfirmed assessment projects, of assessment projects now in progress, and of land acquisitions and other costs payable out of assessment funds shall be paid in accordance with the Board of Estimate resolutions authorizing such projects. Such resolutions shall continue to be amendable to the extent presently provided by law.

## IX. EFFECTIVE DATE OF PROPOSED CHARTER

The proposed charter, if adopted, shall take effect on January 1, 1963. The fixing of this date will make it possible to prepare necessary amendments to the Administrative Code to bring it into harmony with the provisions of the new charter. The first election of borough-wide Councilmen shall take place at the general election of 1963, and the borough-wide Councilmen then elected shall take office on January 1, 1964, their terms to expire concurrently with the terms of the Councilmen then serving from the Senate Districts.

## RECOMMENDATIONS

That a study be made to adjust the payment dates of the real estate taxes so that the semi-annual payments are advanced over a period of four years to July 1 and January 1 of each fiscal year to bring the first semi-annual payment during the first month of the Expense Budget and the second semi-annual payment during the first month of the Expense Budget and the second semi-annual payment during the seventh month of the Expense Budget. Presently the first half of the real estate taxes is due and payable on October 1 and the second half is due and payable on April 1, and the City is compelled to borrow large sums of money to meet its requirements while awaiting payment of real estate taxes.

That the State Legislature grant to the City of New York power which it does not now possess under State law to permit the Comptroller of the City of New York to investigate and audit the performance of all contracts let by the Board of Education involving the expenditure of monies appropriated by the City.

That the State Legislature empower the City of New York to create a board for the hearing and determination of contested excise taxes (subject to court review), the members of such board to be appointed by the Mayor.

# FINAL REPORT
# OF CHARTER REVISION COMMISSION
# OF THE CITY OF NEW YORK

The Commission received many constructive comments and suggestions from public officials, citizens, and citizen groups, some in writing and some at a public hearing on July 20, 1961.

The tentative conclusions of the Commission have been changed and supplemented as follows:

Sewers of all kinds will be placed under the Commissioner of Public Works, and streets, roads, and highways of all kinds under a Commissioner of Highways. Each will have a resident deputy and a borough office in each borough.

There will be a public hearing on every project in the Capital Budget before the Mayor may direct that it be initiated. Thus, the Capital Budget will become an appropriating document, but there will also be a "second look" at each project before the City finally commits itself.

A vacancy in the office of Mayor will be filled at the next general election, without waiting for an odd-numbered year. This is in accord with state law. A Council President or Comptroller, acting as Mayor, will resume his original office for his unexpired term upon the election and qualification of a new mayor.

The proposal for minority representation through limited voting will be submitted as a separate proposition as originally announced, but it will contain a further provision that a party or independent body may nominate only one candidate for Councilman at large in each borough.

The language in the present Charter that may be construed to deny policemen and firemen the right to belong to line organizations will be omitted. The ban on political contribution and membership in political organizations will be continued. The rights guaranteed to all officers and employees by section 15 of the Civil Rights Law will be expressly recognized and reaffirmed by charter provision.

The Council will be required to continue its Finance Committee and authorized to have such other committees as it may need. The Finance Committee will be properly staffed to handle the council's role in the new Budget procedure.

The Director of City Planning, who is also the Chairman of the City Planning Commission, will serve at the pleasure of the Mayor. The other members of the Commission will retain their fixed, overlapping terms.

The Capital Budget will go over to the fiscal year of the Expense Budget, but the two budget-making periods will be at different times of the year.

Provisions exempting the school system from city control over the expenditure of city funds will be deleted; thus state legislation

granting any degree of control to the City can take effect without charter amendment.

The effective date after which the City may authorize local improvements paid for by City-wide assessment will be advanced to January 1, 1962.

The proposed revision of the Charter, embodying the previous recommendations of the Commission, amended as above set forth, has been completed by the Commission and has been duly filed with the City Clerk as required by the statute which authorized the creation of the Commission.

The question of the adoption of this Charter will therefore be on the ballot on November 7 next.

# NEW YORK CITY CHARTER
## AND
# ADMINISTRATIVE CODE
## ANNOTATED

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# NEW YORK CITY CHARTER

AND

# ADMINISTRATIVE CODE

ANNOTATED

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VOLUME 1

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# NEW YORK CITY CHARTER

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## INTRODUCTORY

§ 1. **The city.**—The city of New York as now existing shall continue with the boundaries and with the powers, rights and property and subject to the obligations and liabilities which exist at the time when this charter shall take effect. (*Derived from former* §1.)

### CASE NOTES

¶ 1. A contract between the city and a domestic corporation whereby the corporation undertook to operate a Foreign Trade Zone theretofore operated by the City at Staten Island under a federal grant from the Foreign Trade Zone Board was not authorized by this section. Although prior to the adoption of the Charter, the city had the authority to operate the Zone itself, and this section continued that power, the city did not have the authority to operate the Zone through the medium of a third party. The inclusion in the table of repealed laws annexed to the Administrative Code (Laws of 1935, Ch. 246) which authorized the city to operate a Foreign Trade Zone was inadvertent where this section provided that the city should continue with the powers possessed at the time the Charter took effect.—American Dock Co. v. City of New York, 174 Misc. 813, 21 N. Y. S. 2d 943 [1940], aff'd, without opinion, 261 App. Div. 1063, 26 N. Y. S. 2d 704, and 286 N. Y. 658, 36 N. E. 2d 696.

§ 2. **The boroughs.**—The boroughs of the city are continued as existing at the time of the adoption of this charter. (*Derived from former* § 2.)

# CHAPTER 1

# MAYOR

§ 3. **Office; powers.**—The mayor shall be the chief executive officer of the city. He may, by executive order, at any time, create or abolish bureaus, divisions or positions within his executive office as he may deem necessary to fulfill his duties. He may from time to time by executive order, delegate to or withdraw from any member of said office, specified functions, powers and duties, except his power to act on local laws or resolutions of the council, to act as a magistrate or to appoint or remove officials. Every such order shall be filed with the city clerk. (*Derived from former* §§ 3 *and* 4. *Section* 3 *as amended by L. L.* 1949, *No.* 107.)

## CASE NOTES

**¶ 1. Unlike the office of President under the federal system, the powers of the office of Mayor of the City of New York are not exclusively executive, and unlike the federal system, which recognizes a separation of powers into three independent branches, the chartered plan of government for the City of New York has but two branches—executive and legislative—the functions of which, as defined by the legislature, are not always independent, since a city is not sovereign, as are the federal government and the states, but is simply an agency of the state. That** the Mayor is "the chief executive officer of the city," and the Council is "the local legislative body of the city", and that functions are exercised by the Mayor and the Council which are independent of each other, is not enough to entitle the Mayor to immunities which are accorded the executive under the federal plan of government.—**La Guardia v. Smith**, 288 N. Y. 1, 41 N. E. 2d 153 [1942], aff'g 262 App. Div. 708, 27 N. Y. S. 2d 992, which aff'd without opinion, 176 Misc. 482, 27 N. Y. S. 2d 321.

§ 4. **Election; term; salary.**—The mayor shall be elected at the general election in the year nineteen hundred sixty-five and every four years thereafter. He shall hold office for a term of four years commencing on the first day of January after his election. The salary of the mayor shall be fifty thousand dollars a year. (*Derived from former* § 3 *as amended by L. L.* 1949, *No.* 107. *Amended by L. L.* 1961, *No.* 96.)

§ 5. **Annual statement to council.**—The mayor shall communicate to the council at least once in each year a statement of the finances, government and affairs of the city with a summary statement of the activities of the agencies of the city. (*Derived from former* § 5.)

§ 6. **Heads of departments; appoint; remove.**—a. The mayor shall appoint the heads of departments, all commissioners and all other officers not elected by the people, except as otherwise provided by law.

b. The mayor, whenever in his judgment the public interest shall so require, may remove from office any public officer holding office by appointment from a mayor of the city, except officers for whose removal other provision is made by law. No public officer shall hold his office for any specific term, except as otherwise provided by law. (*Derived from former* § 4.)

CROSS REFERENCE: Service of process on Mayor or person designated by him, see Civil Practice Act, § 228.

## CASE NOTES

¶ 1. Contention of dismissed city employee that the term of office of the Commissioner of the Department of Housing and Buildings had expired with the expiration of the Mayor's second term and that since the Mayor had failed to formally reappoint him to office, the office of the Commissioner was to be deemed vacant and the Commissioner was therefore without authority to file any charges against the employee, was overruled, since Public Officers Law § 5 provides for a holding over in office after the expiration of the term until a successor is chosen and qualifies, and the Commissioner had not been appointed for a definite term as former § 4, subd. b, (now § 6) of the Charter provides that no public officers shall hold office for any specific term except as otherwise provided by law. Consequently the Commissioner's appointment for an indefinite term did not automatically terminate with the expiration of the Mayor's second term, but since he held office at the pleasure of the appointing power, he continued in office until death, resignation or removal. No formal reappointment was necessary.—In re Jennings (Wilson), 179 Misc. 358, 40 N. Y. S. 2d 400 [1942].

¶ 2. In directing the attention of the Civil Service Commission to Civil Service employee's meretricious relationship with a female city employee who had been found guilty of a serious offense, and in requiring him to act thereon, the mayor did not usurp the Commission's functions nor deprive them of their freedom of action. The mayor, as the chief executive officer of the city, was authorized by the Charter and by standards of proper official conduct to keep himself informed as to the acts of subordinate officials and employees and to cause appropriate action to be taken when inpropriety was brought to his attention. Consequently, having acted on their own independent judgment in framing and serving charges against the employee, the Civil Service Commission was authorized to take disciplinary action pending a hearing and determination of the charges.—Guinier v. Kern, 106 (30) N. Y. L. J. (8–5–41) 273, Col. 5 T.

¶ 3. While former § 5 authorizes the Mayor to keep informed of the actions of his officials, it does not require him to interfere with their discretionary powers. Hence, a private individual was not entitled to an order compelling the Mayor or Police Commissioner to take official action for the holding of a departmental trial to hear certain charges brought by the private individual against a police officer.—Matter of Goldberg, 9 Misc. 2d 663, 168 N. Y. S. 2d 16 [1957]; aff'd without opinion 5 A. D. 2d 857, 172 N. Y. S. 2d 526 [1958].

¶ 4. The mayor is under a duty to recommend legislation which he deems necessary and he may direct any investigation which will supply him with the necessary information to recommend such legislation. Thus, the mayor's direction to the Commissioner of Investigation to conduct an inquiry to ascertain whether those doing business in the milk industry in the city employed practices having the effect of increasing the price of milk was within the authority conferred upon the mayor by the Charter and statute.—Matter of Dairymen's League Co-operative Association, Inc., 274 App. Div. 591, 84 N. Y. S. 2d 749 [1948] aff'd 299 N. Y. 634, 86 N. E. 2d 509.

§ 7. **Deputy mayors; executive office of mayor.**—The mayor shall have power to appoint two or more deputy mayors. Except as otherwise directed by the mayor, one deputy shall act as the

representative of the mayor on boards and committees, exercise jurisdiction over all legislative and ceremonial functions, be policy advisor to the mayor, supervise the executive office and perform such other duties as the mayor may assign to him, and one deputy shall supervise the other offices and departments of the city, except the law department, the department of investigation and such other agencies or bureaus as the mayor, from time to time, may direct. (*Derived from former* § 9.)

**CASE NOTES**

¶ 1. The vice chairman of the council cannot sit in the Board of Estimate during absences of the mayor from the City, where such absences continue for less than 30 days and the mayor has designated the deputy mayor to sit in his place during such temporary absence. Nothing in the Charter limits the exercise of the mayor's power to delegate to the deputy mayor the right to sit as a member of the Board in his place to those occasions when the mayor is within the confines of the City. A contrary intention is evidenced by provision authorizing the mayor to delegate designated powers to his deputy either before or after commencement of his absence. This section, which excepts certain powers of the mayor which may not be delegated to the deputy, omits any statement that the right to deputize should cease during the mayor's absence or sickness. Also, by former § 10, sub(b), the president of the council is not permitted to exercise any powers of the mayor which are lawfully delegated to the deputy mayor. Requirement of Charter that president of the council act as presiding officer of the Board of Estimate during mayor's absence did not conflict with authority of mayor to authorize deputy to sit for him during his absence, since the president presides on such occasion because the statute so directs and not because he is acting as mayor.—Sharkey v. LaGuardia, 259 App. Div. 557, 19 N. Y. S. 2d 965 [1940] aff'd 283 N. Y. 725, 28 N. E. 2d 726.

§ 8. **General powers.**—a. The mayor, subject to this charter, shall exercise all the powers vested in the city, except as otherwise provided by law.

b. The mayor shall be a magistrate.

c. Notwithstanding any other provision of law, the mayor shall have the powers of a finance board under the local finance law and may exercise such powers without regard to any provision of law prescribing the voting strength required for a resolution or action of such finance board, provided, however, that whenever the mayor determines that obligations should be issued and the amount thereof, he shall certify such determination to the comptroller who shall thereupon determine the nature and term of such obligations and shall arrange for the issuance thereof. (*Derived from former* § 6. *Subdivision c amended by L.* 1962, *ch.* 998, § 1.)

§ 9. **Removal of mayor.**—The mayor may be removed from office by the governor upon charges and after service upon him of a copy of the charges and an opportunity to be heard in his defense. Pending the preparation and disposition of charges, the governor may suspend the mayor for a period not exceeding thirty days. (*Derived from former* § 8.)

CROSS REFERENCE: Additional power of Governor to remove Mayor, see Public Officers Law, § 33.

§ 10. **Succession.**—a. In case of the suspension of the mayor from office, his temporary inability to discharge the powers and duties of his office by reason of sickness or otherwise, or his absence from the city, the powers and duties of the office of mayor shall devolve upon the president of the council or the comptroller in that order of succession until the suspension, inability or absence shall cease. While so acting temporarily as mayor neither the president of the council nor the comptroller shall exercise any power of appointment to or removal from office or any power lawfully delegated by the mayor to a deputy mayor whether before or after the commencement of such suspension, in ability or absence; and shall not, until such suspension, inability or absence shall have continued nine days, sign, approve or disapprove any local law or resolution, unless the period during which the mayor can act thereon would expire during said nine days in which case the president of the council or the comptroller shall have the power to disapprove the same within forty-eight hours before the time to act expires.

b. In the case of a failure of a person elected as mayor to qualify, or a vacancy in the office caused by the mayor's resignation, removal, death or permanent inability to discharge his powers and duties, such powers and duties shall devolve upon the president of the council, the comptroller or a person selected pursuant to subdivision b of section twenty-seven, in that order of succession, until a new mayor shall be elected as provided herein. If the vacancy shall occur before the twentieth day of September in any year, such vacancy shall be filled in the general election held in that year, otherwise it shall be filled in the general election held in the following year. The term of the person then elected mayor shall begin on January first after such election and shall expire on the date when the term of the mayor originally elected would have expired. Upon the commencement of the term of the thus elected mayor, the president of the council or the comptroller then acting as mayor shall complete the term of the office to which he was elected if any remains. (*Derived from former* § 10.)

CROSS REFERENCE: General City Law § 2-a provides that President of Council succeeds to office of Mayor for balance of term.

## CASE NOTES

¶ 1. The vice chairman of the council cannot sit in the Board of Estimate during absences of the mayor from the City, where such absences continue for less than 30 days and the mayor has designated the deputy mayor to sit in his place during such temporary absence. Under sub (b) of former § 10, the president of the council is not permitted to exercise any powers of the mayor which are lawfully delegated to the deputy mayor. —Sharkey v. LaGuardia, 259 App. Div. 557, 19 N. Y. S. 2d 965 [1940] aff'd 283 N. Y. 725, 28 N. E. 2d 726.

¶ 2. President of the Council who was presently serving as Acting Mayor to fill the vacancy created by resignation of Mayor on September 2, would not continue as Acting Mayor until January 1, but the person who should be duly elected as Mayor at the general election on November 7 would immediately, after having duly qualified, assume the office of Mayor.—Joseph v. Corsi, 277 App. Div. 351, 100 N. Y. S. 2d 49 (1950), aff'd without opinion, 301 N. Y. 742, 95 N. E. 2d 412.

# CHAPTER 2

# COUNCIL

§ 21. **Legislative power.**—In addition to the other powers vested in it by this charter, the council shall be vested with the legislative power of the city, and shall be the local legislative body of the city. (*Derived from former* § 21.)

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**City governmental branches, generally,** ¶ 4
**Exclusive nature of Council's power,** ¶¶ 5, 6
**Investigatory powers, expenses of,** ¶¶ 1, 2
**Local law, determination of,** ¶ 3
Police power, ¶ 7

¶ 1. The City Council does not act as a departmental agency of the City when it exercises its legislative power by way of an investigation conducted pursuant to former § 43 (now § 41) of the Charter, and hence, former § 891 (now § 1111) prohibiting an agency from incurring a liability in excess of the amount appropriated therefor and §§ 121, 122, and 123, providing that the Board of Estimate has, in the first instance, been given to make appropriation to governmental purposes of the City, did not preclude a stenographer engaged by special committee of the City Council to report the proceedings of the Committee in its investigation from recovering the value of the services notwithstanding the failure of the board of Estimate to make an appropriation for the necessary expenses of the Committee. That the resolution authorizing the special committee to make its investigation included a provision authorizing the Committee to request that an appropriation for expenses be made by the Board of Estimate, did not show an intent that its action was to be subject to immediate administrative interdiction by the Board of Estimate.—Smith v. City of New York, 289 N. Y. 517, 47 N. E. 2d 45 [1943].

¶2. Former § 891 (now § 1111) of the City Charter, providing that no "agency" of the City shall incur liability in excess of the amount appropriated or otherwise authorized did not preclude an attorney from recovering compensation from City for services rendered as counsel to a special committee of the City Council appointed to investigate pursuant to former & 43 (now § 41) of the Charter. When the Council exercises its investigatory powers it is not an "agency" of the City and has the power to bind the City for the expenses of the investigation without the sanction of, or an appropriation from the Board of Estimate.—Ellis v. City of New York, 180 Misc. 968, 46 N. Y. S. 2d 363 [1943], aff'd 267 App. Div. 810, 47 N. Y. S. 2d 96, and 295 N. Y. 780, 66 N. E. 2d 297.

¶ 3. Resolution of Council designating a special committee under Charter § 43 (now § 41) to determine whether city broadcasting station should be abolished, was not a local law or resolution as defined by Charter §§ 21 or 26 and hence approval of mayor as provided in former §§ 38, 39 and 40 (now §§ 38 and 39) was not required. —Matter of Radio Station WNYC (Novik), 169 Misc. 502, 7 N. Y. S. 2d 297 [1938] aff'd 285 App. Div. 844, 7 N. Y. S. 2d 998, and 280 N. Y. 629.

¶ 4. Unlike the Federal system of government which recognizes a separation of powers into three independent branches, the Charter plan of government for the City of New York

has but two branches, namely, executive and legislative, the functions of which, as defined by the legislature, are not always independent, since a city is not a sovereign, as are the Federal government and the States, but is simply an agency of the state. The mayor is the "chief executive officer of the City" and the Council is the "local legislative body of the City" and the functions exercised by each which are independent of each other, is not enough to entitle the mayor to immunities which are accorded the executive under the Federal plan of government.—LaGuardia v. Smith, 288 N. Y. 1, 41 N. E. 2d 153 [1942] aff'g 262 App. Div. 708, 27 N. Y. S. 2d 992.

¶ 5. Although former § 21 vests the Municipal Council with the sole legislative power of the City, it is modified by Charter § 435 and the Police Commissioner may properly make traffic rules and regulations. The two sections are in pari materia and as such must be construed with reference to each other.—Peo v. Lewis, 167 Misc. 139, 3 N. Y. S. 2d 508 [1938].

¶ 6. Neither former § 21 nor any other provision of the Charter vests the mayor with the power to remove civil service employees for violating a regulation prohibiting any employee from performing private employment outside his regular working hours.—Matter of Natilson (Hodgson), 264 App. Div. 384, 35 N. Y. S. 2d 537 [1942] aff'd 289 N. Y. 842, 47 N. E. 2d 442.

§ 22. **Composition of council.**—a. The council shall consist of the president of the council and of other members termed councilmen.

b. One councilman shall be elected from each senate district as now or hereafter constituted lying wholly or partly within the city, and two councilmen shall be elected at large from each of the boroughs.

c. No party or independent body as defined in the election law shall nominate more than one candidate for councilman to be elected at large in any borough.

d. Each elector shall have the right to vote for not more than one candidate at large and the two candidates receiving the largest number of votes in each borough shall be elected.

e. The first election of councilmen at large shall be held at the general election in the year nineteen hundred sixty-three and the terms of councilmen so elected shall expire coterminously with those of the councilmen then in office. (*Derived from former* § 22.)

§ 23. **President of the council.**—a. The president of the council shall be elected by the electors of the city at the same time and for the same term as in this charter prescribed for the mayor.

b. The president of the council may be removed or suspended in the same manner as provided in this charter with respect to the mayor.

c. The president of the council may, by written authority filed with the board of estimate and with the city clerk, designate any two officers or employees appointed by him to exercise the powers specified in this subdivision. Either such officer or employee, so designated, may act in the place of the president of the council as a member of the board of estimate whenever the president of the council, although present in the city, shall be absent from a meeting of said board for any reason whatever.

d. The president of the council shall preside over the meetings of the council and shall have the right to participate in the discussion of the council but shall not have a vote except in case of a tie. (*Derived from former* § 23. *Subdivision c amended by L.* 1962, *ch.* 998, § 2).

CROSS REFERENCE: General City Law § 2-a provides that President of Council succeeds to office of Mayor for balance of term and that Vice Chairman of Council succeeds to office of President of Council for balance of term.

§ 24. **Election; term; vacancies.**—Except as provided in subdivision e of section twenty-two, the councilmen shall be elected at the general election in the year nineteen hundred sixty-five and every four years thereafter. The term of office of each councilman shall commence on the first day of January after his election and shall continue for four years thereafter. Any vacancy which may occur among the councilmen shall be filled by election by a majority of all the councilmen, of a person who must be of the same political party as the councilman whose place has become vacant if such councilman was elected as the candidate of a political party and who must be a resident of the district or borough, as the case may be, from which such councilman was elected. (*Derived from former* § 24, *as amended by L. L.* 1945, *No.* 32; *L. L.* 1953, *No.* 63. *Amended by L.* 1962, *ch.* 998, § 3.)

## CASE NOTES

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**Method of filling of vacancies,** ¶¶ 1–3
**Review of failure to fill,** ¶ 4
**Term of office of person filling vacancy,** ¶ 5

¶ 1. Where member of the Council whose term did not expire until December 31, 1941 had resigned and successor had been appointed whose term would expire December 31, 1940, the successor to be elected at the next general election *held* required to be elected pursuant to the statutes applicable to elections generally, and not pursuant to the proportional representation method, inasmuch as absence of any reference in the Charter to proportional representation as the method for filling of vacancies was significant, the machinery thereof, which was adapted for election of a number of persons from a single district, was wholly unfitted for replacement of one of several, and there was nothing in the Election Law inappropriate to such an election.—Ross v. Cohen, 283 N. Y. 388, 28 N. E. 2d 883, aff'g 259 App. Div. 1020, 121 N. Y. S. 2d 158.

¶ 2. Provision of § 24 of the Charter providing that any vacancy which may occur among the City Councilmen shall be filled by election by the Councilmen of a person who must be of the same political party as the Councilman whose place has become vacant, *held* to require the filling of all vacancies, and such obligation to elect a successor remained unaffected by fact that the prior incumbent was not identified with a political party. In the latter case, the party affiliation of the successor would be immaterial.—In re Melzer, 82 N. Y. S. 2d 18 [1948].

¶ 3. Provision of Constitution, Art. XIII, § 8, relative to filling of vacancies in office, is applicable to all elective city officers, including Councilmen of the City of New York, and § 24 of the Charter is to be interpreted as if the Legislature intended by such section fully to carry out the constitutional mandate.—Id.

¶ 4. Where nature and extent of the duty of filling vacancies imposed by New York City Charter § 24 in the

instant situation posed a question of first impression, giving rise to great doubt as to the proper course to pursue, and the City Council had merely postponed action until clarification by the proper tribunal, there was no refusal to perform a duty enjoined by law or the making of a determination which would be reviewable under C. P. A. Art. 78.—In re Melzer, 82 N. Y. S. 2d 18 [1948].

¶ 5. On resignation of member of Council, whose term did not expire until December 31, 1941, the Council was without power to provide that term of office of party selected to fill the vacancy should endure "for the unexpired balance of the term" of the resigning member, since Constitution, Art. XIII, § 8 and Public Officers Law § 38 provide that in case of elective officers no person appointed to fill a vacancy shall hold his office longer than commencement of political year next succeeding the first annual election after the happening of the vacancy, and consequently the Council could not validly fill the vacancy for a period beyond December 31, 1940 (Charter § 24).—Ross v. Cohen, 283 N. Y. 388, 28 N. E. 2d 883 aff'g 259 App. Div. 1020, 21 N. Y. S. 2d 158.

§ 25. **Salaries.**—The salary of the president of the council shall be thirty-five thousand dollars a year. The salary of each councilman shall be ten thousand dollars a year. *(Derived from former* § 25 *as amended by L. L. 1949, No. 107. Amended by L. L. 1961, No. 96.)*

**CASE NOTES**

¶ 1. When ch. 637 of the laws of 1932, which permitted the reduction of salaries of City employees during the emergency period, was repealed and the City exercised its power to reopen the budget for the year 1937, it was without power any longer to withhold from plaintiff, who was serving as president of the Board of Aldermen, the salary fixed by Charter § 18 for such position, as plaintiff could not be compelled to take less than the salary fixed by statute. Such restoration was not dependent upon any discretion on the part of the City, and the plaintiff was entitled to be restored to a salary of $25,000.00 per year as fixed by statute notwithstanding § 25 of the Charter which fixed the salary of the president of the City Council at $15,000.00.—Brunner v. City of New York, 105 (139) N. Y. L. J. (6–16–41) 2707, Col. 1 M.

§ 26. **Local laws.**—Except as otherwise provided by law, all legislative action by the council shall be by local law. The style of local law shall be "Be it enacted by the council as follows." *(Derived from former* § 26.)

**CASE NOTES**

¶ 1. A resolution of the Council designating a special committee to investigate the management of a municipal broadcasting station was not a local law or resolution requiring submission to the mayor. The language of the resolution differed from that required by former § 26 for it read "resolved that the committee on rules of the Council . . ." and further, the investigating powers of the Council are specifically excluded from the charter provisions dealing with local laws.—Matter of Radio Station WNYC (Novik), 169 Misc. 502, 7 N. Y. S. 2d 297 [1938] aff'd 255 App. Div. 844, 7 N. Y. S. 2d 998 and 280 N. Y. 629, 20 N. E. 2d 1008.

§ 27. **Powers of council.**—a. Any enumeration of powers in this charter shall not be held to limit the legislative power of the council except as in this charter specifically provided. The council in addition to all enumerated powers shall have power to adopt

local laws as to it may seem meet, which are not inconsistent with the provisions of this charter or with the constitution or laws of the United States or of this state, for the good rule and government of the city; for the order, protection and government of persons and property; for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants; and to effectuate the purposes and provisions of this charter or of the other laws relating to the city. The council shall have power to provide for the enforcement of local laws by legal or equitable proceedings, to prescribe that violations thereof shall constitute misdemeanors, offenses or infractions and to provide for the punishment of violations thereof by civil penalty, fine, forfeiture or imprisonment, or by two or more of such punishments.

b. In the event that there exists no other provision of law for the filling of a vacancy in any elective office, resulting from removal or suspension from such office, or the death, resignation or inability of the incumbent to exercise the powers or to discharge the duties of the office, the council by a majority vote of all the councilmen shall elect a successor to fill the vacancy in such office.

c. All local laws shall be general, applying either throughout the whole city or throughout specified portions thereof.

d. The council shall not pass any local law authorizing the placing or continuing of any encroachment or obstruction upon any street or sidewalk excepting temporary occupation thereof during and for the purpose of the erection, repairing or demolition of a building on a lot abutting thereon under revocable licenses therefor, and excepting the erection of booths, stands or displays or the maintenance of sidewalk cafes under licenses to be granted only with the consent of the owner of the premises if the same shall be located in whole or in part within stoop lines.

e. All local laws in relation to licenses shall fix the license fees to be paid, if any, and shall provide that all licenses shall be according to an established form and shall be regularly numbered and duly registered. (*Derived from former* §§ 27 *and* 42.)

CROSS REFERENCES: Power to adopt local laws, see Constitution, Art. IX, §§ 8 and 12; City Home Rule Law, § 11.

Restrictions on power to adopt local laws, see City Home Rule Law, § 21.

**Power to adopt local laws more restrictive than Multiple Dwelling Law, see Multiple Dwelling Law, § 3, subd. 5.**

**Power to adopt local laws more restrictive than Local Finance Law, see Local Finance Law, § 170.00.**

Power to impose various special taxes, see L. 1947, ch. 278, as amended.

Power to adopt local laws providing for sales of tax liens, see Tax Law, § 168-c.

Power to impose joint payroll tax, see General City Law, Article 2-D.

Prohibition on amendments relating to contributions to or benefits of pension or retirement systems, see Civil Service Law, § 94.

Power to provide for community mental health services, see Mental Hygiene Law, § 190-a.

Power to require veterans to obtain local peddlers' licenses, see General Business Law, § 32 (8).

Power to fix mileage rate for use of personally owned automobiles by officers and employees in performing duties, see General City Law, § 20 (33).

## CASE NOTES

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Commercial Christmas displays on sidewalks, ¶ 7
Federal law, providing penalties for violation of, ¶ 6
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Motor vehicles, regulation of design and color of, ¶ 5
Police powers, ¶¶ 1, 2, 4

¶ 1. Under § 11 of the City Home Rule Law and § 27 of the Charter, the City has broad powers to regulate the use of the City streets and to provide by local law for the good government of the City, and the preservation and promotion of its health, safety and general welfare of its inhabitants. Local laws are valid which have a substantial relation to matters within the field where legislative power is vested in the local legislative body of the City, but they must be reasonably calculated to achieve a legitimate public purpose. —Good Humor Corp. v. City of New York, 290 N. Y. 312, 49 N. E. 2d 153 [1943], aff'g 264 App. Div. 620, 36 N. Y. S. 2d 85, which affirmed 33 N. Y. S. 2d 905.

¶ 2. Under the New York Constitution, the Home Rule Law and New York City Charter § 27, the City has the power to enact legislation to protect the safety and health of its inhabitants as long as the legislation does not conflict with State laws.—Molnar v. Curtin, 273 App. Div. 322, 77 N. Y. S. 2d 553 [1948].

¶ 3. Councilman of City of New York who had been convicted in the Federal court of the felony of conspiring to teach and advocate the overthrow of the U. S. Government by force and violence, *held* to have committed an act involving a violation of his oath of office within meaning of Public Officers Law, § 30, subd. 5, disqualifying him to continue as a councilman.—In re Davis (Impellitieri), 197 Misc. 162, 94 N. Y. S. 2d 159 (1950).

¶ 4. The provisions of the Administrative Code, §§ B32–250.0 et seq as enacted by Local Law No. 61 of 1947 and the Rules promulgated thereunder for the licensing and regulation of garages and parking lots within the City of New York are constitutional. The report of the Committee on General Welfare as to the abuses which were prevalent before the enactment of the local law made it clear that the regulation of garages and parking lots had a substantial relation to the general welfare of the inhabitants of the City and the enactment therefor constituted a valid exercise of the police power.—Pomeranz v. City of New York, 1 Misc. 2d 486, 151 N. Y. S. 2d 789 [1955].

¶ 5. Local Law No. 16 of 1939 which made it unlawful to possess a motor vehicle designed or colored in the manner of vehicles of the fire department was unconstitutional when applied to trucks owned by the plaintiff and registered with the State.—The Great Atlantic and Pacific Tea Co. v. City of New York, 173 Misc. 470, 17 N. Y. S. 2d 270 [1940].

¶ 6. A local law (Code § U41–5.0) which imposed penalties for violation of federal price, rationing and rent control programs was within the legislative power of the city and since it was not inconsistent with the federal law, the local law was valid.—Peo. v. Lewis, 295 N. Y. 42, 64 N. E. 2d 702 [1945].

¶ 7. Former § 42 (b), prohibiting City Council from passing any local laws authorizing an obstruction or encroachment upon any street or sidewalk, except the temporary occupation thereof for erection, demolition or repair of buildings and for erection of booths, stands or displays or maintenance of sidewalk cafes under licenses required a license for all the enumerated classifications of temporary obstructions, including the erection of booths, stands, and displays. Hence, Administrative Code § 82d 7–15.0 (4) authorizing storekeepers and peddlers to sell and display Christmas trees, holiday decorations and toys on sidewalk upon obtaining consent of owners of abutting premises, was invalid.—People v. Berner; People v. Traet, 170 Misc. 501, 10 N. Y. S. 2d 339 [1939].

§ 28. **Meetings.**—The first meeting of the council in each year shall be held on the first Wednesday after the first Monday of January at noon. The stated and occasional meetings of the council shall be held as provided by its rules; provided, however, that at least two stated meetings shall be held each month, except in its discretion in July and August. A majority of the councilmen shall constitute a quorum. (*Derived from former* § 28 *as amended by L. L.* 1940, *No.* 147.)

§ 29. **Special meetings.**—The mayor may at any time call special meetings of the council. He shall also call a special meeting when a requisition for that purpose signed by five councilmen has been presented to him. Not less than one day before a special meeting is held, notice of the time thereof and of the business proposed to be transacted, signed by the mayor, shall be published in the City Record, and at the same time the city clerk shall cause a copy of such notice to be left at or sent by post to the usual place of abode or of business of each councilman; but want of service of a notice upon any councilman shall not affect the validity of the meeting. No business shall be transacted at such special meetings other than that specified in the notice relating thereto. (*Derived from former* § 33 *as amended by L.* 1950, *ch.* 434.)

**CASE NOTES**

¶ 1. Where the City Council met on the day when the notice of meeting was published but adjourned until the next day, proceedings taken on the later day were valid. There was a substantial compliance with the notice requirements of former § 33.—Whalen v. Wagner, 2 Misc. 2d 89, 152 N. Y. S. 2d 386 [1956]; aff'd 3 A. D. 2d 936, 163 N. Y. S. 2d 225 [1957]; aff'd 4 N. Y. 2d 575, 176 N. Y. S. 2d 616, 152 N. E. 2d 54 [1958].

§ 30. **Vice-chairman.**—The council shall elect from among the councilmen a vice-chairman, who shall possess the powers and perform the duties of the president of the council when the president is absent or while the president is acting as mayor, or when a vacancy occurs in the office of the president, and the vice-chairman shall, during such times, have the right to vote only in case of a tie and shall be a member of every board of which the president of the council is a member by virtue of his office, except that such vice-chairman shall not be a member of the board of estimate unless the president of the council is acting as mayor under subdivision b of section ten or in case of the failure of a person elected as president of the council to qualify or a vacancy in the office caused by the president's resignation, removal, death or permanent inability to discharge his powers and duties. In any such event, the vice-chairman shall act as president of the council with all the powers and duties of said office. (*Derived from former* § 29 *as amended by L.* 1950, *ch.* 434.)

CROSS REFERENCE: General City Law § 2-a provides that Vice Chairman of Council succeeds to office of President of Council for balance of term.

## CASE NOTES

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Adoption of rules, ¶ 7
Election of vice-chairman; method, ¶¶ 1–3
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Term of office, ¶¶ 4–6

¶ 1. Former § 29 (now § 30) of the Charter, providing for "election" of a vice-chairman, did not require that the election be consummated by adoption of a resolution, and the method adopted, that of balloting, thus permitting the expression of a choice among several nominees, would seem to have been proper.—Morris v. Cashmore, 253 App. Div. 657, 3 N. Y. S. 2d 624 [1938], aff'd without opinion, 278 N. Y. 730.

¶ 2. Considering the provisions contained in the former charters, and fact that in the Charter there were many instances where a particular number of votes was specified, fair conclusion was that in omitting similar specifications as to election of a vice-chairman the Charter intended that general parliamentary rules were to apply, and hence a majority of a quorum of the Council were empowered to elect a vice-chairman, appoint a committee, and adopt rules.—Id.

¶ 3. Since the Council was acting under Reed's Rules of Parliamentary Procedure and such rules provided that an officer of a legislative body might be elected by a plurality only where a rule providing for such election had been adopted, and the rules in force at the time required a majority of the quorum to act, the casting of 13 votes for a particular candidate for vice-chairman was insufficient to elect that candidate where there were 26 councilmen present at the roll call.—Id.

¶ 4. Office of vice-chairman *held* intended to carry with it tenure of office for the full term for which the individual had been elected to the Council, and the Council could not subsequently rescind its vote and thus remove the vice-chairman.—Morris v. Cashmore, 253 App. Div. 657, 3 N. Y. S. 2d 624 [1938] aff'd 278 N. Y. 730.

¶ 5. State Constitution, Art. X, § 3, limiting the duration of office "during the pleasure of the authority making the appointment", applies only where the authority is continuous, whereas former § 29 (now § 30) of the Charter refers only to a single election.—Id.

¶ 6. Examination of Charter provisions concerning duties of vice-chairman clearly indicate that selection of person to fill such place was to be deemed more than the temporary designation of a member who was to be unseated at the whim of the body, and that, having once elected the vice-chairman, the Council had exhausted its powers.—Id.

¶ 7. By § 31 of the Charter, the adoption of rules is left entirely to the determination of the Council, the matter is procedural, and the general parliamentary law was clearly intended to prevail. However, rules are always within control of the majority and may be changed from time to time by a majority vote.—Id.

¶ 8. Vice-chairman of the Council *held* not entitled to sit in the Board of Estimate during absences of the Mayor from the City, where such absences continue for less than thirty days and where the Mayor has designated the Deputy Mayor to sit in his place during such temporary absences. Nothing in the Charter limited the exercise of the Mayor's power to delegate to the Deputy Mayor the right to sit as a member of the Board in his place to those occasions when the Mayor was within the confines of the City, but a contrary intention was evidenced by provision of the Charter authorizing the Mayor to delegate designated powers to his deputy either before or after commencement of the Mayor's absence, and by former § 9 of the Charter, which excepts certain powers of the Mayor which might not be delegated to the deputy but omits any statement that the right to deputize should cease during the Mayor's absence or sickness. Also, by § 10, subd. b of the Charter the president of the Council is not permitted to exercise any powers of the Mayor which are lawfully delegated to the Deputy Mayor. Requirement of Charter that president of the Council

act as presiding officer of the Board of Estimate during Mayor's absence did not conflict with authority of Mayor to authorize deputy to sit for him during his absence, since the president presides on such occasions because the statute so directs and not because he is acting as Mayor. Provisions of § 10, concerning right of president to act for Mayor during Mayor's absence from City, and those of § 63 concerning his right to preside at meetings of the Board, are reconcilable with right of deputy to sit in the Board during the Mayor's absence.—Sharkey v. La Guardia, 259 App. Div. 557, 19 N. Y. S. 2d 965 [1940], which reversed 173 Misc. 567, 18 N. Y. S. 2d 306, aff'd without opinion, 283 N. Y. 725.

§ 31. **Sergeant-at-arms; procedure; expulsion of members.**—The council may elect a sergeant-at-arms and such research, drafting, clerical and other assistants as are needful to its purposes, within the appropriation provided therefor. The council shall determine the rules of its own proceedings; it may appoint committees and shall appoint a finance committee properly staffed to consider budgetary and related matters; shall be the judge of the election returns and qualifications of its own members, subject, however, to review by any court of competent jurisdiction; shall keep a journal of its proceedings; shall sit with open doors; shall have authority to compel the attendance of absent members and to punish its members for disorderly behavior, and to expel any member, after charges and a hearing, with the concurrence of two-thirds of all the councilmen. (*Derived from former* § 30. *Amended by L.* 1962, *ch.* 998, § 4.)

**CASE NOTES**

¶ 1. The right of the City Council to rule on the qualifications of its members impliedly carries with it the equal right to incur any expense reasonably necessary to its exercise and to obligate the City to pay such expense. Thus, the plaintiffs, court stenographers, were entitled to recover from the City the reasonable value of services furnished to the Council during the course of investigations conducted to determine the eligibility of persons to membership in the Council.—Chambers v. City of New York, 286 N. Y. 308, 36 N. E. 2d 313 [1941].

¶ 2. The adoption of rules is, by this section, left entirely to the determination of the Council. Thus, the action of the Council in electing a vice-chairman by balloting and not consummating the election by the adoption of a resolution was valid. A majority of a quorum of the Council was empowered to elect a vice-chairman and the casting of 13 votes for the vice-chairman at a meeting at which 25 councilmen were present was sufficient.—Morris v. Cashmore, 253 App. Div. 657, 3 N. Y. S. 2d 624 [1938], aff'd 278 N. Y. 730, 17 N. E. 2d 143.

§ 32. **City clerk; duties**—a. The council shall appoint a clerk, who shall perform such duties as may be prescribed by law. The clerk so appointed shall be the city clerk and the clerk of the council, and shall hold his office for six years and until his successor shall be appointed and has qualified. The city clerk shall have charge of all the papers and documents of the city, except such as are by law committed to the keeping of the several departments or of other officers. He shall keep the record of the proceedings of the council. He shall also keep a separate record of all the local laws of the city in a book to be provided for that purpose, with proper indices, which book shall be deemed a public record of such local

laws, and each local law shall be attested by said clerk. He shall also keep a separate and public record which shall be known as the "street franchise book." In such record he shall forthwith file a copy duly certified by or under the authority of the board of estimate granting, making or adopting the same, of every grant, franchise, contract or resolution in the nature of a franchise which shall hereafter be granted, made or adopted by said board, together with copies of all formalities of the execution or verification thereof, and shall forthwith, after so filing the same, transmit to the board a copy of such record, with a minute of the date and volume thereof, duly certified by him. Copies of all papers duly filed in his office, and transcripts thereof, and of the record of proceedings of the council and copies of the laws, ordinances and local laws of the city, certified by him under the corporate seal of the city, shall be admissible in evidence in all courts and places in the same manner and for the same purposes as papers or documents similarly authenticated by the clerk of a county. The city clerk may be removed on charges by a two-third vote of all the councilmen, subject, however, to judicial review. He shall collect such fees as shall be fixed by law.

b. It shall be the duty of the city clerk to keep open for inspection at all reasonable times the records and minutes of the proceedings of the council. He shall keep the seal of the city, and his signature shall be necessary to all grants and other documents, except as otherwise provided by law. In the absence of the clerk by sickness or otherwise, his first deputy shall be vested with and possessed of all the rights and powers and be charged with all the duties by law imposed upon the clerk. In the absence of the first deputy clerk, the city clerk by an instrument in writing may designate one of his clerks, who shall be vested with and possessed of all the rights and powers and charged with all the duties by law imposed upon said clerk. The signature of the person so designated shall be in place of and of the same force and effect as the signature of the city clerk. Such designation shall be made in triplicate and shall be duly filed and remain of record in the city clerk's office and in the offices of the mayor and of the comptroller, but the designation shall be for a period not exceeding three months and shall not extend beyond the city clerk's term of office and shall be at all times revocable by the city clerk. (*Derived from former* § 31 *as amended by L. L.* 1958, *No.* 19.)

§ 33. **Councilmen not to be employees of agencies.**—No councilman shall be an employee of any agency in any capacity whatever. (*Derived from former* § 32.)

§ 34. **Vote required for local law or resolution.**—Except as otherwise provided by law, no local law or resolution shall be passed except by at least the majority affirmative vote of all the councilmen. (*Derived from former* § 34 *as amended by L.* 1943, *ch.* 710, § 560, *pursuant to L.* 1943, *ch.* 710, *Part* 8, § 9; *L.* 1944, *ch.* 606, § 6, *and L.* 1945, *ch.* 338, § 64. *Amended by L.* 1962, *ch.* 998, § 5.)

CASE NOTES

¶ 1. Election of a vice-chairman, appointment of committees and adoption of rules by the Council were not "resolutions" within meaning of § 34 of the Charter, and hence § 34 was not construable as limiting the power of the majority of the quorum to perform such acts, nor as authorizing the Mayor under § 38 to veto such acts.—Morris v. Cashmore, 253 App. Div. 657, 3 N. Y. S. 2d 624 [1938], aff'd 278 N. Y. 730.

¶ 2. General Construction Law, § 41, providing that a majority of any group of public officers might perform and exercise the powers of the body, did not limit right of the Council to act by a majority of a quorum in intracameral matters, such as the election of a vice-chairman, appointment of committees, and adoption of rules.—Id.

§ 35. **Ayes and noes.**—On the final passage of a local law or resolution the question shall be taken by ayes and noes, which shall be entered in the journal of proceedings. (*Derived from former* § 35.)

§ 36. **Local laws; subject and title.**—Every local law shall embrace only one subject. The title shall briefly refer to the subject-matter. (*Derived from former* § 36.)

CASE NOTES

¶ 1. A proposition submitting to the electorate the question whether the Charter should be amended to reorganize county government by abolishing the county offices of sheriff and register of deeds and creating city-wide appointive offices of City Sheriff and City Register was not invalid on the ground that the proposition embraced more than one subject, since the subject matter was merely the county reorganization.—Burke v. Kern, 287 N. Y. 203, 38 N. E. 2d 500 [1941], rev'g 263 App. Div. 834, 31 N. Y. S. 2d 1015.

§ 37. **Local laws; passage.**—No local law shall be passed until it shall have been in its final form and upon the desks of the councilmen at least seven calendar days, exclusive of Sundays, prior to its final passage, unless the mayor shall have certified as to the necessity for its immediate passage and such local law be passed by the affirmative vote of two-thirds of all the councilmen. (*Derived from former* § 37.)

CASE NOTES

¶ 1. Pursuant to § 110 of the Construction Law, and the plain meaning of this section, the day of passage is excluded in determining whether this section has been complied with.—Matter of London, 22 Misc. 2d 360, 195 N. Y. S. 2d 550 [1959]; aff'd 13 A. D. 2d 479, 214 N. Y. S. 2d 647 [1961].

§ 38. **Local laws; action by mayor.**—a. Every local law certified by the clerk of the council, after its passage by the council, shall be presented to the mayor for approval.

b. If the mayor approve the local law, he shall sign it and return it to the clerk; it shall then be deemed to have been adopted. If he disapprove it, he shall return it to the clerk with his objections stated in writing and the clerk shall present the same with such objections to the council at its next regular meeting and such objec-

tions shall be entered in its journal. The council within thirty days thereafter may reconsider the same. If after such reconsideration the votes of two-thirds of all the councilmen be cast in favor of repassing such local law, it shall be deemed adopted, notwithstanding the objections of the mayor. Only one vote shall be had upon such reconsideration. The vote shall be taken by ayes and noes, which shall be entered in the journal. If within forty-five days after the local law shall have been presented to him, the mayor shall neither approve nor return the local law to the clerk with his objections, it shall be deemed to have been adopted in like manner as if he had signed it. At any time prior to the return of a local law by the mayor, the council may recall the same and reconsider its action thereon. (*Derived from former* § 38.)

## CASE NOTES

¶ 1. It was not intended by former § 38 of the Charter that the Mayor should have the power of veto over such matters as the election of a vice-chairman, appointment of committees, or adoption of rules by the Council.—Morris v. Cashmore, 253 App. Div. 657, 3 N. Y. S. 2d 624 [1938], aff'd without opinion, 278 N. Y. 730.

¶ 2. Resolution of Council designating a special committee under Charter § 43 to determine whether city broadcasting station should be abolished, was not a local law or resolution as defined by Charter § 21 or 26 and hence approval of mayor as required by former §§ 38, 39 and 40 (now §§ 38 and 39) was not required.—Matter of Radio Station WNYC (Novik), 169 Misc. 502 N. Y. S. 2d 297 [1938] aff'd 255 App. Div. 844, 7 N. Y. S. 2d 998, aff'd 280 N. Y. 629.

§ 39. **Local laws; referendum.**—A local law shall be submitted for the approval of the electors at the next general election held not less than sixty days after the adoption thereof, and shall become operative as prescribed therein only when approved at such election by the affirmative vote of a majority of the qualified electors of the city voting upon the proposition, if it:

1. Abolishes or changes the form or composition of the council or the board of estimate or increases or decreases the number of votes any member is entitled to cast.

2. Changes the veto power of the mayor.

3. Changes the law of succession to the mayoralty.

4. Abolishes an elective office, or changes the method of nominating, electing or removing an elective officer, or changes the term of an elective officer, or reduces the salary of an elective officer during his term of office.

5. Abolishes, transfers or curtails any power of an elective officer.

6. Creates a new elective office.

7. Changes a provision of law relating to public utility franchises.

8. Changes a provision of law relating to the membership or terms of office of the city civil service commission.

9. Reduces the salary or compensation of a city officer or employee or increases his hours of employment or changes his work-

ing conditions if such salary, compensation, hours or conditions have been fixed by a state statute and approved by the vote of the qualified electors of the city; and no provision effecting such reductions, increases or changes contained in any local law or proposed new charter shall become effective unless the definite question with respect to such reductions, increases or changes shall be separately submitted and approved by the affirmative vote of a majority of the qualified electors voting thereon.

10. Provides a new charter for the city.

11. Transfers powers vested by this charter in an agency the head of which is appointed by the mayor to an agency the head of which is not so appointed or vice versa.

12. Dispenses with a provision of this charter requiring a public notice and hearing as a condition precedent to official action.

13. Dispenses with a requirement of this charter for public bidding or for public letting of contracts.

14. Changes a provision of this charter governing the classes or character of city bonds or other obligations, the purposes for which or the amount in which any class of obligations may be issued.

15. Changes a provision of this charter relating to the audit of the city's accounts.

16. Removes restrictions in this charter on the sale, lease or other disposition of city property.

17. Curtails the powers of the city planning commission, or changes the vote in the council or the board of estimate required to take action without or contrary to the recommendation of the city planning commission.

18. Repeals or amends this section or any of the following sections of this charter; sections forty-two, one hundred ninety-one, one hundred ninety-two, one hundred ninety-three, one hundred ninety-nine, two hundred, two hundred twenty-five, eleven hundred six, eleven hundred seven, eleven hundred eight, eleven hundred ten, eleven hundred eleven, eleven hundred fifteen, eleven hundred sixteen, eleven hundred seventeen, eleven hundred eighteen, and eleven hundred twenty-three. (*Derived from former* § 40.)

## CASE NOTES UNDER FORMER § 39

¶ 1. Order directing Board of Elections to disregard initiative petitions and a proposed local law amending the Charter so as to provide for payment of a salary bonus to the uniformed members of the Police and Fire Departments of the City, and to omit a referendum therefor from the official ballots and voting machines for use at the general election, was affirmed on ground the proposed local law was not an amendment to the Charter within the meaning of City Home Rule Law § 19a. The only law actually proposed to be amended was the Administrative Code, which was enacted by the Legislature and might only be amended as provided by former § 39 of the Charter, or by the Legislature itself.—Astwood v. Cohen, 291 N. Y. 484, 53 N. E. 2d 358 [1944].

¶ 2. Local Law No. 68 of 1938 which purported to amend Code § 82d7–15.0 by providing that Christmas trees and toys could be sold on a sidewalk during December was violative of Charter § 42 which requires a license for sidewalk displays. If the local law was intended as an amendment to the Charter it was violative of this sec-

tion since the local law was neither approved by nor presented for approval to the Board of Estimate.—People (McLees) v. Berner, 170 Misc. 501, 10 N. Y. S. 2d 339 [1939].

¶ 3. A local law affecting the compensation of probationary patrolmen was not subject to mandatory referendum although it reduced the employees compensation where the compensation of patrolmen was fixed by the Administrative Code, a state statute, which was never a subject of local referendum.—Allmendinger v. City of New York, 182 Misc. 142, 46 N. Y. S. 2d 641 [1944], aff'd 269 App. Div. 691, 54 N. Y. S. 2d 392 and 295 N. Y. 644, 64 N. E. 2d 712.

CROSS REFERENCE: See City Home Rule Law, §§ 15–17 re local laws subject to mandatory and permissive referenda.

§ 40. **Reconsideration.**—At any time prior to the election at which a local law is to be submitted to the electors for approval pursuant to this charter, the council, not later than fifteen days prior to the election, may reconsider its action thereon and repeal such local law without submission to the mayor, whereupon the proposition for its approval shall not be submitted at such election, or if submitted the vote of the electors thereon shall be without effect. (*Derived from former* § 41.)

§ 41. **Power of investigaiton.**—The council shall have power from time to time to appoint a special committee to investigate any matters relating to the property, affairs or government of the city or of any county within the city. Any such committee or a subcommittee thereof shall have power to require the attendance and examine and take testimony under oath of such persons as it may deem necessary and to require the production of books, accounts, papers and other evidence relative to the inquiry. (*Derived from former* § 43.)

## CASE NOTES

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¶ 1. Resolution of Council designating a special committee under Charter former § 43 (now § 41) to determine whether city broadcasting station should be abolished, was not a local law or resolution as defined by Charter §§ 21 or 26, and hence approval of Mayor as provided in former §§ 38, 39 and 40 (now §§ 38 and 39) was not required.—Matter of Radio Station WNYC (Novik), 169 Misc. 502, 7 N. Y. S. 2d 297 [1938], aff'd without opinion, 255 App. Div. 844, 7 N. Y. S. 2d 998, and 280 N. Y. 629.

¶ 2. Resolution of the Council authorizing an investigation of the Municipal Civil Service Commission did not exceed the power of the Council because the stated purpose of the inquiry was not to bring about remedial legislation but solely to lay the foundation for a petition to the Mayor by the Council calling for removal of administrative officials.

Former § 43 (Now § 41) expressly authorized such an investigation.—In re Smith (Kern) 175 Misc. 937, 26 N. Y. S. 2d 560 [1940], aff'd without opinion, 260 App. Div. 1003, 24 N. Y. S. 2d 992 and 285 N. Y. 632, 33 N. E. 2d 556.

¶ 3. Aside from the express right to investigate any matter relating to the property, affairs or government of the City conferred by former § 43 (now § 41) of the Charter upon the Council of the right of the Council to pass laws regulating the administration of relief insofar as it was conducted by the City or with City funds necessarily implied the right of the Council to direct an investigation of the administration of relief in the City, and the action of the Council in conducting such investigation was equivalent to that of the legislature, since the Council, where it has jurisdiction, may act for the locality precisely as the legislature may act for the state. Hence, in issuing subpoenas directed to the Commissioner and an employee of the Department of Investigation, the Supreme Court merely acted as the implement of the legislature, and it was not for the Supreme Court to interfere with the legislative action on the complaint that the broad nature of the subpoenas would interfere with the proper conduct of a similar investigation being made by the Commissioner at the Mayor's behest. Furthermore, there would seem no valid reason why information obtained by the Commissioner should not be available to the Council, or why the Commissioner's information should be confidential as against a legislative inquiry.—Herlands v. Surpless, 258 App. Div. 275, 16 N. Y. S. 2d 454 [1939], aff'g 171 Misc. 914, 14 N. Y. S. 2d 312; aff'd 282 N. Y. 647, 26 N. E. 2d 800.

¶ 4. In view of power of the Council to legislate upon matters affecting the health, safety and welfare of civil service employees, and its right to initiate a referendum to change the membership of the Municipal Civil Service Commission, the Council *held* to possess the requisite authority to investigate the Commission, notwithstanding the legislature had set up a complete system for the administration of the Civil Service. However, the Council might not interfere with the merit system itself.—In re Smith (Kern), 175 Misc. 937, 26 N. Y. S. 2d 560 [1940]; aff'd, without opinion, 260 App. Div. 1003, 24 N. Y. S. 2d 992, and 285 N. Y. 632, 33 N. E. 2d 556.

¶ 5. Written report made to the Mayor by City employee whom the Mayor had directed to investigate matters relating to the personnel at the Information Center, *held* subject to subpoena by a special committee of the Council investigating affairs of the Municipal Civil Service Commission, since the scope of former § 43 (now § 41) of the Charter, bestowing upon the Council the power to appoint a special committee to investigate City affairs and granting it power to require the attendance and examine such persons as it might deem necessary, is broad enough to apply to the Mayor. There was not apparent in the Charter an intention by the legislature to keep in a constant state of isolated independence the functions of the Mayor and the Council, and moreover the principle of the separation of powers applies only to the sovereign authority, and not to the government of cities.—La Guardia v. Smith, 288 N. Y. 1, 41 N. E. 2d 153 [1942], aff'g 262 App. Div. 708, 27 N. Y. S. 2d 992, which aff'd 176 Misc. 482, 27 N. Y. S. 2d 321.

¶ 6. Powers conferred upon a special committee appointed by the Council to investigate the Municipal Civil Service Commission might validly be exercised by a single member of the committee, where the Council itself expressly vested each member of the committee with the authority of the entire committee. Section 899 of the Charter providing that whenever any act was authorized to be done by any board or other body, the action of the majority of the board or body should be deemed the act of the entire board or body, and that a majority of the board or body should constitute a quorum thereof, applied only to situations where confusion might otherwise result as to the number of members of the board or body necessary to constitute a quorum, and as to the number necessary to act on behalf of the committee.—In re Smith (Kern), 175 Misc. 937, 26 N. Y. S. 2d 560 [1940]; aff'd, without opinion, 260 App. Div. 1003, 24 N. Y. S. 2d 992, and 285 N. Y. 632, 33 N. E. 2d 556.

¶ 7. Inasmuch as the Council had the power in the first instance to authorize an investigation by a committee of one, it possessed the power

to authorize a subcommittee of one to conduct hearings in aid of such investigation.—Id.

¶ 8. The subcommittee of one member of the committee of the Council investigating the Municipal Civil Service Commission, *held* authorized to examine witnesses at private rather than public hearings, since such power to examine witnesses at private hearings was expressly conferred upon the Commissioner of Investigation by § 803 of the Charter and framers of the Charter must have intended that the Council would have the same power, the requirement of a public hearing would hamper investigation and permit the public airing of reckless charges, and moreover the committee had stated the Civil Service Commissioner would subsequently be accorded an opportunity to testify at a public hearing before the full committee.—Id.

¶ 9. Provisions of former § 30 (now § 31) of the Charter that the Council shall sit with open doors referred only to legislative sessions of the Council and not to fact-finding investigations by committees of the Council.—Id.

¶ 10. Inasmuch as the Corporation Counsel and the Commissioner of Investigation are heads of executive departments and the obvious design of the Charter was to make the Council an independent body with power to investigate the executive department, the choice of counsel to conduct an investigation lay with the Council, and it was not required to call upon the Corporation Counsel for legal assistance.—Barry v. City of New York, 175 Misc. 712, 25 N. Y. S. 2d 27 [1941]; aff'd 261 App. Div. 957, 27 N. Y. S. 2d 425.

¶ 11. A stenographer engaged by a special committee of the city council to report the proceedings of the committee in its investigation of emergency unemployment relief was entitled to recover from the city for the value of his services notwithstanding the failure of the board of estimate to make an appropriation for the necessary expenses of the committee. Former § 891 (now § 1111) of the Charter which prohibits an agency from incurring a liability in excess of the amount appropriated therefor and former §§ 121–123 which provide that the board of estimate has, in the first instance, the duty to make appropriations for the governmental purposes of the city, did not preclude the grant of a judgment to plaintiff because the city council did not act as a departmental agency when it exercised its legislative powers under this section.—Smith v. City of New York, 289 N. Y. 517, 47 N. E. 2d 35 [1943].

¶ 12. Attorney who sought to recover from the City of New York for services rendered to the City while acting as counsel to a special committee of the City Council appointed to investigate the Municipal Civil Service Commission, was merely obliged under the Charter to present his bill for audit to the Comptroller, and was not required to submit a statement of his charges for audit to either the Council or the special committee (Charter § 93, subd. C).—Ellis v. City of N. Y., 180 Misc. 968, 46 N. Y. S. 2d 363 [1943], aff'd without opinion, 269 App. Div. 685, 54 N. Y. S. 2d 380, and 295 N. Y. 780, 66 N. E. 2d 297.

¶ 13. The hiring of plaintiff-attorney by a special committee of the City Council appointed to investigate the Municipal Civil Service Committee, implied a promise to pay for the services performed, and any casual remark thereafter made by the attorney during the course of the argument of a motion or in the examination of a witness would not impair the terms of the original undertaking wherein he absolved the individual members of the committee of personal liability for his services, but stated that such absolution was without prejudice to his right to secure compensation from the City.—Id.

¶ 14. Legal assistants to counsel to special committee appointed to investigate the affairs of the Municipal Civil Service Commission, *held* entitled to recover for services rendered by them, where it was clear that the intent was that they should be compensated for such services.—Ellis v. City of N. Y., 109 (93) N. Y. L. J. (4-22-43) 1562, Col. 7 T.

¶ 15. Attorney who had rendered professional services as attorney to a special committee of the New York City Council investigating alleged abuses in the administration of the Municipal Civil Service Commission, *held* entitled to recover the reasonable value of his services, even though the special committee was not expressly authorized to conduct its

investigation, and even though no request for an appropriation was made to the Board of Estimate, and no appropriation was actually received. The Charter apparently imposes no limitation on the power of the City Council to contract liability it such course is necessary to the discharge of its legislative functions as defined in the Charter.—Gruss v. City of New York, 179 Misc. 1053, 40 N. Y. S. 2d 816 [1943].

¶ 16. An attorney employed by special committee of Council in an investigation of City departments was entitled to recover from the City for services rendered and no appropriation by the Board of Estimate was necessary since the Council possessed express power to appoint investigating committees under former Charter §§ 21 and 43 (now §§ 21 and 41). The resolution of the Council appointing the special committee which provided that if in the judgment of the City an appropriation of funds was needed for anticipated expenses of the committee be necessary, the request should be made to the Board of Estimate should not be construed as a recognition by the Council of its own lack of power with respect to the expenditure of money and as a command by the Council to the committee not to incur expenses without approval of the Board. The Council was not an "agency" of the City within the meaning of former § 89 (now § 1111) of the Charter prohibiting an agency from incurring any expense in excess of the amount authorized.—Barry v. City of New York, 175 Misc. 712, 25 N. Y. S. 2d 27 [1941]; aff'd 261 App. Div. 957, 27 N. Y. S. 2d 425.

¶ 17. The testimony elicited of a civil service employee who had been subpoenaed to appear at a public hearing before a committee of the City Council which was investigating the Municipal Civil Service Commission could not be called public criticism of the municipal civil service commissioners and punished as such. Hence, the determination of the Commission dismissing the employee for making false public statements impugning the integrity of the Commission to the prejudice of the public service was annulled, where the charges against the employee could not be supported except by a tortured interpretation of the answers made as being in conflict with statements made two years earlier before a commissioner.—Berg v. Marsh, 268 App. Div. 1, 48 N. Y. S. 2d 285 [1944], aff'd 294 N. Y. 713, 61 N. E. 2d 450.

¶ 18. Civil Practice Act § 352, privileging communications between physician and patient, may be asserted whenever the power of the court is invoked in manner authorized by Civil Practice Act Art. 33 to compel a witness to disclose information which under other provisions of the same article he is forbidden to disclose. Hence New York City Director of Hospitals and the Medical Superintendent of Lincoln Hospital, on basis of § 352, could refuse to obey subpoenas issued to them by a committee of the Council investigating into management of the hospital pursuant to authority of former Charter § 43 (now § 41), where the subpoenas required production of records and complaints with respect to interns and other hospital physicians and with respect to medical or other treatment furnished in the hospital and containing data relating to condition of patients or medical or other treatment furnished them.—New York City Council v. Goldwater (Lincoln Hospital), 284 N. Y. 296 [1940], rev'g 259 App. Div. 883, 20 N. Y. S. 2d 717, which affirmed 174 Misc. 389, 20 N. Y. S. 2d 712.

§ 42. **Amendment of charter.**—Amendments to this charter may be adopted by either of the following methods:

1. By local law adopted in accordance with the provisions of this charter.

2. By vote of the electors of the city upon the petition of electors of the city, an amendment may be adopted

(a) in relation to the manner of voting for the elective officers of the city or any of them, or

(b) abolishing any elective office or offices or creating a new office or offices, including if so provided a transfer of powers to the newly created office or offices or a disposition of the

powers of any office abolished, but no such amendment shall repeal or change any limitations contained in this charter on any power.

(c) Such amendment may be adopted in the manner following:

(1) Not less than fifty thousand qualified electors of the city may file in the office of the city clerk a petition for the submission to the electors of the city at the next general election therein held not less than sixty days after filing of such petition of such a proposed amendment or amendments to the charter to be set forth in full in the petition. The petition may be made upon separate sheets and the signatures of each shall be authenticated in the manner provided by the election law for the authentication of designating petitions. The several sheets so signed and authenticated when fastended together and offered for filing shall be deemed to constitute one petition. A signature made earlier than one hundred twenty days before the filing of the petition shall not be counted. If within ten days after the filing of such petition a written objection thereto be filed with the officer with whom such petition is required by law to be filed, the supreme court or any justice thereof of the first or second judicial district or of the county of Queens shall determine any question arising thereunder and make such order as justice may require. Such proceedings shall be heard and determined in the manner prescribed by the election law in relation to judicial proceedings thereunder.

(2) If such proposed amendment or amendments receive the affirmative vote of the majority of the qualified electors of the city voting thereon, it or they shall take effect as prescribed therein.

3. In such other manner as may be provided by law. (*Derived from former* § 44.)

CROSS REFERENCE: Power to amend charter by initiative, see City Home Rule Law, § 19-a.

## CASE NOTES

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¶ 1. Provisions of the Election Law relative to designating petitions, requiring the furnishing of the address, and assembly and election districts of signatories to a petition, *held* to apply to an initiative petition filed pursuant to former Charter § 44a for purpose of submitting to the City voters an amendment to the Charter abolishing offices for sheriff and registrar and substituting a single sheriff and a single registrar to be appointed by the Mayor. This conclusion was necessary because former § 44a merely required that the petition be signed by 50,000 qualified electors and that

their signatures be authenticated, and consequently there would be no way of identifying the signatories if compliance with the Election Law were not required.—Phillips v. Hubbard, 284 N. Y. 152, 29 N. E. 2d 969.

¶ 2. A "qualified elector", within the meaning of former Charter § 44, is a person qualified as to citizenship, age and residence, as provided in State Constitution, Art. II, § 1 and Election Law § 150, to exercise, at a particular election, the elective franchise within the City of New York.—Id.

¶ 3. Signatures to initiative petition for amendment of the Charter as to which the statement of place of registration and authentication of that statement were false, were invalid and could not be counted, notwithstanding the general statement in the petition that such signers were qualified electors within the City of New York, where no evidence thereof was furnished except the admittedly false statement. Existence of facts necessary to give the petition vitality must be shown and could not be presumed.—Id.

¶ 4. Proposition setting forth a proposed amendment to the Charter, *held* properly submitted to the voters in accordance with former § 44 of the Charter rather than with City Home Rule Law § 19a, which would have required some 213,000 signatures to the initiating petition rather than the 50,000 signatures required by former § 44. Section 19a was enacted after approval of the Charter, which contained former § 44, and moreover § 19a is a general provision applying to the State as a whole, and the rule is that such a law does not repeal by implication a special provision applying to a particular portion of the State. Also, City Home Rule Law § 33 provides that it was not intended to repeal by implication any existing provision of law, § 36 provides that all existing charters and local laws, so far as not inconsistent with the Chapter, should continue in force, and § 19a by its very terms does not set up an exclusive method of enactment.—Burke v. Kern, 287 N. Y. 203 [1941], rev'g 263 App. Div. 834, 31 N. Y. S. 2d 1015.

¶ 5. City Clerk *held* properly to have refused to submit to the electors of the City of New York a proposed amendment to the City Charter to add a new chapter providing for creation of a new Department of Transportation of the City, at the head of which should be a Commissioner of Transportation, prescribing the authority, duties and powers of the Commissioner and fixing a rate of fare at not more than 5 cents, etc. Any proposed amendment which would take from the Board of Transportation and the Mayor the powers granted under the Rapid Transit Act would conflict with former § 375 of the Charter, and consequently such an amendment would be invalid under provisions of former § 44, subd. 2 of the Charter prohibiting any amendment which would repeal or change any limitations contained in the chapter or any power.—Connolly v. Stand, 192 Misc. 872, 83 N. Y. S. 2d 445 [1948], aff'd 274 App. Div. 877, 82 N. Y. S. 2d 922, aff'd 298 N. Y. 658, 82 N. E. 2d 399.

¶ 6. The City Home Rule Law cannot be distorted into a mere addendum to former § 44 of the New York City Charter. Section 30 of the Home Rule Law establishes clearly that no action can be taken under it which would conflict with the existing Rapid Transit Law. Furthermore, the argument that transit is now a matter exclusively of city concern and not of state legislation, is fallacious.—Id.

¶ 7. An order directing board of elections to disregard initiative petitions in a proposed local law was proper where the proposed local law was not an amendment to the Charter within the meaning of City Home Rule Law § 19a. The only law actually proposed to be amended was the Administrative Code, which was enacted by the Legislature and might only be amended as provided by former § 39 of the Charter or by the Legislature itself.—Astwood v. Cohen, 291 N. Y. 484, 53 N. E. 2d 358 [1944].

¶ 8. The enactment of City Home Rule Law § 19-a did not effect a repeal of former § 44 by implication or by necessary intendment. Thus, a proposition signed by "not less than 50,000 qualified electors of the city" was validly submitted although § 19-a of the City Home Rule Law requires that a petition amending a City Charter must be signed by at least 10% of the total number of votes cast for the governor at the last gubernatorial election.—Matter of Albert (Kern), 287 N. Y. 666, 39 N. E. 2d 289, rev'g 263 A. D. 48, 31 N. Y. S. 2d 418 and aff'g 177 Misc. 852, 32 N. Y. S. 2d 310 [1941].

§ 43. **Submission of local laws or amendments.**—A proposition for the submission of a local law or an amendment to this charter for the approval of the electors pursuant to this charter shall contain the title of such local law or a brief statement of the subject of such amendment. The city clerk with the advice of the corporation counsel shall prepare an abstract of such local law or amendment concisely stating the title or subject and the purpose and effect thereof, and forthwith shall transmit such proposition and such abstract to the election officers charged with the duty of publishing the notice of and furnishing the supplies for such election. A sufficient number of copies of such abstract shall be printed, delivered with the other election supplies and distributed to the electors at the time of the registration of voters and at the election. If there be more than one such proposition to be voted upon at such election, each such proposition shall be separately and consecutively numbered. In case of a conflict between two local laws or two amendments adopted at the same election, the one receiving the largest affirmative vote shall control. (*Derived from former* § 45.)

## CASE NOTES

¶ 1. Requirement of § 45 of the Charter that a sufficient number of copies of the abstract of a proposed amendment should be delivered with the other election supplies and distributed to the electors at the time of the registration of voters and at the election, *held* to have been complied with as to distribution at time of registration by the delivery of 400 copies to each polling place on the opening day of registration week, with instructions to ask for more if needed. As to distribution on election day there was substantial compliance by placards placed in each polling place calling attention of the voters to the proposition, by having the proposition on the voting machines, and by having copies of the abstract available. Since out of over 2,000,000 voters only some 500,000 voted for or against the amendment, the printing of 1,638,400 copies of the abstract was sufficient. Also, such provision of the statute is directory only, and there was substantial compliance.—Burke v. Kern, 287 N. Y. 203, 38 N. E. 2d 500 [1941], rev'g 263 App. Div. 834, 31 N. Y. S. 2d 1015.

¶ 2. The failure of the Board of Elections to comply with the provisions of this section which provide that a sufficient number of copies of an abstract of a proposed local law amending the Charter shall be printed and distributed to the electors at the time of the registration of voters and at the election did not nullify the adoption of a proposition abolishing the office of County Sheriff and Register. There was a substantial compliance with the requirements of the section sufficient to adequately apprise the electorate of the nature of the proposition and that they were called upon to vote on the proposition on Election Day. The Board of Elections did not print a sufficient number of copies to give each one to each registrant and no copies were distributed on Election Day. However, two facsimiles were posted on Election Day.—Matter of Albert (Kern), 177 Misc. 852, 32 N. Y. S. 2d 310, aff'd 287 N. Y. 666, 39 N. E. 2d 289 which rev'd 263 App. Div. 48, 31 N. Y. S. 2d 418.

# CHAPTER 3

## BOARD OF ESTIMATE

§ 61. **Membership.**—The mayor, the comptroller, the president of the council and the presidents of the boroughs shall constitute the board of estimate. (*Derived from former* § 61.)

§ 62. **Voting in the board.**—a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast four votes, and the president of each borough shall be entitled to cast two votes.

b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board.

c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public.

d. A quorum of the board shall consist of a sufficient number of members thereof to cast twelve votes, including at least two of the members authorized to cast four votes each. (*Derived from former* § 62 *as amended by L.* 1958, *ch.* 719.)

§ 63. **Meetings.**—The first meeting of the board in every year shall be called by the mayor upon due notice. Subsequent meetings shall be called as the board shall direct. The mayor, or in his absence the president of the council, shall preside at all meetings. (*Derived from former* § 63).

§ 64. **Journal; record.**—a. The secretary of the board shall keep a journal of the meetings of the board, which shall be a public record and which shall contain a record of ayes and noes on all votes taken on any resolution or other action of the board, the text of any resolution as passed by the board, a record of any other action taken by the board in such form as may be required by the board and such other matters as may be required by the board.

b. A full stenographic record of all public meetings of the board shall be filed in the office of the secretary and shall be a public record, and a transcript thereof or of any part thereof shall be promptly furnished to any citizen or taxpayer of the city on his demand made within ninety days of the meeting on payment of reasonable fees fixed by law or by resolution of the board. (*Derived from former* § 64.)

**CASE NOTES**

¶ 1. In taxpayer's action seeking to invalidate grant by Board of Estimate of a franchise to operate buses, plaintiff could not establish, in face of recitals to the contrary in the official journal of the Board of Estimate, that the Board had not made inquiry into the money value of the franchise and the adequacy of the compensation therefor, since in awarding franchises the Board acts in a legislative capacity, and the acts of a legislative body, as recorded in its journal, may not be collaterally attacked.—Loos v. City of N. Y., 257 App. Div. 219, 13 N. Y. S. 2d 119 [1939], rev'g 170 Misc. 14, 104, 9 N. Y. S. 2d 760.

¶ 2. Plaintiff could not dispute the action of the Board of Estimate in legislating a zoning amendment by claiming that only defendant's project was then considered, when the contrary was shown by the minutes of the hearing before the Board of Estimate. Nor might the court inquire into the motive of the Board, nor go behind the duly enacted legislation of the Board in an attempt to seek a wrongful motive.—Nappi v. La Guardia, 184 Misc. 775, 55 N. Y. S. 2d 80 [1944], aff'd without opinion, 269 App. Div. 693, 54 N. Y. S. 2d 722, and 295 N. Y. 652.

§ 65. **Rules.**—The board may adopt rules for the conduct of its proceedings not inconsistent with the provisions of law, and such rules shall not be suspended at any meeting except by affirmative vote of two-thirds of the votes which all members present are entitled to cast. By unanimous vote, it may delegate to any member or committee the power to act or hold hearings on any matter within its jurisdiction other than matters included in chapters six, eight, nine and fourteen; but such delegation shall not apply to any particular matter specified by any member in a notice filed with the secretary. (*Derived from former* § 65.)

**CASE NOTES**

¶ 1. A petitioner cannot insist that the Board hear his petition on a specified date, since it is discretionary with the Board when it will hear and determine petitions.—Matter of Ungar (Wagner), 20 Misc. 2d 403, 195 N. Y. S. 2d 2 [1961].

§ 66. **Secretary.**—The secretary of the board shall be appointed and may be removed at pleasure by the board. (*Derived from former* § 66.)

§ 67. **Responsibilities of the board.**—The board shall exercise the powers and perform the duties imposed upon it by this charter, and shall:

1. Grant leases of city property and concessions for the use of city property and enter into leases of property to the city for city use.

2. Have power with the approval of the mayor to assign to use for any public purposes any city property, for whatsoever purpose originally acquired, which it may find to be no longer required for such purpose and may assign space in any city building to any agency.

3. Make recommendations to the mayor or the council in regard to matters of city policy whenever requested or on its own initiative.

4. Hold public hearings on any such matter of city policy or other matters within the scope of its responsibilities whenever requested by the mayor or required to do so by this charter or other provision of law or whenever in its judgment the public interest will be benefited thereby. (*Derived from former* §§ 69 *and* 70.)

## CASE NOTES

¶ 1. The City of New York has no power to sell or offer to sell land acquired for park purposes to private purchasers without the sanction of the legislature.—Aldrich v. City of N. Y., 208 Misc. 930, 145 N. Y. S. 2d 732 [1955].

¶ 2. A taxpayer's action to restrain the sale of Neponsit Beach Hospital land to private purchasers was not premature where the land had been surrendered to the City and although the Board of Estimate had not made a final decision on the disposition of the land, it had defeated a resolution to assign the land to the Department of Parks.—Aldrich v. City of New York, 208 Misc. 930, 145 N. Y. S. 2d 732 [1955].

¶ 3. A resolution of the board of estimate providing that no city funds should be used for the payment of wages to any employees in the Department of Welfare or other department who did not give his whole time to his duties or who engaged in any other business or employment was invalid as being legislative in nature. Neither former § 70 nor § 39 gives legislative power to the board of estimates. Furthermore, the charter does not grant power to the mayor or board of estimate who make Civil Service Rules.—Natilson v. Hodgeson, 264 App. Div. 384, 35 N. Y. S. 2d 537, aff'd without opinion 289 N. Y. 842, 47 N. E. 2d 442 [1943].

¶ 4. A resolution of the New York City Board of Estimate awarding a general construction contract to the second lowest bidder was presumptively valid and sustainable in view of the lowest bidder's practice of giving gifts to City employees.—Kayfield Construct. Corp. v. Morris, 15 A. D. 2d 373, 225 N. Y. S. 2d 507 [1962].

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¶ 1. Under Municipal Court Code § 7a, creating position of clerk to justice of the Municipal Court and providing that salaries of such clerks should be fixed by the Board of Estimate, the Board, acting at budget-making time, *held* to have possessed full authority to fix the salaries of such position at $1200 per year, notwithstanding the board had originally fixed such salaries at $3240, and the court might not substitute its discretion for that vested in the Board to so reduce the salaries.—McCarthy v. La Guardia, 172 Misc. 260, 14 N. Y. S. 2d 943 [1939], aff'd without opinion, 259 App. Div. 710, 19 N. Y. S. 2d 148, and 283 N. Y. 701.

¶ 2. Resolution of State Civil Service Commission revising salary grades of positions in the service of the counties within the City could not deprive the City Board of Estimate of its power to fix salaries.—Cannizzaro v. Joseph, 284 App. Div. 396, 131 N. Y. S. 2d 766, [1954] aff'd 306 N. Y. 828, 118 N. E. 2d 829.

¶ 3. Inasmuch as the statutory authority to fix salaries for positions such as those occupied by petitioner was vested in the Board of Estimate by County Law § 180b (1), subd. b, the classification of the positions by the Municipal Civil Service Commission into grades in accordance with salaries attaching to such positions did not preclude the Board from reducing the appropriations for such positions even though the salaries attaching to the positions might be reduced below the minimum of the grade into which the positions were theretofore classified.—Conroy v. La Guardia, 17 N. Y. S. 2d 387 [1939].

¶ 4. The original classifying and grading of petitioners by the Municipal Civil Service Commission in the position known as "Public Health Nurse", with the compensation being prescribed for the various grades, had the force and effect of law (288 N. Y. 25; Civil Service Law § 6, subd. 1), and a subsequent resolution adopted by the Municipal Commission and approved by the Mayor, but not by the State Civil Service Commission, attempting to amend the classification by changing the compensation of the grades, was of no force and effect, as it constituted an attempt to modify an existing grading resolution without the approval of the State Commission as required by Civil Service Law § 11 (284 N. Y. 504). Modification of grading is a civil service function, and the execution of such function was not within the province of the powers of the Board of Estimate under former §§ 67 and 68 of the Charter. Former § 68 of the charter expressly makes the power of the Board subject to the Civil Service Law. The amending resolution did not merely modify a maximum salary in a salary grade, but involved a change of grade as well.—Burri v. Kern, 180 Misc. 74, 39 N. Y. S. 2d 640 [1945], aff'd without opinion, 266 App. Div. 841, 42 N. Y. S. 2d 942, and 291 N. Y. 776, 53 N. E. 2d 242.

¶ 5. Where plaintiff had been duly appointed an assistant district attorney of Kings County and the District Attorney under authority of County Law § 202a, subd. 3 had fixed his salary at $7,000 per year but the appropriation made by the City budgetary authorities for the period was at the rate of $5,540 per year, plaintiff *held* entitled to recover in an action at law the difference between the amount fixed by the District Attorney and the budgetary appropriation, notwithstanding the statute providing for payment of his salary did not fix the salary in a specified amount but vested discretion in the district attorney, and not the city budgetary agency (79 App. Div. 460, aff'd 175 N. Y. 473; &c.).—Barshay v. City of N. Y., 103 (133) N. Y. L. J. (6–7–40) 2598, Col. 2 F.

¶ 6. When Chapter 637 of the Laws of 1932, which permitted the reduction of salaries of City employees during the emergency period, was repealed and the City exercised its power to reopen the budget for the year 1937, it was without power any longer to withhold from plaintiff, who was serving as President of the Board of Aldermen, the salary fixed by Greater New York Charter § 18 for such position, as plaintiff could not be compelled to take less than the salary fixed by statute (216 N. Y. 304). Such restoration was not dependent upon any discretion on part of the City, and plaintiff was entitled to be restored to a salary of $25,000 per year as fixed by statute, notwithstanding § 25 of the new Charter fixed the salary of the president of the City Council at $15,000.—Brunner v. City of N. Y., 105 (139) N. Y. L. J. (6–16–41) 2707, Col. 1 M.

¶ 7. In 1920, when the salaries of city employees were fixed by the Board of Aldermen on recommendation of the Board of Estimate, the Board of Estimate adopted a resolution recommending that "foremen" be paid $300 per year more than mechanics. Thereafter, when the Board of Estimate fixed salaries in 1945–1951 this increment was not included. Held: the plaintiffs, as "foremen" were not entitled to the additional $300 per annum because the 1920 resolution was not effective unless implemented in a budget. The budgeted salary controlled as against the nonbudgeted salary stated in the resolution.—Anderson v. City of New York, 281 App. Div. 539, 120 N. Y. S. 2d 860, aff'd 306 N. Y. 803, 118 N. E. 2d 819.

¶ 8. In view of the constitutional amendment (Const., Art. IX, § 5) providing for appointment of the County Clerk of New York County by the Appellate Division and empowering such Court to impanel jurors and to fix the salaries of his subordinates subject to revision by the Board of Estimate, upon appointment of a County Clerk on January 1, 1938 by the Appellate Division there resulted a vacancy in the position of Secretary, Division of Jurors, in the office of the County Clerk, and hence the County Clerk in filling such vacancy had to obtain permission of the budget director, and act of the budget director in fixing the salary of the Secretary at $4,000 per year was therefore conclusive notwithstanding the budget adopted on October 29, 1937 for the year 1938 and the first half of 1939 provided for a salary of $6,000 per year [277 N. Y. 84; 280 N. Y. 217; County Law §§ 180a, 180b]. That the County Clerk in making his request to the budget director for permission to appoint the Secretary at $4,000 per year assumed the validity of the new budget, which was subsequently declared invalid, was immaterial.—Cahoon v. City of N. Y., 106 (137) N. Y. L. J. (12–13–41) 1958, Col. 7 F.

¶ 9. Where plaintiff-employee's compensation was fixed in the City budget at $2,700 per annum for the year commencing July 1, 1942, but under the decision in *Petrocelli* v. *McGoldrick* (288 N. Y. 25), construing Local Law No. 45 of 1936, plaintiff's compensation was in effect increased to $3,180 per year, Board of Estimate could not, after adoption of the 1942 budget, by resolution reduce plaintiff's compensation below the amount thus fixed by law for the budget year. Local Law No. 45 as amended in 1942 was prospective in operation, and moreover once a budget is adopted by the combined action of the Budget Director, the Mayor, the Board of Estimate and the City Council, a single participant, such as the Board of Estimate, cannot alone modify it—Rasmussen v. City of N. Y., 88 N. Y. S. 2d 103 [1948], aff'd 276 App. Div. 904, 94 N. Y. S. 2d 904, and 301 N. Y. 532, 93 N. E. 2d 344.

¶ 10. Where the comptroller had ruled that auto enginemen did not come within the scope of Labor Law § 220, dealing with prevailing rate of wages, and there had as yet been no court ruling on the question, it was reasonable for the Comptroller to demand from such enginemen who wished to receive the basic salary increase of $250 per annum an agreement waiving rights under Labor Law § 220. There was no legal impediment to reducing petitioner's salary as fixed in the budget to extent of the raise granted, since such increase depended upon an implied conclusion that petitioner's position was not governed by § 220.—King v. Patterson, 124 (54) N. Y. L. J. (9–18–50) 493, Col. 6 M.

¶ 11. Amendments of Public Service Law § 14, subd. 2, in 1940 to provide that all other salaries and expenses of the Transit Commission chargeable to the City in which the Commission has jurisdiction shall be subject to the budget-making powers of the City, did not authorize the New York City Board of Estimate to change or diminish the salary rates of State employees in the service of the Commission in N. Y. C. contrary to the express provisions of the State law fixing their rate of compensation, and hence the affected employees were entitled to the increments of salary prescribed by Civil Service Law §§ 40 and 41. This construction was supported by the provision of former § 67 of the Charter vesting power in the Board of Estimate to fix salaries "except as otherwise provided in this charter *or by statute*."—Powers v. LaGuardia, 181 Misc. 624, 43 N. Y. 2d 341 [1943], modified, 267 App. Div. 807, 46 N. Y. S. 2d 95 to strike from the decretal paragraph the words "prior to the com

mencement of this proceeding." Aff'd, 292 N. Y. 695, 56 N. E. 2d 112.

¶ 12. In fixing salaries of clerks, deputy clerks and assistant clerks of the Municipal Court the Board of Estimate was not required to fix the salaries at not less than the amounts specified for the positions in the resolution of the Civil Service Commission which was approved by the Mayor and by the State Commission and therefore had the "effect of law". This was so because the statute enacting Municipal Court Code § 7a provided that it should not be construed to have a different effect from the provisions of law in force when it took effect, and at that time the predecessor statute (Laws 1927, ch. 506) provided that notwithstanding the provisions of any other statute the Board of Estimate was authorized to fix the compensation of the clerks of such court.—In re Aronson (La Guardia), 115 (60) N. Y. L. J. (3-14-46) 1015, Col. 4 F.

¶ 13. New York City Board of Estimate *held* not to have the right to "fix" the salaries paid to the attendants in the Kings County Court, nor were they vested with power by virtue of Judiciary Law § 352 to pass upon the propriety of such salaries when determined by the board of county judges, provided they were within the range of salaries paid to attendants in the Supreme Court, Kings County. "Equalization" was not to be gauged by salaries received by attendants having comparative lengths of service, as the Legislature had prescribed no such provision insofar as the Supreme Court was concerned.—In re Moskowitz (La Guardia), 183 Misc. 33, 48 N. Y. S. 2d 174 [1944], aff'd 268 App. Div. 918, 51 N. Y. S. 2d 758, aff'd 294 N. Y. 830, 62 N. E. 2d 388.

¶ 14. With passage of Laws of 1940, ch. 246, amending Public Service Law § 14, subd. 2, the Transit Commission was shorn of its power to fix the amount of appropriation for salaries of its employees, which it previously could do without right of the City to review or reduce it. However, this did not confer an overall power on the City to change the rate of compensation specifically fixed by statute for State employees, but the City was only empowered to fix the rate of compensation for Transit Commission employees other than in those instances where the compensation was already fixed by some superior law. This was indicated by the exception clauses in the New York City Charter, §§ 67 and 68. —Bleich v. O'Dwyer, 68 N. Y. S. 2d 193 [1946], aff'd 272 App. Div. 790, 69 N. Y. S. 2d 762, aff'd 297 N. Y. 652, 75 N. E. 2d 753.

¶ 15. The purpose of cost-of living bonuses was to reward employees who remained in the City service during the hectic war years. An employee in military service during this period was not entitled to recover the equivalent of the bonuses.—Spencer v. City of New York, 1 App. Div. 2d 768, 147 N. Y. S. 2d 887 [1956].

¶ 16. Resolution of July 1, 1948, increasing salaries of junior assessors *held* not to apply to petitioners who were promoted after August 1, since the cost of living adjustment applied only to those employees holding such positions as of the date of the resolution.—Ackerman v. City of N. Y., 133 (15) N. Y. L. J. (1-21-55) 6, Col. 7 F.

¶ 17. City's plan for "cost-of-living bonuses" was not binding upon the Justices of the Supreme Court, Kings County, and the employees of such court were not obliged to accept the conditions imposed by such plan, as the justices have exclusive power to determine what salaries shall be paid to its administrative, clerical and other personnel, and when such salaries are fixed it becomes the duty of the Board of Estimate to provide the funds necessary to pay them.—Brower v. La Guardia, 50 N. Y. S. 2d 82 [1944].

¶ 18. Where Board of Estimate had appropriated a sum for payment of a cost-of-living bonus to "low paid employees," to be expended in accordance with schedules to be prepared by the Budget Director, but such Director made no provision for payment of the bonus to plaintiff or any other employee of the Mortgage Tax Bureau, plaintiff had no valid basis for now obtaining recovery of a bonus, even though the Director had apparently excluded plaintiff from participation in the bonus in the erroneous belief that he was a state, and not a city, employee. Who was "low paid" and how much of a bonus they were to receive was left to the discretion of the Budget Director, and the Court might not substitute its discretion for that of the Director or the Board of Estimate.—Goodman

v. City of N. Y., 108 N. Y. S. 2d 2 [1951].

¶ 19. Requirement that vacant office authorized to be filled by director of the budget must be filled within sixty days of the date when it was authorized, was not unreasonable, and hence attempted appointment after expiration of the sixty-day period was ineffective.—People (Geoghan) v. McGoldrick, 101 (130) N. Y. L. J. (6–6–39) 2605, Col. 7 T.

¶ 20. Court could not compel a department head to fill vacancies, nor compel the making of an appropriation of funds therefor.—In re Correction Officers' Benevolent Assn., Inc., 119 (26) N. Y. L. J. (2–6–48) 487, Col. 4 F.

¶ 21. The power of the Budget Director to regulate the salary at which a vacancy occurring during the fiscal year may be filled is clearly sanctioned in § 2 of the budgetary Terms and Conditions promulgated by the Board of Estimate, and such Terms and Conditions constitute a valid delegation of power by the Board of Estimate to the Budget Director. Such budgetary Terms and Conditions delegating to the Budget Director or other budget officer the power to determine the salary at which vacant positions should be filled during the budget year have been repeatedly upheld.—McGovern v. Patterson, 273 App. Div. 35, 75 N. Y. S. 2d 492 [1947], aff'd 298 N. Y. 530, 80 N. E. 2d 530.

¶ 22. Budget Director was authorized to issue a certificate for filling of a vacancy at a sum less than the line schedule rate as set forth in the budget. The inclusion of a line in the budget does not necessarily constitute a fixation of the salary of the incumbent occupying such line, as the budget is a plan which sets forth maximum amounts and is not intended to be used against the City and its fiscal authorities in their efforts to avail themselves of economies. Furthermore, request of the County Clerk that the position be filled at the salary petitioner claimed, was without binding effect.—Id.

¶ 23. The Budget Director is without authority to increase the entrance salary of a new employee over the line schedule rate, as such action can only be taken by the Board of Estimate.—Id.

¶ 24. District attorney of County of Kings *held* entitled to peremptory order directing City Comptroller to audit and pay compensation provided for in the City budget as fixed by the District Attorney for personal services of eight assistant district attorneys from date specified in the notice of motion, where the only opposition was that of an assistant budget director of the City, and his opposition was based on fact that two of the eight assistant district attorneys were indicted nearly a month after the request for approval of the salary, although such budget director admittedly knew that one of them had been acquitted by a jury and that the court had theretofore ordered the budget director to comply with a similar request for payment (257 App. Div. 316).—People (Geoghan) v. McGoldrick, 102 (94) N. Y. L. J. (10–21–39) 1238, Col. 3 F.

¶ 25. Petitioner, who had been employed in office of the Register of New York County as a recording clerk, possessed no grievance because the City authorities determined that the recording work could more properly be performed by use of photostat machines, and accordingly the Board of Estimate had failed to make appropriation for recording clerks. Likewise, petitioner had no complaint because the budget provided for only one position of photostat operator (280 N. Y. 210).—Fertig v. Reavy, 103 (23) N. Y. L. J. (1–27–40) 436, Col. 5 M.

¶ 26. Action of New York City Health Department in fixing compensation of petitioner, a war veteran occupying position of medical inspector, on a per diem instead of an annual basis, *held* not to violate Civil Service Law § 22 relative to removal of veterans, since the new arrangement did not effect the discharge or abolition of the position but only the method of pay, and furthermore the change, made pursuant to the authority of New York City Charter Former §§ 67 and 68, made for a vast improvement in the City Health Service, as well as for substantial economy, and did not involve an abuse of power or bad faith (175 Misc. 165, aff'd 26 N. Y. S. 2d 493).—In re Steibel (La Guardia), 105 (66) N. Y. L. J. (3–21–41) 1267, Col. 4 M.

¶ 27. Nothing in Local Law No. 26 of 1937 or of Civil Service Law § 31,

subd. 7 abridges the power of the Board of Estimate to fix salaries under former § 67 of the New York City- Charter.—Cunningham v. Mc Goldrick, 106 (130) N. Y. L. J. (12–5–41) 1829, Col. 6 T.

¶ 28. Former § 67 of the Charter does not create the power of the City to fix salaries, which power is incidental to the assignment of public functions to the City by the State, but merely lodges the City's power to fix salaries in the Board of Estimate. Accordingly, where the employment agreements involved in the litigation had been approved by the Board of Estimate, it was not necessary to consider the power of the Budget Director to enter into such contracts.—Evadan Realty Corp. v. Patterson, 192 Misc. 850, 78 N. Y. S. 2d 114 [1948], aff'd 276 App. Div. 751, 92 N. Y. S. 2d 504, appeal denied 300 N. Y. 760.

¶ 29. Plaintiff, while employed by the American Museum of Natural History, was not an employee of the City of New York merely because the Museum, a distinct and separate corporation, received budgetary contributions from the City. The City had no part in the hiring of plaintiff, in the direction of his work, or in the termination of his employment, and he was paid by checks of the Museum.—Hundertpfund v. Am. Museum of Natural History, 124 (64) N. Y. L. J. (10–2–50) 656, Col. 7 F.

¶ 30. Domestic Relations Court Act § 16 does not vest mandatory salary-fixing power in the presiding justice of the Court of Domestic Relations, but such salary-fixing power is vested in the Board of Estimate under former § 67 of the New York City Charter. Hence refusal of Board of Estimate to create any additional positions in the title of "Supervising Probation Officer" in the Court of Domestic Relations was clearly within the scope of the authority conferred on the Board by former § 67, and the application by petitioners that they be paid the salary of supervising probation officers in the 1951–1952 budget was denied. Furthermore, the presiding justice had not appointed petitioners to such position, and fact that they might be discharging the duties of that position did not dispense with the necessity for an appointment to the position in order to qualify for the emoluments thereof.—Corning v. Hill, 126 (72) N. Y. L. J. (10–11–51) 820, Col. 5 M.

¶ 31. Plaintiffs could not continue to perform the duties of positions for which definite salaries had been fixed by the proper authorities and at the same time recover extra compensation for additional time which they were required to give to their duties. The increase in the working hours had already been held legal.—Axelrod v. City of N. Y., 127 (113) N. Y. L. J. (6–11–52) 2326, Col. 3 F.

¶ 32. Inasmuch as Judiciary Law § 354 authorizes the judges of the Court of General Sessions to fix the compensation of officers and employees of the Court, the Board of Estimate has no discretion whatsoever to sit in judgment on the wisdom or prudence of the action of the Board of Judges and is compelled to perform the pure ministerial task of including in the budget, the amounts fixed by the court to pay the salary so determined.—Matter of Capozzoli, 208 Misc. 328, 144 N. Y. S. 2d 404 [1955].

¶ 33. The power to fix salaries paid to city employees is vested in the Board of Estimate, except as otherwise provided in the Charter. It is not vested in the Civil Service Commission. Thus, a local law (L. L. 1945, No. 190) which provided for annual salary increments up to a maximum salary of $2,340 for the position of playground director in the Department of Parks was valid even though the Municipal Civil Service Commission provided that the maximum salary for the Commission should be $2,400 per annum.—Reif v. City of New York, 134 (57) N. Y. L. J. (9–21–55) 7, Col. 6 T.

¶ 34. Chapter 842 of the Laws of 1955 which provides that the present incumbent of any elective office who received a salary less than that fixed by law or municipal charter to recover the difference between the amount received and the established salary did not permit petitioner to recover for reduced salaries paid by the City in 1932–1937 pursuant to the emergency power granted to the City to reduce salaries and suspend the operation of the Charter in regard to salaries. Insofar as salaries fixed by the Charter are concerned, the charter provisions were superseded by enactments of successive budgets and ceased to be compensation fixed by law.—Bergerman v. Gerose, 133 (115) N. Y. L. J. (6–14–55) 8, Col. 2 M.

¶ 35. The right of the Board of Estimate to establish salaries pursuant to former § 67 is to be exercised only in connection with the adoption of a budget. Thus, where the 1938 budget fixed the salary of clerks of the justices of the Municipal Court at $3,240 the Board of Estimate could not, by a resolution subsequently adopted lower the salaries to $1,200 where there was no emergency justifying this action.—Rushford v. LaGuardia, 280 N. Y. 217, 20 N. E. 2d 547.

¶ 36. The Board of Estimate has the general power to fix salaries on a per session basis even though this will result in depriving city employees of mandatory salary increments, sick leave pay and vacations with pay. The action of the Board in changing the manner of paying salary did not amount to the abolition or modification of any position as prohibited by former § 68.—Matter of Lewin, 175 Misc. 165, 22 N. Y. S. 2d 409 [1940], aff'd 261 App. Div. 940, 26 N. Y. S. 2d 493, and 287 N. Y. 28, 38 N. E. 2d 117.

¶ 37. The Board of Estimate was obliged to fix the salary for a deputy county clerk of Richmond County although he had been appointed after the departmental estimate for the year had been submitted. The County Clerk had the right to make the appointment and the Board of Estimate then had the duty to fix the salary for the appointee.—Matter of Tiernan, 170 Misc. 55, 10 N. Y. S. 2d 81, aff'd 255 App. Div. 754, 9 N. Y. S. 2d 619 [1938].

¶ 38. Where, under a "career and salary plan" approved by the Board of Estimate, the Personnel Director established a "table of equivalencies" for the reclassification of certain Grade 4 attorneys in the Corporation Counsel's office, and the reclassification conformed the civil service structure to the reality of their former assignments and duties, it was valid. Whether the assignment of certain attorneys to the positions of senior, supervising, and principal attorney so conformed or constituted favoritism presented a question of fact.—Matter of Mandle v. Brown, 5 N. Y. 2d 51, 177 N. Y. S. 2d 482, 152 N. E. 2d 511 [1958].

¶ 39. Where at time the Career and Salary Plan was adopted the position of climber and pruner was excluded from its operation, a salary scale incorporated therein authorizing a retroactive reduction of earned wages of climber and pruner was void not only because it violated the principles of the Career and Salary Plan but because the Board of Estimate lacked authority to reduce compensation of positions while the salary was fixed by statute.—Auguti v. Board of Estimate, 9 Misc. 2d 346, 169 N. Y. S. 2d 670 [1957].

¶ 40. Inasmuch as the Code (§ 434a–8.0) provides for the compensation of probationary patrolmen, the Board of Estimate, despite the terms of this section, was without power to fix the compensation of such patrolmen. Patrolmen who accepted compensation under protest were entitled to recover the difference between the compensation paid pursuant to the Board of Estimate resolution and the compensation payable under the provisions of the Code.—Schneider v. City of New York, 178 Misc. 238, 33 N. Y. S. 2d 170 [1942], aff'd 264 App. Div. 855, 36 N. Y. S. 2d 423 and 289 N. Y. 785, 46 N. E. 2d 847.

¶ 41. Code § B40–6.1 provides that any person in the service of the City who is reinstated to a similar position from a preferred civil service list shall receive the same salary he received at the time his name was placed on the list. The petitioners were laid off in 1934 for lack of funds and placed on the preferred list for reappointment. They were reappointed several months later but at reduced salaries. Held: the provisions of § B40–6.1 was not a "statute" within the meaning of this section and the Board of Estimate had the power to fix a lower salary for the petitioners upon their reappointment. —Matter of Tormey, 284 N. Y. 607, 29 N. E. 2d 929, aff'g 259 App. Div. 802, 19 N. Y. S. 2d 1019.

¶ 42. Comptroller and Board of Estimate ordered to make budgetary provision for salaries and positions fixed by Board of Trial Justices, Supreme Court.—In re Daly (Gerosa), 140 (33) N. Y. L. J. (8–15–58) 2, Col. 6 T.

¶ 43. The City and State Civil Service Commission had no control over the fixation of salaries of City employees. The power was lodged in the Board of Estimate subject to the limitations set forth in the New York City Charter.—Auguti v. Board of Estimate, 9 Misc. 2d 346, 169 N. Y. S. 2d 670 [1957].

§ 68. **Bureaus under the board.**—a. There shall be the following bureaus under the board:

1. The bureau of the secretary, the head of which shall be the secretary of the board of estimate.

2. The bureau of franchises, the head of which shall be the director of franchises.

3. The bureau of retirement and pensions, the head of which shall be the secretary of the retirement system.

b. The head of each bureau shall be appointed by and shall be removable at the pleasure of the board. The head of each bureau and the secretary shall perform such duties as may be conferred upon him by the board or by law and shall have the powers of the head of a department in respect to the organization of his bureau and the officers and employees thereof. (*Derived from former* § 66.)

## CASE NOTES UNDER FORMER § 68

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**Abolition of position, ¶¶ 9–12**
**Creation of new positions, ¶ 16**
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**Grading resolutions, ¶ 17**
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**Salary reduction after adoption of budget, ¶¶ 1–4**

¶ 1. Where language of resolution of Board of Estimate whereunder certain employees' salaries were reduced, demonstrated that, instead of exercising any power which the Board might have possessed under Charter former § 68 regarding salaries paid from the City treasury, the Board had attempted pursuant to old Charter §§ 226 and 952 to adopt as the proposed budget for 1938 the tentative budget theretofore adopted, the effect of former § 68 of the Charter *held* not to be presented—Dixon v. La Guardia, 277 N. Y. 84 [1938], aff'g 253 App. Div. 881, 2 N. Y. S. 2d 477, which aff'd 166 Misc. 889, 2 N. Y. S. 2d 466.

¶ 2. Former § 68 of the Charter, empowering the Board of Estimate to create, abolish or modify positions and grades of persons paid from the City treasury, *held* not to have empowered the Board of Estimate to make drastic reductions in salaries of clerks to justices of the Municipal Court, where their salaries had already been fixed for the year 1938 and the first half of 1939 by a budget theretofore adopted, since the power bestowed upon the Board of Estimate by virtue of former § 68 was exercisable only in connection with adoption of a budget. However, clerks who had been appointed in 1938 at reduced salaries, *held* entitled only to the salaries at which they were so appointed, since such salaries were not fixed by statute, Laws of 1929 ch. 235, creating office of clerk to justice of the Municipal Court, granted authority to fix the salary to the Board of Estimate and Apportionment, and regulation adopted by the Board authorizing payment of persons appointed after January 1, 1938 only on certificate of the Director of the Budget and a specification of the rate of compensation, was a reasonable method for exercising the Board's salary-fixing power.—Rushford v. La Guardia, 280 N. Y. 217 [1939], aff'g 255 App. Div. 597, 8 N. Y. S. 2d 498, which modified 169 Misc. 581, 7 N. Y. S. 2d 467.

¶ 3. Action of the Municipal Civil Service Commission, on request of Department of Public Works, in changing titles of deckhand at $1,800 per year to able-bodied seaman at $105 per month, and marine oiler at $2,191 per year to oiler (marine) at $115 per month, and changing the service from an eight-hour basis to a twenty-four-hour basis, and re-

quiring the personnel to live aboard the vessels—the salaries and titles thus changed being comparable to those paid and used by private companies operating similar harbor craft —*held* to have been in good faith and not a subterfuge or mere shuffle to reduce the salaries of petitioners (N. Y. C. Charter §§ 67, 68; 281 N. Y. 12; 257 App. Div. 295, aff'd 281 N. Y. 170; 279 N. Y. 42).—In re O'Connor (Kern), 103 (63) N. Y. L. J. (3-16-40) 1213, Col. 1 F.

¶ 4. Right of Board of Estimate to lower salary schedules pursuant to former §§ 67 and 68 of the Charter, must be exercised in compliance with the Civil Service Law, and if the Board desires to reduce pay schedules the effect of such deduction should be uniform for all incumbents throughout a grade.—Friedman v. Kern, 171 Misc. 332, 13 N. Y. S. 2d 163 [1939].

¶ 5. Under County Law § 202a, authorizing the District Attorney of Kings County to adjust, regulate and determine the salaries of his assistant district attorneys, the district attorney possessed the power, after filing his departmental estimate for 1938 and before August 1, 1937, to increase the salaries of two of his assistants above the amount fixed for them in the departmental estimate, and to appoint two new assistants to vacancies created during course of budgetary year, and the budget director might not refuse permission to make such changes.—People v. McGoldrick, 257 App. Div. 316, 12 N. Y. S. 2d 939 [1939].

¶ 6. Petitioner, asserting that prior to July 16, 1938 he was employed in operation of sludge boats in connection with the sewage disposal plant at Ward's Island as a marine oiler on an eight-hour day without maintenance at $2190 per year, and that his position had been reclassified under the title "oiler (marine)" at $150 per month plus maintenance, but that he continued to perform the same duties thereafter, *held* entitled to a trial of the issue thus raised on his application for an order requiring the Civil Service Commission to restore the title of his position, the former rate of compensation, and earned salary which had been withheld from him by reason of the reduction, since if petitioner were performing the same service under the new title the reduction of pay during the budgetary period was unwarranted.—In re O'Connor (Kern), 171 Misc. 336, 12 N. Y. S. 2d 650 [1939].

¶ 7. Action of Board of Estimate on adoption of the 1940-1941 budget in changing status of physicians in Department of Health from "per annum" employees to temporary "per session" employees, *held* valid, since in absence of special legislation it is for the Board of Estimate to determine whether to dispense with a given service or whether or not and on what basis to maintain a given appropriation, and neither determination impairs any right of a civil service employee.—Ross v. La Guardia; Lewin v. La Guardia, 287 N. Y. 28 [1941] aff'g 261 App. Div. 940, 26 N. Y. S. 2d 493 which aff'd 175 Misc. 165, 22 N. Y. S. 2d 409.

¶ 8. When once a position is established and appropriation has been made by the Board of Estimate, the appointing officer or body may select the persons who are to fill the various positions and receive the salaries attached thereto, from among those declared by the Municipal Civil Service Commission to be eligible therefor. The rights of a civil service employee to a given position are dependent upon the existence of the position and an appropriation of salary therefor, and when the position and salary are authorized by the Board of Estimate the individual then enjoys certain rights of priority as against other contenders.—Ross v. La Guardia; Lewin v. La Guardia, 287 N. Y. 28 [1941], aff'g 261 App. Div. 940, 26 N. Y. S. 2d 493, which aff'd 175 Misc. 165, 22 N. Y. S. 2d 409.

¶ 9 Motion of petitioner for reinstatement as "comparer" in office of Register of the County of Queens was denied, since Board of Estimate was empowered to abolish the petitioner's position (N. Y. City Charter § 68; 219 N. Y. 252; 217 N. Y. 45).—Stehle v. McGoldrick, 102 (120) N. Y. L. J. (11-24-39) 1773, Col. 3 M, aff'd without opinion, 259 App. Div. 874, 20 N. Y. S. 2d 662, aff'd without opinion, 285 N. Y. 543.

¶ 10. Inasmuch as the duties of the County Clerk of Queens County as agent for Commissioner of Motor Vehicles had been taken away and returned to the Commissioner by Laws of 1939, ch. 562, with result that the Motor Vehicle Division of the Clerk's Office was left without further duties, and on recommendation of the budget director 21 posi-

tions in the Clerk's office had been abolished as unnecessary, Board of Estimate properly eliminated from the 1939–1940 budget the appropriations for the abolished positions. Charter former § 68 was not construable as empowering the Board to abolish positions only when it adopted a budget, particularly since such a construction which would prohibit modification of the budget by eliminating appropriations when positions were rendered unnecessary as result of legislation enacted after adoption of the budget, would result in retention on the payroll of unnecessary employees (263 N. Y. 258).—In re Lange (McGoldrick), 173 Misc. 1020, 19 N. Y. S. 2d 162.

¶ 11. Position of executive clerk in office of the Surrogate of Queens County could be abolished in good faith during a fiscal year, after a budget incorporating it had been adopted.—In re Conroy (Savarese), 111 (63) N. Y. L. J. (3–17–44) 1067, Col. 2 T.

¶ 12. The power to create and to abolish positions is vested in the Board of Estimate, which, in absence of mandatory salary legislation, may also fix the compensation payable to the holder of a position.—Ross v. La Guardia, 287 N. Y. 28, 38 N. E. 2d 117 [1941].

¶ 13. Former § 68 of the Charter empowers the Board of Estimate to create, abolish or modify positions only when it adopts a budget. Accordingly, the Board of Estimate could not, except at the time of the adoption of a budget, increase the number of positions of deputy chief in the Fire Department from 54 to 64.—Broderick v. City of N. Y., 295 N. Y. 363, 67 N. E. 2d 737 [1946], aff'g 268 App. Div. 856, 50 N. Y. S. 2d 844, and 182 Misc. 990, 47 N. Y. S. 2d 714.

¶ 14. Order holding that action of budget director in creating additional positions in the Fire Department without specific approval of the Board of Estimate, was not sanctioned by law, was affirmed by the Court of Appeals without opinion, on authority of *Matter of Broderick* v. *City of New York*, 295 N. Y. 363. —Welling v. Walsh, 295 N. Y. 963, 68 N. E. 2d 50 [1946].

¶ 15. The director, with the concurrence of the comptroller, could not modify the city expense budget by eliminating ten positions of battalion chief in the fire department and by creating therein ten additional positions in the lower rank of deputy chief on theory that he was merely making provision for incumbents in a position already created at the rate established therefor by the original budget.—Broderick v. City of New York, 295 N. Y. 363, 67 N. E. 2d 737 [1946], aff'g 268 App. Div. 856, 50 N. Y. S. 2d 844.

¶ 16. The Board of Estimate has no authority to create a position of "probationary fireman" without a reference to the Director of Budgets and a certificate from the Municipal Civil Service Commission. A resolution which created such a grade and fixed a salary of $1,200 per annum for the grade was ineffectual. Thus, the petitioner, appointed as a probationary fireman was entitled to the salary established for a fourth-grade fireman.—Allen v. City of New York, 179 Misc. 539, 39 N. Y. S. 2d 962 [1943], aff'd 292 N. Y. 567, 54 N. E. 2d 688.

¶ 17. The grading of employees is a civil service function and the execution of that function is not within the province of the Board of Estimate. The power of the Board to create, abolish or modify positions and grades is subject to the provisions of the Civil Service Law and a grading resolution adopted without approval of the State Civil Service Commission was ineffectual.—Matter of Burri (Kern), 180 Misc. 74, 39 N. Y. S. 2d 640 [1943], aff'd 291 N. Y. 776, 53 N. E. 2d 242.

¶ 18. Where the 1938 budget contained an appropriation for positions in the office of the Surrogate of Richmond County but on January 1, 1938 both positions were vacant, the Board of Estimate could abolish the positions even after the Surrogate had made appointments thereto. The budget appropriation required a certificate from the director of the budget before any vacancy could be filled by a head of a department and no such certificate was obtained by the Surrogate prior to filling the offices. Inasmuch as the offices were filled in an invalid manner, the Board of Estimate could abolish them at any time during the budget year.—Matter of Daly, 255 App. Div. 294, 7 N. Y. S. 2d 756 [1938], aff'd 280 N. Y. 589, 20 N. E. 2d 27.

¶ 19. Where, under a "career and salary plan" approved by the Board of Estimate, the personnel director established a "table of equivalencies"

for the reclassification of certain grade for attorneys in the corporation counsel's office, and the reclassification conformed the civil service structure to the reality of their former assignment and duties, it was valid. Whether the assignment of certain attorneys to the positions of senior, supervising, and principal attorneys as so conformed or constituted favoritism presented a question of fact.—Matter of Mandle v. Brown, 5 N. Y. 2d 51, 177 N. Y. S. 2d 482, 152 N. E. 2d 511 [1958].

§ 69. **Board head of retirement system.**—The board shall be the head of the New York City employees' retirement system and shall, subject to the provisions of law, from time to time establish rules and regulations for the administration and transaction of the business of the system and to carry out the provisions of law in relation thereto. (*Derived from former* § 71.)

## CASE NOTES

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**Accidental death benefits,** ¶ 4
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**Retirement, withdrawal of application,** ¶ 5

¶ 1. Under former § 71 (now § 69) of the Charter, providing that the Board of Estimate shall from time to time establish rules and regulations for the administration and transaction of the business of the Retirement System, it may be that the Board had sufficient authority to promulgate Rule 8 requiring the Medical Board to pass upon all medical examinations needed in the operation of the Retirement System, including the review and report upon the medical aspects of all claims that death was the result of an accident sustained while a member and while in the performance of duty and was not the result of willful negligence, with the reservation that the Board of Estimate should have the power to determine whether the accident was sustained in the performance of duty and whether death was the result of willful negligence.—Daley v. Board of Estimate, 267 App. Div. 592, 49 N. Y. S. 2d 139 [1944].

¶ 2. The Board of Estimate has power to place upon specially trained subordinates the duty of investigating and reporting on many matters upon which the Board is required to pass judgment, and it may have such reports made by the Medical Board and by the Bureau of Retirement and Pensions as created pursuant to Charter § 66, subd. 5.—Id.

¶ 3. The Board of Estimate may require its Bureau of Pensions and the Medical Board of the Retirement System to investigate and report to it.—Id.

¶ 4. Resolution of Board of Estimate denying petitioner an accidental death benefit and granting her merely an ordinary death benefit upon the death of her husband, was annulled on ground that the claim was actually determined by the Medical Board and not by the Board of Estimate, as required by former § 71 (now § 69) of the Charter, where the Medical Board's report merely stated such Board's conclusion that death was not the result of an accident, the report was inaccurate in stating that the employee had not consulted his physician until January 1938 and failed to advise the Board that a physician had been called on December 31, 1937, the report incorrectly stated that there was no corroboration of the claim that the employee was injured at work although the sworn testimony of several physicians and others furnished such corroboration, and the Board of Estimate was not advised as to the evidence upon which the Medical Board reached its conclusion.—Id.

¶ 5. Determination of Board of Estimate refusing, on recommendation of Commissioner of Department of Cor-

rection, to permit petitioner, a captain in the Department, to withdraw his application for retirement, *held* not to have been arbitrary, as there appeared to be ample ground for the action of the Board and the Commissioner.—Sullivan v. Williams, 125 (96) N. Y. L. J. (5–17–51) 1826, Col. 4F, aff'd 279 App. Div. 554, 107 N. Y. S. 2d 96, and 303 N. Y. 871, 104 N. E. 2d 922.

¶ 6. Policemen, who were members of Patrolmen's Benevolent Association, were entitled to an order against Police Commissioner for deduction from their salary of their dues, pursuant to a resolution of the Board of Estimate authorizing salary deductions of employees to pay membership dues of employee organization. The Court could see no conflict between the exclusive right of the Police Commissioner over the discipline of the men and the provisions of the resolutions.—Matter of Moriarity, 20 Misc. 2d 593, 192 N. Y. S. 2d 32 [1959].

# CHAPTER 4

# BOROUGH PRESIDENTS

§ 81. **Qualifications; election; term; salary; removal; vacancy.** —a. There shall be a president of each borough, who must be a resident thereof at the time of his election and remain a resident thereof throughout his term of office.

b. He shall be elected by the electors of the borough at the same time and for the same term as in this charter prescribed for the mayor.

c. His salary shall be thirty-five thousand dollars a year.

d. A president of a borough may be removed or suspended in the same manner as provided in this charter with respect to the mayor.

e. Any vacancy in the office of a borough president caused by removal from the borough or otherwise, shall be filled by an election to such vacancy by majority vote of all the councilmen then in office representing such borough, and in case of any such vacancy it shall be the duty of the mayor forthwith to call such councilmen into session for such an election and to preside thereat, but he shall not vote in such election except in the case of a tie vote. (*Derived from former* § 81. *Subdivision c amended by L. L.* 1961, *No.* 96.)

## CASE NOTES

¶ 1. Participation, in the election to fill a vacancy in the office of President of the Borough of Richmond, by respondent who since July 1, 1952 had been in possession of the office of Commissioner of Public Works, *held* not to have rendered the election invalid on theory respondent was not legally the Commissioner of Borough Works, since it is well established that the acts of public officers de facto are binding and valid so far as the public and third parties are concerned. Moreover, an injunction would not be granted as to an election which had already been held and in which petitioner had actively participated in his capacity of City Councilman from Richmond, as the courts have uniformly refused to grant injunctive relief against a fact already accomplished. —Schick v. Impellitteri, 122 N. Y. S. 2d 729 [1953], aff'd 282 App. Div. 663, 122 N. Y. S. 2d 794.

¶ 2. Where the president of a Borough resigned his office following the return of an indictment of conspiracy against him, the Court of Special Sessions refused to release the minutes of the Grand Jury to the Governor.—Matter of 3rd December, 1959 Grand Jury, 20 Misc. 2d 475, 196 N. Y. S. 2d 233 [1960].

§ 82. **Powers and duties.**—The president of a borough shall

1. Appoint and may at pleasure remove a deputy and an executive assistant, either of whom may discharge such of the powers of the president of the borough as the president by instrument in writing filed in his office and with the board of estimate may delegate to either of them, and either, in the order of priority specified by

the president in such instrument, shall, when such president is prevented from attending to the duties of his office, by reason of sickness, absence from the city or suspension from office, act as such president.

2. Have power to appoint a secretary and such assistants, clerks and subordinates as he may deem necessary, within the appropriation therefor. The said secretary, assistants, clerks and subordinates shall hold office at the pleasure of the president, subject to the provisions of the civil service law.

3. Continue to maintain a topographical bureau for such borough.

4. Have power to recommend capital projects.

5. Be a member of the site selection board as provided in section two hundred twenty-seven.

6. Have power to hold public hearings on matters of public interest.

7. Make recommendations to the mayor and to other city officials in the interests of the people of his borough.

8. Perform such other functions and duties and exercise such other powers as may be assigned to him by law. (*Derived from former* § 82. *Amended by L.* 1962, *ch.* 998, § 6.)

## CASE NOTES

¶ 1. Former § 82-c of the Charter, empowering the Borough President to appoint assistants, clerks and subordinates, would seem clearly to contemplate appointments to positions for which salaries have been appropriated and which enjoy Civil Service status, and does not appear to have been intended to embrace "honorary" positions without compensation, such as an "Honorary Commissioner of borough public works".—In re Costello (Simonetti), 202 Misc. 51, 107 N. Y. S. 2d 726 [1951].

¶ 2. Honorary Commissioner of Borough Works appointed by the President of the Borough of Manhattan to examine into the testimony before the U. S. Senate Crime Committee regarding the relationship between one of the parties examined by the Committee and the Secretary to the Borough President and to investigate as to such Secretary's fitness to continue as such, *held* without authority to subpoena petitioner to testify in the investigation. The Secretary to the Borough President holds office only at the pleasure of the Borough President and may be removed without cause and without any hearing, and therefore there was no mandatory nor implied power of investigation such as might sustain the subpoena power under C. P. A. § 406. Even if such subpoena power resided in the Borough President, the "Honorary Commissioner" was not vested with such power, as the office was unofficial and without validity. Even if such appointment were valid, and C. P. A. § 406 conferred power to issue subpoenas upon the Borough President for purpose of enabling him to take proof as to whether to exercise his power of removal, it would not confer power to issue subpoenas upon an honorary commissioner, to whom no power of removal was delegated.—In re Costello (Simonetti), 202 Misc. 51, 107 N. Y. S. 2d 726 [1951].

¶ 3. Rule of Local Improvement Board of the Borough of Queens providing that in absence of the Borough President and the Commissioner of Borough Works, the Board's meeting should be opened by one of the councilmen, who should cause to be read any communication designating a temporary chairman, and that the temporary chairman designated by the Borough President should then preside at the meeting, *held* to infringe upon the Borough President's powers as granted by Charter former § 82(a), (f), which provides that the Borough

President is Chairman of every local improvement board with the right to preside and vote at all meetings, and that he may authorize by instrument in writing filed with the City Clerk any officer or employee appointed by him to exercise any of the powers and perform any of the duties of the President.—Maickel v. Lundy, 4 Misc. 2d 98, 155 N. Y. S. 2d 581 [1953].

§ 83. **Community districts.**—The city planning commission, not later than January first, nineteen hundred sixty-eight, shall prepare and adopt, and, from time to time, modify a map of community districts within each borough. Such districts shall coincide, so far as feasible, with the historic communities from which the city has developed and shall be suitable as districts to be used for the planning of community life within the city.

§ 84. **Community planning boards.**—a. After the city planning commission has adopted a map pursuant to section eighty-three hereof, there shall be a community district planning board for each of the community districts. Such boards shall consist of the councilmen elected from the borough in which such community district lies and the member or members of the council within whose councilmanic district such community district lies in whole or in part and not less than five nor more than nine members appointed by the borough president. Members of such board appointed by the borough president shall serve at his pleasure and without compensation and shall be residents of the community district for which they are appointed.

b. Each such board shall:

1. Advise the borough president in respect to any matter relating to the development or welfare of its district and any matter which may be referred to it by him.

2. On request or on its own initiative advise the city planning commission and the borough improvement board in respect to any matter within the jurisdiction of the commission relating to its district. (*Derived from former* § 196.)

§ 85. **Borough improvement board.**—There shall be in each borough a board to be known as the borough improvement board which shall consist of the borough president and the councilmen elected from such borough. The borough president shall be the chairman of such board which shall hold public hearings at stated intervals in the borough and report to the board of estimate, council, the mayor and the city planning commission on borough programs and proposed capital projects. Such board shall employ technical and clerical assistance within appropriations therefor

# CHAPTER 5

# COMPTROLLER

§ 91. **Election; term; salary.**—The comptroller shall be elected by the electors of the city at the same time and for the same term as in this charter prescribed for the mayor. His salary shall be forty thousand dollars a year. (*Derived from former* § 91 *as amended by L. L.* 1949, *No.* 107. *Amended by L. L.* 1961, *No.* 96.)

§ 92. **Removal from office.**—The comptroller may be removed or suspended in the same manner as provided in this charter with respect to the mayor. (*Derived from former* § 92.)

§ 93. **Powers and duties.**—a. The comptroller from time to time in his discretion may, and whenever required by law or requested by the mayor, the board of estimate or the council, shall advise the mayor, the board of estimate and the council on the financial condition of the city or any phase thereof and make such recommendations, comments and criticisms in regard to the operations, fiscal policies and financial transactions of the city as he may deem advisable in the public interest.

b. He shall have power to investigate all matters relating to or affecting the finances of the city, including without limitation the performance of contracts and the receipt and expenditure of city funds, and for such purpose he shall have power to require the attendance and examine and take the testimony under oath of such persons as he may deem necessary.

c. He shall have power and it shall be his duty to audit all vouchers before payment and prepare warrants, to audit all official accounts and to audit annually the accrual and collection of all revenues and receipts and to prescribe methods of recording, reporting and accounting in the several agencies.

d. He shall have power to settle and adjust all claims in favor of or against the city in such manner as shall be prescribed by law and for that purpose may administer oaths, except that, with regard to excise and non-property taxes, such power shall be vested in the director of finance.

e. He shall administer and manage the several sinking funds of the city and all other trust funds held by the city, and provide for the receipt and safekeeping of all moneys in such funds, except as provided in subdivision three of section four hundred fourteen of this charter, and in such administration he shall be deemed to be acting in a fiduciary capacity.

f. He shall keep the accounts of the city and shall at least once in each month render to each agency a summary statement of so much thereof as relates to such agency.

g. Within four months after the close of each fiscal year, he shall publish a statement for such year, including a full and detailed statement of the receipts and expenditures of the city and the cash balance or surplus at the end of the fiscal year, an itemized statement of all taxes due and uncollected at the close of the fiscal year, an itemized statement of the condition of the sinking funds, the street and park opening funds and the street improvement funds, so long as such funds shall be continued, and any other assessable improvement funds, and of the tax appropriation and general fund stabilization reserve fund as at the close of the fiscal year, the different sources of city revenue and the amount received from each, the several appropriations made for the fiscal year, the objects for which they were made and the amount of moneys expended under each, the money borrowed on the credit of the city, the amount of each loan, the authority under which it was made and the terms on which it was obtained, and such other information in regard to such fiscal year as may be determined by the comptroller or by law.

h. He shall establish for his office and for city agencies a system of accounts which shall, so far as practicable, be uniform.

i. He shall prescribe systems of accounting for city agencies, including but not limited to the department of water supply, gas and electricity and the department of marine and aviation, whose revenues arising out of the use of facilities and services supplied by such agency constitute fifty per centum or more of the appropriation provided for the operation of such agency, which systems of accounting shall conform so far as practicable to standard public utility accounting practices. The comptroller shall publish in his annual report statistical data in regard to the financial operations of such city agencies. (*Derived from former* § 93, *as amended by L.* 1943, *ch.* 710, § 561 *with effective date postponed by L.* 1944, *ch.* 606, § 6 *amd L.* 1954, *ch.* 338, § 64. *Subdivisions d and e amended by L.* 1962, *ch.* 998, § 7.)

CROSS REFERENCE: Service of process on Comptroller or person designated by him, see Civil Practice Act, § 228.

## CASE NOTES

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**Audit of claims,** ¶¶ 3–5, 8
**Investigation of city finances,** ¶¶ 1, 2
**Overpayment of claims,** ¶ 8
**Payment of claims,** ¶¶ 3–6, 8
**Summary judgment,** ¶ 6
**Variance, power to grant,** ¶ 9

¶ 1. City Comptroller held authorized under former § 93, subd. d of the City Charter, to issue subpoenas requiring the present applicants to appear before him in an investigation by him relating to the finances of the City, particularly with respect to assessments for widening and paving certain streets, where such subpoenas were issued in the course of such investigation affecting the finances of the City, and did not involve the merits of the claims for refunds of assessments presently pending in the courts. Fur-

thermore, the Comptroller is authorized to examine as witnesses persons who are not in the employ of the City.—In re City of N. Y. (Allen & Pike Sts.), 181 Misc. 860, 43 N. Y. S. 2d 316 [1943].

¶ 2. Administrative Code § 93d–1.0 and Charter former § 93d deal with pre-lawsuit procedure, and once litigation has begun such provisions are no longer operative and any examination desired must be sought under the Civil Practice Act.—Id.

¶ 3. Where the Common Council, in the exercise of its investigatory powers employed an attorney, the attorney was not required to have his statement of charges approved or audited by either the City Council or its special committee. It was sufficient that the attorney presented his bill for audit by the comptroller.—Ellis v. City of New York, 180 Misc. 968, 46 N. Y. S. 2d 363 [1943], aff'd 267 App. Div. 810, 47 N. Y. S. 2d 96.

¶ 4. Although the provisions of this section may prohibit the Comptroller from inquiring into the justness of a claim accruing under the provisions of a contract for public letting, where a contract between a contractor and the Board of Water Supply stated that the City shall not be estopped from showing the true value of work, the city could withhold payment to the contractor. Where such clauses are found in a contract and where there is no clear showing that the public agency is independent of the City, mandamus will not lie.—Matter of Frazier-Davis Construction Co., 6 A. D. 2d 112, 175 N. Y. S. 2d 765 [1958].

¶ 5. A voucher of the Board of Education for work performed by a contractor cannot be made subject to audit by the Comptroller.—In re C. K. Rehner, Inc., 17 Misc. 2d 226, 184 N. Y. S. 2d 998 [1959].

¶ 6. The City sent to plaintiff contractors a check with a "payment in full" notation. The check was received and deposited by an employee of plaintiffs during their absence from their office. In an action by plaintiffs to recover for extra work, the City was not entitled to summary judgment. The nature of the payment and its acceptance raised issues of fact.—Moriarty v. City of New York, 141 (65) N. Y. L. J. (4–6–59) 15, Col. 4 T.

¶ 7. A comptroller, after a hearing, established rates for welders for the period of 1938–1945 and deducted 10 per cent from the wages of the welders for reasonable monetary value of vacations and pension benefits granted by the City. The plaintiffs, who were welders, sued the City to recover the 10 per cent deductions. Held: the Comptroller was in error in making said deductions. However, the compaint was dismissed, since the exclusive remedy of the plaintiffs was by writ of certiorari within 30 days after the determination of the Comptroller, pursuant to § 220(8) of the Labor Law.—Jung v. The City of New York, 6 Misc. 2d 200, 76 N. Y. S. 2d 235 [1947].

¶ 8. Although petitioner's claim for the use of his equipment in the performance of a contract had been audited and paid by the City, the acting comptroller could issue a subpoena for the purpose of investigating whether petitioner had been overpaid.—In re Tully & DiNapoli, Inc., 146 (99) N. Y. L. J. (11–22–61) 11, Col. 8 F.

¶ 9. The Supreme Court could not set aside a determination of the Board of Standards and Appeals of the City of New York granting a variance for a gasoline station in a residence district in which the New York City Housing Authority constructed a housing project. The granting of the variance was within the discretionary powers of the board.—New York City Housing Authority v. Foley, 32 Misc. 2d 41, 223 N. Y. S. 2d 621 [1961].

§ 94. **Deputy comptrollers.**—a. The comptroller shall appoint and at pleasure remove a first, and second deputy comptroller. He may appoint and at pleasure remove a third deputy comptroller who shall be a person qualified to advise and assist the comptroller in all matters relating to borrowings and the investment of funds. Each of the deputies shall have such powers and duties as may be assigned to him by the comptroller by instrument in writing filed with the city clerk.

b. Any deputy comptroller may act in the place of the comptroller as a member of the board of estimate or of any other board, body or committee of which the comptroller is a member whenever the comptroller shall so authorize in writing and such authorization is filed with such board, body or committee and with the city clerk.

c. In the event of a vacancy in the office of comptroller, or whenever by reason of sickness, absence from the city or suspension from office, the comptroller shall be prevented from attending to the duties of his office, or while the comptroller is acting as mayor, the first deputy comptroller or in the case of his illness or absence the second deputy comptroller or in the case of his illness or absence the third deputy comptroller shall act as comptroller. (*Derived from former* § 94.)

# CHAPTER 6

# EXPENSE BUDGET

§ 110. **Fiscal year.**—The fiscal year of the city shall commence on the first day of July in each year and shall terminate at midnight on the ensuing thirtieth day of June. (*Derived from former* § 111.)

§ 111. **Bureau of the budget.**—a. There shall be a bureau of the budget in the executive office of the mayor, the head of which shall be director of the budget who shall be appointed by the mayor.

b. It shall be the duty of the director to prepare each year an executive budget for the ensuing fiscal year and to perform all such duties in regard thereto as the mayor may direct. He shall have the power, personally or by his representatives, to survey each agency for the purpose of ascertaining its budgetary requirements. He may require any agency, or any officer or employee, to furnish data and information and to answer inquiries pertinent to such survey. (*Derived from former* §§ 112 *and* 113.)

## CASE NOTES

¶ 1. In Civil Service promotion examination for promotion from Clerk, Grade 3, to Grade 4 in the Finance Department, question requiring candidate to explain fully the procedure in carrying out an assignment to prepare job descriptions for all of the positions in the Department, was relevant to the duties of the position for which the examination was held, as under Charter former § 113 (now § 111) and Administrative Code § 113–1.0 et seq., Grade 4 clerks would reasonably be assigned to prepare descriptions of the work being done or which reasonably could be assigned to be done.—Furman v. Marsh, 185 Misc. 209, 56 N. Y. S. 2d 690 [1945].

¶ 2. Director of the Budget was not authorized to issue a certificate permitting the filling of a certain vacancy but at a lower salary. Provision of budget stating that no vacancy should be filled except upon a certificate issued by the director upon such terms and conditions as might be proper, referred, by "terms and conditions", to the administration of payment and was hardly intended to delegate to the Director the power to fix salaries. Furthermore, such power to fix salaries would seem not delegable, as the Director is given nothing but administrative duties in respect to the preparation of the budget.—McGovern v. Patterson, 117 (131) N. Y. L. J. (6–6–47) 2234, Col. 6 F.

¶ 3. Petitioner who had passed a promotion examination for senior stenographer in the Department of Public Works and was actually performing the duties of senior stenographer in the Department of Public Works, Division of Operation and Maintenance in New York City, would be entitled to an order directing the Civil Service Commission and Superintendent of Public Works to certify her as senior stenographer and appoint her to such position, which existed at least de facto in the New York City office. However, the granting of such relief was barred by fact that the Director of the Budget had not approved such classification for petitioner or the position held by her, nor approved any budgetary appropriation for such position, and he was not made a party to the proceeding.—Leitner v. Conway, 195 Misc. 621, 90 N. Y. S. 2d 441 [1949].

§ 112. **Departmental estimates.**—On such date as the mayor may direct, but not later than the first day of January in each year, the head of each agency shall submit to the director of the budget an estimate of the requirements for expenses of such agency for the ensuing fiscal year. Such estimates shall consist of proposed units of appropriation, each unit to represent the amount requested for a particular program, purpose, activity or institution and separate totals shall be stated under each unit according to personal service and other than personal service. Each requested unit of appropriation shall be supported by line items showing how the total amount of such unit is arrived at. Such estimates shall be known as departmental estimates for current expenses and shall be in such form and contain such further information as may be required by the mayor or by law. Such departmental estimates shall be public records and shall at all reasonable times be open to public inspection. (*Derived from former* § 114.)

**CASE NOTES**

¶ 1. Where statute authorizing the Surrogate of Bronx County to fix the compensation of court officers and employees became a law on March 21, 1944, the Surrogate exercised such power on April 8, 1944, at which time the Board of Estimate had not as yet conducted public hearings on the budget for 1944–1945, and on April 27, 1944 it met and adopted the budget with full knowledge of the legislative action and the Surrogate's fixation thereunder, but failed to comply with such fixation, defense of the Board of Estimate to proceeding brought against the Board by the Surrogate to effect that the departmental estimates were not timely submitted under the provisions of the Charter, was deemed without merit. —Henderson v. La Guardia, 182 Misc. 1071, 48 N. Y. S. 2d 918 [1944], aff'd without opinion, 268 App. Div. 892, 51 N. Y. S. 2d 87, and 294 N. Y. 728, 61 N. E. 2d 456.

¶ 2. The Court denied a petition for an order directing the Commissioner of Health to include in the budget of the Department of Health funds for mosquito control.—Matter of Modugno, 11 Misc. 2d 1022, 173 N. Y. S. 2d 729 [1958].

§ 113. **Statement by comptroller.**—a. Not later than the fifteenth day of February in each year, the comptroller shall submit to the mayor, to the board of estimate and to the council a certified statement which shall be published forthwith in the City Record and which shall contain:

1. An itemized statement of the condition of the tax deficiency account and a schedule of the appropriations for such account required by law.

2. An itemized statement of the condition of the tax appropriation and general fund stabilization reserve fund and any appropriation required by law for such account.

3. A schedule of appropriations required for debt service, including approriations to the several sinking funds required by law.

4. Such other information as may be required by law.

b. At such times as the mayor, the board of estimate or the council shall request, the comptroller shall submit to them a certified statement showing as of a specified date:

1. An itemized statement of all taxes due and uncollected.

2. Such other information as may be requested by the mayor, the board of estimate or the council. (*Derived from former* § 115 *as amended by L. L.* 1955, *No.* 21. *Amended by L. L.* 1961, *No.* 93. *Paragraph* 2 *of subdivision a amended by L.* 1962, *ch.* 998, § 9. *Paragraph* 4 *of subdivision a repealed and paragraph* 5 *of subdivision a renumbered as paragraph* 4 *by L. L.* 1961, *No.* 93.)

§ 114. **Statement of president of tax commission.**—Not later than the first day of March in each year, the president of the tax commission shall submit to the mayor, to the board of estimate and to the council a tentative estimate of the assessed valuation of real property subject to taxation for the ensuing fiscal year, which shall be published forthwith in the City Record. (*Derived from former* § 116.)

§ 115. **Hearings on departmental estimates.**—Each member of the council and each member of the board of estimate shall have the right to attend in person or by a representative any and all hearings conducted by the director of the budget or his representative at which the heads of agencies or their representatives or subordinates appear to explain their departmental estimates, to ask such questions and to require the production of such papers and records at such hearings as may seem to him appropriate and proper. The public may be present at such hearings but shall not have the right to be heard. (*Derived from former* § 118.)

§ 116. **Submission of the budget.**—Not later than the fifteenth day of April the mayor simultaneously shall submit to the board of estimate and the council (1) a proposed budget for the ensuing fiscal year, and (2) a budget message, both of which shall be public records and shall be printed forthwith. (*Derived from former* § 121.)

§ 117. **Contents of the budget and budget message.**—a. There shall be included in the budget:

1. Units of appropriation, prepared according to section one hundred twelve, in such amounts and upon such terms and conditions as may be determined by the mayor.

2. The amounts required by law to be appropriated to the several sinking funds as certified by the comptroller.

3. The amount required to pay the interest and principal of city obligations as certified by the comptroller.

4. The amounts required by law to be appropriated to the tax deficiency account, and for the tax appropriation and general fund stabilization reserve fund, as certified by the comptroller.

5. The amounts required by law to be appropriated to the street and park opening funds and the street improvement funds as certified by the comptroller.

6. The amount as certified by the comptroller equal to the average of all expenditures during each of the five preceding fiscal years for the payment of the expense of the removal of snow and ice, exclusive of salaries and wages of regular employees of the city except for overtime work and for work on Sundays and holidays, and exclusive of the purchase of equipment.

7. The several amounts which are payable from sources other than the real estate tax levy, provided however that amounts appropriated pursuant to chapter nine of this charter which are allocable to a particular program, purpose, activity or institution, shall be included for informational purposes only.

8. Such other amounts as may be required by law.

9. The terms and conditions under which appropriations shall be administered.

10. Amounts as shall be determined in the manner provided in this chapter to be necessary to pay the expenses of conducting the business of the city for the ensuing fiscal year and for other lawful public purposes.

All such units and amounts shall be set forth without deduction of revenues from any source except as otherwise required by law.

b. The budget message, which shall not be deemed a part of the budget, shall include:

1. An explanation, in general summary terms, of the major emphasis and objectives of the budget.

2. Itemized information and supporting schedules of positions, salaries and other-than-personal service expenses, anticipated for the ensuing fiscal year, accompanied by comparisons with the amounts requested therefor in the departmental estimates and with the amounts appropriated therefor in the current expense budget, as last modified as of the fifteenth day of March of the current year.

3. Estimates of all revenue receipts and recommendations for any changes in the revenue and fiscal sources and operations of the city, including intergovernmental revenue and fiscal arrangements.

4. An itemized statement of the receipts of the general fund for each of the four preceding fiscal years, and for the first seven months of the current fiscal year, and the estimated receipts of such fund for the balance of the current fiscal year, and for the ensuing fiscal year, in the preparation of which the mayor shall consult with the comptroller. (*Derived from former* §§ 117 *and* 119. *Paragraph* 5 *of subdivision a amended by L. L.* 1961, *No.* 93. *Paragraph* 7 *of subdivision a amended, paragraph* 10 *added and paragraph* 2 *of subdivision b amended by L.* 1962, *ch.* 998, § 10, 11 *and* 12.)

## CASE NOTES

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**Budget notes to finance pay increases, ¶ 5**
**Claims, judgments, charges and expenses, ¶¶ 5, 6**
**Cost of living bonus, ¶ 10–12**
**Expenses of city council for investigations, ¶¶ 1–4**
**Publication expenses, ¶ 7**
**Subitemization of budget items, ¶¶ 8, 9**

¶ 1. Absence of a statutory appropriation for employment of outside stenographers did not preclude recovery by plaintiffs from City of New York of the agreed price and reasonable value of stenographic services furnished by plaintiffs during course of investigations conducted by the Council to determine the qualifications and election of three members of the Council.—Chambers v. City of N. Y., 286 N. Y. 308 [1941], aff'g 261 App. Div. 807, 24 N. Y. S. 2d 1021, which aff'd 173 Misc. 769, 19 N. Y. S. 2d. 79.

¶ 2. In the exercise of its powers and the performance of its duties under former § 30 (now § 31) of the Charter, in order that the Council may be properly organized and may properly conduct its meetings as a department of government, the Council may create a liability of the City for expenses reasonably necessary.—Id.

¶ 3. A stenographer engaged by a special committee of the City Council to report the proceedings of the committee in its investigation of the local handling of emergency unemployment relief was entitled to recover from the city for the value of his services notwithstanding the failure of the board of estimate to make an appropriation for the necessary expenses of the committee. The City Council does not act as a departmental agency of the City when it exercises its legislative power by way of an investigation and hence former § 891 (now § 1111) which prohibits an agency from incurring a liability in excess of the amount appropriated therefor is not applicable.—Smith v. City of N. Y., 289 N. Y. 517, 47 N. E. 2d 35 [1943].

¶ 4. An attorney could recover compensation from the City for services rendered as counsel to a special committee of the City Council appointed to make an investigation pursuant to former § 43 (now § 41) even though the Board of Estimate did not make an appropriation therefor.—Ellis v. City of N. Y., 180 Misc. 968, 46 N. Y. S. 2d 363 [1943] aff'd 267 App. Div. 810, 47 N. Y. S. 2d 96, and 295 N. Y. 780, 66 N. E. 2d 297.

¶ 5. The maximum amount of budget notes which can legally be issued and sold by the City of New York to finance pay increases proposed to be granted to employees of the Board of Transportation, *held* governed by Local Finance Law § 29, subd. c2, which contains no limitation as to amount, and not by subd. a2, which does impose a limitation. The wage increases planned by the Board of Transportation were "claims" within meaning of § 29, subd. c2, and former § 117 of the N. Y. C. Charter.—Wilmerding v. O'Dwyer, 272 App. Div. 35, 69 N. Y. S. 2d 90 [1947], reversed (297 N. Y. 664, 76 N. E. 2d 325), and case remitted to Special Term with directions to dismiss the complaint on ground that the issues were moot.

¶ 6. Former § 117, subd. 5(a), providing for the inclusion in the budget of items for payment of claims, judgments, etc., continues in force and remains unaffected by enactment of the Local Finance Law, and clearly indicates a requirement that the annual budget for the City include an appropriation based on a five-year average that would represent the sums necessary to meet expenditures for payment of claims, judgments, etc.—Id.

¶ 7. The failure of the city to make a budget appropriation for the publication of notices required by statute was not a defense to a newspaper publisher's claim for reimbursement. However, the publisher could not recover where the publication was commenced in 1938 at a time when the Charter restricted publication to the City Record.—Brooklyn Citizen v. City of N. Y., 258 App. Div. 657, 17 N. Y. S. 2d 765 [1940].

¶ 8. Perusal of the sections of the Charter relating to the preparation of

the City Budget read in the light of the statutory purposes to be served, discloses the intention of the drafters to have the Charter provide a comprehensive scheme for subitemization of budgetary code items through supporting schedules so as to (1) permit a comparison of items with similar appropriations for preceding years, (2) facilitate public hearings and discussion concerning the necessity for the proposed items of expenditure, and (3) enable the City Council to examine the budget as proposed and determine which items are proper and necesssary. Accordingly, the itemization should be sufficiently explicit to disclose with reasonable clarity the purposes for which the money is proposed to be expended.—Wilmerding v. La Guardia, 268 App. Div. 496, 52 N. Y. S. 2d 169 [1944], affirming 183 Misc. 142, 50 N. Y. S. 2d 292.

¶ 9. Supporting line schedules for code item designated "Unallocated Appropriations", setting forth an appropriation of $3,500,000 for "motor vehicles, equipment, repair parts, special machinery, unforeseen expenditures and sundry expenses", was objectionable. As respects the first stated purpose of the purchase of motor vehicles, equipment, repair parts and special machinery, the lumping of such items without any separation of the amounts sought for each would not seem to comply with requirements of the Charter for items supported by line schedules, and even if separately stated, it would seem that such items were required under former § 120 to be made to the Department of Purchase, and segregated in the name of the institution or agency for which the moneys were intended. The second purpose of the appropriation, for "unforeseen expenditures and sundry expenses", which would appear to permit the use of the whole sum of $3,500,000 for such purpose, would seem objectionable, as there was no statement concerning the nature of the emergency, or other attempted limitation as to the purpose for which the money might be expended, and it afforded no reasonable opportunity for comparison with prior budgets, or criticism at public hearing, or for consideration by the City Council. Although an appropriation for increased compensation, or "cost of living bonuses", for city firemen, for which purpose $3,000,000 of such sum was actually used, would no doubt be a proper municipal expenditure, concealment of such a proposed expenditure by calling it "unforeseen expenditures and sundry expenses" would be the sort of practice that itemized budget making seeks to prevent. Furthermore, statements contained in the Mayor's message or matters disclosed by subsequent resolution could not be considered in determining the sufficiency of the complaint of a taxpayer who attacked the legality of appropriations in the City budget.—Id.

¶ 10. The legality of a proposed appropriation would appear to be an official act such as to impair the public interests or calculated to work public injury, and would threaten waste through the dissipation of public funds in a manner not authorized by law. Accordingly, a taxpayer's complaint attacking the legality of certain appropriations in the budget was sufficient without an allegation of facts showing waste, and mere allegations of illegality without specifying waste, were sufficient.—Wilmerding v. La Guardia, 268 App. Div. 496, 52 N. Y. S. 2d 169 [1944], aff'g 183 Misc. 142, 50 N. Y. S. 2d 292.

¶ 11. Provision for a cost of living bonus for certain city firemen was not an unforeseen contingency, except as to amount, and therefore there should have been a reference to it in the budgetary items.—Wilmerding v. La Guardia, 184 Misc. 607, 54 N. Y. S. 2d 531 [1945].

¶ 12. Although there should have been a reference to the cost of living bonus in the budgetary items, no injunction would be granted against the use for such bonus of a sum appropriated for unforeseen expenditures and sundry expenses, as it would be detrimental to the municipality to require that such bonus be financed by tax notes, and it might lead to unnecessary complications if payment were ordered to be made for existing surplus appropriations. However, an injunction would issue against the use of the balance of the appropriation for unforeseen expenditures and sundry expenses, and this balance would be ordered to go into the tax deficiency account.—Id.

§ 118. **Appropriations for supplies, materials and equipment.**—Appropriations for the purchase of supplies, materials and equip-

ment required by and to be purchased for the account of the various agencies and institutions for which the department of purchase is authorized by the provisions of this charter to make purchases shall be made to the department of purchase, but shall be segregated under the name of the agency or institution for which they are intended and shall be considered and accounted for as appropriated for such agency or institution. Nothing herein contained shall prevent the designation of part of such appropriations as a general stores account or under other appropriate designation to enable the department of purchase to maintain a stock in anticipation of requirements. (*Derived from former* § 120. *Amended by L.* 1962, *ch.* 998, § 13.)

**CASE NOTES**

¶ 1. A budget item for "unallocated appropriations—motor vehicle equipment, repair parts, special machinery, unforeseen expenditures and sundry expenses.....$3,500,000" was invalid for lack of proper itemization. However, even if separately stated, the appropriations being for the purchase of supplies, were required under this section to be made to the Department of Purchase and segregated in the name of the institution or agency for which the money was intended.—Wilmerding v. LaGuardia, 268 App. Div. 496, 52 N. Y. S. 2d 169 [1944].

§ 119. **Budget hearings.**—Between the fifteenth and thirtieth days of April in each year, the board of estimate and the council shall hold public hearings on the budget as presented by the mayor. The council may hold such hearings as a body or by its finance committee. Such hearings may be held jointly by consent of both bodies. Officers of agencies shall have the right, and it shall be their duty when requested by the board of estimate or the council, to appear and be heard. (*Derived from former* § 122. *Amended by L.* 1962, *ch.* 998, § 14.)

**CASE NOTES**

¶ 1. The preliminary regulatory matters referred to in former §§ 121–123 of the Charter are not prohibitory or jurisdictional. Thus, where the legislature gave the Surrogate of Bronx County the power to fix the salaries of his officers and employees and the law was enacted on March 21, an estimate submitted by the Surrogate on April 8, had to be complied with by the Board of Estimate where it had not as yet conducted its public hearings on the budget at the time of the submission of the estimate.—Henderson v. LaGuardia, 182 Misc. 1071, 48 N. Y. S. 2d 918 [1944], aff'd 268 App. Div. 892, 51 N. Y. S. 2d 87 and 294 N. Y. 728, 61 N. E. 2d 456.

§ 120. **The budget; approval.**—Except as otherwise provided by law, and subject to the veto of the mayor, either the board of estimate or the council shall have the power to increase, decrease, or omit any unit of appropriation in the budget as submitted by the mayor, or to add any unit of appropriation thereto or to change any term or condition thereof. Each shall return the budget to the mayor not earlier than the sixth day of May nor later than the sixteenth day of May in each year. When both bodies have returned the budget, or on the seventeenth day of May, if either has not returned the budget, each unit of appropriation not increased, decreased, added, omitted or changed by either body

shall be deemed to have been adopted. (*Derived from former* §§ 123 *and* 124.)

## CASE NOTES

¶ 1. Resolution of Board of Estimate providing that no City funds should be used for payment of wages of any employee in the Department of Welfare or other department who did not give his whole time to his duties or who was engaged in any other business or employment, *held* invalid as being clearly legislative in nature, purporting to attach conditions to the holding of civil service positions in City departments, whereas the legislative power of the City is vested in the Council by § 21 of the Charter. Neither former § 70 nor former § 39 gives legislative power to the Board of Estimate. Former § 123 (now § 120) of the Charter, referring to powers of the Board of Estimate to increase, decrease or omit items from the budget, merely refers to accounting problems and kindred subjects, and does not grant legislative power to such Board under the guise of passing the budget. Furthermore, the Charter does not grant power to the Mayor or Board of Estimate to make civil service rules.—Natilson v. Hodson, 264 App. Div. 384, 35 N. Y. S. 2d 537, aff'd without opinion 289 N. Y. 842, 47 N. E. 2d 442 [1943].

¶ 2. A Code item in the budget reading "unallocated approprations—motor vehicle equipment, repair parts, special machinery, unforeseen expenditures and sundry expenses..... $3,500,000" was not in compliance with the Charter which sets out a comprehensive scheme of budgetary Code items through supporting schedules.—Wilmerding v. LaGuardia, 268 App. Div. 496, 52 N. Y. S. 2d 169 [1944].

¶ 3. A resolution passed in 1920 by the Board of Estimate which recommended to the Board of Aldermen a rate of pay for "foremen" of $300 per annum in excess of the pay of mechanics was not effective where it was not implemented in the budget and the plaintiffs as "foremen" could not recover any wages in excess of those established in the yearly budgets.—Anderson v. City of New York, 281 App. Div. 539, 120 N. Y. S. 2d 860, aff'd 306 N. Y. 803, 118 N. E. 2d 819.

¶ 4. The action of the budget director in modifying the expense budget by eliminating ten positions of battalion chief and creating ten additional positions was not authorized by the Charter. The terms and conditions permitted modification of the appropriation by adding new positions but such terms and conditions could not be used to permit the summary realignment of an unlimited number of incumbents without a clear warrant of law. Charter § 128 does not furnish such warrant to the budget director.—Matter of Broderick, 295 N. Y. 363, 67 N. E. 2d 737 [1946].

¶ 5. A provision in a budget that vacancies should be filled only upon a certificate of the director of the budget who could impose such terms and conditions as he found proper was valid and the budget director was within his power when he authorized the filling of a vacancy which had a line schedule rate of $4,450.00 at $3,850.00 per annum. The appointee was not entitled to payment of salary in excess of the rate so fixed by the budget director.—Matter of McGovern, 273 App. Div. 35, 75 N. Y. S. 2d 492 [1947], aff'd 298 N. Y. 530, 80 N. E. 2d 667.

¶ 6. A resolution passed in 1920 by the Board of Estimate which recommended to the Board of Aldermen a rate of pay for "foremen" of $300 per annum in excess of the pay of mechanics was not effective where it was not implemented in the budget and the plaintiffs as "foremen" could not recover any wages in excess of those established in the yearly budgets.—Anderson v. City of New York, 281 App. Div. 539, 120 N. Y. S. 2d 860, aff'd 306 N. Y. 803, 118 N. E. 2d 819.

§ 121. **Veto of the mayor.**—a. Any action by the council on a unit of appropriation or on the terms and conditions of the budget shall be certified to the mayor by the president of the council. Any action by the board of estimate on a unit of appropriation or on the terms and conditions of the budget shall be certified to the mayor by the secretary of the board of estimate.

b. If the council or the board of estimate shall have increased or reduced or omitted any unit of appropriation in the budget as submitted by the mayor, or added any unit of appropriation thereto or changed or omitted any term or condition thereof, the mayor may, on or before the first day of June, disapprove any such increase, reduction, omission, addition or change and return such budget to the board of estimate and to the council, setting forth his objections thereto in writing.

c. Each unit of appropriation, term or condition, the disposition of which is so disapproved, shall thereupon be restored to or omitted from the budget in accordance with the proposed budget as previously submitted by the mayor, unless on or prior to the tenth day of June, both the board of estimate (other than the mayor) by a vote of two-thirds of the total number of votes which all of the members of the board (other than the mayor) are entitled to cast, and the council by a vote of two-thirds of all the councilmen acting separately but in identical terms shall restore or omit such increase, reduction, omission, addition or change so vetoed, in which case the same shall become part of the budget. Upon the completion of the foregoing, or on the eleventh day of June, whichever is earlier, the budget as submitted and modified pursuant to the foregoing provisions of this chapter shall be deemed to have been finally adopted. (*Derived from former* § 125. *Amended by L.* 1962, *ch.* 998, § 15.)

§ 122. **Appropriation, certification and publication.**—Not later than the fifteenth day of June in each year, the budget as finally adopted in such year shall be certified by the mayor, the comptroller and the city clerk as the budget for the ensuing fiscal year, and the several amounts therein specified as units of appropriation, shall be and become appropriated to the several purposes therein named whether payable from the tax levy or otherwise. The budget shall thereupon be filed in the office of the comptroller and the city clerk and shall be published forthwith in the City Record. (*Derived from former* § 126. *Amended by L.* 1962, *ch. 998,* § 16.)

§ 123. **Budget administration.**—a. Except as otherwise provided by law, no unit of appropriation shall be available for expenditure by any agency until a schedule fixing positions and salaries or setting forth other expenses within such unit of appropriation, established subject to the provisions of this charter, of the civil service law and of other applicable statutes, shall have been approved by the mayor, copies of which schedule shall be filed by the director of the budget with the comptroller, the department of personnel and the affected agency. To the extent that such a schedule or any amendment or modification thereof departs or differs from the itemized information and supporting schedules included in the budget message as submitted by the mayor in accordance with the provisions of paragraph two of subdivision b of section one hundred seventeen, such schedule, amendment or modification shall be published forthwith in the City Record.

b. The mayor shall keep informed during the course of each fiscal year, of the progress of expenditures and the receipt of revenues, and it shall be the duty of all agencies, when requested by the mayor, to supply all information needed for this purpose.

c. The mayor may issue directives imposing limitations on the transfer or expenditure of funds appropriated in the budget, which except as otherwise provided by law shall be binding on all agencies. (*Subdivision a amended by L.* 1962, *ch.* 998, § 17.)

§ 124. **Budget modification.**—a. Subject to the provisions of this charter, of the civil service law and of other applicable statutes, changes in schedules, within units of appropriation, activities or institutions, may be made prior to the commencement of or during the fiscal year by the head of the affected agency except that the mayor may withdraw from such affected agency, and upon such withdrawal, himself exercise the power to make such changes in such schedules applicable to such agency. Such changes shall be published in the City Record and written notice thereof shall be given to the mayor and the comptroller not less than ten days before the effective date thereof.

b. The mayor may during any fiscal year transfer part or all of any unit of appropriation within any agency to another unit of appropriation within such agency or part or all of any unit of appropriation which has not been assigned to any agency, to any unit of appropriation within any agency for the purpose for which such unassigned unit of appropriation was originally established. Each such transfer shall be published in the City Record and written notice thereof shall be given to the comptroller not less than ten days before the effective date thereof.

c. Upon recommendation of the mayor, the board of estimate and the council may during any fiscal year transfer part or all of any unit of appropriation from one agency to another, or establish a new unit of appropriation within funds lawfully available therefor, or transfer all or part of any unit of appropriation for the purpose of establishing or adding to any new unit of appropriation, or change the terms and conditions of the budget; but in any such case there shall be public hearings in the manner provided in section one hundred nineteen upon ten days' notice published in the City Record. Written notice of any such transfer or change shall be given to the comptroller within ten days after such transfer or change.

d. The provisions of this section shall not be deemed to authorize any transfer from appropriations required by law. (*Derived from former* §§ 127 *and* 128. *Subdivision a, b and c amended by L.* 1962, *ch. 998,* § 18.)

## CASE NOTES

¶ 1. Under former § 127 (now § 124) of the Charter, the power of the Board of Estimate to make transfer of appropriations during the fiscal year may be exercised at any time after the adoption of the budget, provided that the transfer takes effect after commencement of the fiscal year. Wilmerding v. La Guardia, 184 Misc. 607, 54 N. Y. S. 2d 531 [1945]. See also

183 Misc. 142, 50 N. Y. S. 2d 292, modified in other respects, 268 App. Div. 496, 52 N. Y. S. 2d 169.

¶ 2. Provision of former § 128 of the Charter authorizing the Director of the Budget upon the request of the head of an agency and "with the approval of the Board of Estimate" to transfer during any fiscal year an appropriation or part thereof from one line to another within the same schedule provided the total appropriation for the applicable code item is not increased, requires that the Board of Estimate itself first be satisfied with each separate transfer order made by the Budget Director, and such official duty of the board to pass judgment upon actual transfers of appropriations cannot be delegated. Furthermore, the scope of former § 128 cannot be deemed to have been enlarged through administrative construction, as it would appear that former § 128 was a limitation upon the practice that had previously been made use of by the Budget Director in his handling of appropriations within codes. Hence, the Budget Director, with the concurrence of the Comptroller, might not modify the City expense budget by eliminating ten positions of battalion chief in the Fire Department and by creating therein ten additional positions in the next higher rank of deputy chief on theory he was merely making provision for additional incumbents of a position already created at the rate established therefor by the original budget.—Broderick v. City of N. Y., 295 N. Y. 363, 67 N. E. 2d 737 [1946], aff'g 268 App. Div. 856, 50 N. Y. S. 2d 844, and 182 Misc. 990, 47 N. Y. S. 2d 714.

§ 125. **Unexpended balances of appropriations.**—Not later than the first day of February in each year, the mayor upon the recommendation of the comptroller shall transfer to the tax deficiency account all balances of appropriations for preceding fiscal years unexpended on the preceding first day of January, after deducting therefrom amounts sufficient to satisfy all outstanding claims payable from such appropriations. (*Derived from former* § 129.)

§ 126. **General fund.**—All revenues of the city, of every department, board, office and commission thereof, and of every borough, county and other division of government within the city, from whatsoever source except taxes on real estate, not required by law to be paid into any other fund or account shall be paid into a fund to be termed the "general fund." (*Derived from former* § 130.)

## CASE NOTES

¶ 1. Difference between revenues derived from occupancy tax imposed by City of New York and amount presently necessary for housing subsidies might be used for general City purposes, and was not required to be accumulated as a reserve for housing subsidies for future use, since the State Constitution, Art. XVIII § 2 and State Housing Law § 94 specifically direct that revenues from the occupancy tax and other taxes authorized were to be deposited in the general fund of the City, under New York City Charter former § 130 (now § 126) the general fund must be employed to meet municipal expenses generally and to reduce the real estate taxes to be levied, and in view of the statutory history it would seem the word "may" as used in Public Housing Law § 94 authorizing the levy of the tax and providing that the revenues resulting "may be used for the purpose of making municipal periodic subsidies", was not construable as "must".—Wilmerding v. La Guardia, 105 (27) N. Y. L. J. (2–1–41) 504, Col. 4 F.

¶ 2. A tax for the privilege of selling liquor, wine or beer at retail within the City of New York did not have to comply with § 22 of Article III of the State Constitution for the constitutional provision does not apply to local taxes. However, even if the

provision applied, it was satisfied by the requirement of this section that the tax money was to go into the City's General Fund.—Steuben Restaurants, Inc. v. City of New York, 202 Misc. 22, 114 N. Y. S. 2d 753 [1952].

§ 127. **Tax deficiency account.**—There shall be an account known as the "tax deficiency account."

a. Such account shall be charged or debited with

(1) all discounts allowed for the prepayment of taxes;

(2) the amount of all taxes cancelled or remitted.

The charges specified in paragraphs (1) and (2) shall be made not less frequently than once a month.

b. Such account shall be credited with

(1) all appropriations or parts thereof transferred to such account pursuant to section one hundred twenty-five during the calendar year preceding the adoption of the budget;

(2) the amount by which the total of the taxes levied for the current fiscal year exceeds, by reason of the fixing of the tax rate in cents and hundredths of a cent upon each dollar of assessed valuation, the total amount required to be raised by taes;

(3) the amount of delinquent taxes collected prior to the preceding first day of January theretofore charged against this account;

(4) The proceeds of the sale of real property acquired by virtue of tax enforcement foreclosure proceedings, or by deed in lieu thereof, including subsequent receipts in diminution of purchase money mortgages accepted at the time of sale, in an amount equal to the unpaid real estate taxes against such property from the first day of January or the first day of July, whichever first immediately precedes the date on which title vested in the city to the date of conveyance of title by the city, without interest or penalties thereon.

c. For such account there shall be appropriated annually in the budget a sum equal to the amounts by which the debits shall exceed the credits of this account as of the first day of February of each year, subject to the provisions of section one hundred twenty-eight of this charter. (*Derived from former* § 131. *Subd. b* (4) *amended by L. L.* 1961, *No.* 80.)

§ 128. **Tax appropriation and general fund stabilization reserve fund.**—a. There shall be a fund known as the "tax appropriation and general fund stabilization reserve fund." Such fund shall be credited with all sums appropriated to cover taxes due and uncollected pursuant to chapter eight hundred thirty-one of the laws of nineteen hundred thirty-three deducting therefrom all amounts by which such appropriations were reduced or offset on account of accruals or estimated revenues which have not been realized.

b. To this fund there shall be appropriated annually in the budget a sum sufficient to bring the total accumulations of said

fund to an amount equal to thirty per centum of the tax levy of the current fiscal year, but in no event shall the amounts appropriated to the tax deficiency account and the tax appropriation and general fund stabilization reserve fund together exceed two per centum of the tax levy of the current fiscal year except as hereinafter provided.

c. The board of estimate and the council, on the recommendation of the mayor may, in their discretion, authorize the use of any cash in the tax appropriation and general fund stabilization reserve fund in excess of thirty per cent of the tax levy for the current fiscal year for the reduction of taxes in any succeeding fiscal year.

d. The cash accumulated in the tax appropriation and general fund stabilization reserve fund may be borrowed from time to time for the purposes for which tax anticipation notes or revenue anticipation notes may be issued. Such loans shall be made without interest and shall be evidenced by tax anticipation notes or revenue anticipation notes, as the case may be, which shall be held in this fund. Such loans shall be repaid in the manner provided in the local finance law but such repayment shall be subsequent to the repayment of all other tax anticipation notes or revenue anticipation notes, as the case may be, sold to the public which have matured.

e. If, at the close of a fiscal year the total amount of the receipts from special taxes, fees, fines, water revenues, rentals, and all other sources of revenue required to be paid into the general fund during such fiscal year shall be less than the total amount of estimated receipts which was deducted by the council from the amount of the expense budget in determining the amount to be raised by tax upon real estate for such fiscal year, the amount of the difference between such total amounts shall be transferred from the tax appropriation and general fund stabilization reserve fund to the general fund. If after such transfer the cash remaining in such tax appropriation and general fund stabilization reserve fund shall be an amount less than ten per cent of the tax levy for such fiscal year, the amount transferred shall be repaid by equal appropriations in not less than three expense budgets during the next succeeding six fiscal years, provided, however, that if the amount of cash in such tax appropriation and general fund stabilization reserve fund shall, at the close of any one of such next succeeding six fiscal years, be equal to or in excess of ten per cent of the tax levy for such fiscal year, no further repayment of the whole or any part of such transfer shall be required to be made in any subsequent fiscal year. Any such expense budget appropriation shall be in addition to that required by subdivision b hereof.

f. As used in this section, the term "tax levy" shall mean that part of the real estate tax levy which is included within the tax limitation prescribed by section ten of article eight of the state constitution. (*Derived from former* § 132 *as amended by L.* 1943, *ch.* 710 *pursuant to L.* 1944, *ch.* 606, § 6 *and L.* 1945, *ch.* 338 *and by L.* 1955, *No.* 66.)

# CHAPTER 7

# REAL PROPERTY ASSESSMENT DEPARTMENT

§ 151. **Department; president.**—There shall be a real property assessment department the head of which shall be the president of the tax commission, referred to in this chapter as the president. (*Derived from former* § 151.)

§ 152. **Offices.**—The real property assessment department shall maintain its main office in one borough and a branch office in each other borough.

§ 153. **Tax commission**—a. There shall be a tax commission to consist of the president and six commissioners who shall be appointed by the mayor. At least one resident of each borough shall be included among the commissioners.

b. The tax commission shall be charged with the duty of reviewing and correcting all assessments of real property for taxation. (*Derived from former* § 153.)

§ 154. **Administrative powers of commissioners.**—Any commissioner shall exercise such other powers and duties as the president may from time to time assign to him. (*Derived from former* § 154.)

§ 155. **Assessors.**—a. The president shall appoint as many assessors as shall be necessary within the appropriation therefor.

b. The assessors shall, under the direction of the president, be charged with the duty of assessing for taxation all the taxable real property in the several districts that may be assigned to them by the president, and of preparing the assessment-rolls. (*Derived from former* § 155.)

§ 156. **Right of entry.**—The president or any commissioner or any assessor may enter upon real property and into buildings and structures at all reasonable times to ascertain the character of the property. Refusal by the owner or his agent to permit such entry shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. (*Derived from former* § 156.)

§ 157. **Taxable status of property.**—The taxable status of all real property assessable for taxation in the city of New York shall be fixed for the succeeding fiscal year on the twenty-fifth day of January in each year. (*Derived from former* § 157.)

## CASE NOTES

¶ 1. In tax certiorari proceeding, refusal of court to permit proof of a bona fide sale of the property involved, made within a few weeks after the taxable status date, *held* reversible error. Provision of § 157

of the Charter stating that the taxable status of real property shall be fixed for the succeeding fiscal year on January 25th of each year, merely means that the assessed valuation of the property is to be determined as of that date, and proof of occurrences after the taxable status date which may shed light upon the actual value as of that date is not barred. Evidence of a sale made after the taxable status date is admissible at the hearing before the Court even though it could not have been before the tax assessors on January 25th, as a certiorari proceeding is also in the nature of a new trial; moreover, assessments do not become final until May 25th in each year.—People (Four Park Avenue Corp.) v. Lilly, 265 App. Div. 68, 37 N. Y. S. 2d 733 [1942].

¶ 2. Tax Law § 4-a provides that whenever a person not entitled to an exemption acquires title to property which is exempt from taxation such property shall immediately become subject to taxation. The plaintiff acquired title to exempt property on June 6th, 1947. In April of that year § 4-a had been enacted. The amendment to the Tax Law was, by its terms, applicable to the current year and hence, although plaintiff purchased the property after the date fixed for establishing taxable status he was nonetheless subject to taxation for the taxable year beginning July 1, 1946.—Bronx Garment Center, Inc. v. City of New York, 199 Misc. 513, 106 N. Y. S. 2d 720 [1951], aff'd 279 App. Div. 1048, 113 N. Y. S. 2d 257.

¶ 3. New York City foreclosed its tax lien and received title to a certain hotel property on July 19, 1943. On December 30, 1943, the plaintiffs agreed to purchase the property but conveyance was not made until March of 1944. Held: even though the City had title to the property on the taxable status date the property could be assessed to the plaintiff for the year 1944–1945.—People ex rel. Keywell v. Chambers, 300 N. Y. 509, 89 N. E. 2d 245 [1949].

¶ 4. Petitioner was not entitled to tax exemption for year 1957–58 for store premises (37) where it appeared that some store tenants entered into possession, setting up their counters, marking merchandise, and doing office work prior to April 15, 1957. The fact that temporary certificates of occupancy were not issued until April 27 and that the tenants were not required to pay rent until April 25 was not controlling on the issue of taxable status.—States Island Plaza, Inc. v. Tax Commissioner, 145 (100) N. Y. L. J. (5–24–61) 18, Col. 4 M.

§ 158. **Assessment of real property.**—The assessors shall commence to assess real estate on the first day in August in each year, not a Sunday or a legal holiday. (*Derived from former* § 158.)

§ 159. **Statement of assessed valuation.**—The assessor or other person having charge of a borough office of the department shall compute from the annual record of the assessed valuation of real estate in such office the total aggregate amount of the assessed valuation of real property appearing on such annual record for such borough, and shall transmit a statement of such aggregate amount to the tax commission at the main office of the department on or before the twenty-fifth day of January in each year. (*Derived from former* § 159.)

§ 160. **Annual record of assessed valuation; public inspection.**—The books of the annual record of the assessed valuation of real estate shall be opened to the public not later than the first day in February in each year, not a Sunday or a legal holiday, and remain open during usual business hours for public inspection and examination until the fifteenth day of March thereafter. The tax commission, previous to and during the time such books are open to public inspection, shall advertise such fact in the

City Record and in such other newspaper or newspapers published in the several boroughs as may be authorized by the director of the City Record with the approval of the mayor and the comptroller. (*Derived from former* § 160. *Amended by L.* 1962, *ch.* 998, § 19.)

### CASE NOTES

¶ 1. That March 15, which is the date until which § 160 of the Charter provides that the books of assessed valuation shall remain open for inspection and examination, fell on a Sunday, did not extend to March 16 the time for filing an application to correct an assessment. General Construction Law § 20 was inapplicable because the time specified was not measured by days.—People (Beekman Studios, Inc.) v. Miller, 117 (105) N. Y. L. J. (5–6–47) 1772, Col. 7 F.

¶ 2. Misrepresentations of the assessed valuation and taxes on property was not sufficient to rescind a contract for the purchase of the property on the grounds of fraud where at the time of misrepresentation, the assessment for the coming year was a matter of public record and the tax rate was a matter requiring future action by the city council and could only be a matter of conjecture.—Irvlor Realty Corp. v. 62–114 Imlay Street Corp., 151 N. Y. S. 2d 191 [1956].

§ 161. **Annual record of assessed valuation; additions and changes.**—While the books of annual record of the assessed valuation of real estate remain open for public inspection and examination, the tax commission may place on such books any real estate and also the assessed valuation of any such real estate that may have been omitted from such books on the day of the opening thereof, and it may increase or diminish the assessed valuation of any real estate as in its judgment may be just or necessary for the equalization of taxation; but no such addition to the books and no such increase in assessed valuation shall be made, except upon mailing ten days' prior written notice addressed to the owners of record of the real estate affected thereby at their last known residence or business address and the filing of an affidavit of such mailing in the main office of the department. When such notice is mailed after the twenty-third day of February, such owners may apply for a correction of such assessment so added or so increased within twenty days after the mailing of such notice with the same force and effect as if such application were made on or before the fifteenth day of March in such year. (*Derived from former* § 161.)

### CASE NOTES

¶ 1. Application for injunctive relief to correct an alleged improper assessment, was denied, as plaintiff possessed an adequate remedy at law by an application under § 161 of the Charter, pursuant to which the defendant purported to have acted, and in the event the Tax Commission overruled its protest, it might maintain a certiorari proceeding to review the Commissioners' determination.—Heckscher Foundation for Children v. Mills, 111 (58) N. Y. L. J. (3–11–44) 975, Col. 7 F.

¶ 2. That title to the property during the tax years 1943–44 and 1944–45 was held by the United States did not render it exempt from taxation under Tax Law § 24 and N. Y. C. Charter 161, where the property had been ac-

§ 161, where the property had been acquired by the United States by con-

demnation on request of the Defense Plant Corporation, which had no power to condemn, the property had then been leased to the plaintiff for the manufacture of essential military equipment at a rate based upon a percentage of the aggregate net sales from the leased premises, in determining the sales price of military equipment manufactured and sold to the government plaintiff included the tax as payable under the lease for the tax years in question as an expense, and a delay of 2½ years in transferring title to the Defense Plant Corporation was occasioned by wartime pressure in Washington. Contention that no property has been "omitted" from the books of annual record of the assessment valuation or "omitted" from the assessment rolls unless there is absolutely no reference in either of the records to the property in dispute, was rejected.—Mergenthaler Linotype Co. v. Mills, 126 (4) N. Y. L. J. (7–6–51) 35, Col. 3 F.

§ 162. **Apportionment of assessments.**—When any separately assessed parcel of real estate shall have been divided prior to the first day of June, the tax commission may apportion the assessment thereof in such manner as may be provided by law. (*Derived from former* § 162.)

§ 163. **Application for correction of assessment for taxation.**—During the time that the books of annual record of the assessed valuation of real estate are open for public inspection, any person or corporation claiming to be aggrieved by the assessed valuation of real estate may apply for correction of such assessment. Such application shall be duly verified by a person having personal knowledge of the facts stated therein, provided that if the application is signed by someone other than the person or an officer of the corporation claiming to be aggrieved the application must be accompanied by a duly executed power of attorney as prescribed by the rules and regulations of the tax commission and shall specify clearly the following matters:

(1) the objection thereto and the grounds for such objection;

(2) where such application alleges illegality it shall specify the grounds of the alleged illegality, or where such application alleges errors by reason of over-valuation it shall state the extent of such over-valuation, or where such application alleges inequality it shall specify the instances in which such inequality exists and the extent thereof;

(3) except in the case of multiple or other dwelling which is occupied or is to be occupied exclusively by fewer than seven families, all income received or accrued and all expenses paid or incurred in the operation of the property during the calendar year preceding the date of the application, or during the applicant's fiscal year preceding the date of the application if the applicant's books and records are maintained on a fiscal year basis for federal income tax purposes, or during the period of the applicant's connection with the property if such period commenced after the first day of January of the calendar year preceding the date of the application, except that where the applicant has not operated the property and is without knowledge of the income and expenses of operation, it shall state such facts under oath in lieu thereof. In the event that the statement of income and expenses is not filed as part of the

application, such statement, duly verified as in this section provided, shall be filed prior to the twenty-fifth day of April.

The filing of an application in the manner and form hereinabove prescribed, shall be a prerequisite to the review of a final determination of the tax commission as provided in section one hundred sixty-six. Such application, in the case of real property indicated on the tax map by a parcel number, shall be filed in the office of the department in the borough in which such real property is situated, and in the case of real property indicated by an identification number, it shall be filed in the main office of the department. Assessors assigned by the president for the purpose of receiving such application are thereby authorized to administer oaths between the first day of February and the fifteenth day of March. (*Derived from former* § 163, *as amended by L. L.* 1952, *No.* 128.)

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¶ 1. Written application for correction of assessment, signed by the applicant through its president who stated in writing that he, "being duly sworn says" that the statements therein were true, *held* sufficient under Charter § 163, requiring that the application be "in writing under oath", notwithstanding that the form for the jurat was blank and the notary failed to affix her signature thereto, where it appeared that the application had been signed and sworn to by the president in presence of the notary public, who took the oath but inadvertently failed to fill out the jurat. The oath itself was not required to be in writing, and the jurat was simply evidence of the fact that the oath was properly taken.—People (Fifth Ave. & 37th St. Corp.) v. Miller, 261 App. Div. 550, 26 N. Y. S. 2d 219 [1941], aff'd without opinion, 286 N. Y. 628, 36 N. E. 2d 682.

¶ 2. A paper sworn to in another state is not verified when it is merely sworn to before a notary public (C. P. A. § 359). It must have a certificate of authentication attached to it, and the absence thereof was jurisdictional and might not be waived, and the Court might not direct that the paper be returned to relator for purpose of supplying a jurisdictional defect (5 N. Y. Civil Pro. R. 376).—People (Thompson) v. Miller, 105 (15) N. Y. L. J. (1–18–41) 288, Col. 3 F.

¶ 3. Application for reduction of assessment which was signed and verified in Ohio but failed to have attached thereto an authenticating certificate to the signature of the notary public, *held* not ineffective, since proof of due authentication

**might be furnished at any time.—People (Rudolph Wurlitzer Co.) v. Miller, 106 (81) N. Y. L. J. (10–4–41) 897, Col. 6 M.**

¶ 4. Technicality of notary public's name appearing on the line where owner's name should be did not deprive taxpayer of his right to review.—Genia Realty Corp. v. Boyland, 133 (55) N. Y. L. J. (3–21–55) 7, Col. 6 F.

¶ 5. A consolidation of the two lots **for assessment purposes did not change the character and status of the real estate even though the value may have been increased as the result** of consolidation, and consequently no protest was necessary as a condition to maintenance of a certiorari proceeding to review the assessment.—People (Karlopat Realty Corp.) v. Sexton, 106 (144) N. Y. L. J. (12–22–41) 2084, Col. 2 M.

¶ 6. Where applications for exemption were filed but no applications for correction of the assessments on the parcels were ever filed with the Tax Department, the Court was without jurisdiction of certiorari proceeding to review the assessments.—People (McElroy) v. Miller, 105 (101) N. Y. L. J. (5–1–41) 1938, Col. 5 M.

¶ 7. Court, in a certiorari proceeding to review tax assessments, could not amend the application for correction so as to decrease the value as stated in the application, since the commissioners had relied upon such statement when reviewing the assessments.—People (125 East 57th St. Corp.) v. Miller, 104 (139) N. Y. L. J. (12–16–40) 2059, Col. 5 T.

¶ 8. Where following the assessment in question the then owner of the property contracted for and sold the property pursuant to a bargain and sale deed which contained the customary clause "together with the appurtenances and all the estate and rights of the party of the first part in and to said premises", the former owner of the premises thereby divested himself of title and was no longer a party aggrieved entitled to bring a certiorari proceeding (264 App. Div. 262). However, the new owner, who had instituted a certiorari proceeding within the proper period, was a party aggrieved, inasmuch as it had succeeded to all the rights of the former owner, and with the obligation to pay taxes thereafter accruing was the corresponding right to challenge those taxes (85 N. Y. 536; &c.).—People (Jamaica Sav. Bank) v. Lilly, 108 (30) N. Y. L. J. (8-5-42) 280, Col. 4 T.

¶ 9. Where on February 16 C contracted to sell to relator a portion of a large plot owned by it, C advised the Tax Department thereof but such Department did not apportion the tax lot until October 3, the only protest filed against the tax assessment was that of C, which confined its objection to valuations of the improvements on the portion of the tax lot not included in the sale made to relator, and the assessment was reduced on C's application, a writ subsequently obtained by relator to review the assessment on its property, *held* to have been without authority.—Ginstling v. Lilly, 121 (114) N. Y. L. J. (6–13–49) 2096, Col. 6 M.

¶ 10. Tenant who occupied the premises under a long term lease which provided that the tenant should pay the taxes, was a person aggrieved by the assessment and might bring a certiorari tax proceeding to review it.—Irish Government v. Boyland, 127 (119) N. Y. L. J. (6–19–52) 2433, Col. 1 T.

¶ 11. Contention that since the property was exempted from taxation at least until November 10, 1952, when petitioner acquired title thereto, the then owner of the property was in no position to protest the valuation as made and therefore failure to file the protest should not foreclose petitioners from now questioning the correctness of the assessment, was rejected, as the pecuniary rights of an owner of tax exempt property are definitely concerned with excessive valuations and such a person has every right as an aggrieved party to file a protest and petition to review a determination for alleged overvaluation.—Bierman v. Boyland, 125 N. Y. S. 2d 86 [1953].

¶ 12. Proceeding to review final determination of Tax Commission assessing petitioner's real property in a certain sum upon restoration of the property from the exempt rolls to the tax rolls of the City pursuant to Tax Law § 4-a, was dismissed, inasmuch as there had been a default in protesting the alleged overvaluation within the time prescribed by the Charter. Contention that the owner of the property during the time when protest should have been filed was in no position to protest because the property was exempt was rejected, as the owner of exempt

property may claim to be aggrieved by reason of assessed valuation. Administrative Code § 153b–2.0 was not designed to afford relief in the courts to those who fail to comply with the applicable provisions of the Charter, or to create new or additional remedies to purchasers of real property after March 15 where there was default or failure to file protest prior to that date.—Seamen's Bank for Savings v. Boyland, 125 N. Y. S. 2d 265 [1953].

¶ 13. Where the aggrieved party to an assessment was a lessee obligated by his lease to pay the taxes, the statement of the affiant that he was an officer of the owner corporation when, in fact, he was an officer of the lessee corporation was merely a procedural defect and was not fatal to the application.—Milhouse-Link, Inc. v. Tax Comm'rs., 134 (120) N. Y. L. J. (12–23–55) 3, Col. 3 F.

¶ 14. Inasmuch as § 160 of the Charter requires that books of record of assessed valuations shall remain open until March 15, and § 163 provides for correction of valuation during period when books are open for inspection, applications for correction filed on March 16 were not timely filed, notwithstanding March 15 fell on a Sunday, as the statute gives no extra time by reason thereof. General Construction Law § 20 was inapplicable as the time specified was not measured by days.—Firfifth Realty, Inc. v. Mills, 121 (54) N. Y. L. J. (3-18-49) 996, Col. 6 M.

¶ 15. Motion to require respondent to accept application for correction of assessed value of real estate of petitioner and 50 taxpayers listed therein, was denied, as §§ 160 and 163 of the Charter required the applications to be filed by March 15 whereas the applications were mailed by registered mail, special delivery, on Friday, March 14, in Manhattan but were not received at the Tax Commission's office until Monday, March 17, due to fact that the Kew Gardens Post Office Substation, where the applications were finally transmitted for delivery by the Post Office Department, is closed on Saturdays. The courts are without power to extend the short statute of limitations fixed by the Legislature for the time of filing.—Kaye v. Boyland, 127 (80) N. Y. L. J. (4–24–52) 1645, Col. 7 F.

¶ 16. Where no protest against the valuation had been filed by the former owner prior to March 15, 1952 and no petition to review the determination was filed prior to October 24, 1952, no challenge thereto upon the ground of overvaluation might be entertained by the Court. The proceeding for a review of real property tax assessments by the courts is statutory and must be strictly followed, and failure to timely file a protest as provided by statute foreclosed any right of review.—Bierman v. Boyland, 125 N. Y. S. 2d 86 [1953].

¶ 17. Application for correction of an assessment which failed to specify any objection whatsoever as to the assessment or to state the grounds for any objection, *held* fatally insufficient, requiring dismissal of the certiorari proceedings for lack of jurisdiction (N. Y. C. Charter § 163; 284 N. Y. 150; 281 N. Y. 554; &c.).—People (2440 Grand Concourse, Inc.) v. Miller, 178 Misc. 1038, 37 N. Y. S. 2d 264 [1940], aff'd without opinion, 261 App. Div. 948, 26 N. Y. S. 2d 219.

¶ 18. Where application to Tax Commission for correction of assessed valuation was made on a blank furnished by the City, and, although the applicant failed to answer the questions as to whether the objection was based on the valuation of the land or the building, or upon inequality or illegality, he had set forth the assessed valuation and the considerably lower amount as the value he considered the fair value, and the Tax Commissioner had regarded the publication as a sufficient statement of the objection and had then overruled such objection, the City might not now be heard to object to the sufficiency of the specification of objections.—People ex rel. MacCracken v. Miller, 291 N. Y. 55, 50 N. E. 2d 542 [1943].

¶ 19. Application for writ of certiorari to review a tax assessment which was stated in the application to be incorrect by reason of overvaluation of both land and building, was not defective for failure to state the amount of claimed overvaluation. Mere fact that application did not comply with rule adopted by the Tax Commission directing the commissioners to take no action when the claimed value was omitted from the application, did not make the application defective, as the rules could not add to the statutory requirements. Furthermore, refusal of the commissioners to give relator the opportunity of finding the amount of

such overvaluation in an appraisal at the hearing before the commissioners, or otherwise, was arbitrary and unreasonable. Even if there was a defect, action of the commissioners in failing to allow further facts to be presented to them amounted to a waiver of any defect.—People (Relmar Operating Corp.) v. Mills, 65 N. Y. S. 2d 194 [1946].

¶ 20. Section 163 of the Charter does not expressly require that the applicant's opinion of the value of the property be set forth in the application for a tax reduction. Accordingly, application which stated that the objection to the assessment was based on valuation of the land and building and which set forth other facts sufficient to enable the Tax Commission to act on the application, was not jurisdictionally defective for failure to state the fair value of the property on the taxable status date.—New York Wetpruf Corp. v. Mills, 120 (80) N. Y. L. J. (10–25–48) 903, Col. 6 M.

¶ 21. An application for correction of assessment for taxation which merely stated that the assessed valuation of realtor's property was $1,050,000 and that relator considered the full value of the property on the assessment date to be $850,000, held sufficient as stating a claim that the property was overvalued to extent of $200,000.—Weston Estates, Inc. v. Chambers, 121 (60) N. Y. L. J. (3-21–49) 1015, Col. 7 F.

¶ 22. Action of tax commissioners in granting relator a hearing based on the application, and in thereafter reaffirming the assessment, *held* not to constitute a waiver of the defects in the application, since relator had sought to review for overvaluation, and the basis for such action on part of the commissioners was in the application for correction, and in any event it would appear that the commissioners could not waive a statutory requirement that gave jurisdiction.—People (2440 Grand Concourse, Inc.) v. Miller, 178 Misc. 1038, 37 N. Y. S. 2d 264 [1940] aff'd without opinion, 261 App. Div. 948, 26 N. Y. S. 2d 219.

¶ 23. Failure to set forth a claimed value in the application for correction of the assessed value, constituted a procedural defect and not a jurisdictional one, and was waived by conduct of the Tax Commission in holding a hearing and in making a return based upon the application.—People ex rel. Irving Trust Co. v. Miller, 264 App. Div. 270, 37 N. Y. S. 2d 266 [1942].

¶ 24. Where applications by relators to review tax assessments had been signed by an attorney-in-fact, his failure to file therewith a power of attorney as required by § 163 of the Charter, *held* to have rendered the applications so fatally defective as to deprive court of jurisdiction to entertain the proceeding to review the assessments.—Berkley v. Boyland, 205 Misc. 264, 129 N. Y. S. 2d 52 [1954].

¶ 25. An application for correction of assessment was dismissed where such application was signed by petitioner's attorney without the filing of a power of attorney.—Boyd v. Boyland, 133 (55) N. Y. L. J. (3–21–55) 7, Col. 7 M.

¶ 26. Where petitioner failed to file with his application for correction of the assessment a statement of the income received and expenses incurred in the operation of the property during the calendar year preceding the date of the application, his proceeding to review the assessment was dismissed, as the filing of a statement is a jurisdictional requirement to a review.—Casper Garber Realty v. Boyland, 131 (103) N. Y. L. J. (5–28–54) 9, Col. 2 T.

¶ 27. Local Law No. 128 of 1952, amending former § 163 of the Charter wherein all petitioners seeking to review tax assessments were required to file an income and expense statement *held* inconsistent with § 166–1.0 of the Administrative Code where, by legislative enactment, the Supreme Court acquired jurisdiction to entertain all tax proceedings upon the presentation of a petition which clearly stated the grounds of objection. Local law was invalid under the Constitution and the City Home Rule Law.—Schayes v. MacDuff, 285 App. Div. 1220, 140 N. Y. S. 2d 764 [1955].

¶ 28. A determination of the Tax Commission granting a tax exemption on real property owned by Columbia University became final on March 15th, and thereafter the Commission was without authority to change the assessment. Thus, a petition seeking to cancel the exemption on the ground that the Commission had not made a finding that Columbia University did not practice racial discrimination was dismissed where it was filed on July 19th, more than 4 months after the determination of the Commission be-

came final.—Matter of Goldstein (Mills), 185 Misc. 851, 57 N. Y. S. 2d 810 [1945], aff'd 270 App. Div. 930, 62 N. Y. S. 2d 619.

¶ 29. Where City of New York was owner of real property, cost of sidewalk repairs charged against the property was not assessable to new owner who purchased the real property from the City after the repairs were made.—Miller Ave. Parking Corp. v. City of New York, 144 (117) N. Y. L. J. (12–20–60) 11, Col. 7 M.

¶ 30. The Supreme Court would not entertain an action by a taxpayer for declaratory judgment that her assessment was illegal and void based on the contention that the assessor had not made a personal inspection, since the plaintiff's sole remedy is by a proceeding as set forth in § 166–1.0 of the Administrative Code.—Cedzich v. The City of New York, 19 Misc. 2d 572, 190 N. Y. S. 2d 167 [1959].

¶ 31. The failure to set forth details of assessment in body of original petition and schedule was fatal, since the Court could not permit an amendment, as the time for filing and serving another petition had expired.—Matter of Beekman's Estate (Boylan), 143 (15) N. Y. L. J. (1–22–60) 13, Col. 6 T.

¶ 32. The president of 53 civic organizations in the Borough of Queens filed a petition for review of real estate assessments in behalf of 32,000 protestees and 250,000 owners of 1 and 2-family houses in Queens. Held: the petition deals largely in generalities and irrelevancies and does not satisfy §§ 163–166 of the Charter or § 166–1.0 of the Administrative Code, which set forth specifically, the matter in which a review of an assessment may be ontained. There is no basis set forth in this petition for a review of any single assessment of the 53 parcels of the named petitioners, or the 32,000 protestees, or of the 250,000 home owners or of the many more thousands of commercial properties contained in this assessment roll.—Matter of Lome, 19 Misc. 2d 803, 192 N. Y. S. 2d 787 [1959]; aff'd 11 A. D. 2d 773, 204 N. Y. S. 2d 910 [1960].

¶ 33. The period for filing applications for the benefits set forth in § J41–2.4 of the Code were fixed to accord with the administration of taxes generally in New York City. Hence, the dates for application are between February 1 and March 15.—Kreulen v. Boyland, 8 Misc. 2d 895, 166 N. Y. S. 2d 179 [1957].

¶ 34. Where the time for filing a tax protest terminated on Sunday, the taxpayer could properly file the protest on the following Monday.—Matter of Fay, 18 Misc. 2d 504, 187 N. Y. S. 2d 504 [1959].

¶ 35. An application for the correction of an assessment should not have been rejected on the ground that it failed to state the grounds of the objection where, although the application did not specify that the objection was made on the grounds of over-valuation it did set forth that the property was assessed in the sum of $137,000 and did claim that the full value of the property was only $87,000.—Matter of Reiner, 278 App. Div. 580, 102 N. Y. S. 2d 461 [1951], appeal denied 302 N. Y. 951.

¶ 36. Protests of assessments signed by persons other than the petitioners are jurisdictionally defective where a power of attorney has not been filed with the Tax Department.—In re Devellier (Tax Commissioners), 141 (40) N. Y. L. J. (3–2–59) 13, Col. 1 M.

¶ 37. The City has no power to impose restrictions upon a taxpayer's right to a review by certiorari. A petition signed by petitioner's attorney, during the petitioner's absence in Europe, was proper, despite the lack of a power of attorney.—MacPherson v. Boyland, 136 (5) N. Y. L. J. (7–9–56) 4, Col. 5 M.

¶ 38. While the City may, as a prerequisite to review by its own tax officers, require a statement of income and expenses in the application, it has no authority to bar a further review by the Court. The City's application to dismiss the petition is denied.—Matter of 749 Broadway Realty Corp. v. Boyland, 1 A. D. 2d 819, 148 N. Y. S. 2d 741 [1955]; aff'd without opinion 3 N. Y. 2d 737, 163 N. Y. S. 2d 973, 143 N. E. 2d 519 [1957]. (Citation in paragraph 27 under § 163 in Vol. 1 should have been Matter of 749 Broadway Realty Corp. v. Boyland, 1 Misc. 2d 575, 140 N. Y. S. 2d 766 [1955].

§ 164 **Procedure on application.**—Between the first day of February and the twenty-fifth day of May, the tax commission may itself or by a commissioner or assessor thereunto authorized by the

commission, act upon applications, compel the attendance of witnesses, administer oaths or affirmations and examine applicants and other witnesses under oath. It shall make rules of practice for proceedings before the tax commission, and such rules and regulations as may be appropriate and expedient to the end that the taxpayers may have a hearing in the borough in which they reside or in which their property is located, except that all applications with respect to property indicated on the tax maps by identification numbers shall be heard by the tax commission sitting as a body at its main office. (*Derived from former* § 164 *as amended by L. L.* 1951, *No.* 58.)

## CASE NOTES

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**Correction of defects,** ¶ 6
**Rules of tax commission, validity of,** ¶¶ 2–5
**Satisfaction of due process requirements,** ¶ 1
**Waiver of defects,** ¶ 7

¶ 1. Sections of Charter under which taxes are levied upon real estate in the City of New York more than satisfy the taxpayer's right, under due process requirements, to notice and a chance to be heard at some stage before the charge becomes an absolute lien upon his property.—In re 801–815 East New York Ave. Brooklyn (Cannon), 290 N. Y. 236, 48 N. E. 2d 502 [1943].

¶ 2. Section 164 of the Charter does not authorize the Tax Commission to modify or enlarge provisions of § 163, which provides that an application to correct an assessment shall specify the objections and the grounds therefor. It does not authorize the taxing authorities to write to an applicant who filed a protest, requiring him to furnish additional information and making the furnishing thereof a jurisdictional requirement.—People (Sprague Realty Corp.) v. Mills, 71 N. Y. S. 2d 132 [1947].

¶ 3. Provisions of N. Y. C. Charter § 164, authorizing Tax Commission to make rules of practice, does not authorize the Commission to modify or enlarge the provisions of § 163.—People (Fein) v. Mills, 118 (106) N. Y. L. J. (11–17–47) 1333, Col. 2 M.

¶ 4. Application for correction of assessed valuation signed by a person recited to be "agent" of the owner, might not be rejected for failure to comply with rule of the Tax Commission requiring that an application signed by a person other than the aggrieved party must be accompanied by a duly executed power of attorney. Neither § 163 nor § 164 of the Charter authorized the Commission to enlarge or modify the legal requirements of an application.—Id.

¶ 5. Application for correction of assessed valuation was not defective for alleged failure to comply with rule of the Tax Commission requiring an application for correction of assessed valuation, where signed by a person other than the person claiming to be aggrieved by the assessment, to be accompanied by a duly executed power of attorney or by proof of authorization sworn to by the agent. § 164 of the Charter authorizing the Tax Commission to make rules and regulations does not authorize it to modify or enlarge the provisions of § 163 as to applications to correct assessments.—Irish Government v. Boyland, 127 (119) N. Y. L. J. (6–19–52) 2433, Col. 1 T.

¶ 6. Where application for correction of assessed valuation was filed without being accompanied by proof of authorization and a statement of income and expense as required by the Tax Commission's rules, but the Commission gave relator permission to file the authorization at a subsequent date, and later notified relator to appear at a hearing to be held on April 3, the relator's offering of the required authorization and income and expense statement at the time of the hearing and the subsequent filing of the authorization with the Tax Department on April 8, both dates being within the statutory

period in which the Commission is empower to hold hearings, *held* to constitute a timely correction of the defects.—People (McVeigh) v. Mills, 116 (134) N. Y. L. J. (12-20-46) 1829, Col. 2 M.

¶ 7. Furthermore, the Commission's failure to object to the application at time of filing and its giving permission to relator to file additional proof at a subsequent date, coupled with sending of a notice of hearing without raising any objection, amounted to a waiver of the failure to supply the proof within the time specified in the rules.—Id.

§ 165. **Final determination of the tax commission.**—The final determination of the tax commission upon any application for the correction of an assessment shall be rendered not later than the twenty-fifth day of May. Otherwise, the assessment objected to shall be deemed to be the final determination of the tax commission. (*Derived from former* § 165.)

### CASE NOTES

¶ 1. City's motion to dismiss on the ground that petition for review of final determination of City Tax Commission was not timely *denied* where petition failed to show date of final adverse determination.—The Second District Dental Society of N. Y. v. Boyland, 139 N. Y. S. 2d 123 [1955].

¶ 2. The determination of the Tax Commission continuing the exemption of real property owned by Columbia University became final on March 15th, 1945 and a proceeding to review the determination of the Tax Commission in refusing to cancel the exemption which was brought more than four months after the determination of the exemption had become final was barred by Civil Practice Act § 1286.—Matter of Goldstein (Mills), 185 Misc. 851, 57 N. Y. S. 2d 810 [1945], aff'd 270 App. Div. 930, 62 N. Y. S. 2d 619.

§ 166. **Proceeding to review final determination of the tax commission.**—A proceeding to review or correct on the merits any final determination of the tax commission may be had as provided by law, and if brought to review a determination mentioned in section one hundred sixty-five must be commenced before the twenty-fifth day of October following the time when the determination sought to be reviewed or corrected was made. (*Derived from former* § 166 *as amended by L.* 1949, *ch.* 550.)

### CASE NOTES

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**Costs and expenses, allowance of,** ¶ 15
**Exclusiveness of remedy prescribed by the Charter,** ¶¶ 1–3, 17
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**Time to file income and expense statement,** ¶ 16

¶ 1. Claim of State Insurance Fund to exemption from taxation of real property purchased by it for purpose of erecting an office building thereon for transaction of its business, on ground it was an agency of the State of New York and therefore exempt under Tax Law § 4, subd. 2, *held* reviewable in a proceeding under C. P. A. Art. 78, notwithstanding the statutory remedy provided by §§ 165 and 166 of the Charter, and 166–1.0 of the Administrative Code for review of a determination of the Tax Commission. The "illegality" envisaged by the Administrative Code does not encompass a genuine jurisdictional challenge to the very power

of the Commission to assess at all. Moreover, statutes purporting to set up exclusive procedures for reviewing tax assessments do not bar collateral action when the taxes are levied without jurisdiction. — State Ins. Fund v. Boyland, 282 App. Div. 516, 125 N. Y. S. 2d 169 [1953], aff'd 309 N. Y. 1009, 133 N. E. 2d 457 [1954].

¶ 2. A proceeding under C. P. A. Art. 78 may not be resorted to by the taxpayer as an alternative remedy to the one provided by the Tax Law or the City Charter.—Bierman v. Boyland, 125 N. Y. S. 2d 86 [1953].

¶ 3. Application for review of determination of the tax commissioners which denied petitioner an exemption from taxation of its real property, might not properly be made under C. P. A., Art 78, inasmuch as the New York City Charter provides a complete remedy for review of an assessment claimed to be erroneous because the property is exempt (N. Y. C. Charter § 166), and such jurisdiction is exclusive, as only where the Charter is entirely silent may recourse be had to the Tax Law and the Civil Practice Act (198 App. Div 317; 178 App. Div. 251; 262 N. Y. 665; &c.).—In re National Arts Club (Miller), 105 (58) N. Y. L. J. (3–12–41) 1121. Col. 3 M.

¶ 4. Section 166 of the Charter, providing that an application to review a determination of the tax commission must be brought before October 25, applied only to tax assessments made in the future for a fiscal year beginning July 1, 1939, and proceedings to review assessments for the year 1938 and the first half of 1939 were governed by the time schedule prescribed by the old Charter, since both in the old and new charters the period of elapsed time to review assessments was five months, and it clearly was not intended to grant nine months in which to bring proceedings to review assessments for 1938 and the first half of 1939. Furthermore, there was nothing inconsistent in applying the limitation date provided in the old Charter to review assessments made under the time schedule of that Charter (Charter §§ 951, 982).—People (Kaydel Realty Co.) v. Miller; People (Vandalia Realty Corp.) v. Miller, 255 App. Div. 449, 7 N. Y. S. 2d 963 [1938] aff'd without opinion, 280 N. Y. 652.

¶ 5. Tax certiorari proceedings were dismissed on ground that since the writ of certiorari was not served on the Tax Commissioner within the time limited by § 166 for the commencement of such statutory proceedings, the proceedings were not timely begun and the court acquired no jurisdiction to entertain them.—People (Cary) v. Lilly, 293 N. Y. 828, 59 N. E. 2d 432 [1944]; People (Bowery Savings Bank) v. Lilly, 293 N. Y. 833, 59 N. E. 2d 434 [1944].

¶ 6. Application for order directing Tax Commission to cancel tax exemption on real property of Columbia University, *held* barred by the four-month period prescribed by C. P. A. § 1286, where more than four months had elapsed since the Commission made its determination or allegedly failed to perform the duty of cancelling the tax exemption. The four-month period ran from March 15, 1945, which was the last day permitted by law for filing of applications for correction of or protest against assessed valuations (Charter §§ 160, 163).—Goldstein v. Mills (Trustees of Columbia Univ.), 185 Misc. 851, 57 N. Y. S. 2d 810 [1945], aff'd 270 App. Div. 930, 62 N. Y. S. 2d 619, appeal denied 296 N. Y. 1057.

¶ 7. General Construction Law § 25-a, providing that when a certain period of time ends on Sunday or holiday, act may be done on next succeeding business day *held* not applicable to § 166 of the Charter requiring that tax review proceeding must be commenced before October 25, since that section does not involve any computation of time.—R. R. Heywood Co. v. Boland, 140 N. Y. S. 2d 769 [1955].

¶ 8. Where application to correct assessment was on file all during the time set for its filing and was acted upon by the Board of Taxes and Assessments and was accepted by it as the basis of the relator's protest, motion of the Board to quash the writ, after a final order had been entered, on ground the application to correct the assessment was prematurely filed, was denied.—People (Gallagher's Steak House, Inc.) v. Miller, 114 (80) N. Y. L. J. (10–4–45) 763, Col. 1 T.

¶ 9. Certiorari proceedings to review tax assessments must be commenced before October 25th. Thus, a writ obtained on October 24th and served on October 25th was ineffective as not being served within the time

limited by this section of the Charter.—People ex rel. Sheffield Farms Co., Inc. v. Lilly, 295 N. Y. 354, 67 N. E. 2d 579 [1946].

¶ 10. Proceeding for review of tax assessment is begun with service of the writ, and hence writ was dismissed where service was made on July 1, whereas the Charter required that the proceeding be begun no later than June 30.—Bremark Realty Corp. v. Miller, 123 (43) N. Y. L. J. (3–6–50) 799, Col. 6 F.

¶ 11. Certiorari proceeding to review tax assessment was not "begun" within the time limit fixed by § 166 of the Charter, where nothing more was done by the aggrieved taxpayer before the end of the time limit than to obtain a court order directing a writ to issue, and fixing the time within which service should be made. The inadvertent failure of the taxpayer to cause the writ to be issued and served prior to the statutory date was not an irregularity for which Special Term could afford relief, and subsequent service of a writ bearing date some 2½ months after the last date on which the proceedings might have been "begun" did not constitute due and timely process.—People (Northchester Corp.) v. Miller, 288 N. Y. 163, 42 N. E. 2d 469 [1942], rev'g 263 App. Div. 83, 31 N. Y. S. 2d 586.

¶ 12. City's motion to dismiss on the ground that petition for review of final determination of City tax Commission was not timely *denied* where petition failed to show date of final adverse determination.—The Second District Dental Society of N. Y. v. Boyland, 139 N. Y. S. 2d 123 [1955].

¶ 13. Proceedings to review the final determination of the Tax Commission must be commenced before October 25th and even though October 24th falls on a Sunday the time to commence the proceedings is not extended.—(Clemons Realty Co. v. Boyland, 134 (123) N. Y. L. J. (12–29–55) 5, Col. 5 F.

¶ 14. The filing of a petition within the time limited for the commencement of certiorari proceedings was not sufficient where the writ was not actually served until after the expiration of the time limited for the commencement of such proceedings.—People ex rel. Goelet v. Miller, 293 N. Y. 832, 59 N. E. 2d 433 [1944].

¶ 15. In absence of any provision in the New York City Charter governing the allowance of costs on appeal in a tax certiorari proceeding, recourse was to be had to applicable provisions of the Tax Law.—People (243 Corp.) v. Miller, 104 (138) N. Y. L. J. (12–14–40) 2041, Col. 3 T, a 3 M.

¶ 16. Failure to file an income and expense statement within the time prescribed was not a jurisdictional defect. Local Law No. 28, being inconsistent with the Code, *held* invalid.—In re Lindley House, Inc. (Tax Comm'rs) 133 (55) N. Y. L. J. (3–21–55) 7, Col. 6 F.

¶ 17. To same effect, Alwalt Realty Corp. v. Boyland, 5 Misc. 2d 1061, 160 N. Y. S. 2d 504 [1957]; appeal dismissed 4 A. D. 2d 940, 170 N. Y. S. 2d 490 [1957].

¶ 18. Where a tenant makes timely application for review of an assessment and then decides to discontinue the proceeding, his landlord may intervene for the purpose of continuing it even after the expiration of the statute of limitations.—Matter of Fleetair, Inc. v. Tax Commission, 15 Misc. 2d 502, 181 N. Y .S. 2d 645 [1958].

§ 167. **Assessment-rolls; preparation and delivery.**—Commencing immediately after the closing to public inspection and examination of the books of annual record of the assessed valuation of real estate, the president shall cause to be prepared from such books assessment-rolls for each borough in such manner as shall be provided by law.

As soon as such rolls are completed, the president shall annex to each of such rolls his certificate that the same is correct in accordance with the entries and corrected entries in the several books of annual record. The rolls so certified must, on or before the twentieth day of June in each year, be delivered by the presi-

dent to the council. (*Derived from former* § 167 *as amended by L. L.* 1939, *No.* 168.)

§ 168. **Statement and estimate by mayor.**—The mayor shall prepare and submit to the council, between the fifteenth and the twentieth days of June, a statement setting forth the amount of the budget as fixed for the ensuing fiscal year and also an estimate of the probable amount of receipts into the city treasury during the ensuing fiscal year from all the sources of revenue of the general fund. (*Derived from former* § 168.)

§ 169. **Fixing of tax rate.**—The council shall meet not later than the twenty-fifth day of June to fix the annual tax rate. The council shall deduct the total amount of receipts as estimated by the mayor from the amount of the budget, as fixed for the ensuing fiscal year, and shall cause to be raised by tax such sum as shall be as nearly as possible, but not less than, the balance so arrived at, by fixing a tax rate in cents and hundredths of a cent upon each dollar of assessed valuation. (*Derived from former* § 169.)

CROSS REFERENCE: Limitation on taxing power, see Constitution, Art. VIII, § 10.

Statutory limitation on power to impose taxes on real estate, see General Municipal Law, § 3-b.

**CASE NOTES**

¶ 1. Misrepresentations of the assessed valuation and taxes on property was not sufficient to rescind a contract for the purchase of the property on the grounds of fraud where at the time of misrepresentation, the assessment for the coming year was a matter of public record and the tax rate was a matter requiring future action by the city council and could only be a matter of conjecture.—Irvlor Realty Corp. v. 62–114 Imlay Street Corp., 151 N. Y. S. 2d 191 [1956].

§ 170. **Completion of assessment-rolls.**—At such annual meeting the council shall cause to be set down in the assessment-rolls, opposite to the several sums set down as the valuation of real property, the respective sums, in dollars and cents, to be paid as a tax thereon, rejecting the fractions of a cent. It shall also cause to be added and set down the aggregate valuations of the real property in the several boroughs, and shall transmit to the comptroller of the state by mail a certificate of such aggregate valuation in each borough. (*Derived from former* § 170.)

§ 171. **Delivery of assessment-rolls to director of Finance.**—a. Immediately upon the completion of the assessment-rolls, the city clerk shall procure the proper warrants authorizing and requiring the director of finance to collect the several sums therein mentioned according to law. Such warrants need be signed only by the president of the council and counter-signed by the city clerk. Immediately thereafter and on or before the thirtieth day of June, the assessment-rolls of each borough, as corrected according to law and finally completed, or a fair copy thereof, shall be delivered by the president of the council to the director of finance with the proper

warrants, so signed and counter-signed, annexed thereto. At the same time the president of the council shall notify the comptroller of the amount of taxes in each book of the assessment-rolls so delivered.

b. The director of finance, upon receiving the assessment-rolls and warrants, shall immediately cause the assessment-rolls and warrants of each of the several boroughs to be filed in the respective borough offices. (*Derived from former* § 171.)

CASE NOTES

¶ 1. Under terms of lease, lessee was liable for all taxes laid, levied, assessed or imposed upon the property during the demised term. Held: the obligation of the lessee became absolute as of the date the taxes were levied, i.e. when the tax rolls were delivered to the City Treasurer, and where the lease did not terminate until after that date the lessee was liable.—Gainsborough Real Estate Corp. v. George Kemp Real Estate Co., 207 Misc. 156, 137 N. Y. S. 2d 531 [1954].

§ 172. **Taxes due and payable.**—The director of finance shall, immediately after he shall have received the assessment-rolls, give public notice for at least five days in the City Record and in such newspaper or newspapers published in the several boroughs as may be designated by the director of the City Record with the approval of the mayor, that the assessment-rolls have been delivered to him and that all taxes shall be due and payable at his office in the respective boroughs as follows:

All taxes upon real estate for each fiscal year shall be due and payable in two equal installments, the first of which shall be due and payable on the first day of October in such year, the second of which shall be due and payable on the first day of April in such year. Whenever, however, any property is acquired by the city in condemnation proceedings, the proportionate share of the amount of the tax on such property which would be due and payable on the next succeeding installment date, shall be due and payable on the date when the title to such property vests in the city.

All taxes shall be and become liens on the real estate affected thereby and shall be construed as and deemed to be charged thereon on the respective days when they become due and payable, and not earlier, and shall remain such liens until paid.

Any installment of taxes on real estate, which is due and payable on any date subsequent to the date upon which the first installment becomes due and payable, may be paid on the date when the first installment becomes due and payable or at any time thereafter, provided all prior installments shall have been paid or shall be paid at the same time; and on such payment of such subsequent installment prior to the date upon which it becomes due and payable, a discount shall be allowed from the date of payment to the date when such installment would otherwise be due and payable at the rate fixed by the council. (*Amended by L.* 1962, *ch.* 998, § 20.)

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**Condemnation, ¶ 1**
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**Liens, date of commencement, ¶ 6**
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**Liens, transfer of, ¶ 4**
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**Taxes, payment by city, ¶ 2**

¶ 1. Former § 172 of the Charter, providing that the proportionate share of the amount of the tax on property, which would be due and payable on the next succeeding installment date, shall be due and payable on the date of taking, refers only to property acquired in condemnation by the City, and had no affect in a condemnation proceeding brought in the federal court by the United States government. Also, without the authority of former § 172 of the Charter, the City could not apportion taxes even where it is the condemnor.—United States v. Certain Lands, 41 F. Supp. 51 [1941].

¶ 2. Former § 172 of the Charter was inapplicable to situation where, as part of the compensation for the taking, the City was required to pay the taxes accruing during the City's possession.—In re City of N. Y. (Northern Blvd. Houses, Queens), 118 (48) N. Y. L. J. (9–6–47) 389, Col. 7 F.

¶ 3. The provisions of the Administrative Code making taxes a lien until paid take precedence over general statutes of limitations in §§ 47-a and 48 (2) of the Civil Practice Act. Therefore the holder of such a lien could foreclose it after the expiration of six years.—L. K. Land Corp. v. Gordon, 1 N. Y. 2d 465, 154 N. Y. S. 2d 32, 136 N. E. 2d 500 [1956]; rev'g 1. A. D. 2d 699, 147 N. Y. S. 2d 463.

¶ 4. Under the provisions of this section, the lien of tax persists until paid and is unaffected by a transfer of such tax lien. Thus, the six-year statute of limitations is unavailable as a matter of law in an action to foreclose transfers of tax liens purchased from the City.—Rand v. Bennett, 134 (28) N. Y. L. J. (8–10–55) 4, Col. 3 F.

¶ 5. Under terms of lease, lessee was liable for all taxes laid, levied, assessed or imposed upon the property during the demised term. Held: the obligation of the lessee became absolute as of the date the taxes were levied, i.e. when the tax rolls were delivered to the City Treasurer, and where the lease did not terminate until after that date the lessee was liable.—Gainsborough Real Estate Corp. v. George Kemp Real Estate Co., 207 Misc. 156, 137 N. Y. S. 2d 531 [1954].

¶ 6. Under this section, New York City real estate taxes become liens on October 1 and April 1 of each year.—Rikoon v. Two Boro Dress, Inc., 9 Misc. 2d 591, 171 N. Y. S. 2d 19 [1957]; aff'd 9 A. D. 2d 784, 193 N. Y. S. 2d 302 [1959]; appeal denied 10 A. D. 2d 582, 196 N. Y. S. 2d 612 [1960].

¶ 7. The City of New York has priority over Federal government for payment of unpaid taxes, assessments, water and sewerage charges out of the proceeds of a sale in accordance with the provisions of § 1087 of the CPA. The United States contended that it had priority for liens for estate and gift taxes, since liens attached at the date of decedent's death to the extent of the tax shown to be due by the return of any deficiency in tax found to be due upon review and audit. Held: since it appeared that only a possible claim for estate taxes was involved, the City was entitled to priority over the Federal government.—Daitch v. Fox, 17 Misc. 2d 466, 186 N. Y. S. 2d 1004 [1959].

§ 173. **Interest on taxes.**—The director of finance shall charge, receive and collect the interest upon taxes on real estate not paid when due and payable in such manner and at such rates as shall be provided by law. (*Derived from former* § 173).

# CHAPTER 8

## CITY PLANNING

§ 191. **Department and director of city planning.**—a. There shall be a department of city planning, the head of which shall be the director of city planning. He shall be chairman and a member of the city planning commission.

b. The director of city planning shall:

1. Advise and assist the mayor, the board of estimate and the council in regard to the physical planning and public improvement aspects of all matters related to the development of the city.

2. Provide staff assistance to the city planning commission in all matters under its jurisdiction.

3. Be the custodian of the city map and record thereon all changes legally authorized.

4. Conduct continuous studies and collect statistical and other data to serve as the basis for planning recommendations.

5. Provide to the community district planning boards, when established, such staff assistance as he may determine.

6. Perform such other functions as are assigned to him by the mayor or other provisions of law.

c. The department shall employ such planning experts, engineers, architects and other officers and employees as may be required to perform its duties, within the appropriation therefor. (*Derived from former* § 191 *and* § 195.)

§ 192. **City planning commission.**—a. There shall be a city planning commission to consist of the chairman and six members to be appointed by the mayor. Except as provided in section one hundred ninety-one, no member shall hold any other city office. Members other than the chairman shall be appointed for a term of eight years, except that in case of a vacancy in the office of a member other than that of the chairman the mayor shall appoint a member to serve for the remainder of the unexpired term.

b. One of the members other than the chairman shall be designated by the mayor as vice-chairman and shall serve as such at the pleasure of the mayor. The vice-chairman shall possess the powers and perform the duties of the chairman when the chairman is absent or while a vacancy exists in the office of chairman, and shall at such times serve as director of city planning.

CASE NOTES

¶ 1. There is no incompatibility between the office of associate member of the Planning Commission and the office of Commissioner of Parks, and of Commissioner of Public Works.—Childs v. Moses, 265 App. Div. 353, 38 N. Y. S. 2d 704 [1942], aff'g 178 Misc. 828, 36 N. Y. S. 2d 574, aff'd 290 N. Y. 828, 50 N. E. 2d 235.

¶ 2. The City Planning Commission is an advisory body; it cannot execute City powers or expend City funds without approval or acquiescence of the Board of Estimate.—Childs v. Moses, 265 App. Div. 353, 38 N. Y. S. 2d 704 [1942], aff'g 178 Misc. 828, 36 N. Y. S. 2d 574; aff'd without opinion, 290 N. Y. 828, 50 N. E. 2d 235.

§ 193. **Removal by mayor after hearing.**—A member of the commission other than the chairman may be removed by the mayor only upon proof of official misconduct or of negligence in official duties or of conduct in any manner connected with his official duties which tends to discredit his office, or of mental or physical inability to perform his duties; and before removal he shall receive a copy of the charges and shall be entitled to a hearing before the mayor and to the assistance of counsel at such hearing. (*Derived from former* § 193.)

CASE NOTES UNDER FORMER § 194

¶ 1. Former § 194 was intended to prohibit a reduction in salary of the chairman and other members of the Commission during their terms of office, if any salary is provided for them either by law or in the budget.—Childs v. Moses, 178 Misc. 828, 36 N. Y. S. 2d 574 [1942], aff'd 265 App. Div. 353, 38 N. Y. S. 2d 704 [1942] aff'd without opinion 290 N. Y. 828, 50 N. E. 2d 235.

§ 197. **Master plan of the city.**—a. The city planning commission shall prepare and adopt, in one or more parts, and from time to time modify a master plan for the physical development of the city, which shall provide for the improvement of the city and its future growth and afford adequate and appropriate facilities for the housing, business, industry, transportation, distribution, recreation, comfort, convenience, health and welfare of its population.

b. Before adopting the master plan or any part or modification thereof, the commission shall hold a public hearing or hearings thereon, notice of which shall be published in the City Record at least ten days prior thereto.

c. The master plan and all modifications thereof shall be on file in the office of the department of city planning and certified copies thereof shall be filed in the offices of the city clerk and of each borough president. Upon the adoption of any modification of or in addition to the master plan, it shall be published in the City Record. (*Derived from former* § 197.)

CASE NOTES

¶ 1. Where the steps taken by the Board of Estimate, the City Planning Commission and the Commissioner of Parks in authorizing and inquiring a certain area for a public playground were all in compliance with the pertinent Charter provisions, plaintiffs, who allegedly acquired certain real estate enjoining the proposed playground in reliance upon the acquisi-

tion being for a public park and not a playground, and who had been accorded every opportunity to be heard on merits of the proposed park and playground at the public hearing conducted by the City Planning Commission, could not attack the determinations of the various public parties in collateral fashion by an action to enjoin the construction of the playground.—Steiger v. Moses, 107 (11) N. Y. L. J. (1–14–42) 202, Col. 5 F.

¶ 2. An amendment to building zone resolution which did not change the building zone district liens in any way which could be reflected or located in the master plan, but merely added to the list of permissible uses, in districts already zoned for residences, a new subdivision, providing for administrative offices and laboratory uses under conditions and safeguards not theretofore permitted, came within § 200 relating to "zoning regulations", and was not required affirmatively passed by a ¾'s vote, or at least by a majority vote, of the Board of Estimate, pursuant to § 199 which relates to the master plan of the City.—Nappi v. LaGuardia, 184 Misc. 775, 55 N. Y. S. 2d 80 [1944] aff'd without opinion, 269 App. Div. 693, 54 N. Y. S. 2d 722, and 295 N. Y. 652, 64 N. E. 2d 716.

¶ 3. Where City Planning Commission had indicated on its master plan of the City in accordance with § 197 of the Charter the Owl's Head area as a desirable location for a sewage treatment plant, but such location was not definitely and precisely indicated on the plan, the mere enlargement of the sewage plant by adding property immediately adjacent to the original site was not a modification of the master plan requiring a new hearing.—Timmerman v. City of N. Y., 69 N. Y. S. 2d 102 [1946], aff'd 272 App. Div. 758, 70 N. Y. S. 2d 140.

¶ 4. The City Planning Commission *held* to have acted within the Charter in approving a State aided project and modifying the City's master plan to conform thereto, after due notice and hearing.—Hanniford v. City Planning Commission, 131 (114) N. Y. L. J. (6–15–54) 7, Col. 6 M.

§ 198. **City map.**—a. The city map, as the same shall exist at the time when this charter goes into effect, is hereby continued.

b. The director of city planning shall be the custodian of the city map, and it shall be his duty to complete and maintain the same and to register thereon all changes resulting from action authorized by law.

c. The city map shall be on file in the office of the department of city planning, and certified copies thereof and of all changes thereto shall be filed in the offices of the corporation counsel, the city clerk and of the borough president of the borough in which the land shown on the map is located and in the office in which conveyances of real estate are required to be recorded in the county in which the land shown on the map is located. *(Derived from former* § 198. *Subdivision a and c amended by L.* 1962, *ch.* 998, § 21.)

§ 199. **Projects and changes in city map.**—a. No improvement or project affecting the master plan or the city map and no addition to or change in the city map shall be authorized otherwise than as provided in this charter.

b. Before taking action on any proposed addition to or change in the city map not initiated by the commission, the board of estimate shall refer it to the city planning commission, which shall, after a public hearing, notice of which shall be published in the City Record for at least ten days immediately prior thereto, report thereon within ten weeks with respect to its relation to the master plan and the city map. The commission may delegate to any member

or members of the commission the responsibility of conducting the hearing thereon in person and of preparing the report for action by the commission. However, if any ten persons shall file with the commission, prior to the date of any such hearing, a written request that it be conducted by the commission, such hearing shall be so conducted. If the commission shall report that the proposed action conforms to the master plan or shall recommend the approval or modification of such action it may be taken in accordance with the recommendations of the commission by a majority vote of the board of estimate. If the commission shall report that the proposed action does not conform to the master plan and shall not recommend approval of such action or shall recommend a modification thereof not accepted by the board of estimate, or shall fail to make its report within the said period of ten weeks, the board of estimate may nevertheless take the said action, but only by a three-fourths vote.

c. An addition to or change in the city map may be initiated by recommendation of the city planning commission to the board of estimate adopted after public hearing before the commission, notice of which shall be published in the City Record for at least ten days immediately prior thereto, with the same effect as a report made by the commission on a proposed addition or change referred to it by the board of estimate.

d. Upon the authorization of any such addition or change in the city map or the taking of any other action in accordance with the provision of this section, the city planning commission shall make such change, if any, in the master plan as it shall deem necessary to conform thereto. (*Derived from former* § 199 *as amended by L.* 1957, *ch.* 263.)

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¶ 1. Section 199b of the Chapter, requiring a public hearing before the taking of any action on any proposed change in the City map not initiated by the City Planning Commission, was without application where the change called merely for inclusion of property immediately adjacent to the original site and some 260 feet in width, the purpose being to decrease cost of plant construction and facilitate development of plant, as the City map is not required by Administrative Code § 198a–2.0 to specify the location or lay out of sewage treatment plant.—**Timmerman v. City of N. Y., 69 N. Y. S. 2d 102** [1946], aff'd without opinion, 272 App. Div. 758, 70 N. Y. S. 2d 140.

¶ 2. Contention that the order of condemnation to acquire property for school site was illegal in that the resolution selecting the site modified the Master Plan of the City without following procedure outlined in the Charter, was rejected, as there was involved no change in the City map, the Board of Education pursuant to Education Law § 875 had selected four alternate sites for the school and

thereafter by resolution had selected as an additional alternative site the land acquired in the present proceeding.—In re City of N. Y. (School Site, 37th Ave., Queens), 118 (73) N. Y. L. J. (10–6–47) 751, Col. 2 T

¶ 3. The selection of a site for the construction of a high school *held* in compliance with the Charter where, though the site did not conform to the master plan and was not recommended by the City for that reason, it was approved by the Board of Estimate by unanimous vote.—In re Kenniff (Wagner), 132 (25) N. Y. L. J. (8–5–54) 3, Col. 5 F.

¶ 4. An amendment to a building zone resolution which did not change the building zone district lines in any way which could be reflected or located in the master plan but merely added to the list of permissible uses, in districts already zoned for residential use, a new subdivision, providing for administrative offices and laboratory uses under conditions and safeguards not theretofore permitted, came within § 200 of the Charter relating to "zoning regulations" and was required to be affirmatively passed by a ¾'s vote, or at least by a majority vote of the Board of Estimate, pursuant to former § 199, which relates to the master plan of the city. Nappi v. LaGuardia, 184 Misc. 775, 55 N. Y. S. 2d 80 [1944] aff'd without opinion, 269 App. Div. 693, 54 N. Y. 722 and 295 N. Y. 652, 64 N. E. 2d 716.

¶ 5. Application under C. P. A. Art. 78 to review determination of the City Planning Commission, was denied, as the determination sought to be reviewed, viz., the plan of the Commission and its findings and determination, were but preliminary steps which were required to be submitted to the Board of Estimate for its approval. The determination did not finally determine the rights of the parties, as required by C. P. A. § 1285, subd. 3.—Altmayer v. City Planning Commission, 130 (68) N. Y. L. J. (10–5–53) 643, Col. 4 T.

¶ 6. The selection of a school site by the Board of Estimate will not be upset by the courts unless there was corruption or bad faith amounting to fraud. Action was dismissed where it was claimed that the Board members had conspired to obscure and suppress consideration of a suitable site and thereby authorize the acquisition of another site which included plaintiff's property.—Chelnik v. Wagner, 134 (109) N. Y. L. J. (12–8–55) 7, Col. 4 F.

¶ 7. The legality of the action of the Board of Estimate in changing a zone is a legislative act which must be challenged in a plenary proceeding in which the City Planning Commission and the Board of Estimate are parties. Thus, a proceeding against the Borough Superintendent of Queens to compel him to rescind his revocation of approal of plans for erection of a multiple dwelling after the zoning had been changed by the Board of Estimate was dismissed where the basis of the action was that the zoning change had been accomplished in a manner not in accordance with applicable law.—Farino v. Kelleher, 134 (34) N. Y. L. J. (8–18–55) 6, Col. 3 T.

¶ 8. Petitioner was aggrieved because a project for widening a boulevard cut off a cross street at its intersection therewith, upon which he operated a gasoline station. However, the action of the Board of Estimate in adopting a resolution changing the City map was legislative in character. It referred the proposal to the City Planning Commission in accordance with law, and the latter reported favorably after a public hearing, at which no opposition was expressed. It cannot be said that the Board's action was arbitrary or capricious. It is not subject to review under Art. 78 of the Civil Practice Act, and the petition is dismissed.—Matter of Asness v. City of New York, 5 Misc. 2d 779, 160 N. Y. S. 2d 733 [1957]; aff'd 4 A. D. 2d 677, 164 N. Y. S. 2d 994 [1957].

§ 200. **Zoning regulations.**—Any existing resolution or regulation of the board of estimate or of the city planning commission to regulate and limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, to regulate density of population or to regulate and restrict the locations of trades and industries and location of buildings designed for specific uses or creating districts for any such purpose, including

any such regulation which provides that the board of standards and appeals may determine and vary the application of such resolutions or regulations in harmony with their general purpose and intent and in accordance with general or specific rules contained in such regulations, may be amended, repealed or added to only in the following manner:

1. The city planning commission may upon its own initiative at any time or upon application as provided in section two hundred one, adopt a resolution for any such purpose subject to the limitations provided by law. Before adopting any such resolution, the commission shall afford persons interested an opportunity to be heard at a time and place to be specified in a notice of hearing to be published in the City Record for the ten days of publication of the City Record immediately prior thereto setting forth in general terms the nature of the proposed resolution and a statement of the place at which the entire resolution may be examined. Any such resolution shall be filed with the secretary of the board of estimate within five days from the day of its adoption.

2. Approval, disapproval or modification by the board of estimate of a recommendation by the commission for a change in the zoning resolution must occur within sixty days from the date of filing of the recommendation of the commisison with the board. In case the board shall fail to act on such affirmative resolution within such period of sixty days, such change shall be deemed approved and effective on the sixty-first day after the date of filing unless a protest of owners of affected property shall have been filed in accordance with the provisions of subdivision three. Any resolution for a zoning change which the mayor shall have certified to the planning commission as necessary, and which has been disapproved by the commission, may be adopted by the board of estimate by a three-fourths vote and after a public hearing. The foregoing limitation of sixty days shall be inapplicable to such an adoption and the change shall become effective at a time fixed by the board of estimate.

3. In case a protest against a proposed resolution shall have been presented to the secretary of the board of estimate within thirty days from the date of such filing, duly signed and acknowledged by the owners of twenty per centum or more of the area of

(1) the land included in changes proposed in such proposed resolution, or

(2) the land immediately adjacent extending one hundred feet therefrom, or

(3) the land, if any, directly opposite thereto extending one hundred feet from the street frontage of such opposite land,

such resolution shall not be effective after the filing of such protest unless approved by the board of estimate, either in the form in which it was filed or as modified by the board, by a three-fourths vote of the board within one hundred eighty days after the filing of said resolution with the secretary of the board of estimate. The effective date of such resolution, if so approved, shall be the date

of such approval. A protest duly filed as herein provided may be withdrawn at any time within sixty days from the date of the filing of such resolution. (*Derived from former* § 200 *as amended by L.* 1959, *ch.* 652.)

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¶ 1. Former § 200 of the Charter *held* not unconstitutional as an attempt to confer upon the Board of Estimate power to enact zoning legislation by a minority vote or by inaction, since the power to zone was not given to the Board of Estimate but was delegated to the City Planning Commission, subject only to a veto power in the Board.—431 Fifth Ave. Corp. v. City of N. Y., 184 Misc. 1001, 55 N. Y. S. 2d 203 [1945], aff'd on this point, 270 App. Div. 241, 59 N. Y. S. 2d 25, and 296 N. Y. 588, 68 N. E. 2d 877.

¶ 2. In action by property owner for a judgment declaring a zoning resolution unconstitutional as to its property, defense asserting that plaintiff had not asked for a change of zoning as to its property, was sufficiently broad to include every manner or means by which a change in the zoning resolution, as applied to plaintiff's property, might be consummated, and included a change either by an amendment or by a variance of the zoning resolution.—Ulmer Park Realty Co. v. City of New York, 267 App. Div. 291, 45 N. Y. S. 2d 527.

¶ 3. Property owner, as a condition to maintaining an action attacking the constitutionality of a zoning resolution as applied to its property, was not required first to seek an amendment of the zoning resolution. Neither was it required first to seek a variance of the restrictive provisions of the resolution, as an application for a variance was not available to plaintiff because apparently it did not desire to erect a structure to be devoted to a non-conforming use, and furthermore the Board of Standards and Appeals was powerless to grant a variance since the claim was not that of a special or unique hardship but that the resolution was unreasonable in its application to the locality and confiscatory in its application to plaintiff's property.—Id.

¶ 4. Amendment of Building Zone Resolution to permit administrative

offices and industrial laboratory projects in residential districts on plots of 10 acres or more, was constitutional, in view of the various safeguards, such as that no more than 25 per cent of the land should be occupied by buildings and structures, that buildings should be at least 20 feet apart and might not exceed 50 feet in height, and that separate approval of each project must be given by the City Planning Commission and the Board of Estimate.—Nappi v. La Guardia, 184 Misc. 775, 55 N. Y. S. 2d 80 [1944], aff'd without opinion, 269 App. Div. 693, 54 N. Y. S. 2d 722, and 295 N. Y. 652, 64 N. E. 2d 716.

¶ 5. An amendment to a zoning ordinance which narrowed previous restrictions against garages in a retail use district so as to exclude only such garages as sold gasoline and oil *held* not unconstitutional where hearings were held, and after an extensive study of off-street parking the Planning Commission determined there was insufficient provision for such parking. — Congregation Beth Israel West Side Jewish Center v. Board of Estimate of City of N. Y., 285 App. Div. 629, 139 N. Y. S. 2d 645 [1955].

¶ 6. Under former § 200 of the Charter, property owners opposing certain proposed zoning amendments, *held* properly to have filed their protests with the Board of Estimate rather than with the City Planning Commission.—McCabe v. City of N. Y., 281 N. Y. 349 [1939], rev'g 257 App. Div. 1010, 13 N. Y. S. 2d 676, and modifying 170 Misc. 325, 10 N. Y. S. 2d 383.

¶ 7. Where the requisite number of protests to resolution of the City Planning Commission had been duly filed with the Board of Estimate, the action of the Board contrary to such protests was required to be unanimous, but such action was not obliged to be taken within the thirty-day period required for filing of protests after transmission of the resolution of the Planning Commission to the Board.—Id.

¶ 8. Where amendatory resolution proposed by the City Planning Commission changed the area restrictions as to Residential and Retail Use Districts only in "B" Area Districts, and made no change with respect to the existing area restrictions affecting Business, Manufacturing and Unrestricted Use Districts within "B" Area Districts, protests by owners of 20 per cent of the area of land in all the various Retail Use Districts contained in "B" Area Districts throughout the City was sufficient to require unanimous approval of the changes by the Board of Estimate pursuant to former § 200 of the Charter. That the proposed amendment was comprehensive in nature and included changes affecting various types of Use Districts in many Area and Height Districts did not require protests from 20 per cent of the area of the land in all of the districts affected by any provision of the amendment. It appeared that the changes were indicated in separate sections, each affecting entirely different districts, and therefore separate sections should be considered as if separately enacted so far as the right to protest was concerned. At least all Use Districts in "B" Area Districts not affected by any change brought about by a particular section should have been excluded.—431 Fifth Avenue Corp. v. City of New York, 270 App. Div. 241, 59 N. Y. S. 2d 25 [1945], aff'd without opinion, 296 N. Y. 588, 68 N. E. 2d 877.

¶ 9. Inasmuch as proposed amendment increased the area of a plot which might be built upon within a "B" Area District to extent that the space used for parking and unloading might be included, and this exception was without application in a Residential Use District, protests filed by more than 20 per cent of the area of land in the various Retail Use Districts contained in "B" Area Districts throughout the City was sufficient.—Id.

¶ 10. Contention that action of the Board of Estimate approving amendment of Building Zone Resolution to permit administrative offices and laboratory uses in residence districts on plots of not less than 10 acres, should have been unanimous in view of fact that a protest was filed by the owner of 20 per cent or more of the area of the land immediately adjacent to the 28½ acres belonging to the defendant, was without merit, as the protest was filed in connection with the general amendment to the zoning resolution and not in connection with the application relating to defendant's plot, and in order to require unanimous approval by the Board it would have been necessary for the owners

of at least 20 per cent of the tracts of 10 acres or more in residential districts in the city, or the owners of at least 20 per cent of the land immediately adjacent thereto for a distance of 100 feet, or the owners of at least 20 per cent of the land directly opposite thereto for a distance of 100 feet, to protest.—Nappi v. La Guardia, 184 Misc. 775, 55 N. Y. S. 2d 80 [1944], aff'd without opinion, 269 App. Div. 693, 54 N. Y. S. 2d 722, and 295 N. Y. 652, 64 N. E. 2d 716.

¶ 11. In determining whether a proposed zoning amendment has been objected to by owners of 20 per cent or more of the land in defined areas, so that a unanimous vote of the Board of Estimate is necessary under former § 200 of the Charter, the City properly based its computation of protesting percentages on "streets" as set forth on the City map, and was not required to base it on "streets in use" or "public streets" regardless of whether they were on the map. Considerable force was to be attached to the practical construction of the statute by the Board of Estimate's engineers, who had long followed the method of determining percentage of protesting area on the basis of "mapped streets." Moreover, any other method would result in confusion.—Dole v. City of N. Y., 182 Misc. 408, 44 N. Y. S. 2d 250 [1943].

¶ 12. The provision of former § 200 of the Charter requiring unanimous action by the Board of Estimate in case of protests filed by owners of 20 per cent of the land affected by a proposed change, is a most drastic one which should only be invoked by a clear, unambiguous expression of legislative policy and intent, particularly since property owners have the protection of an expert City Planning Commission which is given the facilities for making comprehensive, scientific surveys and investigations, there is a further protection in the power of veto conferred upon the Board of Estimate and in the opportunity to be heard both before the Commission and the Board, in case of unique hardship a particular property owner affected may have relief in the form of a variance by the Board of Standards and Appeals, and finally the courts can deal with arbitrary, confiscatory exercise of governmental authority.—431 Fifth Ave. Corp. v. City of N. Y., 184 Misc. 1001, 55 N. Y. S. 2d 203 [1945], modified on other grounds, 270 App. Div. 241, 59 N. Y. S. 2d 25, and 296 N. Y. 588, 68 N. E. 2d 877.

¶ 13. Zoning Resolution rezoning a particular area from an "F" to an "E" district wherein construction was limited to dwellings intended for occupancy by single families, *held* not invalid as an attempt to exercise the power to regulate density of population, although it might tend indirectly to have that effect. The resolution did not limit the number of dwellings which might be constructed within the area but only the character of the structures. Hence the resolution was within the power delegated to the City Planning Commission by Charter former § 200, unless there were other proper objections.—Hall v. Leonard, 260 App. Div. 591, 23 N. Y. S. 2d 360 ([1940], rev'g 174 Misc. 454, 21 N. Y. S. 2d 43; aff'd, without opinion, 285 N. Y. 719, 34 N. E. 2d 893.

¶ 14. Amendment of Building Zone Resolution which did not change the building zone district lines in any way which could be reflected or located in the master plan, but merely added to the list of permissible uses, in districts already zoned for residence, a new subdivision, providing for administrative offices and laboratory uses under conditions and safeguards not theretofore permitted, came within former § 200 of the Charter, relating to "zoning regulations", and was not required to be affirmatively passed by a three-fourths vote, or at least by a majority vote, of the Board of Estimate pursuant to § 199, which relates to the master plan of the City.—Nappi v. La Guardia, 184 Misc. 775, 55 N. Y. S. 2d 80 [1944], aff'd without opinion, 269 App. Div. 693, 54 N. Y. S. 2d 722, and 295 N. Y. 652, 64 N. E. 2d 716.

¶ 15. Where on March 16 the City Planning Commission, pursuant to Charter former § 200, duly adopted a resolution amending the Building Zone Resolution so as to change the area in which petitioners' premises were located from a non-restricted district in which gasoline service stations were permissible into a business use district in which they were prohibited and under former § 200 such zoning change became effective in 30 days, determination of the authorities denying petitioners' applications for

the erection of a service station, filed March 30, and for a drop-curb, filed March 31, *held* proper.—Chesebrough v. Murdock, 256 App. Div. 803, 9 N. Y. S. 2d 400.

¶ 16. Contention that amendment of the zoning resolution to permit administrative offices and industrial laboratory projects in residential districts on plots of not less than 10 acres was passed to permit the defendant to locate at a specific place and that this constituted illegal "spot zoning", was rejected, as the minutes of the hearing before the Planning Commission and the Board of Estimate disclosed that the amendment was intended to be city wide in scope, objections were filed not to defendant's project but to the amendment as a whole, the amendment in itself authorized no projects whatsoever and moreover required subsequent separate approval of each project submitted to the Planning Commission and the Board of Estimate.—Nappi v. La Guardia, 184 Misc. 775, 55 N. Y. S. 2d 80 [1944], aff'd without opinion, 269 App. Div. 693, 54 N. Y. S. 2d 722, and 295 N. Y. 652, 64 N. E. 2d 716.

¶ 17. Failure to disapprove defendant's projects was not arbitrary, inasmuch as the project was located close to the waterfront in a substantially undeveloped district, with but two residences within a thousand feet thereof, and no adjacent land owner complained of the proposed use.—Nappi v. La Guardia, 184 Misc. 775, 55 N. Y. S. 2d 80 [1944], aff'd without opinion, 269 App. Div. 693, 54 N. Y. S. 2d 722, and 295 N. Y. 652, 64 N. E. 2d 716.

¶ 18. In connection with a zoning amendment to permit administrative offices and industrial laboratory projects in residential districts on plots of 10 acres or more, requirement of separate approval of each project submitted to the City Planning Commission and the Board of Estimate was both reasonable and proper.—Nappi v. La Guardia, 184 Misc. 775, 55 N. Y. S. 2d 80 [1944], aff'd without opinion, 269 App. Div. 693, 54 N. Y. S. 2d 722, and 295 N. Y. 652, 64 N. E. 2d 716.

¶ 19. A zoning change did not take effect on the date of the filing of the resolution of the Planning Commission with the Board of Estimate and the subsequent issuance of a building permit inconsistent with the rezoning resolution was valid.—Bentrovato v. Crinnion, 206 Misc. 648, 133 N. Y. S. 2d 120 [1954].

¶ 20. The present Charter recognizes all the existing zoning resolutions and regulations of the Board of Estimate but imposes upon the newly created City Planning Commission the duty to initiate all future changes in the zoning regulations and all changes in the existing zoning regulations initiated by the Planning Commission are subject to the approval of the Board of Estimate. Any variations made by the Boad of Standards and Appeals in the zoning regulations of the Board of Estimate are required by former § 200 of the Charter to be in harmony with their general purpose and intent.—Thomas v. Board of Standards and Appeals, 263 App. Div. 352, 33 N. Y. S. 2d 219 [1942]. The Court of Appeals reversed and remitted the proceeding to the Board of Standards and Appeals, 290 N. Y. 109, 48 N. E. 2d 284.

¶ 21. Where corporation which proposed to construct multiple dwellings was aware of proposed rezoning making such construction nonconforming, corporation's actions in engaging architect and clearing site did not give rise to any vested right which would render the zoning change inoperative as to it.—Rosenzweig v. Crinnion, 139 N. Y. S. 2d 172 [1954], appeal dismissed 286 App. Div. 1066, 148 N. Y. S. 2d 912.

¶ 22. Where builder had notice of zoning ordinance amendment rendering his partially completed construction non-conforming, his vested right to a completion permit depended upon the work done before the amendment.—Riverdale Community Planning Ass'n v. Crinnion, 133 N. Y. S. 2d 706 [1954], aff'd 285 App. Div. 1047, 141 N. Y. S. 2d 510, appeal dismissed 1 N. Y. 2d 689, 150 N. Y. S. 2d 616.

¶ 23. Contention that plaintiff's action for a declaratory judgment that certain zoning resolution amendments were invalid was premature as plaintiff had not showed that it had any plans under way for new construction or rebuilding, was rejected, as the complaint might be read as stating a grievance, actual or potential, on behalf of all the owners of property devoted to retail use in B Area Districts, and not merely the

unique problem of a particular land owner. In such a situation it was sound public policy for the court to exercise its discretion to allow a declaratory judgment in order to secure an expeditious determination of the broad questions presented.—431 Fifth Ave. Corp. v. City of N. Y., 184 Misc. 1001, 55 N. Y. S. 2d 203 [1945], aff'd on this point, 270 App. Div. 241, 59 N. Y. S. 2d 25, and 296 N. Y. 588, 68 N. E. 2d 877.

¶ 24. Where on January 7 the City Planning Commission had filed with the Board of Estimate its zoning amendment resolution reducing the usable area of a plot from 80 per cent coverage to 50 per cent, but thereafter on January 14 the Borough Superintendent of Housing and Buildings granted a building permit for construction in the Riverdale area of a multiple dwelling covering 80 per cent of the plot, an action thereupon brought by owner of a residence in the Riverdale area for a declaratory judgment that issuance of the permit was without legal authority in view of the zoning amendment, was dismissed. The administrative remedies of presenting a complaint to the Building Superintendent and then, if necessary, appealing to the Board of Standards and Appeals should first be exhausted. Moreover, under former § 200 of the Charter a zoning change takes effect at the earliest 30 days from date of filing, and therefore the zoning amendment did not under any circumstances take effect until after issuance of the permit and accordingly there was no need for a so-called statutory construction or declaratory judgment in regard to what was obvious. Other alleged issues such as the defendants' bad faith in proceeding with the work, and their haste in light of the impending rezoning changes, presented factual issues which should not presently be resolved.—Bentrovato v. Crinnion, 206 Misc. 648, 133 N. Y. S. 2d 120 [1954].

¶ 25. Plaintiff-owners of two-family dwelling, who sued on behalf of themselves and 550 other owners of one and two-family houses in area which had been changed from a "C" district to an "E-1" district in which construction of multi-family apartment houses was prohibited, *held* entitled to maintain an action for a declaratory judgment that the erection by defendant of a multi-family apartment house in the area would violate the zoning resolution changing the area to an "E-1" district. The declaratory judgment sought was concerning the scope of the resolution, the effective date of it, and whether it was adopted pursuant to former § 200 or 201 of the Charter. Contention that plaintiffs had not exhausted their remedies before the administrative agencies, was overruled, as there had been no act or order of the Borough Superintendent from which plaintiff could appeal.—Rosenzweig v. Crinnion, 126 N. Y. S. 2d 692 [1953], appeal dismissed 286 App. Div. 1066, 148 N. Y. S. 2d 912.

¶ 26. Contention that plaintiff should have applied for a variance was rejected, as the plaintiff was attacking generally the application of the zoning amendment to a considerable area embracing many separate parcels, and was not in the position of a land owner who was uniquely affected by a zoning regulation of general import and who suffered unusual hardship because of the peculiar application of the regulation to his property.—431 Fifth Ave. Corp. v. City of N. Y., 184 Misc. 1001, 55 N. Y. S. 2d 203 [1945], aff'd on this point, 270 App. Div. 241, 59 N. Y. S. 2d 25, and 296 N. Y. 588, 68 N. E. 2d 877.

¶ 27. Plaintiff's contention that the amendment to the zoning resolution rezoning a part of defendant's property from a residence district to a retail district was invalid because notice of a hearing was not personally served on plaintiff, was without merit, as there is no such requirement under the Charter.—Elgar v. S. H. Kress & Co., 280 App. Div. 621, 116 N. Y. S. 2d 527 [1952], rev'd on other grounds, 308 N. Y. 533, 127 N. E. 2d 325 [1955].

¶ 28. Zoning resolution changing the area from a "C" district to an "E-1" district *held* to have been adopted pursuant to former § 200 of the Charter, which permits the Commission upon its own initiative to adopt resolutions for zoning changes, and not pursuant to former § 201, which provides for a change initiated on an application by taxpayers and requires the petition to be filed during the month of April. That the Commission's attention was brought to the need for a zoning change by a petition

submitted to it by property owners was nat necessarily inconsistent with the Commission's having acted upon its own initiative under former § 200.—Rosenzweig v. Crinnion, 126 N. Y. S. 2d 692 [1953].

¶ 29. Where documentary evidence based on official records plainly demonstrated that the City planning commission in amending a zoning resolution followed the procedure prescribed by former § 200 of the Charter and that the defendant's building was erected in full compliance with applicable city building requirements, the defendant had a good defense to a complaint based on the invalidity of a zoning resolution which permitted defendant's business establishment to be built directly across from plaintiff's residential area.—Elgar v. S. H. Kress & Co., 308 N. Y. 533, 127 N. E. 2d 325 [1955].

¶ 30. That City Planning Commission had approved plaintiff's application to establish new G area for single family houses only, *held* not to warrant grant of an injunction restraining property owner in contiguous area wherein apartment houses were permitted from continuing construction of a multiple dwelling, even though plaintiffs intended to endeavor to have the contiguous property also placed in zone prohibiting multiple dwellings 228 App. Div. 86; 134 N. Y. 163; 224 App. Div. 87).—Fieldston Prop. Owners Assn. Inc. v. Hall, 99 (150) N. Y. L. J. (6–29–38) 3129 Col. 6 F.

¶ 31. Owners of single family residences in area of the Bronx devoted exclusively to such residences *held* entitled to temporary injunction restraining defendants from proceeding with proposed construction of an apartment house pending conclusion of application before the City Planning Commission to change the area to a "G" district which would exclude multiple buildings, since if defendants were permitted to proceed with the construction they might secure vested rights which would interfere with the Commission's judgment in acting upon the application (132 Misc. 82, aff'd 225 App. Div. 179, 255 N. Y. 541). Mere affidavit setting forth expenditure of money and incurring of obligations by defendants could not be regarded as establishing the acquisition of a vested right to erect the apartment house, as the proper mode of determining this would be on a trial where cross-examination might be had. That the injunction was until the Commission took action and that after that there would allegedly be no need for a trial, did not preclude grant of the injunction on theory it would in fact be a permanent one, since in case of adverse action of the Commission defendants might review its findings. However, an undertaking in sum of $9,000 was required of plaintiff.—O'Neil v. Riverdale Park, Inc., 101 (65) N. Y. L. J. (3–21–39) 1290, Col. 1 T.

¶ 32. In action to declare void certain zoning resolutions affecting plaintiff's property, plaintiff might not examine as adverse parties the members of the City Planning Commission and of the Board of Estimate with respect to "all factors that have entered into the determination and enactment of" the regulations. In recommending changes in zoning ordinances the Planning Commission acts in an advisory capacity and its recommendations may or may not be followed, and therefore they were neither material nor necessary to the instant action. The Board of Estimate in adopting zoning resolutions acts in a legislative capacity and the reasons motivating legislators are beyond review by the courts. If the resolutions resulted in confiscation of plaintiff's property, the resolutions themselves must be attacked and not the motives of the legislators.—Riccio v. Wagner, 123 (72) N. Y. L. J. (4–14–50) 1323, Col. 5 T.

¶ 33. The power of the City Planning Commission is not limited to the regulation of the location of trades and industries but it may "regulate and restrict * * * locations of buildings, designed for specific uses or creating districts for any such purpose". Thus, the Commission could control the location of physicians' offices. Contention that the Commission, once having controlled the location of the building, could not longer restrict the use of the building except under its power to regulate the location of trades and industries was rejected. The Commission had the power to enact a regulation permitting the use of apartments in multiple dwellings in residence districts by physicians only when the physicians offices were on the first or second floor and access was available from other than a public hall.—People v. 960 Park Ave. Corp., 1 N. Y. 2d 771, 153

N. Y. S. 2d 46, 135 N. E. 2d 585 [1956]; aff'd without opinion 286 A. D. 493, 145 N. Y. S. 2d 190 [1955].

¶ 34. Provision for off-street parking facilities in connection with a shopping center was not objectionable as spot zoning.—Fitchett Crescent Corp. v. City of New York, —— Misc. 2d ——, 155 N. Y. S. 2d 272 [1956].

§ 201. **Applications for zoning changes.**—Applications for changes in zoning resolutions or regulations may be filed by any taxpayer with the city planning commission during the month of January in any year. The commission shall consider and act upon such applications and may hold public hearings thereon, notice of which shall be given in the same manner as provided for other hearings in section two hundred. (*Derived from former* § 201 *as amended by L.* 1957, *ch.* 127.)

**CASE NOTES**

¶ 1. Zoning resolution changing the area from a "C" district to a "E-1" district *held* to have been adopted pursuant to former § 200 which permits the commission upon its own initiative to adopt resolutions for zoning changes and not pursuant to former § 201 which provides for a change initiated on an application by taxpayers and required the petition to be filed during the month of April. The fact that the commission's attention was brought to the need for a zoning change by a petition submitted to it by a property owner was not necessarily inconsistent with the commission's having acted upon its own initiative under former § 200.—Rosenzweig v. Crinnion, 126 N. Y. S. 2d 692 [1953].

§ 202. **Platting of land and dedication of streets and public places.**—a. No map of a subdivision or platting of land into streets, avenues or public places and blocks within the limits of the city shall be received for filing in the office in which instruments affecting real property are required to be recorded in the county in which the land is situated, unless such map shall have been submitted to the board of estimate and approved by such board, after transmittal to the city planning commission for report, by the same procedure as provided in subdivision b of section one hundred ninety-nine for changes in the city map. If such map is disapproved by the board of estimate, the secretary of the board shall certify such fact in writing upon such map, and such map shall be received only for record without such approval.

b. No street, avenue, highway or public place, the layout of which has not been approved as provided in this section, shall be deemed to have been accepted by the city as a street, avenue, highway or public place, unless such street, avenue, highway or public place shall lie within the lines of a street, avenue, highway or public place upon the city map. (*Derived from former* § 202.)

# CHAPTER 9

## CAPITAL PROJECTS AND BUDGET

§ 210. **Fiscal year.**—The fiscal year as defined in section one hundred ten shall be the fiscal year for purposes of this chapter.

§ 211. **Definitions.**—a. As used in this charter:

1. The term "capital project" shall mean:

(a) Any physical public betterment or improvement or any preliminary studies and surveys relative thereto.

(b) The acquisition of property of a permanent nature including wharf property.

(c) The acquisition of any furnishings, machinery, apparatus or equipment for any public betterment or improvement when such betterment or improvement is first constructed or acquired.

(d) Any public betterment involving either a physical improvement or the acquisition of real property for a physical improvement consisting in, including or affecting:

(1) Streets and parks;

(2) Bridges and tunnels other than those crossing navigable waters;

(3) Receiving basins, inlets and sewers, including intercepting sewers, plants or structures for the treatment, disposal or filtration of sewerage, including grit chambers, sewer tunnels and all necessary accessories thereof;

(4) The fencing of vacant lots and filling of sunken lots.

(e) Any combination of the above.

2. The term "pending" shall mean not yet completed.

3. The term "cost" shall include the contract liabilities and expenditure incurred for work in carrying out the physical improvement and interest thereon, and the compensation to be made to the owner of any real property acquired for the improvement as determined by a court or by agreement, and interest thereon.

4. The term "expenses" shall mean any expenses incurred in relation to an assesable improvement exclusive of cost and of damages assessed by the board of assessors.

5. The term "street", as used in this chapter, shall include street, avenue, road, alley, lane, highway, boulevard, concourse, parkway, driveway, culvert, sidewalk, crosswalk, boardwalk, and viaduct, and every class of public road, square and place, except marginal streets.

6. The term "real property" shall include all lands and improvements, lands under water, water front property, the water of any lake, pond or stream, all easements and hereditaments, corporeal or incorporeal, and every estate, interest and right, legal or equitable, in lands or water, and right, interest, privilege, easement and franchise relating to the same, including terms for years and liens by way of judgment, mortgage or otherwise.

7. The term "assessable improvement fund" shall mean the fund established pursuant to section three hundred one.

b. Unless otherwise provided in the capital budget, the cost and expense of the physical improvements or the acquisition of the real property for physical improvements contained in item (d) of subdivision one of paragraph a of this section shall be paid directly or indirectly in the first instance out of the assessable improvement fund and shall be recouped by the city with the taxes of so many fiscal years, not exceeding five, next succeeding the completion of the work or the acquisition of the property as shall be certified by the head of the department at whose request such real property was acquired or the improvement made. (*Derived from former* § 211. *Subdivision a, paragraph* 1*(d) amended by L. L.* 1961, *No.* 93.)

§ 212. **Report of comptroller.**—Not later than the first day of September in each year, the comptroller shall submit to the mayor, the board of estimate and the council a report which shall be published forthwith in the City Record, setting forth the amount and nature of all obligations authorized on account of each pending capital project, the liabilities incurred for each project outstanding on the first day of July and setting forth and commenting in detail upon the city's financial condition and advising as to the maximum amount and nature of debt which in his opinion the city may soundly incur for capital projects during each of the six succeeding fiscal years, and containing such other information as may be required by the mayor. (*Derived from former* § 212.)

§ 213. **Departmental estimates for capital projects.**—On such date as the mayor may direct, but not later than the fifteenth day of September, the head of each agency shall submit to the mayor and the city planning commission a detailed estimate of all capital projects pending or which he believes should be undertaken. Such estimates shall be known as departmental estimates for capital projects and shall be in such form and contain such information as may be required by the mayor and the director of city planning. (*Derived from former* § 213. *Amended by L. L.* 1961, *No.* 93.)

§ 214. **Departmental estimates public records.**—Such departmental estimates shall be public records and shall at all reasonable times be open to public inspection. (*Derived from former* § 213.)

§ 215. **Certificate of the mayor.**—Not later than the fifteenth day of September, the mayor shall issue and publish in the City Record his certificate as to the maximum amount of debt which in his opinion the city may soundly incur for capital projects during the

ensuing fiscal year with his recommendations as to the capital projects to be included in the capital budget. At any time prior to the submission of his proposed capital budget to the board of estimate and to the council, the mayor may amend such certificate. (*Derived from former* § 215.)

§ 216. **Draft capital budget; preparation.**—Each member of the council and each member of the board of estimate shall have the right to attend in person or by a representative any and all hearings conducted by the city planning commission at which the heads of agencies or their representatives or subordinates appear to explain their departmental estimates, to ask such questions and to require the production of such papers and records at such hearings as may seem to him appropriate and proper. The director of the budget shall attend in persosn or by a representative all such hearings and shall render to the city planning commission such assistance and advice as it may require in the preparation of the draft capital budget. The public may be present at such hearings but shall not have the right to be heard. (*Derived from former* § 216.)

§ 217. **Draft capital budget; submission.**—Not later than the fifteenth day of November, the city planning commission shall submit and publish in the City Record to the mayor a draft capital budget for the ensuing fiscal year, the aggregate amount of which shall not exceed the amount specified in the mayor's certificate. The city planning commission shall at the same time so submit and publish comments in regard to projects included in such draft capital budget whether originated in the departmental estimates or by the commission, including conformance with the master plan so far as developed, their relation to a suitable development of the community, whether they will make necessary or desirable the undertakings of other capital projects, whether they have been combined with or can be combined with or have a significant relation to other capital projects pending or proposed, and any recommendation the commission may make as to their urgency or priority in the orderly develoment of the city. (*Derived from former* § 217.)

§ 218. **Draft capital budget; contents.**—The draft capital budget as submitted by the city planning commission shall set forth separately each capital project and shall be arranged in such manner as to set forth clearly:

1. As to each such project: a brief description and location; the total estimated cost; the amount of obligations which have been authorized to date, the amount of obligations which are required to be authorized during the balance of the current fiscal year, the amount of obligations recommended to be issued in the ensuing fiscal year, the amount of obligations required thereafter to complete the project, and the sources of funds thereof; the statutory period of probable usefulness; the estimated additional annual debt service; the estimated additional annual maintenance and operation cost; and any terms and conditions of the project.

2. A listing of all pending projects and recommendations that any pending project be modified, abandoned or postponed.

3. Information in regard to capital projects for which the approval or authorization of the city is required, where such capital projects do not require the appropriation of city funds or the issuance of city obligations.

4. Such other information as the city planning commission or the mayor may deem pertinent or as may be required by law. The mayor may also require the city planning commission to prepare and submit to him on or before a date fixed by him a report in regard to any capital project not included in the capital budget submitted by the city planning commission together with a statement of whether or not the city planning commission approves of the inclusion of such capital project in the capital budget.

§ 219. **Executive capital budget.**—a. Not later than the tenth day of January in each year the mayor shall submit to the board of estimate and to the council a proposed executive capital budget for the ensuing fiscal year, the aggregate amount of which shall not exceed the amount in the mayor's certificate.

b. If the capital budget submitted by the mayor contains any project which was not included by the city planning commission, or omits any project so included, in the proposed capital budget, the mayor shall submit with his capital budget message the report, if any, of the city planning commission in regard to such project, together with a statement of his reasons for the inclusion or omission. The proposed executive capital budget and message and any accompanying reports in regard to specific projects shall be published forthwith in the City Record.

§ 220. **Recommendations of comptroller and city planning commission.**—Not later than the twentieth day of January, the comptroller and the city planning commission shall submit to the board of estimate and to the council reports, which shall be published forthwith in the City Record, containing such comments and recommendations with respect to the proposed executive capital budget as they may deem advisable. (*Derived from former* § 219.)

§ 221. **Executive capital budget; hearings.**—Between the twentieth of January and the fifth day of February in each year, the board of estimate and the council shall hold public hearings on the proposed executive capital budget. The council may hold such hearings as a body or by its finance committee. Such hearings may be held jointly by consent of both bodies. Officers of agencies shall have the right, and it shall be their duty, when requested by the board of estimate or the council, to appear and be heard. (*Amended by L.* 1962, *ch.* 998, § 22.)

§ 222. **Capital budget; adoption.**—Except as otherwise provided by law, and subject to the veto of the mayor, either the board of estimate or the council shall have the power to increase, decrease, or omit the amount of the appropriation for any capital project in

the proposed executive capital budget, or to add any new capital project thereto or to change any term or condition thereof. Each shall return the capital budget to the mayor not earlier than the twenty-first day of February and not later than the sixth day of March. When both bodies have returned the budget, or on the seventh day of March, if either has not returned the budget, each capital project not increased, deceased, added, omitted or changed by either body shall be deemed to have been adopted. (*Derived from former* § 221 *and* § 222.)

§ 223. **Veto of the mayor.**—a. Any action by the council on a capital project or on the terms and conditions of the capital budget shall be certified to the mayor by the president of the council. Any action by the board of estimate on a capital project or on the terms and conditions of the capital budget shall be certified to the mayor by the secretary of the board of estimate.

b. If the council or the board of estimate shall have increased or reduced or omitted the appropriation in the proposed executive capital budget for a particular capital project, or added any capital project thereto or changed or omited any term or condition thereof, the mayor, on or before the twenty-first day of March, may disapprove any such increase, reduction, omission, addition or change and return the capital budget to the council and to the board of estimate, setting forth his objections thereto in writing.

c. Each capital project, term or condition, the disposition of which is so disapproved, shall thereupon be restored to or omitted from the capital budget in accordance with the proposed executive capital budget as previously submitted by the mayor, unless on or prior to the sixth day of April, the board of estimate (other than the mayor) by a vote of two-thirds of the total number of votes which all of the members of the board (other than the mayor) are entitled to cast, and the council by a vote of two-thirds of all of the councilmen acting separately but in identical terms shall restore or omit such increase, reduction, omission, addition or change so vetoed, which shall thereupon become part of the capital budget. Upon the completion of the foregoing, or on the seventh day of April, whichever is earlier, the capital budget as submitted and modified pursuant to the foregoing provisions of this chapter shall be deemed to have been finally adopted.

d. Not later than the tenth of April, the capital budget as finally adopted shall be certified by the mayor and the city clerk as the capital budget for the ensuing fiscal year. The capital budget shall, not later than five days after such certification, be filed in the office of the comptroller and shall be published forthwith in the City Record. (*Amended by L.* 1962, *ch.* 998, § 23.)

§ 224. **Amendment.**—a. Upon receipt of a recommendation in writing from the city planning commission, approved by the affirmative vote of two-thirds of the members thereof, and with the written approval of the mayor, the board of estimate and the

council may amend the capital budget in accordance with such recommendation.

b. Upon the adoption of any such amendment by the board of estimate and by the council, it shall be certified by the mayor, the secretary of the board of estimate, the president of the council and the city clerk and the capital budget shall be amended accordingly.

c. Not later than five days after such certification such amendment shall be filed in the office of the comptroller and shall be published forthwith in the City Record.

§ 225. **Restrictions on capital projects.**—No obligations of the city shall be issued or authorized for or on account of any capital project not included in a capital budget, or in excess of the maximum amount of obligations which may be issued on account of a project as fixed in such capital budget; and no amount may be expended on account of any capital project in excess of the amount appropriated therefor in a capital budget, except that the amount appropriated therefor may be increased by the mayor by not more than fifteen per centum thereof in order to meet any costs required to advance such project. (*Derived from former* § 224.))

**CASE NOTES**

¶ 1. An electrical contractor who submitted the lowest bid for electrical work in the construction of a school building was entitled to recover his increased costs over his bid price where the increased costs were the result of the failure of the Board of Education to award the contract for plumbing and heating at the same time it made the award for electrical work. Although the total bids exceeded the city's appropriation for the project, the Board was liable where plaintiff relied upon representation that it would award all the contracts at once.—Bank v. Board of Education, 305 N. Y. 119, 111 N. E. 2d 238 [1952] rev'g 280 App. Div. 58, 111 N. Y. S. 2d 130.

§ 226. **Capital improvement plan.**—a. Not later than the first day of May in each year the city planning commission shall prepare and submit to the board of estimate a proposed capital improvement plan. Such plan shall set forth by major programs the commission's recommendations for capital improvements to be initiated during the five fiscal years commencing at the end of the ensuing fiscal year, and shall set forth, by major programs, previously authorized and uncompleted capital improvements. Such proposed plan shall be forthwith published in the City Record. The commission may, prior to submitting such plan, in its discretion, prepare and publish in the City Record a preliminary plan and hold public hearings in regard thereto.

b. Between the first and fifteenth days of May in each year, the board of estimate shall hold public hearings in regard to the proposed capital improvement plan and, not later than the twenty-fifth day of May in each year shall submit to the mayor its recommendations in regard to the proposed capital improvement plan.

c. Not later than the fifteenth day of June in each year the mayor shall prepare and publish in the City Record his capital improvement plan for the ensuing five fiscal years, which plan shall set forth, by major programs, his recommendations for capital improvements to be initiated during such five fiscal years and shall set forth, by major programs, a statement of previously authorized and uncompleted capital improvements.

§ 227. **Site selection.**—a. There shall be a site selection board the members of which shall be the director of city planning, the director of the budget, the commissioner of real estate, the comptroller and, with respect to a capital project located wholly or partly within a borough, the president or presidents of the borough or boroughs in which the site is located.

b. Every act of the board shall be by resolution adopted by a majority of the votes cast by all the members. No resolution shall be adopted except after a public hearing, notice of which shall be published in the City Record. No resolution of the board shall be effective unless approved in writing by the mayor.

c. Meetings of the board shall be called as directed by the board, upon notice thereof published in the City Record, provided that the mayor may call a meeting of the board at any time.

d. There shall be a journal of the meetings of the board. Said journal shall be a public record and shall contain a record of the votes taken on any resolution or other action of the board, the text of any resolution as passed by the board, a record of any other action taken by the board in such form as may be required by the board and such other matters as may be required by the board.

e. A stenographic record shall be made of all public meetings of the board. It shall be a public record, transcripts of which shall be promptly furnished to any citizen or taxpayer upon payment of reasonable fees therefor.

f. Except as otherwise provided by law, the board shall, wherever necessary, select sites for capital projects.

g. The board shall have power and authority to adopt and amend rules and regulations for the conduct of its business and to carry out its powers and duties.

§ 228. **Project initiation.**—a. At any time during the fiscal year the mayor, before initiating any capital project included in the capital budget or in any amendment thereto, by directing the acquisition or leasing of real property therefor or, if no acquisition or leasing is required, the letting of a contract for the improvement or any part thereof, shall cause a public hearing to be held by the board of estimate on not less than ten days' notice published in the City Record, and may after such hearing direct such acquisition, leasing or improvement to proceed. Such

direction shall be forwarded to the corporation counsel and to the agency directed to proceed, and shall constitute an order to the corporation counsel and such agency to proceed with such capital project. If such project requires the taking of real property, such direction shall constitute an authorization therefor, and the corporation counsel shall thereupon institute proceedings for such taking in the manner provided by law.

b. Notwithstanding the provisions of the local finance law or any other law, the mayor shall, upon the initiation of such a capital project, determine the amounts of obligations to be used for financing the capital project involved and shall certify his determination to the comptroller, who shall thereupon determine the nature and term of the obligations and arrange for the issuance thereof.

c. The mayor may require any agency to prepare and submit to him periodic reports in regard to the progress of capital projects and may issue directives and adopt rules and regulations in regard to the execution of capital projects which directives, rules and regulations shall be binding upon all agencies. (*Subdivision b amended by L.* 1962, *ch.* 998, § 24.)

§ 229. **Improvements payable other than by city.**—Any owner of real property or any other person interested may apply to the board of estimate to authorize an improvement referred to in item (d) of subdivision one of paragraph a of section two hundred eleven hereof, not included in the capital budget. The board of estimate may authorize such improvement to be made by the city or by such owner or other person interested upon compliance with the following conditions:

1. Such owner or group or other persons interested shall enter into an agreement with the city, whereby he or they will either authorize the city, or himself or themselves agree, to perform such work in accordance with such plans and specifications approved by the agencies having jurisdiction thereover and under their supervision.

2. All of such work shall be done for the account of or at the sole cost and expense of the person or persons applying for permission to do the same, who shall furnish to the city such security and in such amount as may be required to secure the payment of such cost and expense or the proper performance of the said work in the time and in the manner agreed upon, and shall further secure the city, in the latter case, against latent defects in such work for a period of two years.

3. Such improvement shall be approved by the city planning commission.

4. Any agreement providing for the performance of such work and the furnishing of such security, shall be first approved by the board of estimate before the same shall become effective.

§ 230. **Duties and obligations of property owner with respect to sidewalks, fencing of vacant lots and filling of sunken lots.**— a. Notwithstanding any provision of law, the owner of any property shall, at his own cost and expense (1) install, reconstruct, repave, and repair the sidewalk in front of such property; (2) fence any vacant lot or lots comprising part or all of such property and fill any sunken lot or lots comprising part or all such property, whenever the city agency having cognizance and control shall so order. All such work shall be done in the manner, of such materials, and in accordance with such specifications and regulations as may be prescribed by the city agency having cognizance and control. Whenever such agency shall determine that a sidewalk should be installed and constructed, or repaved and reconstructed, or repaired, or that a vacant lot should be fenced, or that a sunken lot should be filled, such agency may cause a notice to be served in the manner prescribed in subdivision d hereof upon the owner of any house, building or vacant lot abutting on such area in which a sidewalk is to be installed or on such sidewalk, to install and construct or to repave and reconstruct or to repair such sidewalk, as the case may require, or upon the owners of a vacant lot which should be fenced, to fence such a lot, or upon the owners of a sunken lot which should be filled, to fill such lot, within the time designated in such notice. Upon the owner's failure to comply with any notice or order of such agency as and within the time specified therein by the agency having cognizance and control, such agency may perform such work or cause the same to be performed, the cost and expense of which shall be due and payable and shall constitute a lien against the premises abutting on such sidewalk or against the lot fenced or filled or ordered to be fenced or filled, as the case may be, when the amount thereof shall have been definitely computed by the agency having cognizance and control and an entry of the amount thereof shall have been entered in the office of the city collector in the book in which such charges against the premises are to be entered.

A notice thereof, stating the amount due and the nature of the charge shall be mailed by the city collector, within five days after such entry, to the last known address of the person whose name appears on the records in the office of the city collector as being the owner or agent or, where no name appears, to the premises addressed to either the owner or the agent. If such charge is not paid within ninety days from the date of entry, it shall be the duty of the city collector to collect and receive interest thereon at the rate of seven percent per annum, to be calculated to the date of payment from the date of entry. Such charge and the interest thereon shall continue to be, until paid, a lien on the premises abutting such sidewalk or on which such lot was fenced or filled, as the case may be. Such charge and interest shall be collected and the lien thereof may be foreclosed in the manner provided by law for the collection and foreclosure of the lien of taxes, sewer rents, sewer surcharges and water rents due and payable to the city, and the provisions of law applicable to the collection and foreclosure of the

lien of such taxes, sewer rents, sewer surcharges and water rents shall apply to such charge and the interest thereon and the lien thereof. Such lien shall be prior and superior to every other lien or claim except the lien of an existing tax, water rent, sewer rent, sewer surcharge, or local assessment.

b. The cost and expense incurred pursuant to subdivision b, c, or d of this section by the agency having cognizance and control, shall be paid initially out of the real property fund upon authorization of the board of estimate. All sums received or collected in reimbursement of such cost or expense pursuant to subdivision b or e of this section, including interest and penalties thereon, shall be paid into the real property fund.

c. As used in this section, the term "agency having cognizance and control," during the period to and including December thirty-first, nineteen hundred sixty-two, shall mean the president of the borough in which such property or sidewalk is located. On and after January first, nineteen hundred sixty-three, such term shall mean the department of highways.

d. Service of a notice or order upon an owner pursuant to the provisions of this section shall be made personally upon such owner or by registered mail addressed to the last known address of the person whose name appears upon the records in the office of the city collector as being the owner of the premises or as the agent of such owner or, if no such name appears, at the address set forth as the address of the owner in the last recorded deed with respect to such premises. A copy of such notice or order shall also be filed in the clerk's office of each county where the property is situated and posted in a conspicuous place on the premises. A copy of such notice or order shall also be sent by registered mail to every owner of record of a mortgage or lien upon the premises at the address appearing in such mortgage or lien instrument as recorded, together with a notice that if such order is not complied with within the time therein specified, the agency having cognizance and control will cause the work required for such compliance to be performed and that the cost and expense of such work will constitute, until paid, a lien against the premises which shall be prior and superior to every other lien or claim except the lien of an existing tax, water rent, sewer rent, sewer surcharge or local assessment.

e. No permit shall be granted for the erection of any building or structure, and no certificate of occupancy shall be issued with respect to any building or structure completed on or after the date upon which this section, as hereby enacted, takes effect, unless the sidewalk in front of such building or structure shall have been installed and paved by the owner at his own cost and expense in the manner, of the materials, and in accordance with the specifications prescribed by the agency having cognizance and control, or unless the owner of such premises has furnished a performance bond to the full cost of such installation and pavement as estimated by such agency. If the cost of such installation and paving exceeds the sum remaining payable under such bond or other security, the

amount of such excess shall be due and payable, shall be a lien against the property and may be enforced, at the times and in the manner provided in this section.

f. Nothing contained in this section shall impair or diminish the power of the city to install, construct, reconstruct, repave or repair sidewalks or to fence vacant lots or to fill sunken lots, or to enter into contracts with the owners of premises abutting on streets for such installation, construction, reconstruction, repaving or repair of sidewalks or fencing of vacant lots or filling of sunken lots, upon such terms and conditions as may be approved by the board of estimate. Nor shall anything contained in this section affect or impair any act done or right accruing or accrued or acquired, or liability incurred prior to the effective date of this section, but the same may be enjoyed and asserted as fully and to the same extent as if this section had not been enacted. (Section added by L. 1962, ch. 998, § 25.)

# CHAPTER 10

# OBLIGATIONS OF THE CITY

§ 250. **Assessment bonds.**—Serial bonds to meet the expenditures payable from the street and park openings fund or the street improvement fund for the payment of which the moneys available in either such fund are insufficient shall not be issued in an amount in excess of the amount of assessments remaining uncollected and a lien upon lands assessed, of awards confirmed and of advance payments to be made for or upon awards in proceedings upon which assessments remain to be imposed, and of contract liability, and of payments on account of work in progress and work completed for which assessments remain to be imposed. The proceeds of the sale of all such bonds shall be paid into the fund on account of which the bonds were issued, and all such bonds shall be redeemed from such fund. (*Derived from former* § 250 *as amended by L.* 1943, *ch.* 710, *L.* 1944, *ch.* 606, *L.* 1945, *ch.* 338.)

§ 251. **Real property fund.**—There shall be a fund to be known as the "real property fund." There shall be paid into such fund the proceeds of all sales of real property of the city, except as otherwise provided by law. (*Derived from former* § 254 *as amended by L. L.* 1960. *No.* 80.)

§ 252. **Payments from real property fund.**—The comptroller may, in his discretion, authorize the expenditure of any money in the real property fund for the purchase of real property for which he has been authorized to issue obligations and within the amount authorized. Upon authorization of the board of estimate, the comptroller may, in his discretion, authorize the expenditure of any money in such fund for payment of any charges or expenses which the city is required to pay under the terms of any lease of real property owned by the city and leased to others and for payment of any costs or charges incurred by the city in connection with the maintenance, construction, improvement, repair, demolition, sale, rental or other disposition of real property owned by the city. (*Derived from former* § 255 as amended by *L.* 1940, *No.* 120. *Amended by L.* 1962, *ch.* 998, § 26.)

§ 253. **Allocation of authorizations to department of purcahse.**—So much of the amount of any obligations authorized as is applicable to the purchase of supplies, materials and equipment which the department of purchase is authorized to purchase shall be allotted to the department of purchase, but shall be considered and accounted for as a part of the cost of the project for which the obligations were authorized. (*Derived from former* § 256.)

# CHAPTER 11

## SINKING FUNDS

§ 271. **Sinking fund of the city of New York.**—There is hereby continued the fund known as the "sinking fund of the city of New York" which shall have for its purpose the amortization and redemption of the principal of the debt of the city of New York incurred on and after the first day of January, eighteen hundred ninety-eight, and evidenced by corporate stock of the city of New York, excepting that issued to provide for the supply of water and that issued since the first day of January, nineteen hundred ten, for rapid transit or rapid transit unification purposes. (*Derived from former* § 271.)

§ 272. **Water sinking fund of the city of New York.**—There is hereby continued the fund known as the "water sinking fund of the city of New York" which shall have for its purpose the amortization and redemption of all corporate stock of the city of New York issued on and after the first day of January, eighteen hundred ninety-eight, to provide for the supply of water. (*Derived from former* § 272.)

§ 273. **Rapid transit sinking fund of the city of New York.**—There is hereby continued the fund known as the "rapid transit sinking fund of the city of New York" which shall have for its purpose the amortization and redemption of all corporate stock of the city of New York issued on and after the first day of January, nineteen hundred ten, for rapid transit purposes. (*Derived from former* § 273.)

§ 273-a. **Transit unification sinking fund of the city of New York.**—There is hereby created the fund known as the "transit unification sinking fund of the city of New York" which shall have for its purpose the amortization and redemption of all corporate stock of the city of New York issued on and after the first day of January, nineteen hundred thirty-nine, for transit unification purposes. (*Derived from former* § 273-a *as added by L. L.* 1939, *ch.* 474.)

§ 274. **Administration of sinking funds.**—The comptroller shall administer and manage the several sinking funds of the city and shall have custody of the securities in such funds. In the administration of such funds the comptroller shall be deemed to be acting in a fiduciary capacity. (*Derived from former* § 274.)

§ 275. **Investment of sinking fund moneys.**—The comptroller may invest the moneys of the several sinking funds only in obligations issued by the city of New York, obligations issued by the

state of New York and obligations issued by the United States of America. When it is possible to purchase for any sinking fund other than the transit unification sinking fund any obligaitons of the city at less than par, other than obligations issued for the purpose of transit unification, the comptroller shall invest such moneys only in such obligations; provided, however, that when it is possible to purchase any obligations, issued for the purpose of transit unification and redeemable from the transit unification sinking fund, at less than par out of moneys of the transit unification sinking fund, the comptroller shall invest such moneys only in such obligations; and further provided, that when in his judgment it is advisable to invest part of the cash credited to a sinking fund in short term obligations because of the approaching maturity of an issue of corporate stock to be redeemed from such fund and when no short-term obligations of the city can be purchased at less than par although obligations of longer terms can be so purchased, he may present to the board of estimate a certified statement detailing such circumstances, and the board may thereupon authorize him to purchase from the city at par its short-term obligations or short term obligations of the United States not exceeding such amount as, together with the estimated amount of cash which stands to the credit of such fund at the time of such maturity, will equal the amount needed for redemption of such corporate stock. (*Derived from former* § 275 *as amended by L.* 1939, *ch.* 474.)

§ 276. **Annual appropriations to the sinking funds.**—For the redemption of the corporate stock redeemable from the several sinking funds there shall be included annually in the budget and paid into each of the sinking funds of the city an amount to be estimated and certified by the comptroller, which amount shall be not less than the aggregate of such annual contributions as, calculated at the time each issue of corporate stock redeemable from such sinking fund was made, would be sufficient if thereafter annually contributed to such fund together with the accumulations of interest thereon computed at the rate of three per centum per annum to meet and discharge such outstanding corporate stock when the same shall be payable; provided, however, that if at the close of a fiscal year there is in any sinking fund a surplus over and above the reserve required by such sinking fund computed as hereinabove provided, the comptroller, in estimating the amount to be included for such sinking fund in the budget, shall reduce the amount of the annual contributions by the amount of such surplus.

Amounts received annually from the operation of any rapid transit railroad, for the construction, equipment or acquisition of which corporate stock redeemable from any such fund shall have been issued, shall not be considered or treated as surplus, but such amounts shall be deducted from the amount certified by the comptroller for the budget for the ensuing year. (*Derived from former* § 276.)

§ 277. **Monthly report.**—Not later than the tenth day in each month, the comptroller shall submit to the board of estimate and the council a certified report, which shall be published forthwith in the City Record, setting forth the operations of the several sinking funds during the preceding months and the condition of such funds at the commencement and close of such month and such other information as may be required. (*Derived from former* § 277.)

§ 278. **Annual report.**—Not later than the first day of September in each year, the comptroller shall submit to the board of estimate and the council a certified report, which shall be published forthwith in convenient form as a supplement to the City Record and which shall set forth in detail the operations of the several sinking funds during the preceding fiscal year, the reserves required, the assets of such funds at the close of such year, the obligations redeemable from such funds, the dates of their maturities and such other information as may be required. (*Derived from former* § 278.)

# CHAPTER 12

# ASSESSABLE IMPROVEMENTS FUNDS

§ 300. **Existing assessable improvement funds.**—The funds for street and park openings and the street improvement funds shall be continued for the purpose of paying from them the sums lawfully authorized to be paid or which may be authorized to be paid on account of assessable improvements lawfully authorized prior to the first day of January, nineteen hundred sixty-two. No other payments shall be made from such funds, and any cash remaining in either of them in excess of the liabilities chargeable thereto shall be paid into the general fund. (*Amended by L. L.* 1961, *No.* 93.)

## CASE NOTES UNDER FORMER CHAPTER 12

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¶ 1. Provisions of Charter, former § 291 et seq., relating to assessable improvements, might not be invoked to affect a street opening proceeding authorized on February 21, 1930, and which was pending and had reached the stage of entry of a tentative decree prior to adoption of the 1938 Charter.
—In re Avenue L, B'klyn, 258 App. Div. 808, 15 N. Y. S. 2d 980 [1939].

¶ 2. Limited housing corporation, which was entitled to exemptions on its buildings and improvements from taxation for local purposes, but not from assessments for local improvements, *held* entitled to exemption from that portion of the charges annually levied against New York City real property which, on the tax books and bills, was segregated under the classification of Assessment for Special Improvements, since under previous decisions it had been held that such assessment was a tax and not one for a local improvement [Local Law No. 9 of 1927; Knickerbocker Village v. Reid, N. Y. L. J. (7–5–38), aff'd 256 App. Div. 973, aff'd 281 N. Y. 861; 283 N. Y. 373; 173 Misc. 906; N. Y. C. Charter §§ 291–305].—Hillside Housing Corp. v. Reid, 104 (144) N. Y. L. J. (12–21–40) 2157, Col. 3 F.

¶ 3. Levies which were apportioned by the Board of Estimate on a city-wide or a borough-wide basis, did not fall within the category of local assessments levied for special benefit, and constituted a tax and not an assessment for benefit. Accordingly, plaintiff, which was a non-profit, edu-

cational corporation, was entitled to cancellation of items of purported assessment for special improvements, as plaintiff's property was favored by a general exemption from direct property taxation.—Cooper Union v. City of N. Y., 272 App. Div. 438, 71 N. Y. S. 2d 204 [1947], aff'd 298 N. Y. 578, 81 N. E. 2d 108.

¶ 4. Former §§ 291 to 320 inclusive which set forth the procedure for assessable improvements are not applicable to proceedings authorized before the 1938 Charter took effect. Thus, the costs and expenses of a proceeding to acquire title to real property in order to improve certain streets including charges incurred by the Borough President and the Law Department must be included in the tentative assessments for benefit of the local area pursuant to the provisions of the Greater New York Charter where the proceeding was originally authorized when the said Charter was in force.—Matter of City of New York (102nd, 110th Streets), 181 Misc. 872, 50 N. Y. S. 2d 722 [1943].

¶ 5. That the published notice stated that the petition for the construction of the Brookhaven sewer would be submitted to the Newtown Local Board in Long Island City, which had no jurisdiction, did not result in the proceedings being initiated without the required public notice so as to render the whole proceeding and the assessments void, where the Board of Estimate had granted preliminary authorization in conformance with amended resolutions adopted by the Jamaica Local Board, passed a further resolution requiring notice of a public hearing for final authorization to be published for ten days in the City Record, and such public notice was duly given and the public hearing was held and duly adjourned from time to time until final adoption of the resolution granting final authorization. Furthermore, the Greater New York Charter, in effect when the sewer proceeding was begun, only required the notice when the petition had been "received" by the president of the Borough, but had no provision as to notice when the petition had originated with the Borough President, as in the instant case.—Emmigrant Industrial Sav. Bank v. City of New York, 271 App. Div. 330, 65 N. Y. S. 2d 507 [1946], affirming in part, 62 N. Y. S. 2d 87; aff'd without opinion, 297 N. Y. 795, 77 N. E. 2d 800.

¶ 6. In view of the language of Charter § 295(a) and Administrative Code § 293–1.0, hearings as to petitions for assessable improvements which have been received by the Borough President or which originate with him should be held by the Local Improvement Board in the first instance. The Borough President may not initiate a proceeding for assessment of improvements before the Board of Estimate without first submitting the matter to the Local Board.—Maickel v. Lundy, 4 Misc. 2d 98, 155 N. Y. S. 2d 581 [1953].

¶ 7. Contention that a subsidy-guarantee contract for a housing project was illegal because it had not received the approval of the City Council but only of the Board of Estimate was rejected, as the Charter provides for permanent improvements, known as "assessable improvements", upon authorization of the Board of Estimate without any concurring action by the Council. The intention of the Legislature discussed in various sections of the Public Housing Law was to place all authority in housing matters in the Board of Estimate and City Planning Commission.—Neufeld v. O'Dwyer, 192 Misc. 538, 79 N. Y. S. 2d 53 [1948].

¶ 8. Objections to condemnation of certain parcels for use as a public park were overruled on ground that action of the body vested with the power to determine necessity or expediency in acquisition of private property for public use was governmental and not judicial, and was not subject to review by the court (217 N. Y. 45; &c.).—In re Public Park (Lawrence, Main and 133d Sts., &c.), 104 (145) N. Y. L. J. (12–23–40) 2175, Col. 7 M.

¶ 9. Assuming the applicability of former § 300, subd. a, the Charter, providing that the Board of Estimate may authorize a physical improvement at any time within two years after date of a preliminary authorization, the final resolution approving a certain improvement, made by the Board on February 2, 1939, was timely, where the preliminary authorization was by amendment brought down to November 17, 1938.—Emigrant Industrial Sav. Bank v. City of New York, 271 App. Div. 330, 65 N. Y. S. 2d 507 [1946], affirming in part, 62 N. Y. S. 2d 87; aff'd without

opinion, 297 N. Y. 795, 77 N. E. 2d 800.

¶ 10. Court was without power to declare particular property exempt from assessments, since Court might only make awards and determine who was entitled to them, fix amount of assessments and decide the party to pay them, and in what amounts (268 N. Y. 26). The issue of exemption is one for the tax commissioners in the first instance, although a review of their action might be had on certiorari. Furthermore former Charter § 315 would seem to provide that all property within the area of assessment should be included, but that the City itself should pay the amount thereafter exempted.—In re City of N. Y. (Elevated Structure; Trinity Plac, &c.), 106 (3) N. Y. L. J. (7–3–41) 30, Col. 6 M.

¶ 11. Where a short, dead-end private street was subject to unrestricted parking of trucks and the City proposed to take it over as a public street, condemnation of a small area at the end of the street to provide a turning space was proper. The fact that a company proposing to build a warehouse at the end of the street would derive some special benefit did not affect the public nature of the appropriation.—In re City of New York (Walnut Avenue), 137 (17) N. Y. L. J. (1–24–57) 8, Col. 2 F.

¶ 12. Requirement of former § 301 of the Charter that the total amount of assessments for benefit should not exceed the total amount of the award, was to be effectuated by placing the costs and expenses of the proceeding on the borough when they are the expenses of the Borough President's office, and on the City when they are the expenses of any other City agencies.—In re Siegfried Place, City of N. Y., 51 N. Y. S. 2d 104 [1939].

¶ 13. In a condemnation proceeding by the City to demolish an elevated railroad structure with one-third of the cost to be borne by abutting property owners, the abutting owners were entitled to intervene. Although property owners are not generally parties in a condemnation proceeding until there has been a tentative assessment affecting their property, the rule is not applicable where the city is the owner of the property being condemned.—In re City of New York (James Street) 135 (12) N. Y. L. J. (1–18–56) 8, Col. 6 F.

¶ 14. Where, as result of opening of a new street, the benefit parcels on the westerly side thereof received a benefit considerably in excess of that received by owners of the parcels on the east as those on the westerly side now had access and egress over a 60-foot street when they legally had no such access before, whereas those on the easterly side benefited merely by now having access and egress over a 60-foot street rather than over 30 feet in accordance with easements which they theretofore possessed, the assessment was apportioned 60 per cent to those on the westerly side and 40 per cent to those on the easterly side.—In re City of N. Y. (Bronx River Ave.), 123 (66) N. Y. L. J. (4–6–50) 1214, Col. 3 M.

¶ 15. The statutory provision that an improvement assessment be made within one year "if practicable" is directory and not mandatory. Therefore, a sewer assessment levied more than six years after completion of the project is not barred by any statute of limitations.—Ploss v. Board of Assessors, 17 Misc. 2d 283, 186 N. Y. S. 2d 301 [1959].

¶ 16. For assessment purposes there was properly added to the value of the remaining parcels the sum by which the lands were enhanced in value by reason of the present improvements.—In re Avenues V and X, E. 18th St., &c., B'klyn, 102 (134) N. Y. L. J. (12–11–39) 2085, Col. 4 M.

¶ 17. Complaint, an action to have removed from the records certain assessments named to be unjust, was insufficient because the remedy for such a situation is specified in Charter former § 311 and Administrative Code § 311–1.0 et seq. Such statutory provisions are exclusive as a remedy, where there were no allegation that an assessment was invalid and such invalidly did not appear on face of the record.—Ottillia Realty Corp., v. City of New York, 103 (96) N. Y. L. J. (4–24–40) 1862, Col. 5 F.

§ 301. **New assessable improvement Fund.**—(*Repealed by L. L. 1961, No. 93.*)

# CHAPTER 13

## CONTRACTS AND PURCHASES

§ 341. **Scope.**—Except as otherwise provided in this charter or by statute, all supplies, materials and equipment to be furnished and work or labor to be done, to be paid for out of the city treasury or out of moneys under the control of or assessed or collected by the city, shall be furnished or provided as prescribed in this chapter.

### CASE NOTES

¶ 1. In view of provisions of the Election Law requiring the Board of Elections to furnish supplies and facilities for registration and enrollment, provisions of § 341 of the Charter that purchase of supplies and equipment payable with City funds should be provided for as prescribed "in this chapter" except as otherwise provided in the Charter "or by Statute", and provisions of § 782a that Commissioner of Department of Purchase, "except as otherwise provided in this charter", should have sole power to purchase all supplies and equipment, Commissioners of Elections of New York City *held* to possess the power to advertise for and receive bids and to award contracts thereon for ballots, supplies, stationery or printing required by the Board of Elections, without reference to the Department of Purchase. Such conclusion was fortified by fact that power of Board of Elections to make purchases had been conceded for years under the old Charter, that nothing in the Charter substantially changed this, and that in such cases Charter § 982c provided that the provisions were not a new enactment but a continuation of the old provisions.—Forbes v. Cohen, 254 App. Div. 548, 5 N. Y. S. 2d 316 [1938].

¶ 2. Municipal purchases must comply with the applicable statutory provisions relating thereto before recovery therefor may be had, even though harsh and unjust results may at times follow, since it is a matter of public policy to prevent inefficiency or dishonesty in such purchases (88 App. Div. 542; 251 N. Y. 198; 236 N. Y. 91). Hence where there were no formal purchase orders confirming the alleged phone orders as required by Bulletin 44 of the T. E. R. A., which is given the force of law by Emergency Relief Act, § 27, no recovery might be had. The material presently involved, covering a period of ten months, could not be included within phrase "immediate needs" in Rule 8, and the "competition" required by such Rule was not shown to have taken place.—Mahoney-Clarke, Inc. v. City of N. Y., 103 (59) N. Y. L. J. (3–12–40) 1135, Col. 6 T.

§ 342. **By whom procured.**—a. All work or labor to be performed by contract, including the furnishing of materials or supplies incident thereto, shall be obtained by the agency for whose use the appropriation therefor shall have been made, except as otherwise provided by law.

b. All other supplies, materials and equipment shall be purchased or procured by the department of purchase, except as otherwise provided by law.

c. The commissioner of purchase may from time to time authorize any agency to make purchases of such supplies, materials and equipment under such conditions as shall be specified in a written authorization, which shall be filed in the department of purchase and in the offices of the comptroller, the director of finance and the city clerk and published in the City Record, but not exceeding an aggregate expenditure in any one calendar month of twelve hundred fifty dollars, provided that the board of estimate may by regulation fix for any agency a lesser aggregate expenditure in any one calendar month.

d. In the event of an emergency requiring an immediate purchase involving an expenditure of not more than five hundred dollars, the agency for whose use such supplies, materials or equipment are necessary may purchase them directly under rules and regulations adopted by the board of estimate. (*Derived from former* § 342.)

CROSS REFERENCE: Separate specifications for certain contract work, see General City Law, § 88.

### CASE NOTES

¶ 1. A budget item for "unallocated appropriations" of $3,500,000.00 for "motor vehicles, unforeseen expenditures and sundry expenses" did not violate the provisions of this section requiring that appropriations for equipment and materials be made through the Department of Purchase and segregated to a particular use since segregation is impossible so long as the nature and kind of equipment that may become available is unknown.—Wilmerding v. LaGuardia, 183 Misc. 142, 50 N. Y. S. 2d 292 [1944]. Reversed by Appellate Division on ground that itemization was required under former §§ 111–132 (now §§ 110–128) of the Charter, 268 App. Div. 496, 52 N. Y. S. 2d 169.

¶ 2. The Commissioners of Election of New York City possess the power to advertise for and receive bids and to award contracts thereon for ballots, supplies, stationery, or printing required by the Board of Election without reference to the Department of Purchase.—Forbes **v. Cohen,** 254 App. Div. 548, 5 N. **Y. S. 2d** 316 [1938].

§ 343. **Public letting.**—a. If the several parts of the work or labor to be done and/or the supplies, materials and equipment to be furnished shall together involve the expenditure of more than two thousand five hundred dollars, such work or labor or supplies, materials and equipment shall be obtained only by contract on public letting founded on sealed bids under such regulations as shall be made by the board of estimate, except that in a special case the board of estimate by a two-thirds vote may order otherwise. The terms of such contracts shall be settled by the corporation counsel as an act of preliminary specification to a proposal for bids.

b. The agency letting the contract may reject all bids if it shall deem it for the interest of the city so to do; if not, it shall, without other consent or approval, award the contract to the lowest responsible bidder, unless the board of estimate by a two-thirds vote shall determine that it is for the public interest that a bid other than that of the lowest responsible bidder shall be accepted. Tie

bids are to be decided by the agency letting the contract and the award made. Whenever a contract is awarded to another than the lowest bidder, except by action of the board of estimate, the agency awarding the same shall file in its office and in the offices of the comptroller, the director of finance and the city clerk a statement in detail of the reasons therefor.

c. No bid shall be valid unless accompanied by a deposit in the amount and manner set forth and specified in the proposal. Upon the award of the contract the deposits of unsuccessful bidders shall be returned to them, and the deposit of the successful bidder shall be returned to him upon his executing the contract and furnishing the required security.

d. Every proposal for bids shall contain a provision that in the event of the failure of the bidder to execute the contract and furnish the required security within five days after notice of the award of the contract to him, his deposit or so much thereof as shall be applicable to the amount of the award made to him shall be retained by the city, and he shall be liable for and shall agree to pay on demand the difference between the price bid and the price for which such contract shall be subsequently relet, including the cost of such reletting and less the amount of such deposit. No plea of mistake in such accepted bid shall be available to the bidder for the recovery of his deposit or as a defense to any action based upon such accepted bid. (*Derived from former* § 343.)

CROSS REFERENCE: General provisions relating to contracts, see General Municipal Law, Article 5-A.

## CASE NOTES

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¶ 1. Requirement of New York City Charter former § 343 that contracts be let to lowest responsible bidder did not apply to a contract awarded under the Rapid Transit Act for installation of electric work and devices in connection with construction of Sixth Avenue Subway.—Arc Electrical Const. Co. v. Bd. of Transportation, 103 (21) N. Y. L. J. (1–25–40) 393, Col. 2 T.

¶ 2. Petitioner *held* not entitled to order directing Board of Transportation to award to petitioner, as the lowest bidder, a contract for installation of electric work and devices in

connection with construction of Sixth Avenue Subway, since such contract was subject to provisions of the Rapid Transit Act, § 36 of such Act contained no requirement that an award be made to the lowest bidder, and in any event § 36 prohibited the award of a contract which had not been consented to by the Board of Estimate, and there was no allegation that such consent had been obtained.—Id.

¶ 3. Complaint, in action to compel award of contract to lowest bidder in a case subject to provisions of the Rapid Transit Act, *held* insufficient, since § 36 of the Rapid Transit Act did not require the award of the contract to the lowest bidder, it was not alleged that the award of the contract to another company would cause damage to the public interest, and moreover it appeared that the award was made to another at the identical price bid by the lowest bidder, and no claim was made that the successful party was not responsible or competent to perform the work.—Rao Const. Co. v. Bd. of Transportation, 103 (21) N. Y. L. J. (1–25–40) 393, Col. 4 T.

¶ 4. The Board of Transportation was clearly empowered to reject all bids, as there is no requirement that the Board award orders by competitive bids (Rapid Transit Act § 36), and in absence of any showing of arbitrary, capricious or illegal conduct the court would not substitute its judgment for that of the Board.—Chalton Paint Co. v. Delaney, 104 (129) N. Y. L. J. (12–4–40) 1862, Col. 2 M.

¶ 5. Although the matter of determining the responsibility of a contractor was within discretion of the City officials, their exercise of such discretion was not conclusive upon the court where abuse and prejudice was indicated, and particularly where the effect would be to cause waste by increasing costs.—Burland Printing Co. v. La Guardia, 9 N. Y. S. 2d 616 [1938].

¶ 6. Where plaintiff printing company over period of eight years had done City work amounting to millions of dollars and had saved the City several hundred thousand dollars by being the lowest bidder, testimonials from the City departments attested to its excellent work and president of the printing trades union stated it was a responsible bidder from the union's viewpoint, action of city officials in barring the company from further City work on ground it was not the lowest *responsible* bidder merely because at one time it had sublet a small portion of its union work to a non-union firm, for which it had been fined, and that at another time it had sublet to a subsidiary company a small quantity of work without consent of Commissioner of Purchases *held* to constitute an abuse of discretion. However, as to contracts which had already been let court would not interfere because that would result in increasing waste, but as to contracts not yet let the City would be restrained from shutting out plaintiff from bidding, or from rejecting its bid on the grounds alleged, pending a trial on the merits. —Id.

¶ 7. Requirement of § 343 of the Charter that the award of contracts on public letting be made to the "lowest responsible bidder" does not mean one who is only pecuniarily responsible but one who also possesses moral worth, and it implies skill, judgment and integrity as well as sufficient financial resources.—Picone v. City of N. Y., 176 Misc. 967, 29 N. Y. S. 2d 539 [1941].

¶ 8. Duty of the awarding agency to determine whether the lowest bidder was the lowest responsible bidder was judicial in its nature, and authorized the agency to investigate and consider the background of the bidder, and in absence of a showing to the contrary it was to be assumed that the discretion of the awarding agency was exercised with an honest desire to award the contract to the lowest responsible bidder and was therefore not subject to review by the courts.—Id.

¶ 9. Requirements of former § 343b of the Charter that a finding be made by a three-fourths vote of the Board of Estimate that it was for the public interest that a bid other than that of the lowest responsible bidder be accepted, did not apply to the present situation where the award was made to the "lowest responsible bidder" as determined by the agency letting the contract.—Id.

¶ 10. Award of sewer construction contract to concern which was the second lowest bidder would not be interfered with by the court where the determination of the agency awarding the contract and the finding of the

Board of Responsibility that such concern was the lowest responsible bidder was based upon the ground that the firm which was the lowest bidder constituted a "front" for a certain person, and his corporation, whose activities in connection with public construction contracts over a period of years had brought them into frequent conflict with the criminal law and its enforcement agencies.—Id.

¶ 11. City, acting through the Commissioner of Public Works on the recommendation of the Board of Contract Responsibility of the Board of Estimate, *held* not to have acted arbitrarily in rejecting petitioner's bid for an electrical contract in connection with a sewage treatment works contract on ground petitioner was not the lowest responsible bidder as it lacked the necessary technical experience and personnel to perform the work. That petitioner at the hearing offered to hire a qualified engineer to lay out and supervise the job did not change the fact that it was not qualified at that time.—Martin Epstein Co. v. City of New York, 100 N. Y. S. 2d 326 [1950].

¶ 12. Action of Board of Estimate in setting up a Board of Contract Responsibility, consisting of the comptroller, the corporation counsel, and the head of the agency making the award, to investigate and pass upon the responsibility of the bidder, did not constitute an illegal delegation of power.—Id.

¶ 13. Determination of committee composed of representatives of the N. Y. C. Department of Purchase, the Department of Welfare and the Comptroller's Office, accompanied by members of the advisory dental board, finding that petitioner dental laboratory was not qualified by equipment, working space, personnel or standard of work product to meet requirements for performance of a contract for dentures for the Department of Welfare and therefore was not a "responsible bidder", might not be disturbed by the court in the absence of showing of fraud, bad faith, arbitrary or other illegal conduct.—Kniska v. Splain, 201 Misc. 729, 110 N. Y. S. 2d 267 [1952].

¶ 14. Corporation which specialized in hospital supplies and merely maintained a small office in New York City where it had some files which appeared to be used for its own purposes and some items of hospital equipment, and which had no warehouse in the City, *held* not to have met the qualification for bidders prescribed by the Commissioner of Purchase in inviting bids for office furniture and equipment and specifying that bids would be considered only from firms regularly engaged in the business covered by the proposal, and that the bidder must have a place of business or warehouse in the City.—Cohen v. City of N. Y., 205 Misc. 105, 127 N. Y. S. 2d 617 [1953].

¶ 15. That commissioner of purchase had adopted practice of making the award by the drawing of lots in case of tie bids, and had followed such procedure in the present instance but upon finding that petitioner, which had been successful on the drawing of lots, was a subagent of another company which had also participated in the drawing, had refused to make the award and had conducted another drawing from which petitioner was excluded, *held* not to give rise to any rights in petitioner, as under Charter former § 343b the practice to be adopted in case of tie bids was left to the agency letting the contract, and the petitioner did not acquire any rights prior to an actual award.—In re Baitinger Elec. Co. (Forbes), 170 Misc. 589, 10 N. Y. S. 2d 924 [1939].

¶ 16. An aggrieved bidder has no claim for damages in contract against the City because his bid is improperly rejected (176 N. Y. 642; 147 App. Div. 537; &c.).—In re Luboil Heat & Power Corp. (Pleydell), 178 Misc. 562. 34 N. Y. S. 2d 587 [1942].

¶ 17. The Court, by way of an order in the nature of mandamus, will rarely direct an administrative agency to award a contract to a particular bidder, since in such cases there is generally vested in the governmental agency a certain amount of discretion, although should the governmental agency have acted arbitrarily in willful disregard of the requirements of law the Court would not hesitate to direct the contract to be awarded to the bidder clearly entitled to receive it.—Id.

¶ 18. Where the action of the Commissioner of Purchase in awarding a contract for sale of fuel oil to the City to the concern which was .02 cents per gallon higher than the lowest bidder was the result of a misunderstanding of the legal requirements, the Court would not direct the Commissioner to award

the contract to the lowest responsible bidder but would direct him to award the contract in accordance with the requirements of law. Thus the Board of Estimate by a three-fourths vote pursuant to former § 343b might award the contract to the second lowest bidder, but until the contract was awarded in accordance with the requirements of the Charter the Commissioner would be stayed from carrying out the terms of the contract illegally entered into.—Id.

¶ 19. Complaint, in taxpayer's action under General Municipal Law § 51, alleging that bids were advertised by City Parkway Authority for construction and improvement of Cross Bay Boulevard but that the Authority failed to act on the bids and delegated its duty to pass thereon to Board of Estimate, which had awarded the contract to a party who bid $25,000 higher than plaintiff, *held* sufficient to state a cause of action for illegality and waste, and it was for the defense to plead that it was for the public interest to ignore the lowest bid.—Bartlett v. La Guardia, 104 (7) N. Y. L. J. (7–9–40) 63, Col. 4 F.

¶ 20. Also, cause of action pleading the alleged illegality of act of Board of Estimate in authorizing the Borough President of Queens County and the Park Commissioner to make an aw..rd without public letting, was sufficient, since burden of showing a special case in which public letting might be dispensed with was upon the officials, and the recital in the complaint that a large contract was let without public bidding demanded an explanation.—Id.

¶ 21. Plaintiff, suing as lowest bidder on certain municipal contracts and complaining of the award of the contracts to another, *held* not entitled to a temporary injunction, since action of Borough President in awarding the contracts to another concern on being advised by the Board of Responsibility that plaintiff was not responsible, was within his authority and was in the nature of a judicial determination which, in absence of caprice, unreasonableness, fraud or collusion, was not subject to review. Furthermore, the policy is not to grant a restraining order pendente lite in a doubtful case, plaintiff was guilty of laches (211 N. Y. 301), and the successful bidders were necessary parties to the action (126 Misc. 140).—Enocip Bldg. Corp. v. City of N. Y., 104 (64) N. Y. L. J. (9–14–40) 625, Col. 6 T.

¶ 22. Decision of Board of Education to reject A's bid for the manufacture and installation of store equipment in trades school notwithstanding it was the lowest bidder and to make the award to the second lowest bidder, *held* not subject to review by the courts, where there was no showing of bad faith or meretricity in the Board's acts, and the decision was made after the report of a committee that the lowest bidder's equipment was inadequate, that it had never done similar work, that work done by it for the Board in another school was unsatisfactory and that on previous occasions its bid had been rejected because of inadequate facilities (131 N. Y. 26; 236 App. Div. 283; 198 N. Y. 402; 255 N. Y. 288).—Neprock Realty, Inc. v. Board of Education, 102 (123) N. Y. L. J. (11–28–39) 1835, Col. 4 F.

¶ 23. Even if plaintiff were the low bidder, it was not entitled to an injunction restraining the Commissioner of Purchases from awarding the contract to another, as the Commissioner had the power to reject all bids or to make separate awards for the items in Class 4 without any award on Class 5, on which the plaintiff made a bid. Furthermore, if plaintiff had a legal right to any award which might be made on Class 5, its remedy at law for damages would appear to be adequate.—N. Y. Trap Rock Corp. v. Pleydell, 113 (47) N. Y. L. J. (2–27–45) 756, Col. 6 F.

¶ 24. Even if it were shown that there was an abuse of discretion on part of the Commissioner of Public Works in rejecting petitioner's bid on ground it was not the lowest "responsible" bidder, it was doubtful whether petitioner would be entitled to any relief, as statutes governing public letting of contracts have been construed as imposing duties upon public officers for the benefit of the public, and not as granting rights to the disappointed bidders.—Martin Epstein Co. v. City of New York, 100 N. Y. S. 2d 326 [1950].

¶ 25. In taxpayer's action against City and various officials to restrain the award of contracts upon which a particular printing company was a low bidder, and to restrain disqualification of such printing company as a bidder on future work, the printing

company *held* entitled to join in the action with the taxpayer.—Burland Printing Co. v. La Guardia, 9 N. Y. S. 2d 616 [1938].

¶ 26. Petitioner, who had submitted the low bid for a contract for dentures for the N. Y. C. Department of Welfare but had been found not to be a responsible bidder, *held* to have properly brought a proceeding under C. P. A. Art. 78 to review the award of the contract to a higher bidder.—Kniska v. Splain, 201 Misc. 729, 110 N. Y. S. 2d 267 [1952].

¶ 27. Where City of New York had rejected all bids for demolition work incident to clearance of a site for new Criminal Court Building and without readvertisement the work was undertaken at City's request by New York Housing Authority without cost to City, low bidder was not entitled to temporarily enjoin City from proceeding with the work, since there was no illegality in conduct of City with resultant harm to the low bidder, as the rejection of all bids was within statutory power of City (New Charter § 343, subd. b).—Goldstein v. La Guardia, 99 (43) N. Y. L. J. (2–23–38) 909, Col. 7 T, aff'd without opinion, 254 App. Div. 673, 4 N. Y. S. 2d 989.

¶ 28. Conduct of the City agency in rejecting all bids for moving a certain building on ground that the bids were too high and that the competition was not sufficiently broad, would not be disturbed, as the City agency had the right to exercise its discretion to determine if it was for the best interest of the City to reject all bids, and in the absence of arbitrary exercise thereof the Court would not interfere.—Halpern v. Hodgkiss, 89 N. Y. S. 2d 451 [1948].

¶ 29. Where serious legal issues had been raised as to which of the four bidders for the electrical work in connection with construction of a hospital by the City of New York was the low bidder, Commissioner *held* not to have acted arbitrarily in exercising his privilege under the contract and Charter former § 343(b) to reject all bids, in view of the prospect of prolonged litigation.—John G. Hellman Co. v. Zurmuhlen, 129 (123) N. Y. L. J. (6–25–53) 2119, Col. 6F.

¶ 30. Where original specifications for buses contained in proposed contract for transportation of physically handicapped school children were so drawn as to exclude competition and to result in contract being awarded to the only company which had the requisite number of buses, and a so-called "interpretation" of the specifications which would have permitted an award of the contract to others was in reality an amendment of the specifications and had not been advertised as required by resolution of Board of Estimate, plaintiff *held* entitled to injunction restraining Board of Education from accepting bids.—Starkie Hldg. Corp. v. Bd. of Education, 101 (78) N. Y. L. J. (4–5–39) 1554, Col. 6 F.

¶ 31. Plaintiff, claiming that the specifications for buses to be used in transportation of physically handicapped school children excluded competition since there was only one company having the requisite number of conforming buses, and that the attempted amendment of the specifications was not legally adopted because no adequate notice thereof had been given, *held* entitled to maintain an action in form of a taxpayer's suit to enjoin the acceptance of bids under the proposals for bids (156 Misc. 2, aff'd 246 App. Div. 699.)—Starkie Hldg. Corp. v. Bd. of Education, 101 (78) N. Y. L. J. (4–5–39) 1554, Col. 6 F.

¶ 32. City was not limited by street light specifications to accept only luminaries employing horizontally burning lamps where specifications added the words "or approved equal".—Westinghouse Elec. Corp. v. Ford, 131 (114) N. Y. L. J. (6–15–54) 7, Col. 6 M.

¶ 33. That the Board of Estimate had previously adopted a resolution authorizing the Commissioner of Docks to award the particular contract by public letting, pursuant to which resolution bids had been received, was merely evidentiary as to whether a "special case" did actually exist, and did not preclude a subsequent determination that such a case did exist.—Heisman v. McKenzie, 100 (119) N. Y. L. J. (11–22–38) 1751, Col. 6 F, at 7 M.

¶ 34. Whether there was reasonable basis for determination of Board of Estimate that the award of a contract for installation of concrete piles within a 60-day period in connection with airplane hangers and buildings at North Beach Airport, Queens, presented a "special case" warranting the award thereof without public letting so as to permit the award to go to the firm which was the second lowest bidder in response to a public letting which the Board

had theretofore authorized, *held* determinable only at a trial, inasmuch as the complete factual picture was apparently not presently before the court (121 N. Y. 631). Inasmuch as time was of the essence in performing the contract, the court would not interfere with the performance thereof by issuance of a temporary injunction, but the matter would be put down for immediate trial.—Id.

¶ 35. In awarding a contract for the sale of fuel oil to the City of New York to a company which bid 6.5 cents per gallon for domestic oil rather than to petitioner which bid 6.48 cents per gallon for imported oil, the Commissioner of Purchase *held* not to have complied with former § 343b of the Charter, notwithstanding a resolution of the Board of Estimate provided that 25 per cent of the bid price of the domestic price should be added to the bid price for foreign supplies in determining an award. A blanket resolution could not take the place of a three-fourths vote by the Board of Estimate in each individual instance where a contract was not to be awarded to the lowest bidder (211 App. Div. 687; 75 N. Y. 388), and moreover the procedure of having the resolution supplemented by a three-fourths vote of the Board in each individual case would result in no great inconvenience in view of the paucity of firms presently selling foreign products.—In re Luboil Heat & Power Corp. (Pleydell), 178 Misc. 562, 34 N. Y. S. 2d 587 [1942].

¶ 36. An agreement which was intended to eliminate plaintiff as a bidder on work for which bids had been asked by the City of New York, was illegal as against public policy.—Unity Sheet Metal Works, Inc. v. Louis Supran, Inc., 112 (87) N. Y. L. J. (10–13–44) 866, Col. 7 M.

¶ 37. Where the "Instructions to Bidders" issued by the Board of Education specifically stated that "Bidders must submit this unit price with their bids or their bids will not be accepted", the Board was within its rights in rejecting the bid of a concern which failed to comply with such instructions and sought to submit a supplementary bid for additional material an hour after all bids had been opened and the results of the bidding publicly announced.—Dordan v. Bd. of Education of City of N. Y., 105 (131) N. Y. L. J. (6–6–41) 2550, Col. 1 T.

¶ 38. Plaintiff, which had obtained a contract from the City of New York for certain work in the construction of a hospital, *held* not entitled to reformation of the contract to increase the unit price for removal of excavated material from the bid price of $6.50 per cubic yard to $26.50 per cubic yard, on ground it had made a mistake in its bid. Plaintiff had done none of the acts provided for in the contract for relief from error, but on the contrary had completed the contract in accordance with its terms. Allegation that the City knew the unit price of $6.50 per cubic yard was inadequate and concealed such knowledge from the plaintiff, was insufficient as a matter of law to constitute fraud. The City was not required to act for the protection of plaintiff's interests.—Heating Maintenance Corp. v. City of N. Y., 131 (54) N. Y. L. J. (3–22–54) 8, Col. 3 F.

¶ 39. Under City fuel contract which set the price of fuel at the price quoted in the National Petroleum News, the price on Monday as quoted in such paper would apply to all deliveries during the publication week.—Paragon Oil Co. v. City of N. Y., 133 (55) N. Y. L. J. (3–21–55) 11, Col. 5 M.

¶ 40. A finding by the board of responsibility of faulty past performance by a manufacturer of fire trucks was based largely upon evidence that its trucks had met all specifications and tests but had required an inordinate amount of repairs. The repairs were stated quantitatively and not according to their nature. The board refused to take evidence concerning performance of similar equipment of other manufacturers. Moreover, the Fire Commissioner unduly dominated the three-man board and indulged in statements which were neither evidence nor proper argument. Witnesses were not sworn. Since the essential elements of a fair trial were not observed, it was necessary to remand the matter for proper reconsideration unless either all bids are rejected or the Board of Estimate approves the award to a higher bidder by a three-fourths vote.—Matter of Ward La France Truck Corp. v. City of N. Y., 7 Misc. 2d 739, 160 N. Y. S. 2d 679 [1957].

¶ 41. The provisions of this section which authorize city agencies to "reject all bids" do not apply to the

Board of Education. Thus, the Board of Education was liable for the excess costs incurred by an electrical contractor over his bid price where the bid had been made on the representation by the Board of Education that contracts for plumbing and heating would be awarded at the same time as the contracts for electrical work and the plumbing and heating contracts were not awarded until the year following the award of the electrical contract. The provision of Education Law § 2556(10) that the Board may reject all bids was not added until 1950 several years after the bids and the contracts were made. —Bank v. Board of Education, 305 N. Y. 119, 111 N. E. 2d 238 [1953].

¶ 42. The low bid on a contract to supply steel lockers omitted two pages of terms required to be included therein. The Commissioner of Purchase advised the bidder that its bid was unacceptable in that form, thus indicating that the omission was not a mere informality which could be waived. Thereafter the bid was revised by the insertion of the missing terms, and the Commissioner accepted it. Petitioner, the next higher bidder, sought mandamus to compel acceptance of its bid. Although the Commissioner's action in accepting the revised bid was a violation of law, it does not follow that petitioner is entitled to any relief. In view of the facts that petitioner was guilty of laches in bringing its proceeding, that the low bidder had commenced performance of the contract, and that the city, for whose benefit the statute was enacted, will save money on the low bid, the discretionary relief of mandamus will be denied.—General Steel Products Corp. v. City of New York, 18 Misc. 2d 106, 187 N. Y. S. 2d 74 [1959].

¶ 43. Where the low bidder on an electrical contract submitted his bid on a form of the wrong color and in violation of instructions to bidders, his bid was properly rejected. The Commissioner of Public Works had ample authority to require that different types of bids be submitted upon specified forms of distinctive colors.—In re Benj. Hochman Electric Co., 141 (29) N. Y. L. J. (2–11–59) 12, Col. 4 F.

¶ 44. A resolution of the New York City Board of Estimate awarding a general construction contract to the second lowest bidder was presumptively valid and sustainable in view of the lowest bidder's practice of giving gifts to city employees.—Kayfield Construction Corp. v. Morris, 15 A. D. 2d 373, 225 N. Y. S. 2d 507 [1962].

¶ 45. Petitioner's contention that specifications for concrete pipe were unsound would not be sufficient grounds for the setting aside of a contract awarded to a competitive bidder. The court would not interfere with the decision of the Commissioner.—William Clemente Corp. v. D'Angelo, 146 (24) N. Y. L. J. (8–4–61) 3, Col. 6 F.

¶ 46. In a proceeding to which the Board of Estimate was not a party, petitioner could not claim that the adoption of a resolution by the board permitting the awarding of a contract was arbitrary.—In re Kayfield Construction Corp., 15 A. D. 2d 373, 225 N. Y. S. 2d 507 [1961].

§ 344. **Purchases involving not more than two thousand five hundred dollars.**—a. If the several parts of the work or labor to be done and/or the supplies, materials and equipment to be furnished shall together involve an expenditure of not more than two thousand five hundred dollars, the same may be procured on order awarded to the lowest responsible bidder upon bids submitted without public advertisement, under such regulations as shall be made by the board of estimate. Purchases of one hundred dollars or less may be made without competition.

b. No expenditure for work, labor, supplies, materials or equipment shall be made unless the necessity therefor be certified to by the agency for the use of which they are intended. (*Derived from former* § 344 *as amended by L.* 1949, *ch.* 852.)

CROSS REFERENCE: General provisions relating to contracts, see General Municipal Law, Article 5-A.

§ 345. **Defaulter to city.**—Any person who is in arrears to the city or any agency upon debt or contract, or who is a defaulter as surety or otherwise upon any obligation to the city or any agency, may be declared by the commissioner of purchase in the case of any purchase made by him, and in the case of any other contract by the comptroller at any time prior to the registration of the contract by him, not to be a responsible bidder, by filing in the offices of the comptroller, the director of finance and the city clerk a statement in detail of the reasons therefor. (*Derived from former* § 345. *Amended by L.* 1962, *ch.* 998, § 27.)

**CASE NOTES**

¶ 1. Under N. Y. C. Charter § 345, it would seem to be discretionary in the Comptroller as to whether contractors who had theretofore defaulted upon a contract with the City should be permitted to bid again.—**Martin v. Nichol, 119 (60) N. Y. L. J. (3-29-48) 1143, Col. 1 M.**

§ 346. **Inspection.**—Inspection and acceptance or rejection of all deliveries of supplies, materials and equipment shall be made by the comptroller. (*Deriver from former* § 346.)

§ 347. **Specifications.**—All purchases shall be based upon specifications which are definite and certain, which permit of competition and which shall not be at variance with standard specifications for the various classes of supplies, materials and equipment approved by the board of standardization provided for in section seven hundred eighty-three; provided, however, that such board may exempt any agency from the necessity of conforming to such standard specifications in any particular case. (*Derived from former* § 347.)

**CASE NOTES**

¶ 1. City's specification in its proposal for bids for parking meters, of a meter designed to regulate parking in only one parking space, *held* not shown to have been arbitrary by plaintiff manufacturer of a double type parking meter controlling the parking of two adjacent car parking spaces.—Internat. Meters, Inc. v. City of N. Y., 124 (53) N. Y. L. J. (9-15-50) 476, Col. 5 F.

¶ 2. Specifications prescribed by defendant City of New York for bids for parking meters, requiring that manufacturers have been engaged in the manufacture of parking meters for at least five years and submit satisfactory evidence of the successful operation for three years in the field of at least 500 of their meters, and requiring that the meters be designed to regulate parking in only one parking space, *held* unreasonable and arbitrary and a waste of the taxpayers' money insofar as it would exclude from consideration plaintiff's twin type parking meters which they had been manufacturing and selling for four years. The City's plan to install 1500 single type meters was experimental; there were obvious advantages of plaintiff's product to do, at least, a major portion of the full ultimate job at manifold possible savings as claimed; there was no showing of any marked degree of superiority of a single space meter; the information concerning available products and qualifications which should have been within the knowledge of the defendant's authorities should have dictated the preparation of a proposal that would enable plaintiff's product to be bid in the interest of testing the new device, and it was quite likely that when the period of experiment was over plaintiffs would have arrived at the point of five-year manufacturer and three years successful operation.—Internat. Meters, Inc. v. City of N. Y., 101 N. Y. S. 2d 208 [1950].

§ 348. **Patented articles; how supplied.**—Except for repairs no patented pavement shall be laid and no patented article other than medical or surgical specialties shall be advertised for, contracted for or purchased, except under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the board of estimate, unless the board of estimate by a two-thirds vote shall find that it is to the interest of the city in a particular case to purchase and shall authorize the purchase of a patented article as to which competition cannot be secured and the mayor gives his approval thereof. (*Derived from former* § 348.)

## CASE NOTES UNDER FORMER § 349

¶ 1. Action by contractor against Board of Education of New York City to recover sum allegedly due for alleged delays and extra work in connection with project, *held* barred by the one-year period of limitations fixed by the contract, which provided that any action should be commenced within one year after filing of certificate of completion of the work. Plaintiff knew or should have known of the filing of the certificate by fact that the warrant for final payment, based upon filing of such certificate, was issued to plaintiff and receipt thereof acknowledged by it, and moreover it was informed by letter as to the date of filing at a time over six months prior to expiration of the one-year period. Since the contract was let by the Board of Education pursuant to the Education Law, Administrative Code §§ 343-5.0, 5.6 were inapplicable.—Driscoll v. Bd. of Education, 98 N. Y. S. 2d 610 [1950].

¶ 2. As respects validity of the custodial system whereby the Board of Education of the City of New York employs for certain school buildings a custodian or custodian engineer, and permits such employee to hire and discharge at will all the help required to operate and maintain the building, it is to be noted that although former § 343 of the Charter bans the making of contracts for services or for the purchase of material or supplies in excess of $1000 without public bidding, the chapter in which former § 343 appears is expressly made inapplicable to the Board of Education by former § 349, at least insofar as purchases are concerned.—Beck v. Board of Education, 268 App. Div. 644, 52 N. Y. S. 2d 712 [1945], aff'd without opinion, 295 N. Y. 717, 65 N. E. 2d 426.

¶ 3. An electrical contractor was entitled to damages in its action against the Board of Education where the contractor had submitted a bid for electrical work in a school building on the Board's implied representation that it was simultaneously awarding to other bidders a plumbing contract and a heating contract in addition to plaintiff's contract. The Board did not award the plumbing and heating contract until the year following the award of the electrical contract and as a result of interruptions and delays the electrical contractor incurred costs of $16,000.00 over his bid price. The Board of Education claimed that under former § 342 of the Charter it could reject all bids but as a result of the provisions of former § 349, § 342 was held not applicable to the Board of Education.—Bank v. Board of Education, 305 N. Y. 119, 111 N. E. 2d 238 [1953].

¶ 4. The Board of Estimate is without the power to make the Comptroller's audit a condition of payment in regard to a voucher of the Board of Education for additional compensation to a contractor.—Matter of C. K. Rehner Inc., 17 Misc. 2d 226, 184 N. Y. S. 2d 998 [1959].

# CHAPTER 14

# FRANCHISES

§ 361. **Definition.**—The term "the streets of the city" as used in this chapter shall include streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers and public grounds or waters within or belonging to the city. (*Derived from former* § 361.)

§ 362. **Powers of board of estimate.**—The board of estimate shall have the control of the streets of the city, except as in this charter otherwise provided, and shall have the exclusive power in behalf of the city to grant franchises or rights or make contracts providing for or involving the occupation or use of any of the streets of the city, whether on, under or over the surface thereof, for railroads, pipe or other conduits or ways or otherwise for the transportation of persons or property or the transmission of gas, electricity, steam, light, heat or power, or the installation of transformer vaults, and to give the consent of the city to any franchise or right of any kind or nature whatsoever for or relating to the occupation or use of the streets of the city under the provisions of the constitution or of any statute. (*Derived from former* § 362.)

CROSS REFERENCE: Jurisdiction over rates of fare and service, see Public Service Law, § 5-d.

## CASE NOTES

¶ 1. The Board of Estimate has the power under this section and former § 70 to set aside streets and other public lands for market purposes. Claim that the setting aside of designated streets for public market purposes is an exercise of power which is legislative in nature and could be exercised only by the City Council rejected.—Matter of Smith (Morgan), 167 Misc. 815, 4 N. Y. S. 2d 837 [1938], aff'd 254 App. Div. 672, 4 N. Y. S. 2d 844 and 278 N. Y. 667, 16 N. E. 2d 394.

¶ 2. A franchise to lay gas conductors in the streets entitles the grantee to install gas pressure regulators in vaults in the streets, equipped with suitable vents. Order granted directing issuance of permit.—In re Brooklyn Union Gas Co. (Cashmore), 140 (43) N. Y. L. J. (8–29–58) 6, Col. 2 F.

¶ 3. Agreements in 1933 and 1936 wherein the defendant bus lines agreed to pay stipulated compensation to transit line acquired by Transit Authority from City in 1953, were null and void, since City had modified the franchise agreement with defendant bus line including the routes covered by the specified contracts on various occasions prior to 1953.—New York City Transit Authority v. The Jamaica Bus Line, 20 Misc. 2d 659, 192 N. Y. S. 2d 72 [1959].

§ 363. **Franchise to be granted by contract.**—Every grant of or consent to a franchise of any character or modification thereof

must be by contract executed by or under the authority of the board of estimate. (*Derived from former* § 363.)

## CASE NOTES

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Advertising revenue as income of franchise owner, ¶¶ 2, 3
Breach of franchise, remedy for, ¶ 8
Creation and proof of franchise, ¶¶ 5, 6
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Surrender of franchise, ¶ 7

¶ 1. Where the Board of Estimate passed a resolution granting to bus company "the franchise, right and consent" described in a form of proposed contract and authorizing the Mayor to execute the contract on behalf of the City, and the Mayor thereafter approved the resolution and the bus company signed and filed the proposed contract, the provisions of §§ 362, 363 and 373 of the Charter were substantially complied with and the contract extending the franchise was binding on the parties thereto, notwithstanding the failure of a City official to affix his signature. Such an act was merely ministerial and did not affect the validity of the contract.—In re North Shore Bus Co. (City of N. Y.), 75 N. Y. S. 2d 372 [1947].

¶ 2. Operator of street cars and buses on City streets *held* required by franchise contract to pay compensation to City based on gross receipts of advertising company to which they had leased the space used in cars and buses for advertising, where it appeared that the advertising company had a total capital of only $2000 consisting of 20 shares, 19 of which were owned by one of the plaintiffs which had furnished the funds for its organization and had complete charge of its business and supplied the officers and offices. The City was not estopped by any prior laxity in collecting. Furthermore, the advertising contracts were assigned in violation of provision of franchise requiring the city's consent and the assumption by the transferee of all obligations of the franchise contract.—Third Ave. Transit Corp. v. City of N. Y., 183 Misc. 1027, 54 N. Y. S. 2d 492 [1945], aff'd without opinion, 270 App. Div. 983, 62 N. Y. S. 2d 872.

¶ 3. Under franchise requiring bus company to pay City a fixed percentage of its gross receipts and defining gross receipts to include revenues of the company from whatever source, the company's receipts from lease of privilege of installing advertising cards in its buses were required to be included as part of its gross receipts for purpose of computing payments under the franchise. However, the company was required to include only what it received under the lease and not the gross receipts by its lessee.—Madison Ave. Coach Co. v. City of N. Y., 82 N. Y. S. 2d 270 [1948], aff'd 274 App. Div. 1050, 86 N. Y. S. 2d 464, and 300 N. Y. 467, 88 N. E. 2d 656.

¶ 4. Plaintiff brewing company *held* not entitled to rescission of franchise or consent granted it by the Board of Estimate of the City of New York to maintain tunnels, pipes and other structures below and above the surface of a street running between and connecting plaintiff's plant and brewery on both sides of the street, on ground that plaintiff's predecessor had acquired a perpetual easement to maintain and use the structures under an award in a condemnation proceeding whereby the City, in 1890, had acquired title to a portion of the street under and above which the structures were maintained, and that plaintiff had accepted the franchise under a mistake as to its rights. The evidence failed to establish the existence of underground or overhead structures in use by plaintiff's predecessor at time of the condemnation proceeding; failure of the City officials to enforce their possible rights for a long period of time could not be made the basis of an admission or estoppel resulting in possible loss

of rights of the public or the municipality; and in the absence of proof that the structures were in existence at time of the award there was no basis for a conclusion that any easement to maintain them was reserved to plaintiff's predecessor. Furthermore, there was no basis for rescinding the franchise and consent for mistake, as every aspect of the situation had been fully investigated by competent persons over a nineteen-month period during which negotiations continued.—Rubel Corp. v. City of N. Y., 73 N. Y. S. 2d 813 [1947].

¶ 5. Where in 1936 the Triborough Bridge Authority had granted defendant bus company a permit to operate bus service over its bridge and such permit had been approved by the Board of Estimate so far as use of City streets as terminals was concerned, with defendant being required to pay a 25 cent toll for each bus, and the City apparently was content from that time to the present to permit operation of such shuttle route without a City permit, the contention of the City which thereafter granted defendant a permit to operate service over the bridge during the World's Fair, that when defendant continued the shuttle route after the closing of the Fair it was operating a part of the routes authorized by the World's Fair consent and accordingly became liable to the City under such consent for a percentage of the gross receipts of the shuttle operation, *held* untenable. The World's Fair consent did not create a valid franchise inasmuch as there was no compliance with statutory requirements, and there was no clear acceptance of benefits under the unlawful consent as defendant in 1940 had notified the City that it had discontinued the operations under such consent and would make no further payments thereunder, and accordingly no estoppel could be invoked against defendant. Furthermore, since the City was free to end the shuttle operation at any time there was no mutual estoppel, and the estoppel invoked against defendant failed for such reason also. Also, City had failed to act with reasonable diligence inasmuch as it had taken no definite action during seven years of operation by defendant, during which defendant paid the Authority $228,025.05 in tolls.—City of N. Y. v. N. Y. C. Omnibus Corp., 84 N. Y. S. 2d 616 [1948].

¶ 6. Contention that the ferry charges were illegal because the City allegedly made a grant of a ferry franchise without complying with the Charter requirements, was overruled, where the City itself was operating the ferry and the charges were being collected by another only for purpose of turning them over to the City. In the circumstances, the City could not be deemed to have granted a franchise.—Heller v. City of N. Y., 123 (19) N. Y. L. J. (1–27–50) 347, Col. 2 F.

¶ 7. Agreement of bus company that its surrender of its franchise to the City should in no way release it from any outstanding obligations to the City, and the City's resolution cancelling and terminating the rights of the bus company under the franchise, did not relieve the bus company from its obligation under the franchise contract to arbitrate certain disputes, and hence City properly initiated arbitration proceedings to settle valuation of the bus company's equipment which City proposed to purchase.—In re North Shore Bus Co., (City of N. Y.), 75 N. Y. S. 2d 372 [1947].

¶ 8. Complaint, in action by water service corporation against City of New York to recover for breach of franchise held by plaintiff to supply water in a part of the City, arising from City's failure to issue permits required by plaintiff to carry on its business under the franchise, would be permitted to stand notwithstanding contention that plaintiff as a franchise holder was limited to a proceeding under C. P. A. Article 78. Use of plaintiff's wells may have been in conflict with the sovereign policy of the State or of the municipality, and the attempted use of mandamus to obtain the permits was met with the decision that the application had been rendered academic by exercise of the municipality's power of eminent domain.—N. Y. Water Service Corp. v. City of N. Y., 201 Misc. 594, 116 N. Y. S. 2d 290, aff'd 279 App. Div. 1048, 113 N. Y. S. 2d 260, and 304 N. Y. 945, 110 N. E. 2d 885.
N. Y. S. 2d 712, and 296 N. Y. 893.

¶ 9. Under the Charter, two public hearings are required in connection with the grant of a franchise, the first being a hearing upon the peti-

tion for a contract and the second upon the form of the contract itself. The Board of Estimate was not confined to the precise form of contract mentioned by the applicant in his petition, as evidenced by the provision for a second hearing which otherwise would serve no useful purpose. In fact, the petition need not refer to the terms of the proposed contract at all. Consequently, the fact that the original application was for a "franchise" and the contract granted was described as a "permit" and that the applicant offered to enter into a certain type of contract and the final contract was different, was immaterial.—Loos v. City of New York, 257 App. Div. 219, 13 N. Y. S. 2d 119 [1939].

§ 364. **Limitation on period of grant.**—a. No such contract shall be for a longer period than twenty-five years except that in the case of a tunnel railroad it may be for a period not exceeding fifty years.

b. The contract may, at the option of the city, provide for giving to the grantee the right of renewals not exceeding in the aggregate twenty-five years on a fair redetermination of the compensation to the city to be made upon standards and methods as therein specified. (*Derived from former* § 364.)

**CASE NOTES**

¶ 1. City might lawfully grant a terminable permit for operation of bus line pursuant to Transportation Corporations Law, Art. V, and at the same time provide for a fixed maximum term pursuant to Charter § 361 et seq. There is no inconsistency between a permit terminable at will but having a maximum life of ten years. Nothing in the Transportation Corporations Law prevented the City from taking advantage of the Charter provisions authorizing a fixed term contract, or from combining the two forms of contracts, provided they were not inconsistent.—Loos v. City of N. Y., 257 App. Div. 219, 13 N. Y. S. 2d 119 [1939], rev'g 170 Misc. 14, 104, 9 N. Y. S. 2d 760.

¶ 2. Condition inserted in the certificate of convenience and necessity issued by Transit Commission to bus line, that the rights thereby granted should terminate on April 20, 1941, constituted a valid condition within the power of the Transit Commission to impose.—Clark v. City of N. Y., 176 Misc. 893, 28 N. Y. S. 2d 110 [1941], aff'd without opinion, 262 App. Div. 855, 28 N. Y. S. 2d 182.

§ 365. **Rights to cease without compensation upon termination.**—At the termination of such contract all the rights or property of the grantee in the streets of the city shall cease without compensation. (*Derived from former* § 365.)

§ 366. **Plant and appurtenances may inure to city upon termination.**—a. Any such contract may provide that upon its termination the property, plant and equipment of the grantee shall, to the extent therein specified, thereupon be and become the property of the city, either without compensation to the grantee or on payment to the grantee of the fair value thereof as property, to be determined as provided in the contract, but excluding any value derived from the franchise.

b. The city shall have the option either to take and operate on its own account the property, plant and equipment when so acquired, or to lease the same for a term not exceeding twenty years. (*Derived from former* § 366.)

§ 367. **General provisions of contracts.**—a. Every such contract shall contain adequate provisions by way of forfeiture or otherwise to secure efficiency of public service at reasonable rates and for the maintenance of the property in good condition throughout the full term of the grant.

b. Every contract granting a franchise for the performance of any public service shall contain an agreement by the grantee to recognize the right of its employees to bargain collectively through representatives of their own choosing, and at all times to recognize and deal with the representatives duly designated or selected by the majority of its employees for the purpose of collective bargaining inrespect to rates of pay, wages, hours of employment or other conditions of employment and not to dominate, interfere with or participate in the management or control of or give financial support to any union or association of its employees. This subdivision shall not apply to a contract providing for a modification or amendment of or extension of service under a franchise not containing a similar provision, provided that the term of such franchise is not extended thereby. (*Derived from former* § 367.)

CASE NOTES

¶ 1. The power to grant franchises conferred upon the City of New York by § 367 of the Charter is primarily designed to protect the City in the use of its streets, and the fares to be provided are incidental.—Queens-Nassau Transit Lines, Inc. v. Maltbie, 186 Misc. 424, 61 N. Y. S. 2d 81 [1946], aff'd 271 App. Div. 81, 63 N. Y. S. 2d 712, and 296 N. Y. 893.

¶ 2. The Public Service Commission possessed power to direct a reduction of the rates of fare of bus companies operating under franchises with the City of New York notwithstanding such franchises fixed the rate of fare, and to conduct the necessary investigation upon which to base a determination as to reduction of fares. The incidental power granted to the City to regulate fares yields to the general power of the Public Service Commission where the State occupies the disputed area of regulation. That some of the companies involved were successors to street car companies which served similar routes, and that rates of fare were fixed by franchise agreements between the City and such companies before occupation of the field of regulation by the State in 1907, did not preclude the Legislature from fixing a different rate of fare.—Id.

§ 368. **Public hearing on the petition.**—Before any such contract shall be made, a public hearing shall be held upon the petition therefor at which citizens shall be entitled to appear and be heard. Such hearing shall be held on at least ten days' notice, which notice, together with the petition in full, shall be published in the City Record, and, at the expense of the petitioner, at least twice in two daily newspapers to be designated by the mayor and which are published in the borough affected. Where only one daily newspaper is published in the borough affected, the mayor shall designate that newspaper together with a daily newspaper published in the city of New York and having a circulation in the borough affected. Where more than one borough is affected or where no daily newspaper is published in the borough affected, the mayor shall designate two daily newspapers published in the

city and having a circulation in the borough or boroughs affected. city and having a circulation in the borough or boroughs affected. (*Derived from former* § 368 *as amended by L.* 1949, *ch.* 495.)

**CASE NOTES**

¶ 1. Consent given by City to operation by defendant of certain bus routes did not create a valid franchise where the consent was granted wi*hout compliance with any of the provisions of the Charter, and operation under it could have been enjoined at instance of a taxpayer or other interested party.—City of N. Y. v. N. Y. C. Omnibus Corp., 84 N. Y. S. 2d 616 [1948].

¶ 2. Under the Charter two district public hearings are required in connection with the grant of franchises, the first being a hearing upon the petition for a contract and the second a hearing upon the form of the contract itself, and the Board of Estimate was not confined to the precise form of contract mentioned by the applicant in his petition, as evidenced by the provision for a second hearing, which otherwise would serve no useful purpose. In fact, the petition need not refer to the terms of the proposed contract at all. Consequently, fact that the original application was for a "franchise" and the contract granted was described as a "permit", and that the applicant offered to enter into a certain type of contract and the final contract was different, was immaterial.—Loos v. City of N. Y., 257 App. Div. 219, 13 N. Y. S. 2d 119 [1939], rev'g 170 Misc. 14, 104, 9 N. Y. S. 2d 760.

¶ 3. New York World-Telegram, a newspaper which is printed and first given to the public in the Borough of Manhattan, although ultimately circulated throughout the City, *held* not to be a newspaper "published" in the Borough of Queens within meaning of Charter § 368, requiring notice of public hearing upon a franchise petition to be published in newspapers published in the Borough affected, since the "place of publication" is the place where the paper is first given to the public for circulation. Hence the contract awarded for operation of buses was illegal because the notice of hearing upon the contract was not published in two newspapers published in the Borough of Queens, where one of the two newspapers was the World-Telegram.—Id.

§ 369. **Inquiry by board of estimate.**—The board of estimate shall make inquiry as to the money value of the proposed franchise or right and the adequacy of the compensation proposed to be paid therefor, and shall embody the result of such inquiry in a form of contract, with all the terms and conditions, including the provisions as to rates, fares and charges. (*Derived from former* § 369.)

**CASE NOTES**

¶ 1. Order staying enforcement of an injunction against respondents' operation of buses to and from a race track in order to afford the respondents an opportunity to obtain necessary certificates of public convenience and to make applications for municipal franchises, would be extended for a further two-month period, where the applications could not presently be acted upon by the Board of Estimate, the vehicles were presently under regulation of public authority, particularly that of the Police Department, having been thought originally to come within the provisions of the New York City Administrative Code applying to sight-seeing buses, and the respondents had shown reasonable diligence and had attempted to comply with the law.—Maltbie v. Veterans Bus Corp., 81 N. Y. S. 2d 622 [1948].

¶ 2. Under the charter, two public hearings are required in connection with the grant of a franchise, the first being a hearing upon the petition for a contract and the second upon

the form of the contract itself. The Board of Estimate was not confined to the precise form of contract mentioned by the applicant in his petition, as evidenced by the provision for a second hearing which otherwise would serve no useful purpose. In fact, the petition need not refer to the terms of the proposed contract at all. Consequently, the fact that the original application was for a "franchise" and the contract granted was described as a "permit" and that the applicant offered to enter into a certain type of contract and the final contract was different, was immaterial.—Loos v. City of New York, 257 App. Div. 219, 13 N. Y. S. 2d 119 [1939].

§ 370. **Proposed contract and resolution to be entered on minutes.**—Such proposed contract together with the form of resolution authorizing the same shall, but not until after the hearing upon the petition, be entered on the minutes of the board of estimate. (*Derived from former* § 370.)

§ 371. **Public hearing on proposed contract and resolution; publication of notice.**—The board of estimate shall, not less than twenty-seven days after such entry and before adopting any such resolution, hold a public hearing thereon at which citizens shall be entitled to appear and be heard. No such hearing shall be held until after notice thereof and the proposed contract and proposed resolution authorizing the same shall have been published in full for at least fifteen days, except Sundays and legal holidays, immediately prior thereto in the City Record, nor until a notice of such hearing, together with the place where copies of the proposed contract and resolution may be obtained by all those interested therein, shall have been published at least twice at the expense of the proposed grantee in the two newspapers in which the petition and notice of hearing thereon shall have been published. (*Derived from former* §371.)

§ 372. **Requisite vote of board of estimate for approval of resolution.**—No such resolution shall take effect unless carried by a three-fourths vote, and the vote shall be shown by ayes and noes as recorded in the minutes of the board. (*Derived from former* § 372.)

## CASE NOTES

¶ 1. Contract between the City and certain corporations, providing for the acquisition of real property for, and the financing, operation and supervision of a slum clearance and development project, *held* not to constitute a "franchise" within the meaning of Chapter 14 of the Charter, and particularly § 372 of the Charter requiring a three-fourths vote of the Board of Estimate to constitute a valid franchise. That the carrying out of the project would necessitate the closing of streets within the area, and that the contract gave the development company the right to construct and operate pipes, conduits and tunnels under the street for heat and other utilities, did not constitute the granting of a franchise, as franchise in the use of the street within the purview of the Charter means use thereof by public service companies in connection with the sale of their facilities to the public generally.—Goldstein v. La-Guardia, 180 Misc. 738, 43 N. Y. S. 2d 202 [1943].

¶ 2. Housing project entered into by the City of New York pursuant to the Redevelopment Companies Law providing that the approval of a housing plan by the local legislative

body may be by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members thereof, was validly entered into by the City. Contention that a three-fourths vote of the Board of Estimate was required for approval of the project because public streets of the City were involved was rejected, as the contract did not call for the granting of any franchise, and moreover the Redevelopment Companies Law was one of statewide application. —Pratt v. La Guardia, 182 Misc. 462, 47 N. Y. S. 2d, 359 [1944], aff'd 268 App. Div. 973, 52 N. Y. S. 2d 569, aff'd, without opinion, 294 N. Y. 842, 62 N. E. 2d 394.

¶ 3. Contention that there was a noncompliance with former § 384 of the Charter and § 384–10.0 of the Administrative Code, providing that a sale of city property should be had only after a three-fourths vote of the Board of Estimate, was also rejected. —Id.

§ 373. **Powers of the mayor.**—a. The separate and additional approval of the mayor shall be necessary to the validity of every such resolution.

b. Every such resolution shall before it takes effect be presented, duly certified, to the mayor for his approval. Such contract or resolution shall not be effective unless such resolution shall be approved by the mayor within sixty days after it is presented to him, or within such further time not exceeding sixty days additional as may be authorized by the board of estimate. (*Derived from former* § 373.)

§ 374. **Revocable consents.**—Consent to construct and use for private use pipes, conduits and tunnels under, railroads tracks upon, and connecting bridges over, any of the streets of the city shall be by resolution of the board of estimate, for such term and upon such conditions as may be provided in the resolution, but shall be revocable at any time by resolution of the board of estimate. Such consents shall provide for adequate compensation to be paid annually to the city during the continuance of the consent, and the separate and additional approval of the mayor shall be necessary to their validity. *(Derived from former* § 374.)

## CASE NOTES

¶ 1. Plaintiff's assignor, having requested, and the Board of Estimate granted, an extension of the date of revocation of its franchise, or a suspension of the resolution of revocation, could not now question the legality of the extension for the purpose of avoiding its obligation to make the agreed franchise payments. However, it would seem that the Board, acting as a legislative body, could lawfully modify its original resolution by extending the date of revocation of the franchise, as requested by the licensee.—Bauer v. City of N. Y., 107 (14) (1–17–42) 253, Col. 1 F.

¶ 2. Although public streets were involved in the granting of a contract for a redevelopment project, inasmuch as the contract did not call for the granting of any franchise, the three-fourths vote required by this section was not necessary.—Pratt v. LaGuardia, 182 Misc. 462, 47 N. Y. S. 2d 359 [1944], aff'd 268 App. Div. 973, 52 N. Y. S. 2d 569, appeal dismissed 294 N. Y. 842, 62 N. E. 2d 394.

# CHAPTER 15

# PROPERTY OF THE CITY

§ 381. **Authority to acquire real property.**—The city may acquire title in fee to real property or any interest therein whenever required for any public or municipal use or purpose or for the promotion of public utility, comfort, health, enjoyment or adornment. Such title or interest shall be acquired according to law by purchase, condemnation or otherwise. (*Derived from former* § 381.)

## CASE NOTES

¶ 1. The delegation of the right of eminent domain by the State, under which right the City took petitioner's property, was within the power of the State.—Matter of City of New York (Brooklyn-Battery T. Plaza), 186 Misc. 603, 62 N. Y. S. 2d 303 [1946], aff'd 270 App. Div. 1027, 64 N. Y. S. 2d 175.

¶ 2. The Commercial Rent Law did not have as its purpose, the prevention of a city from acquiring property for a public improvement by eminent domain during the period of the housing emergency. Thus, the petitioner, as the former owner of a building taken under the City's power of eminent domain and thereafter a tenant at will could not enjoin the city from removing it as a tenant on the ground that it was protected in its tenacy by the Commercial Rent Law. The right to take private property means the right to take not only the legal title, but also the physical possession of the property.—Matter of City of New York (Brooklyn-Battery T. Plaza), 186 Misc. 603, 62 N. Y. S. 2d 303 [1946], aff'd 270 App. Div. 1027, 64 N. Y. S. 2d 175.

§ 382. **Notice to owners of proceding to acquire property.**—In addition to all other requirements of law, written notice of the application to have compensation for real property ascertained in any proceeding brought by the city to acquire title to real property shall be given by the corporation counsel to the owners of all property affected by the proceeding at least ten days prior to such application, by mailing the same to such owners at the address registered or filed with the director of finance for the purpose of forwarding to them bills for taxes, assessments and frontage water rates. Such notice shall state the purpose for which the property is to be acquired and the date when such application will be presented and shall contain a copy of such application. Upon request by the corporation counsel the director of finance shall furnish a certified list of the registered or filed names and addresses of such owners. Failure to comply with the directions contained in this section shall not invalidate or affect the proceeding. (*Derived from former* § 382.)

## CASE NOTES

¶ 1. Fact that City failed to give proper notice of street extension proceeding *should not* weigh against the City on motion by owner for payment of condemnation award.—Application of Joseph E. Marx Co. Inc., 139 N. Y. S. 2d 311 [1954].

§ 383. **Inalienable property.**—The rights of the city in and to its water front, ferries, wharf property, bridges, land under water, public landings, wharves, docks, streets, avenues, highways, parks and all other public places are hereby declared to be inalienable; but upon the closing or discontinuance of any street, avenue, park or other public place, the property may be sold or otherwise disposed of as may be provided by law, and leases of land under water, wharf property, wharves, docks and piers may be made as may be provided by law. Nothing herein contained shall prevent the granting of franchises, permits and licenses in respect to inalienable property. (*Derived from former* § 383.)

**CASE NOTES**

¶ 1. The City of New York has no power to sell or offer to sell land acquired for park purposes to private purchasers without the sanction of the legislature.—Aldrich v. City of N. Y., 208 Misc. 930, 145 N. Y. S. 2d 732 [1955].

¶ 2. Under Lien Law § 3 the lien attaches, with respect to property owned by municipal corporations, not to the land and the improvements thereon but to any sum that the municipality may have appropriated for the purpose of making the improvements. Hence, no lien could attach to the interests of New York City in land leased by the City to the World's Fair Corporation and in turn leased to a concessionaire which had contracted for the erection of the improvement against which the lien was asserted. The City could take the land belonging to it and lease it for a private purpose and still claim that it did not thereby subject the fee of the land to a lien to the same extent as other private lands. The inalienability of city-owned real estate under Charter § 383 was required to be preserved.—John Kennedy & Co. v. New York World's Fair, 260 App. Div. 386, 22 N. Y. S. 2d 901 [1940] aff'd 288 N. Y. 494.

§ 384. **Disposal of property of the city.**—a. No real property of the city may be sold, leased, exchanged or otherwise disposed of except with the approval of the board of estimate and as may be provided by law unless such power is expressly vested by law in another agency.

b. Except as otherwise specifically provided by law:

1. The board of estimate may sell or lease only for the highest marketable price or rental, at public auction or by sealed bids and after advertisement for at least fifteen days in the City Record, any real property belonging to the city or any interest therein, and no such lease shall run for a term longer than ten years, nor a renewal for a term longer than ten years;

2. Real property of the city may be leased only after appraisal made within thirty days prior to the lease; and

3. Real property of the city may be sold only after appraisal made within six months prior to the sale and after a review of such appraisal by the department of real estate within thirty days prior to the sale. (*Derived from former* § 384 *as amended by L.* 1959, *ch.* 509.)

## CASE NOTES

### Index

**Adverse possession against the city, ¶ 2**
**Competitive bidding not required, ¶ 4**
**Housing projects, ¶¶ 6, 7**
**Leases of property, ¶ 3**
**Notice requirements, ¶ 1**
**Street areas, leasing of, ¶ 5**

¶ 1. A taxpayer's action to enjoin the acquisition of property for a slum clearance project, the evidence indicated that all provisions of law respecting advertising and notice of the proposed sale had been duly observed and complied with. Contention that the City did not intend to sell a portion of the property at the "highest marketable price" and at "public auction" was not substantiated by factual proof.—Bleecker Luncheonette v. Wagner, 141 N. Y. S. 2d 293 [1955], aff'd 286 App. Div. 828, 143 N. Y. S. 2d 628, appeal denied 309 N. Y. 781, 128 N. E. 2d 760.

¶ 2. Property which came within the category of properties which the City of New York was permitted to sell or otherwise dispose of under applicable statutes could be lost to the City by adverse possession (278 N. Y. 86; 228 N. Y. 140; &c.).—City of N. Y. v. Milone, 105 (12) N. Y. L. J. (1–15–41) 240, Col. 6 F.

¶ 3. Under lease with City giving tenant option to renew for a ten-year term by giving notice of his election, and providing that at expiration of the term or any renewal thereof the City might either grant further renewals or pay the tenant for any buildings, mortgagee of the leasehold, by notifying City of its desire not to renew but to obtain payment of the value of the building, could not obligate the City to pay the value of the building where tenant desired an extension of the lease for another ten years, since the tenant's mortgage could not vary or increase the City's obligations, and the mortgagee knew the terms of the lease and was bound by them.—In re City of N. Y. (Wallabout Market), 104 (128) N. Y. L. J. (12–3–40) 1848, Col. 3 M.

¶ 4. Under Agriculture and Markets Law § 261, the Commissioner of Public Markets was authorized to lease an ice plant in the power house building in the Bronx Terminal Market without competitive bidding. Even if approval of the Board of Estimate were necessary, it could be found in the rules and regulations for the market which has been approved by the Board of Estimate. In connection with the lease, the city could furnish electric power to the lessee even though the cost of the power represented a large portion of the rental. No waste was shown in the leasing of the ice plant, in fact, the evidence indicated that the plant had been idle for almost 15 years and was rotting away, whereas, by leasing it, the Commissioner restored it to proper operating conditions resulting in a net profit of almost $15,000 per year.—New Colonial Ice Co. v. Wooley, 181 Misc. 473, 41 N. Y. S. 2d 662, [1943].

¶ 5. City of New York, as fee owner of land under Grand Central Terminal viaduct, which was and now is a legally opened street, held such land in trust for use of all people of the State and not as corporate or municipal property, and hence § 383 of the Charter was not construable as permitting the granting of a permit with respect to such property. City could not use the property itself nor permit others to use it except for street purposes.—City of N. Y. v. Aviation Distributors, Inc., 84 N. Y. S. 2d 84 [1948].

¶ 6. A housing project entered into by the City of New York pursuant to the Redevelopment Companies Law providing that the approval of a housing plant by the local legislative body may be by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members thereof, was validly entered into by the city. Contention that there was a non-compliance with this section in that the sale of city property should be had only after a three-fourths vote of the Board of Estimate was rejected.—Pratt v. La

Guardia, 182 Misc. 462, 47 N. Y. S. 2d 359 [1944] aff'd 268 App. Div. 973, 52 N. Y. S. 2d 569, aff'd without opinion, 294 N. Y. 842.

¶ 7. An application to restrain proceedings, pursuant to former § 384 and § 381 of the Charter, looking to acquisition and condemnation of petitioners' property in course of a proposal to condemn land located some distance from an Expressway which was being widened to relocate 48 houses thereon was denied. The City was not proceeding to condemn under § 384–15.0 of the Code but former § 384 was merely authority for the relocation. Accordingly, arguments based on the alleged unconstitutionality of § 384–15.0 were rejected—Watkins v. Ughetta, 273 App. Div. 969, 78 N. Y. S. 2d 393 [1948], aff'd 297 N. Y. 1002, 80 N. E. 2d 457.

¶ 8. Summary judgment was refused where the City sued a purchaser of City property for the deficiency resulting when it had to resell the property after the original purchaser stopped payment on his check. Various issues arising out of the conduct of the original auction sale required trial. In the case of such sales, the strict rules of law are relaxed.—City of New York v. Nadel, 15 Misc. 2d 991, 184 N. Y. S. 2d 995 [1959].

¶ 9. Where public officials recommended the demolition of the old Supreme Court Building in Brooklyn and the Board of Estimate conducted an investigation, the order of demolition would not be enjoined, since the Board had the power to dispose of the same and had not acted in an arbitrary manner.—Moritt v. Wagner, 9 A. D. 2d 751, 193 N. Y. S. 2d 995 (1960).

# CHAPTER 16

# LAW DEPARTMENT

§ 391. **Department; corporation counsel.**—There shall be a law department the head of which shall be corporation counsel. (*Derived from former* § 391.)

§ 392. **Assistants.**—a. The corporation counsel may appoint a first assistant corporation counsel and such other assistants as may be necessary within the appropriation therefor.

b. The first assistant corporation counsel shall, during the absence or disability of the corporation counsel, possess all the powers and perform all the duties of the corporation counsel and in case of the death of the corporation counsel or of a vacancy in that office shall act as corporation counsel until the appointment and qualification of a corporation counsel.

c. Any assistant shall, in addition to the duties regularly assigned to him, possess such of the powers and perform such of the duties of the corporation counsel as he shall empower such assistant to exercise by written authority filed and remaining on record in the department. (*Derived from former* § 392.)

§ 393. **Offices.**—The corporation counsel may maintain an office in each of the boroughs or any of them. (*Derived from former* § 393.)

§ 394. **Powers and duties.**—a. Except as otherwise provided by law, the corporation counsel shall be attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies and in which the city is interested.

b. Except as otherwise provided by law, he shall have charge and conduct of the legal proceedings necessary in opening, widening, altering and closing streets and in acquiring real estate or interests therein for the city by condemnation proceedings, and the preparation of all leases, deeds, contracts, bonds and other legal papers of the city, or of or connected with any agency or officer thereof, and he shall approve as to form all such contracts, leases, deeds, bonds and other legal papers; but the board of estimate may direct such changes to be made in the form of contracts and specifications as the interests of the city may in its judgment require.

c. Except as otherwise provided by law, the corporation counsel shall have the right to institute actions in law or equity and any proceedings provided by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or to collect any

money, debts, fines or penalties or to enforce the laws. He shall not be empowered to compromise, settle or adjust any rights, claims, demands or causes of action in favor of or against the city, and he shall not permit, offer or confess judgment against the city, or accept any offer of judgment in favor of the city without the previous written approval of the comptroller, except that with regard to matters involving excise and non-property taxes, such previous written approval shall be obtained from the director of finance; provided, however, that this inhibition shall not operate to limit or abridge the discretion of the corporation counsel in regard to the proper conduct of the trial of any action or proceeding or to deprive such corporation counsel of the powers and privileges ordinarily exercised in the courts of litigation by attorneys-at-law when acting for private clients.

d. Shall annually compile and publish departmental rules and regulations as provided in section eleven hundred five. (*Derived from former* § 394. *Subdivision c amended by L.* 1962, *ch.* 998, § 28.)

CROSS REFERENCE: Public Service Law, § 108, authorizes municipalities to appear before Public Service Commission in matters relating to rates, service or other matters affecting such corporation or any of its residents.

Service of process on Corporation Counsel or person designated by him, see Civil Practice Act, § 228.

**CASE NOTES**

¶ 1. Contention of attorneys for Office of Price Administration that in the war emergency it was essential that their inspectors have the assistance of counsel to present their many cases involving the State War Emergency Act was deemed sufficient reason for the Office of Price Administration the court to permit an attorney from presently to prosecute in the name of the People defendants charged with violation of such Act, particularly since neither the District Attorney nor the Attorney-General had elected to act in cases where the Office of Price Administration inspectors are the complaining witnesses.—People (Kohler) v. Scharer, 185 Misc. 616, 58 N. Y. Supp. (2d) 87 [1945].

¶ 2. Authority of the Corporation Counsel to conduct all law business of the City and its agencies is exclusive, with certain exceptions.—Kay v. Bd. of Higher Education, 260 App. Div. 9, 20 N. Y. S. 2d 898 [1940].

¶ 3. Motion of Corporation Counsel of City of New York for order directing District Attorney to turn over to him copies of the testimony of two named persons and all employees of the City Tax Department who appeared before a certain grand jury, for use by the Corporation Counsel in connection with Departmental proceedings contemplated against certain employees in the Tax Department, was granted, on consent of the District Attorney, in view of the Corporation Counsel's status as a law enforcement officer, and fact that he was acting in discharge of his duties.—In re Corporation Counsel of City of N. Y., 131 (26) N. Y. L. J. (2–8–54) 7, Col. 7 T.

¶ 4. The corporation counsel is a proper party to commerce action under § 22-a of the Code of Criminal Procedure to enjoin the publication and distribution of material devoted to obscenity and lewdness.—Burke v. Kingsley Books, 208 Misc. 150, 142 N. Y. S. 2d 735 [1955], aff'd 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 134 N. E. 2d 461.

§ 395. **Legal service to agencies.**—The corporation counsel may assign an assistant or assistants to any agency, and no officer

or agency, unless it be herein otherwise especially provided, shall have or employ any attorney or counsel, except where a judgment or order in an action or proceeding may affect him or them individually or may be followed by a motion to commit for contempt of court, in which case he or they may employ and be represented by attorney or counsel at his own or their own expense. (*Derived from former* § 395.)

**CASE NOTES**

¶ 1. Decision of Corporation Counsel that it was inadvisable to appeal from an order setting aside the appointment of a teacher at the College of the City of New York, was binding upon the Board of Higher Education, and its attempted appeal from an order was therefore dismissed as not properly before the court. None of the exceptions to rule that the Corporation Counsel is the sole judge as to conduct of litigation was applicable, since the majority of the Board did not assert that they intended to be contumacious and disobey the order so as to bring themselves within § 395 of the Charter authorizing an officer or agency to employ counsel where a judgment might affect him individually or be followed by a motion to commit for contempt, there was no duty resting upon the Board to engage the teacher, so an order restraining it from so doing might properly be obeyed, and the Corporation Counsel was not charged with fraud, collusion or corruption nor called upon to represent conflicting interests.—Kay v. Bd. of Higher Education, 260 App. Div. 9, 20 N. Y. S. 2d 898 [1940].

¶ 2. Inasmuch as the Corporation Counsel and the Commissioner of Investigation are heads of executive departments appointed by the City's chief executive, and the obvious design of the Charter was to make the Council an independent body with power to investigate all executive departments, the choice of counsel to conduct the investigation by a special committee of the Council in an investigation of City departments concerned with administration of emergency unemployment relief, lay with the Council, and it was not required to call upon the Corporation Counsel for legal assistance (Charter §§ 394, 395).—Barry v. City of N. Y., 175 Misc. 712, 25 N. Y. S. 2d 27 [1941]; aff'd without opinion, 261 App. Div. 957, 27 N. Y. S. 2d 425.

§ 396. **Actions and proceedings for recovery of penalties.**—All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of The City of New York and not in that of any agency, except where otherwise provided by law. (*Derived from former* § 396.)

# CHAPTER 17

## DEPARTMENT OF FINANCE

§ 411. **Department; director of finance.**—There shall be a department of finance the head of which shall be the director of finance. (*Derived from former* § 411.)

§ 412. **Deputies.**—The director of finance may appoint three deputies, one of whom shall be a certified public accountant. The deputies shall have such powers and duties as may be assigned to them by the director of finance by instrument in writing filed with the comptroller. (*Derived from former* § 412. *Amended by L.* 1962, *ch.* 998, § 29.)

### CASE NOTES

¶ 1. Objection that the list of delinquent taxes was not verified by the City Treasurer but by a deputy and acting Treasurer, *held* untenable, as Public Officers Law, § 9 and former Charter § 412 authorizes a deputy official to exercise the powers and duties of the principal during the latter's absence or inability to act.—In re Foreclosure of Tax Lien, 129 (111) N. Y. L. J. (6–9–53) 1940, 7F.

§ 413. **Bond of director of finance and deputies.**—The director of finance and each deputy shall provide a bond. (*Derived from former* § 413.)

§ 414. **Powers and duties of the director of finance.**—Except as otherwise provided by law, the director of finance shall:

1. Collect all taxes, assessments and arrears due the city and all other sums due the city.

2. Provide for the receipt and safe-keeping of all moneys paid into the treasury of the city and the payment of money out of the treasury.

3. Administer and manage all trust funds received or held by the city pursuant to a judgment, decree or order of any court or under section one hundred thirty-six-z of the surrogates court act, section five hundred eighty-six of the code of criminal procedure, section eighty-seven of the social welfare law, sections four hundred twenty-six and four hundred thirty-two of the real property law, section two hundred four of the lien law, section twenty-nine-a of the domestic relations court act and section five hundred fifty-three of the county law, and in such administration shall be deemed to be acting in a fiduciary capacity.

4. Provide for the receipt and safe-keeping of all moneys of the trust funds held by the city pursuant to subdivision three of this section and disburse the same on warrants signed by the comptroller.

5. Administer all excise and non-property taxes imposed by the city. With regard to such taxes, he shall have the power to settle and adjust all claims in favor of or against the city and for that purpose may administer oaths. (*Derived from former* § 414. *Subdivisions* 4 *and* 5 *amended by L.* 1962, *ch.* 998, § 30.)

CROSS REFERENCE: Duty to give receipts when receiving public moneys, see General Municipal Law, § 99-b.

CASE NOTES

¶ 1. The city treasurer possesses power to make reasonable rules not in derogation of the court's authority but in furtherance of the treasurer's own proper purposes so to conduct his own activities with regard to funds held by him pursuant to court order and to make as difficult as possible the way of any transgressor. However, a rule requiring, as a condition for the issuance of a certificate of deposit in connection with the withdrawal of monies from court and trust funds, that information be furnished as to the amount of the attorney's fee, was an unreasonable and invalid requirement, as the amount of the fee is a matter of private contract, subject to the scrutiny of the court under certain circumstances but not the concern of the treasurer. A rule requiring a county clerk's certificate of the notary public's authority, and other questions set forth in questionnaire prepared by the treasurer, were proper.—Natelson v. Portfolio, 291 N. Y. 290 [1943] rev'g 266 App. Div. 442, 42 N. Y. S. 2d 753.

§ 415. **Bureaus of department.**—There shall be in the department:

1. A bureau of city collections, the head of which shall be known as the city collector, which shall collect all taxes and assessments payable to the city.

2. A bureau of receipts and disbursements for the reception and safe-keeping of all moneys paid into the treasury of the city and for the payment of all money on warrants drawn by the comptroller and countersigned by the director of finance.

3. A bureau of excise taxes which shall administer excise and non-property taxes and render determinations in contested cases. (*Derived from former* § 415.)

§ 417. **Place where taxes, assessments and arrears are payable.**—Taxes, assessments and arrears due upon property within any borough shall be payable at the office of the bureau of city collections situated in such borough, and other taxes or sums due the city shall be payable at the main office of the city collector unless otherwise provided by law. (*Derived from former* § 417.)

§ 418. **Publication of financial statement.**—It shall be the duty of the director of finance to publish in the City Record once a month, or oftener if so directed by the mayor, a full and detailed statement of the receipts and expenditures of the city during the preceding month and the cash balance or surplus on the last day of such month. (*Derived from former* § 418.)

§ 419. **Warrants.**—No money shall be paid out of the treasury except on a warrant authorized by law, signed by the comptroller

and countersigned by the director of finance, which shall refer to the law under, and to the appropriation against which it is drawn. No warrant shall be paid on account of any appropriation after the amount authorized to be raised for the purpose specified in the appropriation shall have been expended. In countersigning warrants drawn by the comptroller, the director of finance shall be under no duty of inquiring as to the legality or propriety thereof, but may rely on the comptroller's signature thereto. The director of finance may, however, in the event of any question as to the legality of any proposed payment being brought to his attention, withhold payment pending the determination thereof. (*Derived from former* § 419.)

## CASE NOTES

¶ 1. Where City Treasurer did not object to issuance of warrants but rather to the legality of payment by reason of a claim pending on behalf of the City against petitioner for non-performance under another contract, petitioner *held* not entitled to relief. —In re Halpern (Gilsten), 134 (8) N. Y. L. J. (7–13–55) 2, Col. 5 M.

¶ 2. The petitioner, to whom warrants had been issued for the payment of the City's debt, was not entitled to an order directing the Treasurer to sign and deliver the warrants where the city had a pending claim against petitioner for non-performance of a different contract. The court held that petitioner had not established a clear legal right to relief. (In re Halpern (Gilsten), 134 (8) N. Y. L. J. (7–13–55) 2, Col. 5 M.

¶ 3. Where the contract between the contractor and the City provided that if a claim were made against the City or Board of Education for an act of the contractor the City would be indemnified and a claim was filed by a person for injuries allegedly incurred in connection with the work, the court would not direct the City Comptroller to issue warrants for balance due petitioner for work done for the Board of Education.—Matter of Queensboro Painting Corp. (Gerosa), 143 (7) N. Y. L. J. (1–11–61) 14, Col. 1 F.

§ 420. **Deposits.**—a. The director of finance shall deposit all moneys which shall come into his hands on account of the city on the day of receipt thereof, or on the business day next succeeding, in such banks and trust companies as shall have been designated as deposit banks, but no amount shall be on deposit at any one time in any one bank or trust company exceeding one-half of the amount of the capital and net surplus of such bank or trust company. The moneys so deposited shall be placed to the account of the director of finance and he shall keep a bank-book in which shall be entered his accounts of deposit in, and moneys drawn from, the banks and trust companies in which the deposits shall be made. Each such bank and trust company shall transmit to the comptroller a weekly statement of the moneys which shall be received and paid by it on account of the director of finance.

b. The director of finance shall draw moneys of the city from said banks or trust companies only by checks subjoined and attached to warrants and subscribed by him, and no moneys shall be paid by any such banks or trust companies on account of the director of finance except upon such checks; but this provision shall not apply to transfer checks transferring funds from one city depository to another. (*Derived from former* § 420.)

§ 421. **Deposit banks.**—The mayor, the director of finance and the comptroller shall, by majority vote, by written notice to the director of finance designate the banks or trust companies in which all moneys of the city shall be deposited, and may by like notice in writing from time to time change the banks and trust companies thus designated; but no bank or trust company shall be so designated unless it shall agree to pay into the city treasury interest on the daily balances at a rate which the mayor, the director of finance and the comptroller shall, by a majority vote, fix quarterly on the first days of February, May, August and November in each year, according to the current rate of interest upon like balances deposited in banks and trust companies in the city by private persons or corporations. The director of finance may, with the approval of the comptroller, make time deposits of city moneys, for a period not to exceed six months, in any bank or trust company designated for the deposit of city funds. Each such bank or trust company shall before deposits are made, other than such as are of a temporary character and specifically relate to the current business of the city, execute and file with the director of finance a bond to the city in such form and in such amount as may be prescribed and approved by the director of finance and the comptroller for the safe-keeping and prompt payment of city moneys on demand with interest at the rate agreed upon and, as security for such funds, shall deposit with the comptroller outstanding unmatured obligations issued by the city, the value of which at the existing prices on the open market shall be equal to the estimated amount of the proposed deposit, for which the comptroller shall deliver a certificate of deposit containing the conditions of such bond. On the withdrawal of all or a part of the funds deposited in any depository and a closing or depleting of the account thereof, or in the event of the deposit actually made being less than the estimated amount of such deposit, the director of finance and the comptroller shall certify to such settlement or depletion or difference and direct the surrender of the whole or a proportionate share of the securities so deposited to the owner or owners thereof. (*Derived from former* § 421.)

# CHAPTER 18

## POLICE DEPARTMENT

§ 431. **Department; commissioner.**—a. There shall be a police department the head of which shall be the police commissioner who shall be appointed by the mayor and shall, unless sooner removed, hold office for a term of five years.

b. Whenever in the judgment of the mayor or the governor the public interests shall so require, the commissioner may be removed from office by either, and shall be ineligible for reappointment thereto.

c. Whenever a vacancy shall occur in the office of police commissioner, a police commissioner shall be appointed by the mayor within ten days thereafter. (*Derived from former* § 431.)

CROSS REFERENCE: Additional power of Governor to remove Police Commissioner, see Public Officers Law, § 33.

### CASE NOTES

¶ 1. Where it did not appear whether the ground for rejection of petitioner as probationary patrolman was the fact of Communist petition signed by applicant's mother or was based on the number of applicant's traffic violations, Court *ordered* disclosure by Police Commissioner to determine whether rejection was arbitrary and capricious.—Forde v. Adams, 207 Misc. 577, 138 N. Y. S. 2d 603 [1955].

¶ 2. Where it could not be determined upon papers in certiorari action whether petitioner was passed over for appointment as patrolman because his mother had signed a Communist party petition or because he had violated Traffic and Hack Bureau regulations, the matter was remitted to the Commissioner for further appropriate action.—Matter of Nathanson, 207 Misc. 572, 138 N. Y. S. 2d 598 [1955], appeal dismissed 1 App. Div. 2d 823, 148 N. Y. S. 2d 742.

§ 432. **Deputies.**—The commissioner shall have the power to appoint and at pleasure remove six deputies, one to be known as first deputy commissioner. During the absence or disability of the commissioner, the first deputy commissioner, or if he shall be absent or under disability, the deputy commissioner designated by the commissioner shall possess all the powers and perform all the duties of the commissioner except the power of making appointments and transfers. (*Derived from former* § 432 *as amended by L. L.* 1946, *No.* 6, *and L. L.* 1954, *No.* 43.)

§ 433. **Member of department; no other office.**—Any police commissioner or any member of the police force who shall accept any additional place of public trust or civil emolument or who shall during his term of office be nominated for any office elective by the people and shall not, within ten days succeeding the same, decline the said nomination, shall be deemed thereby to have

resigned his commission and to have vacated his office, and all votes cast at any election for any person holding the office of police commissioner, or within thirty days after he shall have resigned such office, shall be void.

The foregoing provisions shall not apply to any member of the police force who, upon the request of the mayor of any municipality in the state of New York or of the governor of the state or of the attorney-general of the United States, is granted a leave of absence without pay from his duties in the police force of the city to serve temporarily in the performance of police duty in such other municipality or under the government of the state or of the United States; but such member shall not receive any pay from the city of New York while performing such police duty. (*Derived from former* § 434.)

§ 434. **Commissioner; powers and duties.**—a. The commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.

b. The commissioner shall be the chief executive officer of the police force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department. (*Derived from former* § 434.)

**CASE NOTES**

¶ 1. Policemen, who were members of Patrolmen's Benevolent Association, were entitled to an order against Police Commissioner for deduction from their salary of their dues, pursuant to a resolution of the Board of Estimate authorizing salary deductions of employees to pay membership dues of employee organization. The Court could see no conflict between the exclusive right of the Police Commissioner over the discipline of the men and the provisions of the resolutions.—Matter of Moriarty, 20 Misc. 2d 593, 192 N. Y. S. 2d 32 [1959].

¶ 2. Under subdivision (a) of this section, the Commissioner of Police is given the control of the administration and discipline of the Police Department.—Patrolmen's Benevolent Association of the City of New York v. Kennedy, 25 Misc. 2d 63, 201 N. Y. S. 2d 536 [1960].

¶ 3. A general order, #25, promulgated by the Police Commissioner which prohibits any member of the Department from soliciting, accepting or publishing advertisements or receiving funds in connection therewith, in connection with public items. Of any police line organization, without the authority of the Commissioner was not unconstitutionally applied when the Commissioner refused to give his permission to the Patrolmen's Benevolent Association's request to approve the acceptance of advertisements for its journals. The Commissioner was not unreasonable, arbitrary or capricious and the general order did not violate the freedom of the press.—Patrolmen's Benevolent Association of the City of New York v. Kennedy, 25 Misc. 2d 63, 201 N. Y. S. 2d 536 [1960].

¶ 4. Police Commissioner will not be restrained from conducting hearing on charge of violating Police Department rule against "moonlighting" since such regulation is a reasonable exercise of the authority vested in the Commissioner by the City Charter.—Flood v. Kennedy, 26 Misc. 2d 172, 211 N. Y. S. 2d 488 [1961].

§ 435. **Department; duties.**—a. The police department and force shall have the power and it shall be their duty to preserve the public peace, prevent crime, detect and arrest offenders, sup-

press riots, mobs and insurrections, disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places; protect the rights of persons and property, guard the public health, preserve order at elections and all public meetings and assemblages; subject to the provisions of law and the rules and regulations of the commissioner of traffic, regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health; remove all nuisances in the public streets, parks and places; arrest all street mendicants and beggars; provide proper police attendance at fires; inspect and observe all places of public amusement, all places of business having excise or other licenses to carry on any business; enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes or offenses.

b. Except as specifically provided herein, nothing contained in this section shall be deemed to limit, restrict, divest, transfer or supersede the powers or the jurisdiction of any agency as defined in section eleven hundred fifty of the charter.

c. Nothing contained in this charter shall be deemed to grant the department of traffic cognizance or control over the government, administration, disposition and discipline of the police department or police force. (*Derived from former* § 435 *as amended by L. L.* 1949, *No.* 2; *as amended by L. L.* 1950, *No.* 27.)

CROSS REFERENCE: Vehicle and Traffic Law § 54, authorizes parking meters, harging of fees therefor, and the regulation of parking.

## CASE NOTES

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¶ 1. Former § 21, vesting the Council with the legislative power of the City, and former 435 authorizing the Police Commissioner to make rules and regulations for conduct of pedestrian and vehicular traffic, both being enacted as part of the Charter by the same Legislature at the same time and being voted on by the People at one election, came within the reason of the rule governing construction of statutes in pari materia, and, as such they were required to be construed with reference to each other and so as to give validity and effect to each other. As so construed, the apparent inconsistency disappeared and § 21 stood modified at least to extent that the Police Commissioner was empowered to make traffic regulations.—**People v. Lewis, 167 Misc. 139, 3 N. Y. S. 2d 508 [1938].**

¶ 2. The term "streets, squares and avenues" as used in former § 435 of the Charter, authorizing the Police Commissioner to make rules for conduct of vehicular traffic in the use of the public streets, squares and avenues, is used in a generic sense and includes every type of public way used for vehicular traffic.—People v. Hugh Perry, 23 N. Y. S. 2d 769 [1940].

¶ 3. The power to regulate and restrict the movement of traffic conferred by the Charter upon the Police Commissioner may properly be given a broad construction.—Bus Depot Holding Corp. v. Valentine, 288 N. Y. 115, mod'g 262 App. Div. 841, 29 N. Y. S. 2d 509, which aff'd without opinion, 29 N. Y. S. 2d 901.

¶ 4. In view of the broad powers of the Police Department over traffic, of the location of the Belt Parkway within the City lines, and of the evident desire on part of the Legislature to create a uniform set of rules concerning traffic, it is reasonable to construe former § 435 as granting the Police Commissioner authority to

make regulations governing traffic on parkways within the City.—People v. Hugh Perry, 23 N. Y. S. 2d 769 [1940].

¶ 5. Traffic Regulations of the City of New York, such as § 14 limiting the speed of vehicles on City streets to not more than 25 miles per hour, have the force of law, and may be judicially noticed. — Angueira v. B'klyn & Queens Transit Corp., 263 App. Div. 43, 31 N. Y. S. 2d 168 [1941].

¶ 6. The Traffic Commission has succeeded to the powers formerly belonging to the Police Commissioner in respect to the making of regulations for traffic control, and the violation of such regulations continue to be tried by a City Magistrate. — People (Joyce) v. Hogenson, 117 N. Y. S. 2d 260 [1952].

¶ 7. An ordinance regulating the use of City streets probably may be sustained on broader grounds than a Police Department regulation adopted pursuant to the restrictive language of a Charter provision, such as former § 435.—People v. Railway Express Agency, 188 Misc. 342, 67 N. Y. Supp. 2d 732 [1947], aff'd without opinion, 279 N. Y. 703, reargument denied, 297 N. Y. 783.

¶ 8. Police regulations, promulgated for safety and welfare of the people, should not be interfered with by the courts unless justification for interference is clearly manifest (149 N. Y. 453, 459). Hence motion by bus company for an injunction pendente lite restraining enforcement of a certain police regulation, was denied, with the case being set down for prompt trial.—Pennsylvania Greyhound Lines, Inc. v. Valentine, 104 (104) N. Y. L. J. (11-1-40) 1367, Col. 7 M.

¶ 9. Former § 435 of the Charter, authorizing the Police Commissioner to make rules and regulations for conduct of pedestrian and vehicular traffic, *held* constitutional.—People v. Berkowitz, 39 N. Y. S. 2d 236 [1943].

¶ 10. Evidence, consisting of testimony of two police experts who estimated speed of defendant's automobile on basis of the length of the skid marks of his automobile and the application of a mathematical formula, *held* sufficient to establish that defendant was driving his automobile in excess of speed limit of 25 miles per hour.—People (Lucius) v. Herman, 174 Misc. 235, 20 N. Y. S. 2d 149 [1940].

¶ 11. In absence of any evidence indicating that signs were posted at the point in question indicating that a greater or lesser speed was authorized, the general prohibition of a speed faster than 25 miles per hour applied, in prosecution of defendant for violating Article 3, § 14 of the City Traffic Regulations.—Id.

¶ 12. In prosecution of motorist for violation of Article 3, § 14 of City Traffic Regulations prohibiting a speed greater than 25 miles per hour, the prosecution was not required to establish that motorist was traveling at a speed in excess of 25 miles per hour for at least one-quarter of a mile, notwithstanding provision of Vehicle and Traffic Law § 56 that a speed in excess of 40 miles per hour for one-fourth of a mile should be presumptive evidence of driving at a speed which was not prudent. The traffic regulation prescribed a definite rate of speed whereas the state law merely sought to prohibit driving at a dangerous speed, and furthermore under Vehicle and Traffic Law § 54 the Legislature reserved to cities of the first class the power to regulate the speed of motor vehicles operated upon its streets.—Id.

¶ 13. Traffic Regulations of City of New York would appear to include street cars in regulating the speed of vehicles (Traffic Regulations § 1, subd. 13.—Angueira v. B'klyn & Queens Transit Corp., 263 App. Div. 43, 31 N. Y. S. 2d 168 [1941].

¶ 14. Defendant, charged with violating traffic regulations of Police Commissioner prohibiting the driving of a vehicle at a speed in excess of 25 miles per hour "except where signs authorized by proper authority are posted indicating a greater or lesser speed", *held* entitled to a dismissal of the complaint, inasmuch as defendant was charged with speeding on the Belt Parkway, and although the Police Commissioner had concurrent jurisdiction in the matter with the Park Commissioner it did not appear definitely that he had exercised it with sufficient clarity to satisfy the requirements for language prescribing penal offenses, since the rule excepted from its application instances where signs authorized by proper authority are posted authorizing a different speed, and in the immediate case the signs were posted on the parkway by the Park Commis-

sioner.—People v. Hugh Perry, 23 N. Y. S. 2d 769 [1940].

¶ 15. In prosecution of defendant for speeding, based on testimony of police officer who followed defendant for three-tenths of a mile at a uniform distance of 75 feet and clocked defendant's speed on his motorcycle speedometer, testimony of officer that he had observed a test of his speedometer against a master speedometer in the motorcycle headquarters on a date eight days before the arrest and again six days afterwards and that the speedometer was found accurate, *held* sufficient, without testimony of the officer who actually made the test.—People v. Tyler, 127 (6) N. Y. L. J. (1–9–52) 107, Col. 3 T.

¶ 16. Where admittedly defendants' trucks were being expeditiously loaded and unloaded while on street of Midtown Manhattan, they were not "parked," as such term is defined in Vehicle and Traffic Law, § 2, subd. 20, and hence defendants were not guilty of violation of § 190 of the Traffic Regulations providing that a vehicle not being expeditiously loaded or unloaded should be deemed a parked vehicle subject to the parking regulations. The summons did not charge defendant with violating provision of § 190 prohibiting the stopping of a vehicle for purpose of loading or unloading merchandise for a period of more than two hours.—People v. Interstate Dress Carriers, Inc., 203 Misc. 883, 120 N. Y. S. 2d 370 [1953].

¶ 17. Conviction of defendant for violation of § 191 of the Traffic Regulations, providing that no driver of a vehicle shall operate, enter, traverse, stop, stand or park certain types of vehicles upon certain streets in the Borough of Manhattan between certain hours, was reversed on ground defendant was not the "driver" of the vehicle but was evidently a foreman who merely stated he was "responsible" for the vehicle being there.—People v. Goltz, 203 Misc. 883, 120 N. Y. S. 2d 453 [1953].

¶ 18. Under Charter former § 435, authorizing the Police Commissioner to make rules and regulations for the conduct of pedestrian and vehicular traffic, Police Commissioner *held* empowered to promulgate regulations prohibiting the parking of vehicles more than one hour in congested business or residential streets, since in its broad sense the word "traffic" includes the stopping and parking of vehicles, and the time during which parking is to be allowed falls within the discretion of the board of individual to whom the legislative power of promulgating such regulations is committed.—People v. Rubin, 284 N. Y. 392 [1940].

¶ 19. Absence of any direct proof that parking of the automobile in direct violation of the traffic regulation was done by defendant, did not render the evidence insufficient to sustain conviction of defendant for the violation, since proof that defendant was a licensed owner of the automobile warranted the conclusion that he controlled the car and personally violated the regulation.—Id.

¶ 20. Truckdriver who double-parked his truck for purpose of delivering merchandise, *held* not to have violated Art. 2 § 10, subd. (o) of the N. Y. C. Traffic Regulations, prohibiting any person from parking a vehicle on the roadway side of any vehicle parked at the curb of a street, in view of provision of par. (a) of subd. 17 of § 1 of Art. 1, exempting from the definition of "park," a vehicle actually and expeditiously engaged in loading or unloading merchandise.—People v. Ressanen, 306 N. Y. 267, 117 N. E. 2d 547, reversing 203 Misc. 167, 115 N. Y. S. 2d 260.

¶ 21. Section 14 of the Traffic Regulations, which permits a physician to leave his car on the street in front of hospitals, clinics and premises wherein actually attending a patient, for such length of time as may be necessary for that purpose, was not intended to permit a physician to violate subd. 0 of § 10, which prohibits double parking, but was merely intended to except physicians from the time limit upon single parking imposed by other subdivisions of § 10.—Harnik v. Levine, 202 Misc. 648, 115 N. Y. S. 2d 25 [1952], aff'g 106 N. Y. S. 460.

¶ 22. Parking of defendant in violation of the Traffic Regulations constituted a public nuisance entitling the plaintiffs, who could not extricate their car, to a recovery of at least nominal damages. Plaintiffs suffered a financial loss similar to that recoverable when one wrongfully detains the property of another, and this was to be distinguished from damages sought for mental suffering or injured feelings.—Id.

¶ 23. Double parking in the City of New York should not be treated by the courts as an act of negligence per

se.—Miraglia v. Loiacono, 205 Misc. 232, 129 N. Y. S. 2d 879 [1954].

¶ 24. Traffic regulation stating that parking an automobile means "the standing of a vehicle, whether occupied or not, except when actually engaged in loading or unloading merchandise or discharging or picking up passengers", *discussed*, and differences between such regulation and Vehicle and Traffic Law § 2, par. 20, *pointed out. Opinion expressed* that in case of conflict between the traffic regulation and the Vehicle and Traffic law the former controlled. Also, provision relative to loading or unloading is apparently construed as allowing a reasonable time therefor, as indicated by letter of Commissioner Valentine.—105 (148) N. Y. L. J. (6-26-41) 2858, and 106 (20) N. Y. L. J. (7-24-41) 186.

¶ 25. The stopping of defendant's truck on the side of a parked vehicle for the purpose of making a delivery was not "double parking" within the meaning of Traffic Regulation, Art. 1, subd. 17 or Art. 2, par. 10, subd. 2.—Curro v. John J. Casale, Inc., 135 (55) N. Y. L. J. (3-21-56) 7, Col. 8 F.

¶ 26. Act of Police Commissioner in creating "express" streets upon which no parking was permitted during business hours, was not an unreasonable exercise of the police power. —People v. Lewis, 167 Misc. 139, 3 N. Y. S. 2d 508 [1938].

¶ 27. Although violation of traffic regulation creating "express streets" was not a crime in the strict sense of that term, it was nevertheless a violation of a police regulation commonly known as an offense, punishable by fine or imprisonment, or both. —Id.

¶ 28. Police officer *held* not to have exceeded his authority in placing an overtime parking ticket on defendant's automobile notwithstanding Roosevelt Street, in New York County, at the point at which the automobile was parked, is privately owned. Even though the City may not have acquired title to a street and it may be closed off to the public for brief periods at regular intervals in order to protect the title of its true owners, the street is none the less subject to the same police regulations as any other street when being used by the general public.—People v. Garland, 193 Misc. 664, 84 N. Y. S. 2d 72 [1948].

¶ 29. Clause of bus company's franchise enumerating the streets and avenues to be traversed and specifically providing for operation in either direction except that such operation should not be in a direction contrary to police regulations, was not construable as permitting the Police Department to change two-way traffic along the main routes to one-way traffic, but merely meant that when using the few cross streets named in the franchise the buses were limited by traffic regulations.—Eighth Avenue Coach Corp. v. City of N. Y., 286 N. Y. 84, aff'g 259 App. Div. 870, 20 N. Y. S. 2d 402, which affirmed 170 Misc. 243, 10 N. Y. S. 2d 170.

¶ 30. Clause of franchise requiring bus company to obey all laws, ordinances and traffic regulations applicable to omnibus operations and to comply with specific orders issued by the Police Department with respect to operation of buses, was merely a standard clause providing in general terms that the operation should not be illegal, and related only to regulation of the movement of buses while being so operated, and hence did not authorize the Police Department to change two-way traffic along the main route to one-way traffic, since the right to regulate did not reserve the right to destroy the most profitable portion of the route.—Id.

¶ 31. Clause of franchise providing for operation of buses in event any portion of the specified routes were closed to traffic for any reason therein specified, merely provided for temporary diversion of the buses when necessitated by emergency, and did not authorize the Police Department to change two-way traffic along the main route to one-way traffic.—Id.

¶ 32. Where the bus company had paid $475,000 to City for its ten-year franchise to operate buses, had deposited an additional $30,000 as security and had made a large investment for buses and equipment, proposed regulation of Police Commissioner to establish part one-way traffic operation upon Eighth and Ninth avenues over one-sixth of its routes in the best-paying portion, *held* to constitute a taking of the company's property without due process. City might negotiate with the company as to fair terms for curtailing the bus routes, and should the company seek too much the City might condemn the franchise, with the bus company

having the right to have just compensation for the taking fixed by the court.—Id.

¶ 33. Traffic regulation (Traffic Code § 110) prohibiting the carrying of any advertising sign on the person or on any vehicle on the street or sidewalk, but exempting persons who were exercising a lawful right to picket, *held* invalid as being indefinite in not defining what constituted picketing, and as not being reasonable and fair in its application, despite the alleged purpose of the regulation to relieve against unsightliness and congestion.—Walters v. Valentine, 172 Misc. 264, 12 N. Y. S. 2d 612 [1939].

¶ 34. If a truck, in addition to being used in the usual business or regular work of its owner, also displays advertisements of others, it becomes an advertising truck within the meaning of § 79 of the Traffic Regulations. Thus, where chewing gum was advertised on the side of a motor truck owned by and used in the operation of an express company business, there was a violation of the regulations.—People v. Kearns, 168 Misc. 264, 5 N. Y. S. 2d 590 [1938].

¶ 35. Regulation of Police Commissioner of City of New York providing that "no advertising trucks, vans or wagons or motor vehicles shall be allowed in the streets", although business notices might be placed "upon delivery business wagons, so long as such wagons are engaged in the usual business" of the owner and not used mainly for advertising, *held* a proper exercise of Police Commissioner's authority under Charter former § 435 to make traffic regulations, as display of advertising on vehicles would tend to create street congestion.—Id.

¶ 36. Express company which displayed upon its trucks a sign advertising "Wrigley's Spearmint Gum", *held* guilty of violation of regulation of Police Commissioner providing that advertising trucks shall not be allowed in the streets (194 N. Y. 19, aff'd 221 U. S. 467).—Id.

¶ 37. Traffic Regulation § 79, prohibiting use of "advertising vehicles" in the streets, *held* valid, as a reasonable exercise of the Police Commissioner's powers under former § 435 to "regulate, direct, control and restrict" traffic.—People v. Berkowitz, 30 N. Y. S. 2d 236 [1943].

¶ 38. General sales manager of corporation engaged in the clothing business, *held* guilty of violation of traffic regulation prohibiting use of advertising trucks, where he had caused to be driven in a congested portion of Madison Avenue a white covered wagon drawn by two burros and containing on both sides of the wagon signs of large proportions, reading "Modern Custom Tailors, Inc., Harry Berkowitz, Custom Tailor, 804 Lexington Avenue".—Id.

¶ 39. Section 124 of the Traffic Regulations prohibiting the operation of advertising vehicles on the streets, but excepting the putting of business notices upon business delivery vehicles which are not used merely or mainly for advertising, *held* to prohibit the practice of the Railway Express Agency in permitting, for a consideration, the use of the space on the exterior sides of its numerous trucks for general advertising purposes unconnected with its business.—People v. Railway Express Agency, 188 Misc. 342, 67 N. Y. S. 2d 732 [1947], aff'd, 297 N. Y. 783, 77 N. E. 2d 794 and 69 S. Ct. 463, 336 U. S. 106, 93 L. Ed. 533.

¶ 40. Under former § 435 of the Charter, authorizing the Police Commissioner to promulgate regulations for the conduct of pedestrian and vehicular traffic, Police Commissioner *held* to have possessed authority to promulgate regulation prohibiting operation of advertising vehicles upon the streets, as such regulation bore a reasonable relationship to the subject of traffic control and public safety. The exception in the regulation permitting business notices of the owner on the vehicles was a reasonable one.—Id.

¶ 41. Section 124 of the Traffic Regulations prohibiting the operation of advertising vehicles on the streets, but excepting the putting of business notices upon business delivery vehicles which are not used merely or mainly for advertising, *held* not unconstitutional as in violation of due process, nor as violating equal protection of the laws, nor as being a burden on interstate commerce.—Railway Express Agency, Inc. v. People of State of N. Y., 69 S. Ct. 463, 336 U. S. 106, 93 L. Ed. 533 [1949], aff'g 297 N. Y. 783, 77 N. E. 2d 794.

¶ 42. Vehicle and Traffic Law § 54, prohibiting enactment of any ordinance or regulation inconsistent with such law, but providing that the validity or effect of any traffic regulations adopted pursuant to law in cit-

ies of the first class were not thereby impaired, *held* to validate § 67 of the Traffic Rules and Regulations of the City of New York, requiring motor vehicles to display certain lights of a certain type while being operated after sunset and before sunrise, since such regulation could not be inconsistent with the Vehicle and Traffic Law inasmuch as it was identical with § 15, subd. 2 of such law, and furthermore the charge against defendant in the present case was based on a failure to display any lights at the time in question and did not involve the physical lighting equipment itself.—People v. Killmeyer, 171 Misc. 778, 13 N. Y. S. 2d 839 [1939].

¶ 43. Charter § 435, authorizing Police Commissioner to "regulate, direct, control and restrict the movement of vehicular and pedestrian traffic", *held* to authorize enactment of a regulation specifying hours during which lights should be displayed on motor vehicles.—Id.

¶ 44. Regulation of Police Department prohibiting operation over city streets of any bus not having a franchise or permit, except over a route designated by the Police Commissioner, and prohibiting the stopping of buses to take on or discharge passengers except at stops designated by the Police Commissioner, *held* not to apply to operation of buses hired by parents to convey their children to and from school under arrangement whereby parents paid expenses of transportation and the buses called for the children at their various homes and were restricted to carrying the children called for under contract. Hence conviction of defendants for failure to obtain from the Police Commissioner a designated route over which to operate the buses was reversed and the information dismissed. —People v. Weisberger, 282 N. Y. 1, rev'g 171 Wisc. 970, 14 N. Y. S. 2d 297.

¶ 45. Regulations of Police Commissioner completely excluding interstate buses from the "mid-town section" of Manhattan and prohibiting the use by such buses of private terminals in that district, *held* unauthorized under former § 435 of the Charter, which grants to the Commissioner power to regulate traffic. Argument that unless the court held that former § 435 granted the Commissioner power to make the challenged regulatitons the City would be denied power to cope effectively with the traffic problem, should be addressed to the Legislature. —Bus Depot Holding Corp. v. Valentine, 288 N. Y. 115, 41 N. E. 2d 913 [1942], mod'g 262 App. Div. 841, 29 N .Y. S. 2d 509, which aff'd without opinion, 29 N. Y. S. 2d 901.

¶ 46. Where city authorities had established a temporary terminal to be used by plaintiff bus company and others during emergency caused by strike of employees of two bus terminals formerly used by plaintiff, refusal of Police Commissioner to permit plaintiff to use terminal facilities of another bus line on West 41st Street between 7th and 8th Avenues because of congested traffic conditions, *held* not to have been arbitrary, and court would not interfere with his determination. — Edwards Motor Transit Co. v. Wallander, 187 Misc. 446, 61 N. Y. S. 2d 93 [1945].

¶ 47. Traffic regulation prohibiting operation of omnibuses except upon the routes designated in the franchise, did not apply to a bus which, because of engine trouble, deviated from its authorized route but took on no passengers while off the streets designated in its franchise. Hence, in an action to recover for personal injuries sustained in an accident while traveling off its scheduled route, it was improper for the court to charge that the jury should consider on the question of the defendant's negligence the fact that the bus was proceeding along an avenue not commonly used by buses. Moreover, even if the bus had been operating for hire, the charge would have been improper because it did not appear that there was any causal connection between such use and the accident.—Weidenfold v. Surface Transp. Corp., 269 App. Div. 341, 55 N. Y. S. 2d 780 [1945].

¶ 48. Under traffic regulation providing that the driver of a vehicle approaching an intersection not controlled by traffic lights shall grant the right of way to the operator of the vehicle approaching from the right, and a further regulation that a driver making a right turn shall grant the right of way to a driver proceeding straight ahead on an intersecting street, the driver of a bus which was proceeding straight ahead on the intersecting street had the right of way over a police car which was approaching on the intersecting street to the right of the bus, and

which was struck by the bus as it was in the act of making a right turn.—People v. Albergottie, 51 N. Y. S. 2d 270 [1944].

¶ 49. Section 35 of the traffic regulations promulgated by the New York City Police Commissioner, prohibiting a driver with a learner's permit from operating a motor vehicle except on streets designated as learner's streets by the Commissioner, *held* invalid as constituting a regulation of the right of a learner to exercise his privileges granted by his license, whereas under sections 10, 20 and 54 of the Vehicle and Traffic Law the State has reserved to itself and its officials all powers with respect to licenses.—People v. Velich, 70 N. Y. S. 2d 49 [1947].

¶ 50. Traffic regulation § 35, prohibiting a driver with a learner's permit from operating a motor vehicle except on streets designated as learners' streets by the Police Commissioner, *held* a valid exercise by the Police Commissioner of his power to regulate traffic upon the City streets, and did not violate any provisions of the Vehicle and Traffic Law regulating issuance of drivers' licenses, as the police regulation merely dealt with traffic.—Schwartzberg v. Wallander, 190 Misc. 236, 73 N. Y. S. 2d 675 [1947].

¶ 51. Where various owners or employees of auto schools had been issued summonses for violating N. Y. City police regulation restricting operation of vehicles under a learner's permit to certain streets, and some nad been found guilty although in at least one instance the regulation had been held invalid, and there had been no appeals from judgments of conviction, the situation presented a proper one for an action by owners and employees of auto schools for a declaratory judgment that the police regulation was void.—Id.

¶ 52. Violation by infant of traffic regulation prohibiting roller skating in the roadway did not make the infant guilty of contributory negligence as a matter of law, although such violation could properly be considered by the jury with all the other circumstances.—Poplet v. Surface Transp. Corp., 127 (13) N. Y. L. J. (1–18–52) 245, Col. 2 F.

¶ 53. A violation of Article 7, § 101 of the Traffic Regulation relative to brakes, is not a crime, but an offense punishable pursuant to § 1063 of the Charter. Driver of vehicle to which there was attached a two-wheel trailer loaded with two wooden poles 55 feet in length, *held* guilty of violation of traffic regulation prescribing the allowable braking distance. The hydraulic brakes on the forward wheels of the vehicles were inoperable due to the exhaustion of hydraulic fluid in the compression cylinder, but no evidence of leakage immediately prior to the alleged offense was adduced in behalf of the defendant.—People v. Pulizzi, 199 Misc. 405, 106 N. Y. S. 2d 680 [1950].

¶ 54. Conviction of defendant for violation of Traffic Regulations, Art. 3, § 50, providing that a driver shall sound the horn of his vehicle only when necessary to warn a person or animal of danger, was affirmed without opinion. A police officer had testified that he heard the sounding of an automobile horn three times for about two or three seconds each time, and upon investigation discovered that a disabled ambulance was being pushed by an automobile, behind which were two cars and that of defendant. Defendant testified the ambulance driver was astride the center line of the street blocking traffic, that the regulation was ambiguous, and moreover was arbitrary and capriciously administered.—People v. Weil, 304 N. Y. 555 [1952].

¶ 55. Child who was injured while playing on a "Play Street" in the City of New York when its foot and ankle came in contact with the rear wheel of a sanitation truck proceeding through the street, *held* not to have established a right of recovery. The sanitation truck was lawfully traversing the street for purpose of collecting refuse, it was proceeding at a slow rate of speed and in a reasonably prudent manner, and the inference was that there was negligence on part of the infant.—Castro v. City of N. Y., 131 (60) N. Y. L. J. (3–30–54) 9, Col. 6 F.

¶ 56. Section 191 of Article 15 of the Traffic Regulations of the City of New York, prohibiting entrance into the congested garment district of Manhattan of vehicles for transportation of merchandise having an overall length of 33 feet or more between the hours of 8 a.m. and 6 p.m. from Monday through Friday, but permitting entry of such vehicles if destined to an off-street parking facility or terminal located within the area *held*

valid. The regulation had been promulgated only after extensive study and following a hearing; that incidentally interstate commerce was adversely affected was irrelevant; and a possible loss of profit and pecuniary damage to the plaintiff carriers would not prevent the exercise of police power, although such loss and damage were relevant factors determining the reasonableness of the exercise of the power.—Arrow Carrier Corp. v. Traffic Comm'n, 198 Misc. 1112, 99 N. Y. S. 2d 138 [1950].

¶ 57. Section 180 of Article 14 of the Traffic Regulations of the City of New York, forbidding any vehicle or any combination of vehicles over 33 feet in length, including load, for the transportation of merchandise, to enter any of the streets named in the regulation which pertained to the locality known as the Washington Market Area and the section thereof referred to as the "Butter and Egg District", and § 181 prohibiting the parking of vehicles in the locality, on the named streets, 24 hours daily, seven days a week, *held* invalid as unreasonable and discriminatory, inasmuch as no similar restrictions were imposed with respect to the "Midtown Area" or "Garment Center" where greater traffic congestion prevailed and where the cross streets were narrower than those in the market area, and moreover the forbidding of over-length trucks to use the streets when trucks 33 feet in length might use the streets without limitation as to number was illogical. That plaintiffs had grudgingly submitted to the regulations during the several years they had been in effect would not give rise to any estoppel.—Zenith-Godley Co. v. Wylie, 108 N. Y. S. 2d 681 [1951]. On appeal, the Appellate Division stated that "limiting the length of trucks which may enter various areas in New York City does not appear to be invalid of itself," and *held* that in the instant case, involving the reasonableness of a municipal regulation, a trial should be required before the granting of an injunction pendente lite against enforcement of the regulation, 279 App. Div. 498, 110 N. Y. S. 2d 599.

¶ 58. Section 180 of Article 14 of the Traffic Regulations of the City of New York, forbidding any vehicle or any combination of vehicles over 33 feet in length, including load, for the transportation of merchandise, to enter any of the streets named in the Regulation which pertained to the locality known as the Washington Market Area and the section thereof referred to as the "Butter and Egg District," *held*, following a trial, valid and constitutional. The Traffic Commissioner had the power to make the Regulation; such Regulation did not constitute a total prohibition and was not unreasonable; it was intended to relieve traffic conditions in the area and it did relieve such conditions; and it was a proper exercise of police power. Conditions in the Garment Center, which was not subjected to the same Regulation, were dissimilar from those in the instant area.—Zenith-Godley Co. v. Wiley, 121 N. Y. S. 2d 795 [1953].

¶ 59. Local Law No. 68 of 1938, providing that storekeepers and peddlers might sell and display Xmas trees and supplementary items on sidewalk during December, contravened the City Charter (170 Misc. 501), as control of street conditions at holiday time, as well as other times, in congested districts, was a proper subject of regulation, of which the municipal police should not be deprived.—Ploche v. Valentine, 102 (141) N. Y. L. J. (12–19–39) 2217, Col. 4 M.

¶ 60. Where defendant came into court and contested the charge against him for illegal parking on ground proclamations issued by the City Magistrate relative to jurisdiction failed to recite that a majority of the Magistrates consented to the exercise by the Chief City Magistrate of the powers contained in N. Y. C. Criminal Courts Act § 127, the Magistrate was empowered to proceed under former § 435 of the Charter, providing that the Commissioner shall make such rules for the conduct of traffic as he may deem necessary and that violation of such rules shall be triable by a City Magistrate and punishable by not more than 30 days' imprisonment, or by a fine of not more than $50, or both.—People v. Simon, 186 Misc. 1049, 60 N. Y. S. 2d 740 [1946].

¶ 61. A record of conviction of defendant for a traffic infraction consisting of "dangerous driving" as defined in N. Y. C. Traffic Regulations, Art. 3, § 20, after trial on a not guilty plea, was inadmissible against the defendant in a civil suit

arising out of the same occurrence, and he was not subject to interrogation in respect to such conviction to establish a charge of negligence.—Walther v. News Syndicate Co., 276 App. Div. 169, 93 N. Y. S. 2d 537 (1949).

¶ 62. Inasmuch as former § 435 provided for a jail sentence as the alternative to payment of a fine, remedy of the People was not limited to a civil action for the penalty.—People v. Lewis, 167 Misc. 139, 3 N. Y. S. 2d 508 [1938].

¶ 63. Regulations of Police Commissioner providing that a violation of speed limits subjects offender to a fine or imprisonment or both, are penal in nature and should be strictly construed.—People v. Hugh Perry, 23 N. Y. S. 2d 769 [1940].

¶ 64. Under Charter former § 435, Vehicle and Traffic Law § 2, subd. 29, and Penal Law § 2, magistrate had jurisdiction to try defendant on charge of a traffic infraction.—People v. Rubin, 284 N. Y. 392, 31 N. E. 2d 501 [1940].

¶ 65. Police Commissioner would not be restrained pendente lite from stationing a police officer on duty in plaintiff's bar and grill pursuant to the authority of N. Y. C. Charter former § 435, where affidavits of police officers established a reasonable belief of the police that the establishment was frequented by prostitutes who solicited therein. That charges against four women who had been arrested in the premises on charges of soliciting had been dismissed in the Magistrate's Court, was not controlling.—Rodriguez v. Wallender, 119 (53) N. Y. L. J. (3–18–48) 1010, Col. 1 F.

¶ 66. Police Commissioner *held* to have acted lawfully in stationing a policeman and maintaining a "Raided" sign in plaintiff's business premises where many violations had occurred therein.—Azee Rest., Inc. v. Adams, 133 (94) N. Y. L. J. (5–13–55) 7, Col. 3 F.

¶ 67. Commissioner acted lawfully in assigning police officers to petitioner's cafe and posting sign "Raided Premises" thereon, where numerous arrests involved petitioner's customers and official sources reported unlawful activities of its patrons.—674 Cafe, Inc. v. Adams, 132 (3) N. Y. L. J. (7–6–54) 3, Col. 5 F.

¶ 68. Plaintiffs *held* entitled to temporary injunction restraining stationing of police officer in their premises, where since plaintiffs had purchased the premises there had been but a single isolated arrest, plaintiffs had received no complaints or notices from the police, and the complaints received by the police after plaintiffs' purchase were based upon acts occurring prior to the purchase.—Fuld v. Wallander, 119 (58) N. Y. L. J. (3–25–48) 1101, Col. 2 M.

¶ 69. Motion to restrain Police Commissioner from maintaining a patrolman in plaintiff's hotel and from displaying a "raided premises" sign thereon, was denied, where 18 complaints of prostitution had been received by the Police Department between September, 1947 and May, 1948, resulting in numerous arrests and convictions. Although plaintiff had only taken over operation of the premises in May, 1948, he had been the owner since February, 1946, and should have known what was going on during such time.—Kahan v. Wallander, 193 Misc. 190, 83 N. Y. S. 2d 570 [1948].

¶ 70. Hotel operator's application for injunction restraining Police Commissioner from stationing a police officer in the hotel, was denied, where although the hotel clerk and a woman guest who had been arrested on April 8, 1948, were discharged in Magistrate's Court, from January, 1942, to date there had been 105 arrests made in the hotel, 104 of them in connection with prostitution and 66 of them resulting in convictions, and since January 1, 1947, 54 arrests were made, resulting in 34 convictions.—Regent Hotel Corp. v. Wallander, 119 (104) N. Y. L. J. (5–28–48) 2011, Col. 5 T.

¶ 71. The stationing of police in front of a Times Square grill and the maintenance of a "Raided Premises" sign could not be enjoined where the evidence showed that the Armed Forces had complained that venereal disease had been contracted by servicemen from prostitutes met at plaintiff's premises. Evidence also showed that a large percentage of plaintiff's customers were servicemen, that unescorted females frequented the premises and that there was solicitation for immoral purposes.—L. & P. Co. v. Kennedy, 135 (55) N. Y. L. J. (3–21–56) 7, Col. 4 T.

¶ 72. The stationing of police officers in front of plaintiff's premises and the placing of a "raided premises"

sign was reasonable where the police department had received complaints that 18 members of the armed forces had contracted venereal disease from prostitutes met at the premises and many other similar complaints were received. Eighth Avenue Ringside Restaurant, Inc. v. Kennedy, 151 N. Y. S. 2d 91 [1956].

¶ 73. The Police Commissioner was not arbitrary where he placed plaintiff's bar and grill under surveillance and posted a "Raided Premises" sign. The Commissioner had withdrawn his surveillance upon the plaintiff's representation that the premises would be operated in an orderly manner but plaintiff continued to permit male characters affecting feminine mannerisms to visit the premises.—Kay's Bar and Grille, Inc. v. Kennedy, 135 (66) N. Y. L. J. (4–5–56) 8, Col. 1 F.

¶ 74. A temporary injunction prohibiting the Police Commissioner from maintaining a "Raided Premises" sign was denied where charges of violation of law springing from activities initiated in the premises had resulted in some convictions.—389 Eighth Ave. Restaurant, Inc. v. Kennedy, 134 (63) N. Y. L. J. (9–29–55) 7, Col. 1 F.

§ 75. Defendants carrying placard and walking back and forth in front of visitors' entrance to the United Nations and distributing leaflets were improperly convicted of disorderly conduct under Penal Law, § 722. Case did not turn on any agreements executed between the United Nations and the United States.—People v. Carcel, 3 N. Y. 2d 327, 165 N. Y. S. 2d 113, 144 N. E. 2d 81 [1957].

¶ 76. The City was not obligated to station police in a vicinity involved in a labor dispute and plaintiff, who was assaulted by pickets could not recover from the City for its failure to maintain a police officer at the scene of the picketing as a protection for the public.—King v. City of New York, 3 Misc. 2d 241, 152 N. Y. S. 2d 110 [1956].

¶ 77. A reasonable exercise by the Police Department of the authority granted to it by former § 435 of the Charter, imposing the duty upon the Police Department of dispersing assemblages which obstruct the free passage of streets, sidewalks, parks and places, and to regulate the movement of traffic, violates no constitutional rights. Accordingly, the police had the right to take reasonable steps to break up mass picketing by members of labor union in front of certain premises, where the sidewalk was blocked and traffic could not move freely as the result of the demonstration. A police officer had the right to order defendant to move on, and if she deliberately refused to move she would have been guilty of disorderly conduct.—People v. Garvey, 6 Misc. 2d 266, 79 N. Y. S. 2d 456 [1948].

¶ 78. Petitioner's application for order directing Police Commissioner to discharge the police guard assigned to protect him presented a triable issue of fact, in view of statements allegedly made by petitioner that his life was in danger and "a lot of guys would be glad to get me".—In re Polizio (Wallander), 118 (54) N. Y. L. J. (9–13–47) 445, Col. 6 T.

¶ 79. Plaintiff's intestate furnished information to the City police, concerning a national known criminal, who had evaded the clutches of the law. He requested police protection after he had received various threats against his life. Within three weeks he was shot and killed by an unknown person or persons. An action for damages was filed against the City based on the theory that the City had failed to furnish adequate police protection. The complaint was dismissed. Held: the complaint stated a cause of action. The public (acting in this instance through the City of New York) owes a common-law duty to use reasonable care for the protection of persons, who have corroborated with it, in the arrest or prosecution of criminals, once it reasonably appears that they are in danger, due to their corroboration. Section 1848 of the Penal Law, while it recognizes a duty on the part of municipal corporations to persons, who are killed or injured, from aiding in the apprehension of criminals, neither expressly or by implication repeals the common-law remedy.—Shuster v. City of New York, 5 N. Y. 2d 75, 180 N. Y. S. 2d 265, 154 N. E. 2d 534 [1958].

¶ 80. Petitioner, who was the business agent of a certain local branch of the International Longshoremen's Association, *held* entitled to an injunction restraining the District Attorney of Kings County from placing any men from his office as guards of petitioner, notwithstanding the District Attorney's claim that he had learned of threats made against peti-

tioner's life, since until an overt act has been committed which requires investigation and prosecution by the District Attorney he is powerless to act. The placing of the guards was not such a power as was incidental to the prosecution of a crime. However, the order of the Police Commissioner of the City of New York detailing a guard for petitioner would not be disturbed, as under former § 450 of the Charter the Police Department has the duty "to preserve the public peace, *prevent crime,*" etc., and petitioner had stated in his application for a pistol permit that his life was in danger from a dangerous syndicate.—In re Anastasio (Monahan), 124 N. Y. S. 2d 328 [1953].

¶ 81. In action by certain members of New York City Police Department for a declaratory judgment nullifying a rule of the Police Commissioner prohibiting members of the police force from joining any labor union, an application for an injunction pendente lite restraining the Commissioner from enforcing the rule by disciplinary action, was denied, since the plaintiffs failed to show that irreparable harm would result to them if the injunction were not granted, and they failed to show a clear and convincing right to prevail upon the ultimate determination. In every instance when the question has arisen in the courts of last resort in other states, the Court has sustained the power of the Police Commissioner to prohibit members of the police force from joining proscribed organizations. Furthermore, the State Constitution, Art. 1, § 17, providing that employees shall have the right to organize and to bargain collectively through representatives of their own choosing, was not intended to apply to public employees.—Butler v. Monaghan, 200 Misc. 327, 106 N. Y. S. 2d 861 [1951].

¶ 82. Rule 33 of the Commissioner of Docks which required the payment at the New York Municipal Airport of a fee each time a taxicab entered an area designated as a passenger pickup point was valid and enforcement could not be enjoined. The rule was not in conflict with this section which gives the Police Commissioner the power to make rules and regulations governing the traffic on public streets.—Weinstein v. McKenzie, 177 Misc. 451, 30 N. Y. S. 2d 733 [1941].

¶ 83. Rules promulgated by the Police Commissioner which prohibited the employment of any person in a cabaret who had not obtained an identification card, required prospective employees to be fingerprinted and provided that no person convicted of a felony or certain other offenses could be employed in a cabaret were valid.—Matter of Friedman (Valentine), 177 Misc. 437, 30 N. Y. S. 2d 891 [1941], aff'd 266 App. Div. 561, 42 N. Y. S. 2d 593.

¶ 84. The defendant was charged with going the wrong way on a one-way street. The Magistrate refused to admit evidence of a diagram and a photograph taken by defendant ½ hour after he was served with a summons. Held: the refusal of the Magistrate to admit such evidence was reversible error.—People v. Hausen, 142 (101) N. Y. L. J. (11–24–59) 12, Col. 6 F.

¶ 85. Where City of New York posted a "raided premises" sign and stationed a police officer within the owner's premises, court would not enjoin the City from continuing such action in view of testimony of numerous complaints made regarding owner's activities in the premises. In absence of convincing proof that the actions of the City were arbitrary the court would not interfere with the police in the performance of their duties.—Anonfo v. City of New York, 144 (19) N. Y. L. J. (7–28–60) 7, Col. 1 F. Same in Barbarn Realty Corp. v. Kennedy, 144 (62) N. Y. L. J. (9–28–60) 13, Col. 1 F and Barbarn Realty Corp. v. Kennedy, 144 (109) N. Y. L. J. (12–8–60) 14, Col. 4 M.

¶ 86. Police Commissioner would not be temporarily restrained from posting a "raided premise" sign and stationing a uniformed policeman on the premises where the telephone switchboard operator had been arrested for bookmaking in the hotel and there were unusual telephone arrangements and connections in one of the rooms of the hotel of which the plaintiff could not be said to have been unaware.—Bryant Hotel Inc. v. Murphy, 145 (125) N. Y. L. J. (6–29–61) 8, Col. 1 M.

¶ 87. Plaintiff had been arrested 10 times for gambling at his restaurant since 1947, convicted three times, and in April, 1961, a patron was arrested for bookmaking and plaintiff was also arrested for permitting his premises to be used for gambling purposes, although both arrests resulted in acquittals. *Held,* the court would not

interfere with the action of Commissioner in stationing a uniformed policeman on the premises but the posting of the sign "raided premises" would be enjoined.—Gentile v. Murphy, 146 (2) N. Y. L. J. (7–5–61) 7 Col. 2 T.

¶ 88. Although the evidence presented in the affidavits indicated that there might be a reasonable basis for posting a "raided premises" sign and stationing a policeman on petitioner's premises, the earliest time for a trial would be September 5 and in the meantime petitioner's business might be destroyed. Under such circumstances the Commissioner will be temporarily enjoined until the trial date.—Paramount Buffet, Inc. v. Murphy, 145 (122) N. Y. L. J. (6–26–61) 8, Col. 7 F.

¶ 89. Where there were 15 arrests for prostitution at plaintiff's hotel between March, 1959 and March, 1961 and two additional arrests were made on March 28, 1961, one for prostitution and the other for offering to perform an indecent act, a motion for injunction pendente lite restraining the Police Commissioner from maintaining a "raided premises" sign and stationing a uniformed policeman on the premises, would be denied.—Harglo Hotel Corp. v. Murphy, 146 (15) N. Y. L. J. (7–24–61) 5, Col. 5 F.

¶ 90. Petitioner's name was continued in the known gamblers file merely because of two arrests in 1946 for bookmaking, with the first arrest resulting in a $25 fine and the second resulting in an acquittal. Pursuant to the rules of the Department the petitioner's activities at home. with neighbors, co-workers and superiors were periodically checked resulting in embarrassment and harassment. The rules were arbitrary and unreasonable in failing to take into account the degree of rehabilitation and restoration to society as a useful citizen, and the continuance of petitioner's name on the list was arbitrary.—Di Melfi v. Kennedy, 145 (73) N. Y. L. J. (4–17–61) 15, Col. 2 F.

¶ 91. Pursuant to § 534 of the Charter, the Commissioner of Parks issued a regulation, which provided that "no person operating, driving or propelling any vehicle shall proceed at a greater and maximum or less than minimum speed indicated by sign; but in no case shall such maximum speed exceed 40 miles per hour". The defendant was convicted for violating Article 6, § 60 of the Traffic Regulations in that he was driving at a rate of 50 miles per hour in a 40-mile zone. The defendant appealed and claimed that he was entitled to reversal since the prosecution had failed to show that there were any signs posted along the parkway specifying the maximum speed limit. Held: the regulation of the Commissioner had the force of law and the defendant was presumed to have known that this law prohibited signs from being erected permitting speed in excess of 40 miles per hour in this location. Therefore, it was immaterial whether signs had been posted along the parkway.—People v. Amabile, 21 Misc. 2d 951, 198 N. Y. S. 2d 560 [1960].

¶ 92. Testimony by officer that he had checked defendant for 7/10ths of a mile with a speedmeter and that the speedmeter had recently been checked was legally insufficient to convict defendant of speeding charge, especially, in view of the fact that, there was no evidence as to the qualifications of the officer to estimate speed.—People v. Mallee, 142 (101) N. Y. L. J. (11–24–59) 12, Col. 16.

¶ 93. The defendant was charged with operating a motor vehicle at an excessive rate of speed, namely, at 48 miles per hour, in a traffic zone having a posted rate of speed of 40 miles per hour, in violation of § 60 of the Traffic Regulations of the City of New York. Speeding at the scene of the alleged infraction was checked by radar, and highway signs to that effect warned the motorists. Held: The registering and recording of the speed of the defendant's vehicle by the radar speedmeter in the case at bar, in view of an expert's explanation of its nature and function, and the way in which it was set up, tested and operated by the police units, constituted legally admissible evidence. Furthermore, the court held that the time had come now to recognize the scientific accuracy of radar speedmeters in speed cases.—People v. Nasella, 3 Misc. 2d 418, 155 S. 2d 463 [1956].

¶ 94. A defendant was guilty of violating subdivision c-1 of § 81 of the Traffic Regulations, even though he was parked in front of his own driveway. The Regulation is intended to protect the right of an owner to have free access to and from his property. However, that did not give the de-

fendant the right to park his own car where such parking was specifically prohibited.—People v. Koenig, 17 Misc. 2d 934, 187 N. Y. S. 2d 379 [1959].

¶ 95. Traffic Regulation 15 prohibiting parking of any vehicle in posted zone applies to push carts. The definition of parking in § 2, subdivision (20) of the Vehicle and Traffic Law limiting definition to motor vehicles does not render the Traffic Regulation invalid, since it was enacted pursuant to the Charter which takes precedence over the general law.—People v. Weinberger, 8 Misc. 2d 953, 165 N. Y. S. 2d 229 [1957].

¶ 96. Where streets were privately owned but the public had the right to use them and the Police Department had for years regulated traffic and parking on these streets, the property owners' association which owned the streets held not entitled to an order prohibiting defendants from parking their automobiles on such streets. Former § 435 of the City Charter authorizes the Police Department to regulate traffic on such streets and furthermore § 1642 of the Vehicle and Traffic Law gives authority to cities to regulate traffic on any highway, which by definition, included a highway privately owned but open to the public.—Fieldston Property Owners Association v. Bianchi, 145 (112) N. Y. L. J. (6–12–61) 18, Col. 1 M.

¶ 97. Permission granted by the City for omnibuses to carry exterior advertising was not illegal in that the buses operated in City parks, on parkways, and on highways built with State and Federal funds.—Matter of LaGuardia, 22 Misc. 2d 340, 198 N. Y. S. 2d 230 [1960]; aff'd 11 A. D. 2d 655, 203 N. Y. S. 2d 1020 [1960].

¶ 98. The parking of a searchlight truck in the street opposite a theatre, with the light directed toward the marquee of the theatre and at the sky, constituted a violation of the regulations prohibiting parking of a vehicle on any street for advertising purposes.—People v. Wendelken, 4 N. Y. 2d 994, 177 N. Y. S. 2d 511, 152 N. E. 2d 533 [1958].

¶ 99. Although the operator of a gasoline station had procured curb-cut permits to allow entrance to its premises, its rights were subordinate to those of the public in the use of the highway. The City was within its authority in establishing bus stops in front of the station, even though this interfered with access thereto.—Cities Service Oil Co. v. City of New York, 5 N. Y. 2d 110, 180 N. Y. S. 2d 769, 154 N. E. 2d 814 [1958].

¶ 100. A temporary injunction was granted against police surveillance of a restaurant which was about to change hands, in order that the owner might bring about changes of conditions objected to.—Vinli Restaurant Corp. v. Kennedy, 135 (85) N. Y. L. J. (5–2–56) 8, Col. 1 T.

¶ 101. The Police Commissioner was not required to provide police protection to a person as a result of vandalism against his car and apartment.—Todd v. Kennedy, 143 (40) N. Y. L. J. (3–1–60) 13 Col. 4F.

¶ 102. Traffic Regulation 51, which provides that the driver of a vehicle shall not turn the vehicle so as to proceed in the opposite direction upon any street in a business district, is unconstitutional, and invalid, because of vagueness. The words "business district" are especially indefinite, since a driver has no way of knowing as to what "business district" is referred to.—People v. Kassover, 20 Misc. 2d 782, 191 N. Y. S. 2d 54 [1959], App. Div. 24 Misc. 2d 1080, 205 N. Y. S. 2d 428 [1960].

¶ 103. The defendant was not guilty of violating § 30 of Article 3 of the Traffic Regulations, where with a green light in his favor, he proceeded into the intersection and made a left-hand turn, in view of tne fact that there were no other vehicles or pedestrians at the intersection in question at the time.—People v. Murray, 19 Misc. 2d 981, 192 N. Y. S. 2d 960 [1959].

¶ 104. Where defendant was convicted of murder in the second degree his application for an order directing the Police Department to give him a transcript of certain police records alleged to be necessary in subsequent litigation was denied as being beyond the authority of the court.—People v. Girardi, 145 (38) N. Y. L. J. (2–27–61) 17, Col. 3 F.

¶ 105. Tenant of a service station was involved in a private controversy with its landlord which concerned the landlord's forceful entry during the pendency of a summary proceeding. Tenant applied for an order directing the Police Commissioner to divulge the name of the person who committed a

crime against the tenant, to arrest the offender and to give petitioner police protection. *Held,* application denied. Petitioner had sufficient information to commence an action against the landlord on information and belief and then to obtain further evidence by pretrial examination. There was no clear showing of a need for the relief requested.—Matter of Tex Bayside Service Station Inc. (Kennedy), 29 Misc. 2d 337, 214 N. Y. S. 2d 560.

¶ 106. The Police Department and the Commissioner of Traffic had the right to regulate traffic and parking on privately owned streets which were used as public highways with the consent of the owners.—Fieldston Property Owners Association, Inc. v. Bianchi, 29 Misc. 2d 326, 215 N. Y. S. 2d 834 [1961].

¶ 107. Where there had been numerous arrests and convictions for prostitution, a hotel corporation could enjoin the Police Department from maintaining a "raided premises" sign but not from maintaining a police officer on the premises.—Hotel Coolidge, Inc. v. Murphy, 146 (49) N. Y. L. J. (9–11–61) 9, Col. 2 F.

¶ 108. The Police Commissioner acted within his discretion in stationing a patrolman in plaintiff's hotel for nine months. The hotel had a record of prostitution offenses and there was no showing that the owner had adopted preventative measures.—Barbarn Realty Corp. v. Kennedy, 28 Misc. 2d 447, 216 N. Y. S. 2d 291 [1960].

¶ 109. Plaintiff was entitled to a permanent injunction restraining the Police Commissioner from maintaining a policeman in plaintiff's restaurant, together with a sign describing the premises as "raided". Plaintiff's police record consisted solely of the arrest of its bartender and two women who were found not guilty after trial.—Crest Room, Inc. v. Murphy, 31 Misc. 2d 909, 221 N. Y. S. 2d 438 [1961].

§ 436. **Powers over certain trades.**—The commissioner shall in his discretion issue, revoke and suspend licenses for public dance halls, cabarets, hacks, taxicabs and taxi drivers, and make such rules and regulations for the supervision and operation of such public dance halls, cabarets, hacks, taxicabs and taxi drivers as are not inconsistent with any other provision of law; shall possess powers of general supervision and inspection over all licensed or unlicensed pawnbrokers, vendors, junkshop keepers, junk boatmen, cartmen, dealers in secondhand merchandise and auctioneers within the city; and in connection with the performance of any police duties he shall have power to examine such persons, their clerks and employees and their books, business premises and any articles of merchandise in their possession. A refusal or neglect to comply in any respect with the provisions of this section on the part of any pawnbroker, vendor, junkshop keeper, junk boatman, cartman, dealer in secondhand merchandise or auctioneer, or any clerk or employee of any thereof, shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. (*Derived from former* § 436 *as amended by L. L.* 1947, *No.* 39.)

## CASE NOTES

¶ 1. A license to drive a taxicab could not be revoked except by due process of law since the courts have implied the requirement of notice and hearing, where the statute was silent, in all cases where the exercise of a statutory power adversely affected property rights—Hecht v. Monaghan, 307 N. Y. 461, 121 N. E. 2d 421 [1954].

¶ 2. The Commissioner was within his power where he revoked a hack license for the refusal of the petitioner taxi driver to accept a passenger. While it might be desirable to determine the facts by means of testimony under oath, the statutes do

not require either a hearing or testimony under oath.—Matter of Romaner, 270 App. Div. 948, 62 N. Y. S. 2d 497 [1946], appeal dismissed 296 N. Y. 637, 69 N. E. 2d 485.

¶ 3. Since, under § 436–1.0 of the Administrative Code, a cabaret license cannot be revoked or suspended without a hearing upon notice, a proceeding to review and annul a determination of the Police Commissioner which suspended a cabaret license should be transferred to the Appellate Division under the provisions of Civil Practice Act § 1296.—Matter of Hood Restaurant, 186 Misc. 254, 58 N. Y. S. 2d 896 [1945].

¶ 4. Rules promulgated by the Police Commissioner which prohibited the employment of any person in a cabaret who did not possess an identification card and which required all employees of cabarets to be fingerprinted and prohibited the employment of any person convicted of a felony or certain offenses were valid.—Matter of Friedman (Valentine), 177 Misc. 437, 30 N. Y. S. 2d 891 [1941], aff'd 266 App. Div. 561, 42 N. Y. S. 2d 593.

¶ 5. The Police Commissioner of the City of New York has no power to make rules and regulations with reference to hotel runners in the absence of specific statutory delegation of such authority. Thus, regulations which prohibited a runner from wearing a uniform and attempting to divert any person from any indicated destination or place of stay were invalid and their enforcement was enjoined.—Levy v. Valentine, 173 Misc. 306, 17 N. Y. S. 2d 768 [1940].

¶ 6. Revocation of petitioner's license to operate a tow car and refusal to approve his renewal application because of alleged failure to co-operate with the District Attorney by refusing to sign a waiver of immunity before a grand jury, held arbitrary. Petitioner did appear and answered all questions. He was not required to waive his right to immunity.—D'Alesandro v. City of New York, 146 (7) N. Y. L. J. (7–12–61) 8, Col. 6 F.

§ 437. **Detail to attend court.**—The commissioner is empowered to cause some intelligent and experienced person connected with the department to attend any courts in the city in cases where there is need of assistance, who shall, to such extent as shall be permitted by the rules of the court, aid in proceedings pending in such courts. (*Derived from former* § 437.)

§ 438. **Maintenance and operation of telegraph and telephone lines, etc.**—The commissioner shall have power to erect, operate, supply and maintain, subject to the general laws of the state, all such lines of telegraph and telephones and other means of communication as for the purposes and business of the police the commissioner shall deem necessary. The commissioner may provide all instruments, fixtures, property and materials for the purpose above mentioned and control the same. (*Derived from former* § 438.)

**CASE NOTES**

¶ 1. That the City Police Department had refused to approve the restoration of telephone service to a petitioner whose telephone had been removed by the police when they raided his home on suspicion that he was using his home telephone for purpose of wagering on horse races, did not warrant the telephone company's refusal to restore service, as the Public Service Commission and not the Police Department has jurisdiction with respect to telegraph and telephone corporations. Accordingly, the petition for an order against the Police Commissioner directing restoration of telephone service was dismissed, as the Commissioner had no authority over the matter of furnishing telephone service to the public, and consequently there was no duty required by law of him which could be enforced by a mandamus order.—Shillitani v. Valentine, 184 Misc. 77, 53 N. Y. S. 2d 127 [1945], modified 269 App. Div. 568, 56 N. Y. S. 2d 210, aff'd 296 N. Y. 161.

§ 439. **Political activities forbidden.**—Members of the police force shall not contribute any moneys, directly or indirectly, to any political fund, or any fund intended to effect an increase in their emoluments, or join or be or become a member of any political organization, but nothing herein shall be construed to deny to such members any right afforded by section eleven hundred twenty-four. (*Derived from former* § 439.)

# CHAPTER 19

# FIRE DEPARTMENT

§ 481. **Department; commissioner.**—There shall be a fire department the head of which shall be the commissioner. (*Derived from former* § 481.)

§ 482. **Chief may be designated as commissioner.**—The mayor may designate the chief of the fire department to serve as commissioner, and in such case he shall exercise the powers and duties of commissioner and shall continue to exercise his powers and duties as chief and shall receive the salary of the commissioner. While serving as commissioner the chief shall forfeit none of his pension rights and privileges as chief or his civil service status, and such service and the time during which he so serves shall be part of his time and service as chief. Such designation as commissioner shall be in writing filed in the office of the department and in the office of the mayor. (*Derived from former* § 482.)

§ 483. **Deputies.**—The commissioner may appoint three deputies, one of whom may perform all the duties and exercise all the powers of the commissioner except appointment or promotion, detail or dismissal of any member of the uniformed force when thereunto authorized by instrument in writing to be filed in the office of the mayor and comptroller. (*Derived from former* § 483 *as amended by L. L.* 1947, *No.* 8.)

§ 484. **Designation of officers to act.**—The commissioner may designate a clerk or chief of a bureau, who shall have power, when thereunto authorized by the commissioner by instrument in writing to be filed in the offices of the mayor and comptroller, to sign warrants and perform such other duties incidental thereto as may be required during the absence of the commissioner, and for a period of time to be designated in the instrument. (*Derived from former* § 484.)

§ 485. **Seal.**—The commissioner may adopt a seal for the department and direct its use. (*Derived from former* § 485.)

§ 486. **Treasurer.**—The commissioner shall be the treasurer of the department, and shall file in the office of the comptroller a bond for the faithful performance of his duties as such treasurer. (*Derived from former* § 486.)

§ 487. **Powers.**—a. The commissioner shall have sole and exclusive power and perform all duties for the government, discipline, management, maintenance and direction of the fire department and the premises and property in the custody thereof.

b. The department shall have sole and exclusive power and authority to extinguish fires at any place within the jurisdiction of the city and shall have power and authority to extinguish fires upon any vessel in the port of New York or upon any dock, wharf, pier, warehouse or other structure bordering upon or adjacent to such port.

c. The commissioner shall have power to cause any vessel moored to or anchored near any dock or pier in the city of be removed to and secured at such place in the harbor as shall be designated by the commissioner, provided that such vessel shall be on fire or in danger of catching fire or may be, by reason of its condition or the nature of its cargo, a fire menace to shipping, to property or to the water front of the city.

d. The commissioner shall have sole and exclusive jurisdiction over the approval of the installation of all containers for combustibles, chemicals, explosives, inflammables or other dangerous substances, articles, compounds or mixtures, except storage tanks and auxiliary storage tanks for oil-burning equipment and except where the location of the container may affect the structural condition of the building, in which case the commissioner shall not give his approval without the approval of the commissioner of buildings. The commissioner shall certify his approval of all installations of containers in buildings except storage tanks and auxiliary storage tanks for oil-burning equipment to the commissioner of buildings.

e. The commissioner shall have the sole and exclusive power from time to time to designate and fix the location of all fire alarm telegraph, signal and alarm stations in the city, and shall have access to and control of the same for the purpose of the department. (*Derived from former* § 487 *as amended by L. L.* 1959, *No.* 24.)

## CASE NOTES

¶ 1. Under former Charter § 487, subd. d, the Fire Commissioner had full and exclusive jurisdiction over the approval of the installation of containers for combustibles, such as tanks, gasoline lines and pumps in connection with construction of a gasoline service station, and hence installation of gasoline tanks could not properly have been authorized by a new building permit granted by the Superintendent of Buildings.—Tralow Realty Corp. v. Murdock, 261 App. Div. 173, 24 N. Y. S. 2d 561 [1941].

¶ 2. Fire prevention permit, issued a month after a resolution rezoning the district into a residence district had been in legal effect, purporting to permit installation of combustible fuel tanks for proposed gasoline service station in a residence district, was void, and could not validate the installation of gasoline tanks made 48 hours before effective date of the zoning resolution.—Id.

¶ 3. A regulation of the Fire Department which prohibited members from permitting the use of their names and photographs in connection with any article or advertisement in any magazine or newspaper without the written approval of the Chief of the Department and a directive which instructed the plaintiff as President of the Firemen's Association to make no statements concerning members of the Association were constitutional. However, the directive was arbitrary, unreasonable and in violation of Civil Rights Law § 15.—Kane v. Walsh, 295 N. Y. 198, 66 N. E. 2d 53 [1946].

§ 488. **Enforcement of fire laws.**—The commissioner shall have the power and it shall be his duty to enforce all laws and the rules and regulations of the board of standards and appeals in respect to:

1. The manufacture, storage, sale, transportation or use of combustibles, chemicals, explosives, inflammable or other dangerous substances, articles, compounds or mixtures.

2. The investigation of the cause, circumstances and origin of fires and the suppression of arson.

3. The prevention of fires or danger to life or property therefrom, excluding provisions relating to structural conditions and excluding provisions relating to the installation of oil-burning equipment and all appurtenances thereof.

The powers conferred by this section shall not extend to the enforcement of any provision of the health code or the regulations of the board of health, or interfere in any manner with the powers and duties of the department of health or of the commissioner of health or of the department of buildings. (*Derived from former* § 488 *as amended by L. L.* 1959, *No.* 24.)

**CASE NOTES**

¶ 1. Under former § 488 and § 491, the Fire Commissioner has jurisdiction, when an existing standpipe system no longer functions because certain parts or appurtenances have been broken or are missing, to order the repair or restoration of such parts or appurtenances provided no reconstruction of the building itself be required.—People v. Dry Dock Corlears Properties, Inc., 288 N. Y. 305, 43 N. E. 2d 55 [1942].

§ 489. **Regulation of combustibles, etc.**—The commissioner may make and enforce rules and regulations for the manufacture, storage, sale, transportation or use of combustibles, chemicals, explosives, inflammables or other dangerous substances, articles, compounds or mixtures. (*Derived from former* § 489.)

§ 490. **Powers of inspection of the commissioner.**—a. The commissioner is empowered to:

(1) Cause any building, structure, tunnel, enclosure, vessel, place or premises to be inspected for fire hazards by any officer or employee of the department designated for such purpose.

(2) Inspect and test any automatic or other fire alarm system or fire extinguishing equipment.

b. Whenever in any investigation or inspection carried on by the department a condition is found which in the opinion of the commissioner should be referred to any other department, he shall promptly make such reference in writing. (*Derived from former* § 490.)

**CASE NOTES**

¶ 1. The Fire Commissioner was empowered to order the installation of a sprinkling system in a building used for the storage, manufacture and processing of paper though a certificate of occupancy had previously been issued.—In re Empire Distributors, 135 N. Y. S. 2d 836 [1954].

§ 491. **Orders of the commissioner; enforcement.**—a. The commissioner shall have the power and it shall be his duty:

(1) To order in writing the remedying of any condition in violation of any rule or regulation or any provision of law which he is empowered to enforce.

(2) To cause any order of the commissioner which is not complied with within the time fixed in the order for such compliance to be enforced and to take proceedings for the enforcement thereof as may be provided by law.

b. Every order, requirement, decision or determination of the commissioner shall be in writing. The commissioner shall not vary from or take any proceeding or issue any order contrary to the labor law, the multiple dwelling law, the building code or any other provision of law or any rule or decision of the board of standards and appeals. (*Derived from former* § 491.)

**CASE NOTES**

¶ 1. The Fire Commissioner was empowered to order the installation of a sprinkling system in a building used for the storage, manufacture and processing of paper though a certificate of occupancy had previously been issued.—In re Empire Distributors, 135 N. Y. S. 2d 836 [1954].

¶ 2. The Fire Commissioner was empowered to order the repair or restoration of an existing standpipe system where certain parts were broken or missing and where no reconstruction of the building itself was required.—People v. Dry Dock Corlears Properties, 288 N. Y. 305, 43 N. E. 2d 55.

§ 492. **Right of entry of officers of department.**—The commissioner and his deputies and such other officers or employees of the department as are authorized by the commissioner may without fee or hindrance enter and inspect all vessels, premises, grounds, structures, buildings and every part thereof and all underground passages of every sort in the city or in the port of New York for compliance with the provisions of law or rules and regulations enforced by the department. Any refusal to permit such entry or inspection shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. (*Derived from former* § 492.)

§ 493. **Member of department; no other office.**—Any commissioner or any member of the uniformed force of the department who shall accept any additional place of public trust or civil emolument, or who shall during his term of office be nominated for any office elective by the people and shall not, within ten days succeeding the same, decline the said nomination, shall be deemed thereby to have resigned his commission and to have vacated his office. (*Derived from former* § 493.)

§ 494. **Political activities forbidden.**—Members of the uniformed force shall not contribute any moneys, directly or indirectly, to any political fund, or any fund intended to effect an increase in their emoluments, or join or be or become a member of any poli-

tical organization, but nothing herein shall be construed to deny to such members any right afforded by section eleven hundred twenty-four. (*Derived from former* § 494.)

## CASE NOTES

¶ 1. Former § 494 of the New York City Charter, prohibiting certain political activities by members of the uniformed force of the Fire Department, did not disqualify member from being a candidate for the executive committee of the county committee of the Democratic party, although it might subject him to departmental disciplinary action.—In re Reilly (Heffernan), 73 N. Y. S. 2d 312 [1947], aff'd 72 N. Y. S. 2d 288.

# CHAPTER 20

# EDUCATION

§ 521. **Property under board of education; care and control; suits in regard thereto.**—a. The title to all property, real and personal, heretofore or hereafter acquired for school or educational purposes, and also the title to all property, real and personal, purchased for school or educational purposes with any school moneys, whether derived from the issue of bonds or raised by taxation, shall be vested in the city, but under the care and control of the board of education for the purposes of public education, recreation and other public uses.

b. Suits in relation to such property shall be brought in the name of the board of education.

c. The city shall have power to take and hold any property, real or personal, devised or bequeathed or transferred to it for the purposes of education in said city; but such property shall be under the care and control of the board of education for the purposes of public education, recreation and other public uses in the city. (*Derived from former* § 521.)

## CASE NOTES

¶ 1. City of New York was not a proper party defendant to action to recover for injuries sustained by infant in the public school yard, as all property acquired by the City for school purposes is under control of the Board of Education, a separate entity.—In re Rubenstein (Bd. of Education), 127 (92) N. Y. L. J. (5–12–52) 1900, Col. 1 F.

¶ 1.1. To same effect, Winkler v. City of New York, 136 (66) N. Y. L. J. (10–3–56) 11, Col. 8 F.

§ 522. **Reports of board.**—The board of education shall on or before the thirtieth day of November in each year make and transmit to the mayor a report in writing, for the year ending on the thirty-first day of July next preceding, stating the whole number of schools under its jurisdiction during the said year; the number of teachers; the total number of pupils on register, and the average attendance at each school; the number of high schools and training schools for teachers, with the number of teachers and the attendance of pupils at each; the corporate schools or societies from which reports have been made to the board of education, the length of time such schools have been kept open, and the number of teachers and of pupils taught in each such school and the total amount of money expended for the purposes of public education in the city during the preceding fiscal year. The board of education shall also make in said reports such suggestions and recommendations relative to the public

schools of the city as it may deem proper. (*Derived from former* § 522.)

§ 523. **Removal by mayor after hearing.**—Any member of the board of education or of a local school board may be removed by the mayor on proof of official misconduct in office or of negligence in official duties or of conduct in any manner connected with his official duties, or otherwise, which tends to discredit his office or the school system, or for mental or physical inability to perform his duties; but before removal he shall receive notice in writing of the charges and a copy thereof, and shall be entitled to a hearing on notice before the mayor and to the assistance of counsel at said hearing. (*Derived from former* § 523.)

**CASE NOTES**

¶ 1. The Mayor in the discharge of his legal responsibilities imposed by this section has the power to direct the Commissioner of Investigation to make an investigation into the affairs, functions, accounts, methods, personnel and efficiency of the Board of Education.—In re Karelsen (Yavner), 59 N. Y. S. 2d 683 [1945].

¶ 2. Since members of the Board of Education of N. Y. C. receive no compensation or tenure, the right to be a member of the Board is not a property right. The Mayor of the City had the power to nominate and appoint new members to replace those whose term of office were terminated by statute.—Lanza v. Wagner, 30 Misc. 2d 212, 220 N. Y. S. 2d 477 [1961]; aff'd 15 A. D. 2d 552, 222 N. Y. S. 2d 1019 [1961].

§ 524. **School officers not to be interested in contracts; removal.**—The board of education shall have power to remove from office any school officer who shall have been directly or indirectly interested in the furnishing of any supplies or materials, or in the doing of any work or labor, or in the sale or leasing of any real estate, or in any proposal, agreement or contract for any of these purposes, in any case in which the price or consideration is to be paid, in whole or in part, directly or indirectly, out of any school moneys, or who shall have received from any source whatever any commission or compensation in connection with any of the matters aforesaid; and any school officer who shall violate the preceding provisions of this section shall be deemed guilty of a misdemeanor, and shall also forfeit his office and be ineligible to any office or employment under the board of education or under the city or any agency. The provisions of this section shall not apply to authors of school books used in any of the public schools because of any interest they may have as authors in such books. (*Derived from former* § 524.)

§ 525. **Contributions to political funds, etc., prohibited.**—Neither the city superintendent of schools, nor any associate or assistant superintendent of schools, nor any member of the board of examiners, nor any member of the supervising or teaching staff of the department of education of the city shall be permitted to contribute any moneys, directly or indirectly, to any fund intended to affect legislation increasing their emoluments, but nothing herein

shall be construed to deny any right afforded by section eleven hundred twenty-four. (*Derived from former* § 525.)

§ 526. **Powers of investigation.**—The board of education may investigate, of its own motion or otherwise, either in the board or by a committee of its own body, any subject of which it has cognizance or over which it has legal control, including the conduct of any of its members or employees or those of any local school board; and for the purpose of such investigation, such board or its president, or committee or its chairman, shall have and may exercise all the powers which a board of education has or may exercise in the case of a trial under the education law or the civil practice act. Any action or determination of a committee appointed under the provisions of this section shall be subject to approval or reversal by the board, which may also modify the determination of the committee in such way as the board shall deem proper and just, and the judgment of the board thereon shall be final. (*Derived from former* § 526.)

§ 527. **Changes in state law.**—This chapter shall not prevent the city from exercising any power now or hereafter conferred by law.

# CHAPTER 21

# DEPARTMENT OF PARKS

§ 531. **Department; commissioner.**—There shall be a department of parks the head of which shall be the commissioner of parks. (*Derived from former* § 531.)

## CASE NOTES

¶ 1. Commissioner of Parks and Commissioner of Public Works did not vacate their respective offices when they accepted appointment to positions as associate members of the City Planning Commission, inasmuch as the positions were not incompatible and were unsalaried. Former § 881 of the Charter, requiring the head of a department to devote his whole time to his duties, must be read in conjunction with this section and § 895 of the Charter, which expressly authorizes the acceptance of the other office.—Childs v. Moses, 265 App. Div. 353, 38 N. Y. S. 2d 704 [1942], aff'g 178 Misc. 828, 36 N. Y. S. 2d 574, aff'd without opinion, 290 N. Y. 828, 50 N. E. 2d 235.

§ 532. **Authority, duties and powers of the commissioner.**—The Commissioner shall have the power and it shall be his duty:

1. To have charge of the management and be responsible for the care of all parks, parkways, squares and public places, and of the sidewalks immediately adjoining the same, except as otherwise provided by law, of all playgrounds, playground fixtures and other recreation properties, except those within the jurisdiction of the department of education, and of such other streets or avenues as are by law placed under his jurisdiction; but such jurisdiction shall not extend to or include the buildings which are now or hereafter may be erected in parks, squares or public places for governmental purposes other than those of the department of parks.

2. To prepare plans for the establishment of a uniform park and parkway system for the city with due regard to proper connections with the systems of state and county parks and parkways in the counties adjacent to the city, and to execute the same when authorized in accordance with the provisions of this charter.

3. To maintain the beauty and utility of all parks, squares, public places and playgrounds and other recreational properties, except those within the jurisdiction of the department of education, and to institute and execute all measures for the improvement thereof for ornamental purposes and for the beneficial uses of the people of the city.

4. To plant and maintain trees and to construct, erect and establish seats, drinking fountains, statues and works of art in any place within his jurisdiction, and to determine when and where lamps or lighting appliances shall be placed and lighted therein.

5. Except as otherwise provided by law, to authorize and regulate the use of and the projections on and determine the line or curb and the surface construction of all streets and avenues lying within any park, square or public place or within a distance of three hundred fifty feet from the outer boundaries thereof.

6. To maintain buildings and institutions now or hereafter erected or established in any park, square, public place or playground under his jurisdiction and to carry out and perform existing contracts with corporations or institutions for the construction and maintenance of such buildings and institutions.

7. To provide the necessary instruments, furniture and equipment for the several buildings and institutions within its jurisdiction and to develop and improve the same subject to the provisions of law and existing contracts.

8. To apply such sums as may be appropriated for that purpose for the keeping, preservation and exhibition of the collections placed or contained in buildings or institutions now situated or hereafter erected in the parks, squares or public places under his jurisdiction.

9. To have the management, direction and control of all real or personal property granted, devised, bequeathed or conveyed to the city for the extension, improvement or ornamentation of the parks, squares or public places in the city or for the establishment or maintenance, within the limits of any such park, square or public place, of museums, zoological, botanical or other gardens, collections of natural history, observatories, or works of art, or playgrounds or other recreational properties, and upon such trusts and conditions as may be prescribed by the grantors or donors thereof and accepted by the commissioner.

10. To have in immediate charge the control and disposition of such members of the police force of the city as may be assigned for duty in the parks, parkways, squares or public places subject to his jurisdiction. (*Derived from former* § 532.)

## CASE NOTES

¶ 1. Where the steps taken by the Board of Estimate, the City Planning Commission and the Commissioner of Parks in authorizing and acquiring a certain area for a public playground were all in compliance with the pertinent Charter provisions, plaintiffs, who allegedly had acquired certain real estate adjoining the proposed playground in reliance upon the acquisition being for a public park and not a playground, and who had been accorded every opportunity to be heard on the merits of the proposed park and playground at the public hearing conducted by the City Planning Commission, would not be permitted to attack the determinations of the various public bodies in collateral fashion by an action to enjoin the construction of the playground (217 N. Y. 45). Dedication of a substantial portion of the proposed park to playground and recreational facilities did not involve an unauthorized extension of the power to establish parks (229 N. Y. 248).—Steiger v. Moses, 107 (11) N. Y. L. J. (1–14–42) 202, Col. 5 F.

¶ 2. Since the action taken by the Park Commissioner was pursuant to specific authority conferred upon him by the Board of Estimate, which had directed acquisition of the land and

its development for park and playground purposes, the Commissioner could not be charged with gross abuse of the discretion vested in him.—Id.

¶ 3. Arrangement effected between the City of New York and the New York Zoological Society for closing of the Aquarium in Battery Park during construction work in connection with the proposed Brooklyn-Battery Tunnel constituted merely a temporary plan simply suspending, pending the construction work, the contract between the City and the Society covering the exhibition and maintenance of marine exhibits, and did not constitute an abrogation of the contract, which the Commissioner was without authority to do as a matter of law (247 App. Div. 343; 279 N. Y. 288).—Wetter v. Moses, 86 N. Y. S. 2d 110 [1941], aff'd 265 App. Div. 993, 39 N. Y. S. 2d 992.

¶ 4. Decision of the Commissioner of Parks to close the entire area on Battery Park pending construction of the Brooklyn-Battery Tunnel, *held* not an abuse of discretion, in view of fact that contracts for heavy construction work, totaling over $20,000,000, were to be performed, about 1,000 men would be engaged at the work at one time, and heavy machinery would be used in the area (185 N. Y. 92; 206 N. Y. 110).—Id.

¶ 5. Where, after a large number of trees and shrubs had been transported to the location of the work by the plaintiff, who had a contract with City for planting of parkway, it was discovered that the site would not be available to the plaintiff until long after the ordinary spring planting season, and the Park Department engineer thereupon directed plaintiff to build a nursery so that the plants might be preserved until the fall planting season, plaintiff *held* entitled to recover the cost of construction and maintenance of the nursery on ground it was confronted with an emergency, that it was obligated to obey the direction of the Department of Parks engineer, and that he had the authority to give the order and the Department of Parks had the authority to direct reimbursement to plaintiff for the resulting expense.—Madden & Lane, Inc., v. City of N. Y., 111 (20) N. Y. L. J. (1-25-44) 423, Col. 2 F.

¶ 6. Section 21 of Article III of the Rules and Regulations of the Department of Parks, which prohibited meetings, exhibitions, parades, etc. in any park except by permit is constitutional. The regulation is non-discriminatory and has for its sole objective, the safety, comfort and convenience of the people of the City and their appropriate uses of its public parks. Proof showed that a permit had never been refused when applied for on the mall in question unless the time and place had been pre-empted by someone else. Accordingly, the defendant, who without a permit, had erected a stand on the mall and had begun a political talk was properly convicted of a violation of such regulation.—People v. Hass, 299 N. Y. 190, 86 N. E. 2d 169 [1949].

¶ 7. A regulation of the Commissioner of Parks prohibiting meetings or exhibition of placards in public parks without a permit was valid where the sole standard of official action was the promotion of proper and beneficial uses of the parks. Thus, a conviction for exhibiting, without a permit, placards criticizing the visiting foreign British Premier was affirmed.—People v. Nahman, 298 N. Y. 95, 81 N. E. 2d 36 [1948].

¶ 8. A regulation of the Department of Parks granting an exclusive contract for towing service on the Henry Hudson Parkway and excluding therefrom all other tow trucks was reasonable and valid. The regulation was not in violation of Vehicle and Traffic Law § 54 nor of the constitutional guarantee of equal protection of the laws.—People v. LaFrantz, 188 Misc. 989, 69 N. Y. S. 2d 614 [1947], appeal dismissed 302 N. Y. 699, 98 N. E. 2d 490.

¶ 9. Neither this section nor § 534 gives the Commissioner of Parks any control over private property. Thus, an information charging defendants with unlawfully crying their wares through the medium of a loudspeaker in the vicinity of a boardwalk at Coney Island and in violation of a Park Regulation was dismissed where the loudspeaker was located on private property more than 50 feet from the boardwalk.—Matter of Caponigri, 169 Misc. 9, 6 N. Y. S. 2d 577 [1938]

¶ 10. A proposed appropriation by the City of half an acre of Central Park to be used as a parking lot in connection with The Tavern on the Green was illegal.—Freidberg v. City of New York, —— Misc. 2d ——, 151

N. Y. S. 2d 258 [1956], aff'd 2 A. D. 2d 664, 153 N. Y. S. 2d 541.

§ 11. The Park Commissioner is without authority to enter into a lease (as distinguished from issuing a license) to permit the production of musical attractions in Central Park.—Terrell v. Moses, 4 A. D. 2d 171, 163 N. Y. S. 2d 770 [1957].

¶ 12. Where the Commissioner of Parks issued a license for the presentation of theatrical productions in Central Park for four summer seasons, subject to the proviso that he might, in his sole judgment, terminate the license if he deemed the premises to be required for a paramount park or other purpose, his revocation of the license will not be disturbed in the absence of any proof that his action was arbitrary.—Matter of Theatre Festival, Inc. v. Moses, 16 Misc. 2d 258, 181 N. Y. S. 2d 364 [1959].

¶ 13. The Commissioner was arbitrary and capricious in refusing to issue a permit for the presentation of dramatic works in Central Park unless the permitee agreed to charge admission fees in such an amount that 10 percent thereof would take care of the cost of various facilities incidental to such presentations. If petitioner, a nonprofit organization, chose to finance the matter in some other way, it should not be compelled to charge admission fees.—Matter of Shakespeare Workshop v. Moses, 8 A. D. 2d 343, 187 N. Y. S. 2d 683 [1959].

¶ 14. The court held a complaint sufficient in an action to restrain the construction of a restaurant in Central Park which set forth facts respecting circumstances surrounding the proposal, the character of the construction, the effect upon numerous nearby restaurants, the effect on public use of the park, absence of any need for such structure and concluded that such purpose was not a valid park use.—Fifth Avenue Corp. v. City of New York, 146 (13) N. Y. L. J. (7–20–61) 4, Col. 6 T.

¶ 15. Where it appeared that Washington Square Park was comparatively small, 75 per cent landscaped, that residents in the neighborhood used the park for sitting, resting, relaxing and meditating, and that the Park Commissioner had offered use of another park, the application for a permit to use the park for three successive Sundays from 2 to 6 p.m. for a "social folksing" was properly denied since it appeared that the approximately 500 people who attended these affairs would interfere with the use of the park by the residents.—Matter of Young (Morris), 145 (87) N. Y. L. J. (5–5–61) 15, Col. 4 T.

¶ 16. Complaint seeking to restrain the City from constructing a restaurant in Central Park near Fifth Avenue and 59th Street alleging that valuable park property would be destroyed to the detriment of the public use, held, sufficient as a pleading to withstand motion to dismiss. There was a right to have an explanation and justification of the proposal and the complaint should be answered to establish the real issues between the parties.—795 Fifth Avenue Corp. v. City of New York, 144 (63) N. Y. L. J. (9–29–60) 13, Col. 8 M.

§ 533. **Offices of the department.**—The department shall maintain its main office in one borough and a branch office in each other borough. (*Derived from former* § 533.)

§ 534. **Rules and regulations.**—a. The commissioner shall have power to establish and enforce rules and regulations for the government and protection of public parks and of all property under the charge or control of the commissioner, which rules and regulations so far as practicable shall be uniform in all boroughs and shall have the force and effect of law.

b. Any violation of the rules or regulations of the commissioner shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or by both. (*Derived from former* § 534.)

## CASE NOTES

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¶ 1. Regulation of Park Department declaring guilty of a misdemeanor any person acting as crier or advertiser through the media of voice, public address system or other mechanical device on beaches or boardwalks or in their vicinity, *held* to include any person "who causes, procures, aids or abets in the matter," and hence included manager of an amusement who had directed his employees to operate a loud speaker.—People v. Caponigri, 169 Misc. 9, 6 N. Y. S. 2d 577 [1938].

¶ 2. Charter § 534, authorizing Commissioner of Parks to establish and enforce rules and regulations for the government and protection of public parks, *held* not to authorize the promulgation of a regulation prohibiting advertising through media of voice or public address system on beaches or boardwalks "or in the vicinity of same," since § 534 did not give Commissioner power to make rules and regulations affecting private property, such as would result from an extension of jurisdiction into "the vicinity of same". Hence persons who were advertising an amusement at Coney Island by shouting into a loud speaker situated on private property some 50 feet off the boardwalk might not be punished for a violation of such regulation notwithstanding their voices carried across the boardwalk. However such persons might be proceeded against for a violation of the Anti-noise Ordinance.—Id.

¶ 3. Such regulation was also invalid because of the indefiniteness of "in the vicinity of same", and because it failed to state some comprehensible guide as to how the defendant might so use his voice or loud speaker as to avoid a penalty, since certainly intent was not to prohibit the use of voice entirely to advertise wares. —Id.

¶ 4. Regulation of Department of Parks prohibiting exhibition of "any sign, notice, declaration or appeal of any kind" in any park without a permit, *held* intended primarily to prevent exhibition of commercial signs and not to prevent peaceful picketing of private businesses in course of a labor dispute, such as was involved in the present case where defendant union members were picketing a private business located on the Coney Island Boardwalk, a part of the City's parks. Peaceful picketing is a fundamental right, the exercise of which should not be made dependent upon the permission of any individual or board, and consequently provision of the regulation relative to granting of a permit would not validate the regulation. Also, it was not the intent of the regulation to grant to private businesses operating on City property an immunity from labor disputes which other private businesses do not possess.—People v. Ribinovitch, 171 Misc. 569, 13 N. Y. S. 2d 135 [1939].

¶ 5. Regulation of City Department of Parks prohibiting in any park or park street, except by permit, the erecting of any platform, holding of a meeting, the making of a speech, the exhibiting of any signs, placards or appeals of any kind, exhibiting dramatic performances, juggling, rope-walking, or other acrobatics, etc., *held* not to violate the constitutional amendment assuring the right of free press, free speech and free assembly.—People (Redden) v. Nahman, 298 N. Y. 95, 181 N. E. 2d 36

[1948], aff'g 188 Misc. 1019, 70 N. Y. S. 2d 29, and 187 Misc. 821, 64 N. Y. S. 2d 644.

¶ 6. Regulation of Department of Parks prohibiting persons from exhibiting placards or appeals of any kind in parks or upon a park street except by permit, was violated by persons who, while Winston Churchill was entering the City Hall to receive official greetings of the City, exhibited near the steps of the City Hall in the park placards bearing inscriptions such as "No American shall die for Churchill's Empire".—Id.

¶ 7. Magistrate's Court for Eighth Brooklyn District *held* to possess jurisdiction over offense committed within a "bathing area" as defined by the Rules and Regulations of the Commissioner of Parks of City of New York, notwithstanding the offense was committed in a boat in the Atlantic Ocean and that the boundary of the Borough of Brooklyn was described in Administrative Code § 2–1.0 as running "to the Atlantic Ocean", inasmuch as it appeared that the City of New York by condemnation had acquired title to land under the Atlantic Ocean to a point 1,250 feet from the beach and that the alleged violation took place on waters over such land owned by the City.—People v. Reilly, 14 N. Y. S. 2d 589 [1939].

¶ 8. Rule of Park Commissioner prohibiting within park areas the use of public address systems or loudspeakers, advertising, committing nuisances and the navigation of boats and vessels, *held* reasonable, particularly as respects the crowded bathing beaches at Coney Island.—People v. Reilly, 14 N. Y. S. 2d 589 [1939].

¶ 9. Defendant, who had been driving his tow car upon the Henry Hudson Parkway in response to a call for towing service, *held* not guilty of a violation of a regulation of the Department of Parks forbidding commercial vehicles the use of the Henry Hudson Parkway, in view of the exception in the regulations providing that in case of breakdown a disabled vehicle might be towed to the nearest exit. Such exception would not be construed to apply only to towing service rendered by the company to which the Department of Parks had granted a towing service contract.—People v. Mann, 290 N. Y. 89, 48 N. E. 2d 274 [1943].

¶ 10. Provisions in traffic regulations established by the Park Commissioner authorizing a disabled vehicle to be towed to the nearest exit in case of breakdown, included by necessary implication permission for operation of a towing truck to and from the nearest exit. A subdivision of the regulations prohibiting the operation in any park of a vehicle containing any object projecting or hanging outside or on top of the vehicle, did not negative such implication.—Id.

¶ 11. Regulation of Department of Parks granting an exclusive contract for towing service on the Henry Hudson Parkway and excluding therefrom all other tow trucks, *held* reasonable and valid, and not in violation of Vehicle and Traffic Law, § 54, or the constitutional guarantee of equal protection of the laws (Charter §§ 532, 534).—People v. LaFrantz, 188 Misc. 989, 69 N. Y. S. 2d 614 [1947].

¶ 12. Regulation of Department of Parks granting an exclusive contract for towing service on the Henry Hudson Parkway and excluding therefrom all other tow trucks, did not conflict with Administrative Code § 436–7.0, which regulates licensed tow cars and makes it unlawful for any owner or driver of a tow truck to refuse to render towing service to the owner or driver of a disabled motor vehicle.—Id.

¶ 13. Action by owners and operators of fleet of taxicabs for declaratory judgment declaring unconstitutional § 53 of the Regulations of the Department of Parks of the City of New York, which prohibits operation on certain parkways of tow trucks except with a permit from the Commissioner of Parks, was dismissed, since there was at present no actual controversy inasmuch as no criminal proceedings were alleged to exist nor was there alleged to be any interference with the conduct of plaintiffs' normal business. Furthermore, plaintiffs had an adequate remedy at law since, if they violated the regulation by using their own tow truck to remove a disabled taxicab, they would be subject to prosecution and then could test the constitutionality of the section in the enforcement proceeding.—Tobias v. Moses, 73 N. Y. S. 2d 925 [1947].

¶ 14. Complaint, in action for injunction restraining enforcement of Rule of N. Y. C. Department of Parks prohibiting operation of tow trucks upon certain parkways except with a permit from the Commissioner of Parks,

insofar as this would prevent plaintiffs from using their own towing trucks to remove their disabled taxicabs from the parkways, was dismissed, as equity will not ordinarily enjoin the enforcement of a penal regulation, particularly where, as here, no criminal proceedings were pending, and there was no showing of possibility of irreparable injury.—Id.

¶ 15. Complaint against defendant of speeding on the Whitestone and Grand Central Parkways should have been based on §53-c of the Rules and Regulations of the N. Y. C. Department of Parks, as such parkways and the motorcycle police who patrol them are under the jurisdiction of and subject to the Rules and Regulations of the Commissioner of Parks. The predicating of the complaints on § 60 of the N. Y. C. Traffic Regulations, was improper. The jurisdiction of the Commissioner of Parks has not been superseded by the powers and duties given to the Department of Traffic of the City.—People v. Levin, 203 Misc. 480, 118 N. Y. S. 2d 205 [1953].

¶ 16. Defendant, who was clocked by a motorcycle officer for a distance of one-fifth of a mile while traveling over 50 miles per hour on parkways in the city, *held* entitled to dismissal of the complaints, as Vehicle and Traffic Law § 56 requires clocking for one-fourth of a mile for speeds in excess of 50 miles an hour, and although § 64 of the New York City Traffic Regulations made no reference as to clocking a speeder, § 54 of the Park Regulations incorporated therein both the Vehicle and Traffic Law and the N. Y. C. Traffic Regulations. —Id.

¶ 17. The powers of both the Park Commissioner and Police Commissioner in the regulation of traffic on parkways are concurrent.—People v. Perry, 23 N. Y. S. 2d 769 [1940].

¶ 18. A defendant who was charged with speeding on the Belt Parkway was entitled to a dismissal of the complaint where the traffic regulations of the Police Commissioner were at variance with the signs posted on the Parkway by the Park Commissioner.—People v. Perry, 23 N. Y. S. 2d 769 [1940].

¶ 19. Employee of City Park Department, suing on behalf of himself and all others similarly situated, *held* entitled to an injunction pendente lite restraining Park Commissioner from enforcing an order requiring laborers in the department to wear a specified uniform, inasmuch as eventual success of plaintiff would be empty if meanwhile he was required to purchase a uniform at the price of $30, as estimated by the Department, or $54 as estimated by plaintiff, and since a limiting of the relief to require that the present uniform worn by the employees should not be interfered with would continue present conditions and could not meanwhile endanger the public welfare.—Hagan v. Moses, 102 (64) N. Y. L. J. (9–15–39) 654, Col. 3 F.

¶ 20. Under Greater New York Charter former § 610, conferring upon Commissioner of Parks the plenary right to establish and enforce general rules and regulations for the administration of the department, Commissioner possessed the requisite power to promulgate a regulation requiring department employees to wear a prescribed uniform, and such requirement did not create a change of status, nor constitute the employees a "uniform force" as the term was applied in reference to other departments of the city.—Hagan v. Moses 103 (132) N. Y. L. J. (6–6–40) 2571, Col. 4 F.

¶ 21. The Commissioner of Parks was not arbitrary where he dismissed an attendant for insubordination where the attendant had refused to wear the prescribed uniform and had failed to answer the charges made against him. —Penachio v. Moses, 134 (89) N. Y. L. J. (11–7–55) 8, Col. 4 M.

¶ 22. License granted plaintiff by New York City Commissioner of Parks to operate gasoline stations upon the Henry Hudson Parkway, *held* not to come within protection of the Rent Control Act, and hence such act would not permit plaintiff to remain in possession after expiration of its license without submitting a competitive bid to secure a license for a further five-year period. Receipt of money by the City from licensee based upon number of gallons of gasoline and oil sold was incidental to the primary purpose of developing park property for public use; the license was issued for a public and not for a business or profit purpose. —Kesbec, Inc. v. City of N. Y., 189 Misc. 719, 67 N. Y. S. 2d 900 [1946].

¶ 23. Section 21 of Article III of the Rules and Regulations of the Department of Parks, prohibiting meetings, exhibitions, parades, racing, etc. in any park except by permit, *held* not unconstitutional, as it was in essence

a non-discriminatory provision having for its sole objective the safety, comfort and convenience of the people of the city and their appropriate uses of its public parks, and moreover the proof showed that a permit had never been refused when applied for on the mall in question unless it had been pre-empted by someone else. Accordingly, defendant who, without a permit, had erected a stand on the mall in a park area and had begun a political talk was properly convicted of a violation of such regulation.—People v. Hass, 299 N. Y. 190. 86 N. E. 2d 169 [1949] appeal denied 338 U. S. 803, 94 L. E. 486, 70 S. C. 66.

¶ 24. Conviction of defendant for violation of § 34 of Rules and Regulations of Department of Parks, prohibiting loitering in a park between midnight and one-half hour before sunrise without permission from the Commissioner, was reversed on ground the evidence was insufficient to establish a violation of such section. Section 64 of the rules, not § 34, covers stopping or parking in a vehicle in a park after dark.—People v. Alexander, 306 N. Y. 656, 116 N. E. 2d 494 [1953].

¶ 25. A rule of the Park Department (§ 34) prohibiting persons from loitering or remaining in a park after 12 o'clock midnight is not a violation of the power granted to the Park Commissioner under this section. Such a rule is not unconstitutional and is a reasonable measure of local control which affects civil liberties only in an allowable and minor degree.—People v. Zalon, 208 Misc. 855, 145 N. Y. S. 2d 269 [1955].

¶ 26. After the City had entered into a contract whereby they agreed to give laborers the same vacation theretofore established and the laborers had theretofore had a vacation time of 25 working days, the Department of Parks could not reduce the vacation time to 20 days by a subsequently enacted regulation. City's claim that the employees had an adequate remedy at law in that they could have taken off the extra days and sued for their full salary was rejected.—Trainor v. City of New York, 134 (63) N. Y. L. J. (9–29–55) 7, Col. 2 F.

¶ 27. The operating of omnibuses in City parks with exterior advertising, pursuant to permission granted by the City, did not violate Sections 6 and 41 of the Rules of the Department of Parks, in view of the fact that omnibuses were normally permitted to operate on parkways.—Matter of La Guardia, 22 Misc. 2d 340, 198 N. Y. S. 2d 230 [1960]; aff'd 11 A. D. 2d 655, 203 N. Y. S. 2d 1020 [1960].

¶ 28. Pursuant to § 534 of the Charter, the Commissioner of Parks issued a regulation, which provided that "no person operating, driving or propelling any vehicle shall proceed at a greater and maximum or less than minimum speed indicated by sign; but in no case shall such maximum speed exceed 40 miles per hour". The defendant was convicted for violating Article 6 § 60 of the Traffic Regulations in that he was driving at a rate of 50 miles per hour in a 40-mile zone. The defendant appealed and claimed that he was entitled to reversal since the prosecution had failed to show that there were any signs posted along the parkway specifying the miximum speed limit. Held: the regulation of the Commissioner had the force of law and the defendant was presumed to have known that this law prohibited signs from being erected permitting speed in excess of 40 miles per hour in this location. Therefore, it was immaterial whether signs had been posted along the parkway. People v. Amabile, 21 Misc. 2d 951, 198 N. Y. S. 2d 560 [1960].

§ 535. **Military encampments and evolutions; public fairs.** No military encampment, parade, drill, review or other military evolution or exercise shall be held or performed in any park or any part thereof without permit from the commissioner. No military officer shall have authority to order, direct or hold any such parade, drill, review or other evolution or exercise, or encampment, within any park, except in case of riot, insurrection, rebellion or war, without such permit. It shall not be lawful to grant, use or occupy, for the purposes of a public fair or exhibition, any portion of any park, square or public place. (*Derived from former* § 535.)

# CHAPTER 22

## DEPARTMENT OF HEALTH

§ 551. **Department; commissioner.**—a. There shall be a department of health the head of which shall be the commissioner of health.

b. The commissioner.

(1) shall be a doctor of medicine or the holder of a degree in public health received from a college or university after at least two years of graduate study, and

(2) shall have had at least eight years' experience either in public health administration or in college or university public health teaching or in both.

§ 552. **Deputies and secretary.**—The commissioner may appoint two deputies and a secretary of the department. (*Derived from former* § 552.)

§ 553. **Board of health.**—a. There shall be in the department a board of health to consist of the commissioner who shall be chairman and four members, at least two of whom shall be doctors of medicine who shall each have had not less than ten years' experience in any or all of the following: clinical medicine, public health administration or college or university public health teaching.

b. The four members other than the chairman shall serve without compensation and shall be appointed by the mayor, each for a term of eight years, commencing at the expiration of the terms of the present incumbents, except that in case of a vacancy the mayor shall appoint a member to serve for the unexpired term.

c. The secretary of the department shall act as secretary of the board of health, and in his absence the board may designate a secretary pro tempore. The commissioner shall designate such stenographers and other employees of the department as may be necessary to the service of the board of health. (*Derived from former* § 553.)

§ 554. **Removal of members of board.**—A member of the board of health other than the chairman may be removed by the mayor on proof of official misconduct or of negligence in official duties or of conduct in any manner connected with his official duties which tends to discredit his office, or of mental or physical inability to perform his duties; but before removal he shall receive a copy of the charges and shall be entitled to a hearing before the mayor and to the assistance of counsel at such hearing. (*Derived from former* § 554.)

§ 555. **Powers and duties of commissioner.**—The commissioner shall have all the powers and duties of the department except those vested by law in the board of health. (*Derived from former* § 555.)

§ 556. **Authority, duties and powers of the department.**—a. The department shall have jurisdiction to regulate all matters affecting health in the city.

b. The authority, duties and powers of the department shall extend over the city, and over the waters adjacent thereto, within the jurisdiction of the city and within the quarantine limits as established by law.

c. Unless otherwise provided by law, it shall be the duty of the department to enforce all provisions of law applicable in the area under its jurisdiction for the preservation of human life, for the care, promotion and protection of health and relative to the necessary sanitary supervision of the purity and wholesomeness of the water supply and the sources thereof. (*Derived from former* § 556.)

**CASE NOTES**

¶ 1. Order of State Conservation Commission and resolution of New York City Board of Health prohibiting clam digging in certain bays, *held* not to have been arbitrary and illegal, where the authorities had acted after investigation and on basis of a report and study made by the United States Public Health Service, and on basis of experiments, tests and reports made by the various health agencies themselves.—De Roche v. Osborne, 179 Misc. 589, 37 N. Y. S. 2d 348 [1942].

¶ 2. County of Westchester *held* entitled to injunction pendente lite restraining the Commissioner and Department of Health of New York City from enforcing the Board's regulation and the Commissioner's orders providing that receiving stations approved as sources of milk supply for the City of New York should ship into that City such percentage of their total receipts of milk as the Commissioner should determine under penalty of having the approval of the receiving station as a source of supply of milk products for the City of New York suspended or rescinded. The regulation and the orders undertook to limit the shipment of milk and cream into Westchester County by all handlers who did not supply that county in 1944, though they may in the succeeding period have supplied that county with much of its milk; to compel shipment into City of New York of such percentage of total receipts of all approved receiving stations as might be determined by the Commissioner from time to time; and to determine what portion of milk receipts of such handlers might be manufactured into cream and other milk products; and thus sought to divert the flow of milk into the City under penalty of exclusion from the large market of that City and so place a burden upon interstate commerce, whereas this was a field over which Congress had lawfully established control under the Agricultural Marketing Agreement Act of 1937 and the Federal Marketing Order of the Secretary of Agriculture.—County of Westchester v. Dept. of Health of City of N. Y., 65 N. Y. S. 2d 313 [1946], aff'd 271 App. Div. 835, 66 N. Y. S. 2d 648, aff'd 297 N. Y. 491, 74 N. E. 2d 190.

¶ 3. An information charging that the defendant manufactured "french ice cream" adulterated with artificial yellow coloring to simulate egg yolk in violation of the Sanitary Code which prohibited the manufacture of "french ice cream" containing an artificial yellow coloring was dismissed where the use of artificial coloring was expressly permitted by the State Agriculture and Markets Law and the coloring used was harmless and was not designed to misrepresent the product as containing egg yolk.—People v. Blue Ribbon Ice Cream Co., Inc., 1 Misc. 2d 453, 148 N. Y. S. 2d 408 [1956].

¶ 4. The powers conferred by this section to regulate all matters affecting health in the city is subject to the limitation that such laws shall not be inconsistent with the constitution and the laws of the state nor may they alter or supersede any act of the New York State Legislature.—People v. Blue Ribbon Ice Cream Co., 1 Misc. 2d 453, 148 N. Y. S. 2d 408 [1956].

§ 557. **Offices of the department.**—The department shall maintain a main office and shall maintain, furnish and operate offices, health centres and health stations in each borough. The commissioner shall designate an office in each borough in which shall be kept the records of births, stillbirths and deaths in such borough. The health centres may contain facilities for health education and for such other health purposes as in the opinion of the board of health may be necessary to carry out the powers and duties of the department. (*Derived from formed* § 557.)

§ 558. **Health code.**—a. The health code which is in force in the city on the date at which this charter takes effect and all existing provisions of law fixing penalties for violations of the code and all regulations of the board of health on file with the city clerk on the date when this charter takes effect shall continue to be binding and in force except as amended or repealed from time to time. Such code shall have the force and effect of law.

b. The board of health is hereby authorized and empowered from time to time to add to and to alter, amend or repeal any part of the health code, and may therein publish additional provisions for the security of life and health in the city and confer additional powers on the department not inconsistent with the constitution or laws of this state or with this charter, and may provide for the enforcement of the health code or any orders made by the commissioner or the board of health, by such fines, penalties, forfeitures and imprisonment as may be prescribed therein or otherwise by law.

c. The board of health may embrace in the health code all matters and subjects to which the power and authority of the department extends, not limiting their application to the subject of health only.

d. Any violation of the health code shall be treated and punished as a misdemeanor. Pecuniary penalties for violations of the health code may be recovered in a civil action before any justice or tribunal in the city having jurisdiction of civil actions.

e. No amendment or addition to the health code or repeal of any provision thereof adopted by the board of health subsequent to the date of going into effect of this charter shall become valid and effectual until a copy of such amendment, addition or repeal duly certified by the secretary of the board be filed with the city clerk. Upon such filing the amendment or addition shall be part of the health code and shall be published forthwith in the City Record by the city clerk.

f. The board of health may add, amend and repeal regulations in regard to any matter contained in the health code, and such regulations when filed with the city clerk shall have the same force and

effect as a provision of the health code and shall be published forthwith in the City Record.

g. No action shall abate, or right of action already accrued be abolished, by reason of the expiration, repeal or amendment of any provision of the health code or regulations in regard thereto. (*Derived from former* § 558 *as amended by L.* 1961, *ch.* 610. *Subdivisions b and e amended by L.* 1962, *ch. 998*, § 31.)

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¶ 1. Provision of former § 558 of the Charter that any violation of the Sanitary Code shall be treated and punished as a misdemeanor, did not offend Article III, § 1 of the Constitution by delegating to a local health board the legislative power to define criminal offenses and to prescribe penal discipline therefor, since the Board of Health of the City has not been authorized to define any criminal offense, as it is the Charter and Penal Law § 1740 that makes a violation of the Sanitary Code a misdemeanor. The Sanitary Code merely states that any violation thereof shall be punished in the manner prescribed by the Charter and the Penal Code.—People (Yonofsky) v. Blanchard, 288 N. Y. 145, 42 N. E. 2d 7 [1942].

¶ 2. Charter former § 558 endows the Board of Health with broad discretion in its selection of measures by which public health may be protected within the field of its jurisdiction.—Stracquadanio v. Dept. of Health, 285 N. Y. 93, 32 N. E. 2d 806 [1941], aff'g 259 App. Div. 994, 20 N. Y. S. 2d 965, which affirmed 20 N. Y. S. 2d 964.

¶ 3. The Sanitary Code of the City of New York is to be deemed a body of administrative provisions sanctioned by a time-honored exception to the principle that there is to be no transfer of the authority of the Legislature.—People (Yonofsky) v. Blanchard, 288 N. Y. 145, 42 N. E. 2d 7 [1942].

¶ 4. Where the State, by enactment of Agriculture and Markets Law §§ 71-a to 71-j, had set up a comprehensive scheme for controlling the manufacture and sale of frozen desserts and had designated an official who was empowered to grant a permit for manufacture after making an inspection and finding the premises to be sanitary, and the Commissioner of the State Department of Agriculture and Markets had adopted a regulation permitting manufacturing of frozen desserts in a cellar on a grant of special permission therefor, the City might not make regulations of its own inconsistent with the law of the State, and consequently the City Commissioner of Health might not prohibit the manufacture of frozen desserts in a cellar.—S. H. Kress & Co. v. Dept. of Health, 293 N. Y. 55, 127 N. E. 2d 431 [1940].

¶ 5. Provision of § 225 of the City Sanitary Code that where a building is heated by means of a furnace or

other apparatus under the owner's control the owner, in the absence of an agreement to the contrary, shall be deemed to have contracted to furnish heat in accordance with the provisions of such section, was to be deemed a part of a lease containing no provision as to heat, as fully as though it had been expressly incorporated in its terms. Contention that the Sanitary Code, being a City ordinance, lacked the force and effect of a statute and therefore did not give the tenant the right to sue on an implied contract to recover sums expended due to the landlord's failure to supply heat, was rejected.—I. Kalfus Co. v. Ad Press, 184 Misc. 285, 53 N. Y. S. 2d 496 [1945]. Reversed (185 Misc. 214, 56 N. Y. S. 2d 373), on ground no right of action was given to plaintiff by defendant's alleged failure to comply with the provisions of the Sanitary Code.

¶ 6. Intent of the Legislature seems to be that the Sanitary Code of the City of New York is to have within the City of New York the force and effect of State law while elsewhere in the State the Sanitary Code and Public Health Law of the State are to be supreme.—In re Bakers Mut. Ins. Co. of New York, 301 N. Y. 21, 92 N. E. 2d 49 (1950).

¶ 7. The Sanitary Code of the City of New York is a body of administrative provisions which have the force and effect of state law within the City of New York. It is also an exercise of the police power of the City for the benefit and protection of the health and welfare of the City's inhabitants. —People v. Penas, 115 N. Y. S. 2d 441 [1952].

¶ 8. Resolution adopted by Department of Health directing the seizure of all unleashed dogs and the quarantining of them for rabies, thus making a violation of § 17 of the Sanitary Code, which makes it unlawful to have unleashed dogs, prima facie proof of suspicion of infection, could not have the force of statute because it was not filed as required by former § 558, subd. f of the Charter.—Preudhomme v. Stebbins, 269 App. Div. 409, 55 N. Y. S. 2d 397 [1945]; People v. Adorjan, 60 N. Y. S. 2d 651 [1946].

¶ 9. The determination of the means of meeting situations endangering public health is vested in the Board of Health, and the program adopted by the Board under resolutions providing for seizure of any dog found outside the confines of the owner's home and not on leash as required by Sanitary Code § 17, and for the destruction of such dog within 48 hours if not claimed by the owner and for its quarantine for six months if claimed, after which it could be released if it were certified not to be rabid or suspicious of rabies, would not seem in and of itself to violate any constitutional requirement of due process of law. At least, the procedure adopted would not conflict with such requirements where adequate proof is adduced justifying suspicion of infection from the disease. —Preudhomme v. Stebbins, 269 App. Div. 409, 55 N. Y. S. 2d 397, [1945].

¶ 10. Resolution regulating the quarantine of dogs is within the power delegated to the Board of Health.—Steinberg v. Stebbins, 269 App. Div. 910, 56 N. Y. S. 2d 453 [1945], reversing 184 Misc. 794, 55 N. Y. S. 2d 503. To same effect, People v. Adorjan, 60 N. Y. S. 2d 651 [1946].

¶ 11. In Chalfin v. A. S. P. C. A., 184 Misc. 15, 53 N. Y. S. 2d 174 [1945], the Court concluded that it was "loath upon affidavits to interfere with the determination of the Board of Health in so serious a situation", and denied an application for the return of a dog seized by the defendant's agent.

¶ 12. Order of Commissioner of Health requiring defendant to deliver up his dog for destruction or quarantine, pursuant to Resolution of the Board of Health, was authorized by the provision of such Resolution empowering the Commissioner to take all necessary measures for enforcement of such Resolution.—People v. Adorjan, 60 N. Y. S. (2d) 651 [1946].

¶ 13. However, the validity of such an order directing the defendant to surrender his dog must be founded upon evidence on the whole case that there is reasonable cause to justify the suspicion that the dog was infected with rabies.—Id.

¶ 14. Seizure of defendant's dog was unlawful where it appeared that the dog was a small female animal, twelve years of age and highly trained, that the dog was never out of his master's sight, that he never allowed another dog to approach her and that she had always been in good health, and that the dog was on the ground unleashed for a few moments

only and under the control of defendant when she was seized by an officer.—Id.

¶ 15. The City Department of Health would be restrained from destroying dog, and the A. S. P. C. A. would be directed to return the dog to the owner, where the dog had strayed from his master's home and had been delivered to the A. S. P. C. A. by the finder, who had requested the destruction of the dog because it was vicious, the two veterinarians who had determined the dog to be vicious on basis of reports of the history of the dog while at the shelter and the reaction of the dog when a stick was pushed into the cage of the dog, now testified upon further reports of the history of the dog and tests made they found him not to be vicious, and the bites and lacerations which allegedly had been sustained by two attendants were now stated to be merely scratches.—In re McClean, 200 Misc. 48, 108 N. Y. S. 2d 631 [1951].

¶ 16. Where the record disclosed that the dog was not vicious or diseased, and that in each instance of biting the offense occurred on private property and that there was a provocation, without fault on part of the owner and with fault on part of the agents of the City contributing to the result, the Department of Health was directed to return the dog to its owner.—In re Altschuler (Dept. of Health), 125 (117) N. Y. L. J. (6–18–51) 2255, Col. 3 F.

¶ 17. Sanitary Code § 10, subd. 3 imposes an unequivocal mandatory duty upon the Department of Health to seize and destroy a dog upon notification of the infliction of a bite which requires medical treatment, and the Department has no discretion. In instant case, determination of the Department that petitioner's dog bit a person, and did not claw and scratch such person as contended by petitioner, was not unreasonable or arbitrary in view of the evidence.—In re Wetzig (Dept. of Health), 130 (30) N. Y. L. J. (8–11–53) 225 Col. 1 M; reversed and proceeding remitted for a hearing, 282 App. Div. 938, 125 N. Y. S. 2d 879, on ground that upon the record it did not appear that the dog had bitten "a person or various persons on three separate occasions" as provided in Sanitary Code § 10, subd. 3.

¶ 18. By adopting the Charter, the Legislature has given the Board of Health of the City the power to alter, amend or annul any part of the Sanitary Code and to publish additional provisions for the security of life and health in the City of New York. This delegation of power is a proper one, and hence, provided the regulation did not otherwise violate constitutional requirements, the City Board of Health had authority to enact a regulation requiring teachers and other school employees to procure biennially a certificate from a physician based upon a chest X-ray examination certifying that the employee is free from active tuberculosis.—In re Conlon (Marshall), 185 Misc. 638, 59 N. Y. S. 2d 52 [1945], aff'd 271 App. Div. 972, 68 N. Y. S. 2d 438.

¶ 19. Regulation 19 (a) of § 20 of the Sanitary Code, requiring teachers and other school employees coming in contact with children to procure biennially a certificate from a physician based upon a chest X-ray examination certifying that the employee is free from active tuberculosis, *held* constitutional, as reasonably necessary for protection of the public health. It was not discriminatory because it applied only to school teachers and school employees, and it did not invade the teacher's constitutional rights and privileges.—Id.

¶ 20. Section 340 of the Sanitary Code, defining a bathing establishment and prescribing rigid requirements concerning safety appliances and disease contamination, *held* a reasonable and constitutional exercise of the power granted to the Board of Health by former § 558 of the Charter to act in such cases where public health is in jeopardy.—People v. Whitestone Boosters' Civic Assoc., 191 Misc. 121, 76 N. Y. S. 2d 518 [1948], aff'd 274 App. Div. 806, 81 N. Y. S. 2d 154.

¶ 21. New York City Sanitary Code, § 148, Regulation 27, regulating the operation of food handling establishments and requiring that food which has become unfit for human consumption shall be separated from other foodstuffs, marked "condemned" and removed daily, *held* not unconstitutional, as applied to uncandled eggs, on ground advanced that it contravened the State Agriculture and

Markets Law, § 160-b, Regulation 3, which permits the sale of uncandled eggs under certain specified conditions. A municipality might enact additional protective provisions to meet special or peculiar conditions, and a city of eight million inhabitants operated under such "special conditions" as would justify existence of such a regulatory ordinance. The Sanitary Code provision did not limit the sale of uncandled eggs, but simply protected the public from unwholesome foods.—People v. Philip Lewis Eggs Products, Inc., 197 Misc. 212, 93 N. Y. S. 2d 453 (1949).

¶ 22. Under the language of § 148, Regulation 27, it was not necessary to prove an intent to sell in order to justify a conviction.—Id.

¶ 23. Contention that, since the only way that the existence of bad eggs may be determined while in the shell is by candling, there was no responsibility on the defendant's part until the candling was done, was rejected. —Id.

¶ 24. Conviction of defendant, who operated an egg-breaking establishment, for violation of Sanitary Code, § 148, Regulation 27, based on the finding in defendant's cooler of three cases containing 90 dozen eggs of which two-thirds were found, upon candling, to be bad, was sustained, where the evidence showed that the eggs had been in defendant's premises between August 4 and August 9, although the regulation called for denaturing, labelling and daily removal of the eggs.—Id.

¶ 25. Section 33 of the Sanitary Code of New York City, requiring the filing of a "confidential medical report" of the cause of death, which shall be deemed not a part of the certificate of death but a "confidential and privileged communication" which shall not be subject to subpoena nor open to inspection for any reason other than for scientific purposes approved by the Board of Health, *held* consistent with Workmen's Compensation Law § 119, providing for the issuance of subpoenas duces tecum, and not in conflict with subd. b of former § 558 of the New York City Charter, forbidding a grant to the City Health Department of any power inconsistent with the Constitution and laws of the State. Contention that § 33 of the Sanitary Code produces an unequal protection of the laws in that the City as an employer of labor has a favorite position because of an asserted unrestricted access to the files of the Department of Health, was rejected, as § 33 makes the report open for inspection only for scientific purposes approved by the Board of Health.—In re Bakers Mut. Ins. Co. of New York, 301 N. Y. 21, 92 N. E. 2d 49 (1950).

¶ 26. The Department of Health of the City of New York would not be punished for contempt for failure to comply with an ex parte order directing it to furnish plaintiffs with a copy of both sides of a "certificate of Stillborn (Fetal Death)", where the reverse side of the certificate contained matter in the nature of a confidential medical report and was a privileged communication within meaning of N. Y. C. Sanitary Code, § 33-a, and the issuance of a copy of the report would have been a misdemeanor on party of the issuing officer within purview of N. Y. C. Charter, former § 589-d. However, the Department of Health should have moved to vacate the order rather than arrogate to itself the power to determine its validity.—Brill v. Goff, 125 (8) N. Y. L. J. (1–11–51) 135, Col. 5 F.

¶ 27. Subdivision 4 of § 327 of the Sanitary Code, providing that horse flesh intended for animal feed should not be brought into the City of New York, stored or offered for sale therein unless decharacterized by harmless coloring or otherwise, was invalid as violating the Commerce Clause of the Federal Constitution insofar as the applicable Federal law sanctioned merely the use of hermetically sealed containers whereas the Sanitary Code provision added a further requirement that the product be decharacterized by harmless coloring or otherwise. However, insofar as both statutes were consistent they might co-exist and the municipal agency might enforce its local law at least until such time as it was ousted by the Federal authorities exercising their own paramount jurisdiction.—Quaker Oats Co. v. City of New York, 295 N. Y. 527, 168 N. E. 2d 593 [1946], aff'd 331 U. S. 787, 91 L. E. 1817, 67 S. C. 1314.

¶ 28. Aside from being violative of the Commerce Clause of the Federal Constitution in certain respects, subdivision 4 of § 327 of the Sanitary Code was sufficiently definite, within

the legislative competence of the city to enact, and consonant with requirements of the Due Process Clause.—Id.

¶ 29. Provision of subd. 5 of § 327 of the Sanitary Code, directing that horse meat intended for animal food must be ground, chopped or comminuted, so that no piece shall be greater than one half inch in any dimension, *held* not unreasonable or arbitrary, as such provision was aimed at preventing horse meat from being palmed off on an unsuspecting public as legitimate food for human consumption. People v. Schneiderman, 203 Misc. 1064, 119 N. Y. S. 2d 688 [1953].

¶ 30. Section 140a of the Sanitary Code of New York City, providing that it shall be unlawful to bring into the City or to have, sell, or offer to sell any processed beef containing added water greater than 10 per cent of the weight of the meat, *held* unconstitutional as an attempt by local authority to regulate a field appropriated by the Federal government by Federal statute and practice where activities were interstate, but constitutional where activities were intrastate.—Kansas Packing Co. v. City of N. Y., 204 Misc. 1077, 127 N. Y. S. 2d 107 [1953], modified 284 App. Div. 398, 131 N. Y. S. 2d 351, aff'd 309 N. Y. 696, 128 N. E. 2d 411.

¶ 31. The Board of Health of the City of New York is invested with the power, extraordinary as to administrative agencies, to formulate standards as well as to issue orders enforcible by penal sanctions. Subdivision b of this section goes so far as to authorize the Board of Health to prescribe "fines, penalties, forfeitures and imprisonment" in the Sanitary Code for the enforcement of that code or the Board's order; and, accordingly, § 224 of the Sanitary Code makes provision for punishment of this violation. The Sanitary Code, therefore, may be taken to be the body of the administrative provisions sanctioned by a time honored exception to the principle that there is to be no transfer of the authority of the legislature. However, § 277 of the Sanitary Code which requires a building owner to keep all gas appliances in good order was not sufficient to warrant conviction of the home owners where, without their knowledge, a gas refrigerator became defective and admitted gases which caused the death of the tenant.—People v. Weil, 286 App. Div. 753, 146 N. Y. S. 2d 416 [1956].

¶ 32. The Court denied a motion for a temporary injunction to restrain the Board of Health from enforcing a resolution prohibiting tatooing except by a physician since the question required a fuller exposition.—Grossman v. Baumgartner, 147 (28) N. Y. L. J. (2–8–62) 12, Col. 6 M.

§ 559. **Seal.**—The board of health may adopt a seal which shall be used for the authentication of the orders and proceedings of the department, in commissioning its officers and agents and otherwise as may be provided by rule or in the health code. (*Derived from former* § 559.)

§ 560. **Communicable disease hospitals.**—a. Upon the resolution of the board of health addressed to the mayor and to the commissioner of hospitals, and with the written consent of the mayor, any hospital operated by the department of hospitals shall be designated as a hospital for the care and treatment of communicable disease, and the department of health may authorize or direct the removal to any such hospital of any person suffering from such disease or any carrier of a communicable disease if deemed by it necessary for the protection of the public health.

b. The board of health, if in its judgment necessary, may, during the prevalence of an epidemic, take possession of any building or buildings in the city for temporary hospitals, and shall pay a just compensation for private property so taken. Such temporary hospitals shall be under the control of the department of health unless the mayor shall direct that they be placed under the

control of the department of hospitals. (*Derived from former* § 560.)

§ 561. **Permits.**—The board of health may in its discretion grant, suspend or revoke permits for businesses or other matters in respect to any subject regulated by the department. Whenever the board of health in the health code authorizes the issuance, suspension or revocation of a permit by the commissioner, his action shall be subject to review by the board of health upon an appeal by the party aggrieved under such rules as it may provide. Such rules may provide in what cases an appeal may stay the action of the commissioner until final determination by the board of health; but notwithstanding any such rule the board of health shall have power to grant or refuse a stay in any particular case. (*Derived from former* § 561.)

**CASE NOTES**

¶ 1. The New York City Department of Health could require a City home owner to connect up to the municipal sewer system even though the home owner had an outstanding permit allowing him to use a septic tank and even though the septic tank was not a nuisance and did not create a health hazard.—People ex rel. Ullmann v. Butcher, 28 Misc. 2d 24, 209 N. Y. S. 2d 723 [1960].

¶ 32. The Court denied a motion for a temporary injunction to restrain the Board of Health from enforcing a resolution prohibiting tatooing except by a physician since the question required a fuller exposition.—Grossman 1. Baumgartner, 147 (28) N. Y. L. J. (2–8–62) 12, Col. 6 M.

§ 562. **Failure to observe order; penalty.**—Except in cases where it is otherwise provided by law, every violation, neglect or refusal by any person to comply with any order of the commissioner or board of health shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. (*Derived from former* § 562.)

§ 563. **Declaration of imminent peril.**—In the presence of great and imminent peril to the public health, it shall be the duty of the board of health, having first taken and filed among its records what it shall regard as sufficient proof to authorize its declaration of such peril, and having duly entered the same in its records, to take such measures, and to order the department to do such acts beyond those duly provided for the preservation of the public health, including the power to take possession of and occupy as a hospital any building or buildings in the city, as it may in good faith declare the public safety and health to demand, and the mayor shall in writing approve. However, no expenditure shall be incurred in the exercise of such extraordinary power unless provision shall have been made therefore in the budget or unless such expenditures are financed pursuant to sections one hundred twenty-four of this charter or section 29.00 of the local finance law. Such peril shall not be deemed to exist except when and for such period of time as the board of health and mayor shall declare. (*Derived from*

*former* § 563, *as amended by L.* 1943, *ch.* 710, § 569, *pursuant to L.* 1943, *ch.* 710, *Part* 8, § 9, *as amended by L.* 1944, *ch.* 606, § 6, *and L.* 1945, *ch.* 338, § 64.)

§ 564. **Suits and service of papers.**—The department may sue and be sued in and by the proper name of "The Department of Health of the City of New York," and service of all process in suits and proceedings against or affecting said department, and other papers, may be made upon the commissioner or upon the secretary, and not otherwise; except that, according to usual practice in other suits, papers in suits to which the department is a party may be served on the corporation counsel or such assistant as may be assigned by him to the department. (*Derived from former* § 564.)

§ 565. **No personal liability.**—No member, officer or agent of the department and no person other than the department or the city itself shall be sued or held to liability for any act done or omitted in good faith and with ordinary discretion, on behalf of or under the department, or pursuant to its regulations, ordinances, local laws or health laws. And any person whose property may have been unjustly or illegally destroyed or injured, pursuant to any order, regulation or action of the department or its officers, for which no personal liability may exist, as aforesaid, may maintain a proper action against the city for the recovery of the proper compensation or damage. Every such suit must be brought within six months after the cause of action arose, and the recovery shall be limited to the damages suffered. (*Derived from former* § 565.)

## CASE NOTES

¶ 1. Section 565 of the Charter, exempting from personal liability agents of the Department of Health for acts done or omitted to be done in good faith and with ordinary discretion on behalf of the Department or pursuant to its regulations, was not intended to be a new law but merely a continuation of the law as it stood at time of the enactment of the Charter, inasmuch as § 565 repeated § 1196 of the old Charter verbatim, and § 982c of the Charter declares that provisions thereof similar in substance to prior existing law are intended to be a continuation of the old law.—Grimaldi v. City of N. Y., 177 Misc. 492, 30 N. Y. S. 2d 366 [1941].

¶ 2. The limited waiver of the City's immunity from liability for the acts of the officers and agents of the Department of Health does not include a general waiver from immunity for the City's Department of Hospitals. The plaintiff, a registered nurse, employed in a hospital owned and operated by the defendant city, became sick while on duty and was sent to the infirmary where a decomposed solution of morphine was injected into her arm causing an infection which resulted in rendering the arm useless. The City was not liable for the negligence of the nurses in giving plaintiff the injection.—Volk v. City of New York, 259 App. Div. 247, 19 N. Y. S. 2d 53 [1940]. Reversed by Court of Appeals on ground that the City, in operating the nurses' infirmary was acting in a proprietary capacity rather than a governmental capacity and was fulfilling its contractual obligation to the plaintiff. The hospital officials were aware that the solution was decomposed and were negligent in not removing and destroying it, 284 N. Y. 279, 30 N. E. 2d 596.

§ 566. **Right of entry of officers of department.**—The commissioner and his deputies and such officers or employees of the department as are authorized by the commissioner may without fee or hindrance enter, examine and inspect all vessels, premises, grounds, structures, buildings and every part thereof and all underground passages of every sort in the city for compliance with the provisions of law enforced by the department and its rules and regulations, and may make plans, drawings and descriptions thereof, according to the regulations of the department. The owner of his agent or representative and the lessee or occupant of any such premises, grounds, structures, buildings and every part thereof and all underground passages of every sort in the city and every person having the care and management thereof, shall at all times, when required by any such officers or employees, give them free access thereto, and refusal so to do shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. (*Derived from former* § 566.)

§ 567. **Record of births, fetal deaths and deaths.**—The board of health shall prescribe the persons who shall be required to keep a registry of births, fetal deaths and deaths occurring in the city and file certificates thereof with the department and the form and manner in which such registry shall be kept and certificates filed.

The board of health shall make rules for the recording of births which have not been recorded in accordance with law and for the change or alteration of any birth, fetal death or death certificate upon proof satisfactory to the commissioner. (*Derived from former* § 567 *as amended by L. L.* 1953, *No.* 122.)

## CASE NOTES

¶ 1. Upon an application for the issuance of a delayed registration of a birth occurring in 1904, the Board should appraise the empressive evidence adduced, even though it did not meet the requirements of the Boards' stringent rules, and consider the advisability of waiving such rules.—In re Priedolin (Dept. of Health), 140 (16) N. Y. L. J. (7–23–58) 3, Col. 4 F.

¶2. Department of Health would not be directed to amend certificate of birth five years later to set forth the identity of the true father of child who was allegedly the husband of petitioner and who abandoned her three months before birth, in place of the allegedly fictitiously named father where none of the parties involved, the child, the husband or the fictitiously named father had been given notice of the application nor had consented to the relief requested.—Colon v. Department of Health, 145 (44) N. Y. L. J. (3–7–61) 14, Col. 8 F.

§ 568. **Acceptance of private funds.**—No grant, gift, devise, legacy or bequest made to the city or to the department for work to be done within the jurisdiction of the department shall be accepted, and no work or research paid for from private sources shall be carried on under the jurisdiction of the department, except with the approval of the commissioner and of the board of health. (*Derived from former* § 568.)

# CHAPTER 23

## DEPARTMENT OF HOSPITALS

§ 581. **Department; commissioner.**—There shall be a department of hospitals the head of which shall be the commissioner of hospitals. (*Derived from former* § 581.)

§ 582. **Deputies.**—The commissioner may appoint two deputies.

§ 582-a. **Board of hospitals.**—a. There shall be in the department a board of hospitals to consist of the commissioner who shall be chairman and ten members, five of whom shall be doctors of medicine possessed of broad medical, public health and hospital background and experience, and five of whom shall be laymen distinguished in community or business affairs.

b. The ten members, other than the chairman, shall serve without compensation and shall be appointed by the mayor each for a term of five years, commencing at the expiration of the terms of the present incumbents. Each term shall run from the first day of July of the year in which the appointment is made, except that in the case of a vacancy the mayor shall appoint a member to serve for the unexpired term.

c. The secretary of the department shall act as secretary of the board of hospitals, and in his absence, the board may designate a secretary pro tempore. The commissioner shall designate such stenographers and other employees of the department as may be necessary to the service of the board of hospitals.

d. The board shall meet at least once each month and at such other times as such board may provide. (*Derived from former* § 582-a *as added by L. L.* 1950, *No.* 98.)

§ 583. **Powers and duties of commissioner.**—The commissioner shall have all the powers and duties of the department except those vested by law in the board of hospitals. (*Derived from former* § 583 *as added by L. L.* 1950, *No.* 98, *July* 27. *Former* § 583 *renumbered to be* § 583-a.)

### CASE NOTES

¶ 1. Hospital employees who receive free meals as a matter of convenience and not as an inducement of employment acquired no vested right to receive such meals. Therefore, they were not entitled to an injunction against the Commissioner of Hospitals to restrain him from making a charge therefor.—Douglas v. MacLean,——Misc. 2d——, 155 N. Y. S. 2d 547 [1956].

§ 583-a. **Jurisdiction of department.**—a. The department shall:

1. Maintain and operate all hospitals, sanatoria, almshouses or other institutions of the city for the care of sick, injured, aged or

infirm persons, except as otherwise provided by law, and shall have charge and control of the ambulance service provided by the city, and, except as otherwise provided by law, over any psychopathic service for the examination, observation and treatment of persons and over any other service maintained by the city for the care of sick, injured, aged or infirm persons as may be assigned to the department or the commissioner by law.

2. Visit, inspect and license in the discretion of the commissioner all private proprietary institutions where in human beings are receiving or may receive medical attention and/or nursing care and/or custodial supervision, including private proprietary hospitals, sanatoria, nursing homes, convalescent homes, homes for the aged or for chronic patients, unless such institutions are nonprofit corporations incorporated by special act of the legislature or under the general laws of this state or are maintained or operated by such corporations or are duly licensed under the provisions of the mental hygiene law or of section two thousand five hundred twenty of the public health law. Any such institution shall be subject to the jurisdiction of the department as provided in this subdivision, notwithstanding such institution may also be subject to the inspection, supervision and regulation of the state department of social welfare. A license issued under this subdivision shall expire one year from the date of issuance thereof, unless, in the discretion of the commissioner, it shall be sooner revoked, and may be renewed. The board of hospitals, notwithstanding any other provision of law, is hereby authorized to promulgate and include in the hospital code necessary rules and regulations to carry out the purposes of this subdivision to protect the public health and welfare, which shall, before the same become effective, be filed with the city clerk and published in the City Record for three days and shall thereafter have the force and effect of law. The establishment and/or maintenance of any such institution without a license therefor as in this subdivision provided shall be a misdemeanor punishable by a fine not to exceed five hundred dollars or by imprisonment for a period not exceeding one year or by both. *(Derived from former* § 583-a *as amended by L. L.* 1959, *No.* 15.)

CROSS REFERENCE: Additional power to provide ambulance service, see General Municipal Law, § 122-b.

## CASE NOTES

¶ 1. By bringing an Article 78 proceeding to review the determination of the Hospital Board denying a variance from the provisions of the Hospital code and denying renewal of a license to operate a private hospital, petitioners conceded the constitutionality of the Hospital Code and regulations. Furthermore, they failed to show that the action of the Board was arbitrary or unreasonable. The loss petitioners would sustain in reducing the capacity of their hospital from 50 beds to 29 beds in order to conform with the Code will not prevail over considerations of the public health and welfare.—Warshaw v. Jacobs, 16 Misc. 2d 844, 183 N. Y. S. 2d 939 [1959].

¶ 2. The hospital board did not act in an arbitrary manner in refusing a license to a private proprietary hos-

pital, which failed to comply with the minimum space regulations enacted by the Board, pursuant to subdivision 2 of this section. Neither did such regulations constitute unreasonable discrimination or violate due process, since the Legislature itself, in respect to private proprietary hospitals in New York City, has established them in a separate class and has subjected them to special rules and regulations by the Board of Hospitals.—Matter of Engelsher, 5 N. Y. 2d 370, 184 N. Y. S. 2d 640, 157 N. E. 2d 626 [1959]; certiorari denied 360 U. S. 902, 3 L. Ed. 2d 1255, 79 S. Ct. 1286 [1959].

¶ 3. City was not entitled to an injunction restraining continued operation of private proprietary hospital where a license had been issued for many years and the Supreme Court had recently remitted the matter to the Commissioner of Hospitals for a hearing. In view of the fact that nine months had elapsed since the department had directed the defendant to discontinue operations and the defendant had denied all charges of mismanagement there appeared to be no urgency for an injunction without trial. —Jacobs v. Woodiwiss, 145 (21) N. Y. L. J. (1–31–61) 13, Col. 8 F; also, 145 (18) N. Y. L. J. (1–26–61) 16, Col. 4 M.

§ 583-b. **Powers and duties of the board of hospitals.**—The board of hospitals shall have the power and duty to:

1. Develop and maintain long range programs of hospital service for the care of sick, injured, aged and infirm persons who are the responsibility of the department.

2. Establish and promote the highest possible standards for the care of sick, injured, aged and infirm persons to be complied with by institutions under the jurisdiction of or subject to licensing by the department and by institutions which care for any such persons at the expense of the city.

3. Develop, establish and promote standards and methods for increasing the efficiency of operation, maintenance and management of facilities for the care of sick, injured, aged and infirm persons in institutions under the jurisdiction of the department.

4. Approve the capital and expense budget estimates of the department before submission thereof to the appropriate city agencies.

5. Review, within its discretion, any action of the commissioner with respect to the revocation of a license. (*Derived from former* § 583-b *as added by L. L.* 1950, *No.* 98.)

§ 583-c. **Removal of members of board.**—A member of the board of hospitals other than the chairman may be removed by the mayor on proof of official misconduct or of negligence in official duties or of conduct in any manner connected with his official duties which tends to discredit his office, or of mental or physical inability to perform his duties; but before removal he shall receive a copy of the charges and shall be entitled to a hearing before the mayor and to the assistance of counsel at such hearing. (*Derived from former* § 583-c *as added by L. L.* 1950, *No.* 98.)

§ 583-d. **Hospital code.**—a. The board of hospitals is hereby authorized and empowered to promulgate a hospital code and from time to time to add to and to alter, amend or repeal any part of such code. Such hospital code shall consist of such rules and

regulations, not inconsistent with the constitution or the laws of this state or with this charter, as may be necessary to carry out the powers and duties vested by law in the department of hospitals and the board of hospitals.

b. The rules and regulations of the department of hospitals in force or on file with the city clerk on the date this section takes effect are hereby incorporated into the hospital code, and shall continue to be binding and in full force and effect except as amended or repealed from time to time.

c. The board of hospitals may embrace in the hospital code all matters and subjects to which the power and authority of the department extends.

d. Any violation of the hospital code shall be a misdemeanor punishable by a fine not to exceed five hundred dollars or by imprisonment for a period not to exceed one year or by both. In addition, any person who shall violate any provision of such code shall be subject to the payment of a penalty of not more than one hundred dollars, to be recovered in a civil action.

e. No amendment or addition to the hospital code or repeal of any provision thereof shall become valid and effectual until a copy of such amendment, addition or repeal shall be filed with the city clerk and published in The City Record for three days. Upon such filing and publication, such amendment, addition or repeal shall have the force and effect of law.

f. No action shall abate, or right of action already accrued be abolished, by reason of the expiration, repeal or amendment of any provision of the hospital code. (*Derived from former* § 583-d *as added by L. L.* 1950, *No.* 98.)

**CASE NOTES**

¶ 1. Refusal of respondent Commissioner of Hospitals to issue to petitioner a permit to maintain a private hospital at which rooms and other facilities for maternity and new-born infant care were available, *held* not to have been arbitrary, where certain of petitioner's rooms coming within the categories set forth in Sanitary Code, § 110, Regulation 7, did not have hot and cold running water within the room, and where such water was available within the room, or nearby, the controls thereon were manual and not through the use of feet, knees or elbows as required by the regulation. Respondent's position that the requirement was one of the Health Department and that its reasonableness could not be passed upon in the instant proceeding, was sound. Furthermore, the regulation, on the merits, was in all respects reasonable. —Engelsher v. Kogel, 128 (10) N. Y. L. J. (7–15–52) 85, Col. 5 T.

§ 583-e. **Failure to observe order; penalty.**—Except in cases where it is otherwise provided by law, every violation, neglect or refusal by any person to comply with any order of the department or board of hospitals shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. (*Derived from former* § 583-e *as added by L. L.* 1950, *No.* 98.)

§ 583-f. **Seal.**—The board of hospitals may adopt a seal which shall be used for the authentication of the orders and proceedings of the board and of the department, in commissioning its officers and agents and otherwise as may be provided in the hospital code. (*Derived from former* § 583-f *as added by L. L.* 1950, *No.* 98.)

§ 584. **Advisory council.**—a. There shall be in the department an advisory council consisting of one representative from the medical board of each hospital or other institution under the jurisdiction of the department, who shall be chosen by such medical board, and seven members appointed by the mayor, who may or may not be physicians.

b. Members of the advisory council shall serve without compensation.

c. The advisory council shall advise the commissioner in respect to all matters submitted by him and may on its own initiative recommend to the commissioner such changes of administration in the department or in any hospital or institution or service under the jurisdiction of the department as may seem to it advisable.

d. The advisory council shall adopt rules to govern its own proceedings. The secretary shall keep a complete record of all its proceedings, which shall show the names of the members present at each meeting, every matter submitted to it by the commissioner or taken up by it on its own initiative and its action on all such matters. The record shall be filed in the office of the department. The commissioner shall designate such stenographers and clerical assistants of the department as may be necessary to the service of the council.

e. All records and other documents of the department shall be subject to the inspection of the advisory council. (*Derived from former* § 584.)

§ 585. **Medical staffs and boards; medical house officers.**—a. There shall be a medical staff for each hospital or institution under the jurisdiction of the department. The medical staff shall be appointed by the commissioner and shall consist of such number of attending and consulting physicians as he may determine. The medical staff of each hospital or institution shall organize and appoint a medical board of such hospital or institution, subject to such general rules as the commissioner may prescribe.

b. Staff appointments may be terminated at any time by the commissioner after consultation with the medical board of the hospital or institution affected, and a vacancy in any staff or board may be filled by the commissioner after like consultation.

c. Physicians serving in a hospital who serve without compensation shall be authorized to charge medical fees for services rendered by them to patients under the provisions of the workmen's compensation law, or to patients who carry sickness or accident insurance which covers physicians' fees, or to patients

who recover damages from cases in tort, as provided in the regulations made by the commissioner.

d. The commissioner may appoint medical house officers for any hospital or institution under the jurisdiction of the department on the nomination of the medical board of such hospital or institution, and may remove any such medical house officer after giving him an opportunity to be heard.

e. The medical board of each hospital or institution under the jurisdiction of the department, in conjunction with the superintendent or other head thereof, shall propose regulations to govern the medical procedure therein which, when adopted by the commissioner, shall be observed and enforced by the superintendent or other head of such hospital or institution. (*Derived from former* § 585. *Subd. c amended by L. L.* 1962, *No.* 21.)

## CASE NOTES

### Index

**Appointments and removals,** ¶¶ 4–6
**Payment of fees,** ¶¶ 1–3, 7–10

¶ 1. No provision might be made in the order of compromise of infant's claim for personal injuries, for payment out of the proceeds of the settlement of the claims of physicians who rendered professional services to the infant in the hospital. Section 585-c of the New York City Charter, relied upon by the physicians, does not provide for imposition of liens in favor of physicians performing services in city hospitals, and in the absence of any lien the court lacked power to afford relief to the physicians in the instant proceeding.—Viviani v. Howard Johnson's, Inc., 130 N. Y. S. 2d 331 [1953].

¶ 2. The validity of liens claimed by two doctors attached to a hospital who had performed services for the plaintiff while he was unconscious could not be determined in a negligence action in which the doctors were not parties. The court, however, by way of dicta doubted the validity of the liens.—Reardon v. Spagna, 284 App. Div. 975, 134 N. Y. S. 2d 843 [1954] rev'g 205 Misc. 196, 130 N. Y. S. 2d 206.

¶ 3. This section is merely permissive and it does not give the Department of Hospitals authority to compel an assignment in behalf of physicians nor does it give any lien in their behalf. Thus, the Department of Hospitals could not refuse to furnish petitioner a copy of her hospital record for use in connection with a pending personal injury action unless petitioner executed an assignment of the proceeds of her cause of action to the hospital and unnamed physicians to pay their unspecified charges in a sum not to exceed twice the rates set forth in the Workmen's Compensation medical fee schedule. The department was directed to furnish petitioner with a copy of the records.—Matter of Glazer v. Department of Hospitals, 2 Misc. 2d 207, 155 N. Y. S. 2d 414 [1956].

¶ 4. Under § 585, subd. b of the Charter, providing that appointments may be terminated at any time by the Commissioner after consultation with the medical board of the hospital or institution affected, the Commissioner was without power to discharge without consulting with the medical board of the hospital.—Teplitsky v. City of N. Y., 133 N. Y. S. 2d 260 [1954].

¶ 5. That petitioner was the sole remaining eligible for position of deputy medical superintendent in N. Y. C. Department of Hospitals did not, ipso facto, entitle him to appointment (257 App. Div. 420, aff'd 282 N. Y. 375), as the power to make the appointment rested, without power of delegation, solely in the Commissioner of Hospitals (N. Y. C. Charter §§ 585, 884).—D'Oronzio v. Rappleye, 105 (102) N. Y. L. J. (5–2–41) 1958, Col. 6 F.

¶ 6. The determination of the Commissioner of Hospitals terminating petitioner's services as assistant phys-

icist at the end of his probationary period was not arbitrary where the record showed that petitioner's work was not satisfactory and that his personality interfered with the smooth working of the laboratory.—Cahnman v. MacLean, 133(44) N. Y. L. J. (3–4–55) 7, Col. 4 T.

¶ 7. Although a physician in a municipal hospital has no lien for his fees for services rendered to a patient who recovers damages in a tort action, he is entitled, upon the accounting of the administratrix of the deceased patient, to have his claim determined as an ordinary creditor.—Matter of Griffith (Brathwaite), 4 Misc. 2d 733, 157 N. Y. S. 2d 153 [1956].

¶ 8. Where an injured person executed an assignment for professional medical services with his attorney's knowledge, the attorney was liable in damages to the assignee when he distributed the client's monetary recovery. The physician's equitable title in the assignment ripened into legal title sufficient to sustain an action on the assignment when the settlement was paid over to the attorney.—Brinkman v. Moskowitz, 34 Misc. 2d 141, 225 N. Y. S. 2d 458 [1962].

¶ 9. Upon signature of an order of compromise of an infant's claim for injuries, charges by hospital staff physicians were disallowed, where they were based upon unverified and unacknowledged statements completely lacking in detail concerning the nature of the treatments or their frequency, the reasonableness of the charges, or that the doctors were serving in the in-service of the hospital.—Delorey v. Amzalone, 6 Misc. 2d 646, 162 N. Y. S. 2d 375 [1957].

¶ 10. Where the plaintiff's intestate allegedly made assignments to doctors for medical services in accordance with § 585(C) of the Charter and the regulations of the Commissioner of Hospitals, the court would not determine the validity of such liens in an action to which they were not parties, such determination must be made in a separate action by or against the doctor.—Mossorofo v. City of New York, 143 (101) N. Y. L. J. (5–25–60) 14, Col. 6 T.

§ 586. **Hospital units for communicable diseases.**—a. Upon the requisition of the board of health, the commissioner shall designate, set apart and maintain such hospital or hospitals, or such wards or other parts thereof, for the care and treatment of persons having communicable diseases, as the board of health may deem necessary. Notwithstanding such designation and use, such units shall continue under the jurisdiction of the department of hospitals, but shall be administered under such rules and regulations necessary for the protection of the public health as from time to time may be adopted and promulgated by the board of health.

b. Such units shall be available for research or other special work of the department of health under rules prescribed by the commissioner of hospitals.

c. The designation of any such unit may be made for a temporary emergency, and when the board of health shall certify that the necessity for such use shall have ceased it shall again be under the full jurisdiction of the department. (*Derived from former* § 586.)

§ 587. **Care and treatment of patients.**—a. The hospitals or other institutions under the jurisdiction of the department shall be primarily for the care and treatment of the indigent poor of the city and for the protection of the public health, but the department may receive for care and treatment in any hospital or other institution other sick or injured persons and temporarily may receive therein persons alleged to be insane under regulations made by the commissioner.

b. A patient in a hospital or other institution under the jurisdiction of the department who is able to pay, in whole or in part, for care and maintenance, or, if such patient be dependent, a relative legally liable for his support and maintenance, shall be liable for and shall pay to the extent of his ability for such care and maintenance in such hospital or other institution, and the commissioner shall collect and transmit such payments to the treasurer. (*Derived from former* § 587.)

**CASE NOTES**

¶ 1. In action by Commissioner of City Hospitals against taxicab company's insurer which, as part of a settlement with an injured policeman, had assumed responsibility for bill of city hospital in which the policeman had been confined, hospital's charge of $4.50 per diem for general institutional care *held* not excessive, notwithstanding the City allowed only $3 per day for hospitalization in ward cases throughout the City, inasmuch as the proof established that the actual cost averaged about $7 a day.—Goldwater v. Citizens Casualty Co., 17 N. Y. S. 2d 242 [1938].

¶ 2. Furthermore, City was entitled to charge for surgical services notwithstanding members of the medical staff of City hospitals are required to serve without compensation under old Charter § 692e, and in charging for surgical fees the hospital was not guilty of the corporate practice of medicine.—Id.

§ 588. **Acceptance of private funds.**—No grant, gift, devise, legacy or bequest made to the city or to the department for work to be done within the jurisdiction of the department shall be accepted and no work or research paid for from private sources shall be carried on in any hospital or institution under the jurisdiction of the department except with the approval of the commissioner. The commissioner shall promptly report his action to the advisory council. (*Derived from former* § 588.)

# CHAPTER 24

# DEPARTMENT OF WELFARE

§ 601. **Department; commissioner.**—There shall be a department of welfare the head of which shall be the commissioner of welfare. (*Derived from former* § 601.)

§ 602. **Deputies.**—The commissioner may appoint three deputies. (*Derived from former* § 602, *as amended by L. L.* 1960, *No.* 11.)

§ 603. **Powers and duties.**—The commissioner shall have the powers and perform the duties of a commissioner of welfare under the public welfare law, provided that no form of outdoor relief shall be dispensed by the city except under the provisions of a state or local law which shall specifically provide the method, manner and conditions of dispensing the same. (*Derived from former* § 603.)

§ 604. **Public institutions under the commissioner.**—The commissioner shall control, maintain and operate such institutions as are now or may be put under his control. (*Derived from former* § 604.)

# CHAPTER 25

# DEPARTMENT OF CORRECTION

§ 621. **Department; commissioner.**—There shall be a department of correction the head of which shall be the commissioner of correction. (*Derived from former* § 621.)

§ 622. **Deputies.**—The commissioner may appoint two deputies. (*Derived from former* § 622.)

§ 623. **Powers of commissioner.**—The commissioner shall have:

1. Charge and management of all institutions of the city, including all hospital wards therein for the care and custody of felons, misdemeanants and violators of ordinances or local laws and for the detention of witnesses who are unable to furnish security for their appearance in criminal proceedings, except such places for the detention of prisoners or persons charged with crime as are by law placed under the charge of some other agency.

2. Sole power and authority concerning the care, custody and control of all court pens for the detention of prisoners while in the magistrates' courts of the city of New York, the court of special sessions of the city of New York, the domestic relations court of the city of New York, the court of general sessions of the county of New York and the county courts of the counties of the Bronx, Kings, Queens and Richmond and of all vehicles employed in the transportation of prisoners who have been sentenced, are awaiting trial or are held for any other cause. (*Subd.* 2 *as added by L.* 1946, *ch.* 644, *April* 9.)

3. Charge and management of any other institution of the city placed under his jurisdiction by law.

4. All authority, except as otherwise provided by law, concerning the care and custody of felons, misdemeanants and violators of local laws held in the institutions under his charge.

5. All authority in relation to the custody and transportation of persons held for any cause in criminal proceedings in any county within the city. (*Derived from former* § 623. *Subdivisions* 1 *and* 5 *amended by L.* 1962, *ch.* 998, § 32.)

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¶ 1. In action to recover for death of plaintiff's husband as result of an accident which occurred while, as an assistant deputy sheriff in Queens County, he was acting as guard of prisoners being transported in a prison van which was driven by another deputy sheriff, a judgment of the Appellate Division dismissing the complaint as to the sheriff of Queens County and reinstating a verdict against the City on grounds that, under the Charter imposing on the City the duty of transporting prisoners and giving the City sole legal custody and control of vehicles employed in transportation of prisoners, the driver of the van was at the time of the accident performing a municipal function of the City, and hence the City and not the sheriff was liable for the death, was affirmed by the Court of Appeals without opinion.—Miller v. New York City, 292 N. Y. 571, 54 N. E. 2d 690 [1944], aff'g 266 App. Div. 565, 43 N. Y. S. 2d 79.

¶ 2. Motion by petitioner, who was on eligible list for appointment to position of warden, for order directing respondent commissioners to appoint him to position of warden in Department of Correction of City of New York inasmuch as the New York City Reformatory at New Hampton was now in charge of merely a deputy warden, was denied, as there is no provision in law compelling the Commissioner of Correction to appoint a warden where he deems the institution too small to warrant it.—Noble v. Williams, 128 (117) N. Y. L. J. (12–18–52) 1535, Col. 5 F.

¶ 3. Gives the Commissioner of Correction all authority with respect to the custody and transportation of persons held in criminal proceedings in any county within the City of New York. Hence, the Commissioner had full authority to transfer adolescents from one house of detention to another house and the exercise of that authority did not violate any constitutional rights of the adolescents or their attorney and mere inconvenience relating to visitation which may be caused to adolescents or their attorney was not sufficient to condemn the transfer, which was based on enlightened policy with respect to youthful offenders.—Bach v. Kross, 8 Misc. 2d 257, 165 N. Y. S. 2d 1014 [1957]; aff'd 4 A. D. 1017, 169 N. Y. S. 2d 416 [1958].

¶ 4. Where police report concerning a probationary correction officer showed various improprieties, the Commissioner of Correction was not arbitrary in dismissing such officer at the end of his probationary period.—Hamilton v. Kross, 140 (39) N. Y. L. J. (8–25–58) 3, Col. 2 F.

¶ 5. After petitioner satisfactorily served as a correction officer for nearly a year, the Commissioner disqualified him on the ground that he was the father of an illegitimate child. In view of petitioner's support of the child and subsequent marriage to the mother, the matter was remanded to the Commissioner for further consideration.—In re Hartfield (Schechter), 141 (95) N. Y. L. J. (5–18–59) 11, Col. 6 T.

¶ 6. The petitioner was appointed on June 9 to the position of Correction officer subject to investigation of his character. On December 8, he was dismissed, since it was shown that in his prior employment under the housing authority he had been charged with drunkeness and undue absences. The dismissal was not arbitrary, since the position in the Correction Department required a high degree of sobriety and regularity.—In re Ford, (Kross), 143 (69) N. Y. L. J. (4–11–60) 9, Col. 4 M.

¶ 7. Petitioner employed for probation period as a correction officer was entitled to a hearing before he could be discharged by the Commissioner. His record showed three minor traffic violations, a discharge from a job when 18, and debts totaling $1,800 but which had been reduced to $800.—Matter of Davis (Kros), 142 (3) N. Y. L. J. (7–3–59) 4, Col. 5 F.

¶ 8. Where the relator was convicted by the Domestic Relations Court for failing to post a security bond and the Commissioner of Correction selected the workhouse on Harts Island as the place for commitment, the action of the Commissioner was within his discretionary powers vested in him by law. Even if the workhouse were not a proper place, habeas corpus was not the proper remedy to cure the error.—Schildhaus v. Dros, 144 (28) N. Y. L. J. (8–10–60) 7, Col. 1 F.

¶ 9. Prison officials were within their rights in confiscating the strip of metal and rings attached of the kind usually found in a looseleaf binder which they found in the possession of a prisoner on a routine check and

returning the papers attached to the prisoner.—Robertson v. Kross, 145 (43) N. Y. L. J. (3–6–61) 15, Col. 3 T.

¶ 10. Commissioner of Correction had duty and authority to supervise all members of the Department and her order that plaintiff, an officer in the Department surrender his gun because he had not achieved qualified status, would not be interfered with by the court nor would the court interfere with the disciplinary hearing for failure to obey the order to surrender. —Anemone v. Kross, 143 (94) N. Y. L. J. (5–16–60) 13, Col. 4 T.

¶ 11. Control, management, and care of prisoners detained for sentence or those awaiting trial, come under the supervision of the Department of Correction. And unless regulations promulgated by the Department are contrary to law, or it is shown that the Warden has acted in bad taste or in an arbitrary manner, the court will not substitute its judgment for that of the Correction Administrator who is the duly responsible official—People v. Del Rio, 25 Misc. 2d 444, 207 N. Y. S. 2d 186 [1960].

¶ 12. Where Commissioner of Correction terminated petitioner's services as a correction officer at the end of a probationary period because of unfavorable rating reports, and the rating reports supported the determination of the Commissioner, held, not arbitrary and the court would not interfere.—Matter of Howard (Kross) 143 (110) N. Y. L. J. (6–8–60) 14, Col. 4 F.

§ 624. **Cleaning and maintenance of buildings.**—The commissioner shall maintain and operate buildings and structures under his jurisdiction. The commissioner may construct such additions and repairs to buildings under his jurisdiction as can be accomplished by the use of the labor of persons under his care and custody and with materials in the possession of the department. (*Derived from former* § 624.)

§ 625. **Labor of prisoners.**—Every inmate of an institution under the authority of the commissioner shall be employed in some form of industry, in farming operations or other employment, and products thereof shall be utilized in the institutions under the commissioner or in any other agency. Those persons held for trial may be employed in the same manner as sentenced prisoners, provided they give their consent in writing. Such inmates or prisoners held for trial may be detailed by the commissioner to perform work or service on the grounds and buildings or any public improvement under the charge of any other agency. (*Derived from former* § 625.)

§ 626. **Board of correction.**—a. There shall be a city board of correction to consist of nine members to be appointed by the mayor, each for a term of six years, commencing at the expiration of the terms of the present incumbents. Vacancies occurring in such board, otherwise than by expiration of term, shall be filled for the unexpired term. Members of the board shall serve without compensation but may be reimbursed for expenses incurred in the performance of their duties. The chairman of the board shall be designated from time to time by the mayor from among its members. Members of the board may be removed by the mayor for cause and after a hearing at which they shall be entitled to representation by counsel.

The board shall adopt rules to govern its own proceedings. The secretary of the department shall act as secretary of the board and

shall keep a record of its proceedings. The commissioner shall designate such of the department's stenographic, clerical and other assistance to the board as may be necessary for the proper performance of its functions. The commissioner may attend meetings of the board but shall not be a member thereof.

b. The board shall have the following powers and duties:

1. The inspection and visitation of all institutions and facilities under the jurisdiction of the department.

2. The inspection of all books, records, documents, and papers of the department.

3. The preparation for submission to the mayor and the commissioner of

(a) proposals for long-range capital planning

(b) studies and reports concerned with the development of the department's correctional program planning

(c) studies and reports in regard to methods of promoting closer cooperation of custodial, probation and parole agencies of government.

4. The evaluation of departmental performance.

c. The board shall annually and at such other times as it may determine, submit to the mayor and the commissioner reports, findings and recommendations in regard to the matters within its jurisdiction.

# CHAPTER 26

# DEPARTMENT OF BUILDINGS

§ 641. **Department; commissioner.**—There shall be a department of buildings the head of which shall be the commissioner of buildings. (*Derived from former* § 641 *as amended by L. L.* 1955, *No.* 112.)

### CASE NOTES

¶ 1. The dismissed city employee's contention that the term of office of the Commissioner of Department of Housing and Buildings had expired with the expiration of the Mayor's second term was without merit since the Commissioner's appointment is for an indefinite term he is deemed to continue in office until death, resignation or removal.—In re Jennings (Wilson), 179 Misc. 358, 40 N. Y. S. 2d 400 [1942].

§ 642. **Deputies and employees.**—a. The commissioner may appoint two deputies, one of whom shall have had at least ten years' experience as an architect or as a builder or as a professional engineer employed in structural work, and the other of whom shall have had experience in the management and administration of multiple dwellings or in any other field in which knowledge of the multiple dwelling law and other laws relating to housing standards is essential.

b. Persons appointed as inspectors shall be architects, engineers, masons, carpenters, plumbers, plasterers or iron workers who shall have had at least five years' experience as such, respectively. (*Derived from former* § 642 *as amended by L. L.* 1955, *No.* 112, § 2.)

§ 643. **Department; powers.**—a. Except as otherwise provided in this charter or by statute, the department shall enforce the multiple dwelling law, the labor law and such other laws, rules and regulations as may govern the construction, alteration, maintenance, use, occupancy, safety, sanitary conditions, mechanical equipment and inspection of buildings or structures in the city, and shall have charge of the removal of buildings or other structures and of the location, construction, alteration and removal of signs, illuminated or non-illuminated, attached to the exterior of any building or structure, together with all surface and subsurface construction within the curb line, including curb cuts and driveways, the coverings thereof and entrances thereto, and the issuance of permits in reference thereto.

b. The jurisdiction of the department shall not extend to water front property owned by the city, to bridges, tunnels or subways or to structures appurtenant thereto.

c. It shall be the duty of the commissioner to cooperate with state and city housing authorities and the city planning commission and with organizations engaged in the improvement of housing conditions or in the study thereof. (*Derived from former* § 643.)

**CASE NOTES**

¶ 1. Within the limits of the City of New York § 241-a of the Labor Law and the Rules of the Industrial Code relative to building construction are not enforceable by the Department of Labor. Although the provisions of the Labor Law apply to buildings within the City of New York, the rules of the City Board of Standards and Appeals covering the same matter as the Industrial Code prevail exclusively within the city limits, and are enforceable only by the city authorities. The powers of enforcement of laws relating to construction and the safety of employees engaged therein have been substantially broadened by provisions of the Charter. People (Hernon) v. 20 East 74th St. Corporation, 68 N. Y. S. 2d 73 [1947].

¶ 2. A lessee complied with the requirements of its lease when it obtained a "certificate of completion" issued by the Department of Marine and Aviation. The lease called for a certificate of occupancy "by the appropriate municipal department". Since the property was bounded by the Shell Bank basin, the Department of Marine and Aviation had jurisdiction.—Mandel v. Waxman, 146 (70) N. Y. L. J. (10–10–61) 16, Col. 7 M.

§ 644. **Division of housing.**—There shall be in the department a division of housing which shall enforce the multiple dwelling law and any other provision of law, rule or regulation in relation to the maintenance, use, occupancy, safety, sanitary condition and inspection of any building or portion thereof which is occupied or is arranged or intended to be occupied as the home, residence or sleeping place of one or more human beings, not, however, including one- or two-family houses. If a building is occupied in part for such purposes, the commissioner may assign jurisdiction over it to the division, and he may assign other duties to the division not inconsistent with the duties conferred on it in this charter. (*Derived from former* § 644 *as amended by L. L.* 1955, *No.* 112, § 4.)

**CASE NOTES**

¶ 1. Multiple Dwelling Law § 309, providing that whenever, in the opinion of the department charged with enforcement of such law, a multiple dwelling was in a condition dangerous to life or health, such department might declare it a public nuisance and order it to be removed, abated, altered or otherwise improved, should not be construed as intending to give the Commissioner of Buildings power to order structural alterations except where the *statute* has imposed upon owners or occupants of multiple dwellings a standard or requirement which necessitates such alterations, since it is the function of the Legislature to determine what standards of safety should be required for multiple dwellings, and it might not delegate such authority to an administrative officer. —Lyons v. Prince, 281 N. Y. 557 [1939], aff'g 257 App. Div. 202, 12 N. Y. S. 2d 466.

¶ 2. Where the non-fireproof lodging house leased to petitioners complied with every definite requirement of the law when originally constructed in 1889, approval of the plans and specifications were given in accordance with the then existing law, and no statute or order had been enacted requiring that buildings theretofore used as lodging houses and conforming to standards of structural safety required when such use began, should

conform to higher standards imposed for buildings erected or altered for use thereafter, Commissioner of Buildings *held* without authority to require the fire retarding of the stairways and ceilings and the installing of a bulkhead in the roof of the buildings, since the Legislature, under the circumstances of the present case, might not delegate to an administrative officer power to decide whether higher standards and additional requirements should be exacted for protection of public health and safety, even though such higher standards might reasonably be exacted and the Legislature had been remiss in failing to exact them.—Id.

§ 645. **Officers of department; powers and duties.**—a. There shall be a main office of the department and in each borough a branch office and a borough superintendent.

b. The commissioner shall have exclusive power, which shall not be subject to review except by the board of standards and appeals as provided by law,

(1) to examine and approve or disapprove plans for the construction or alteration of any building or structure and to direct the inspection of such building or structure in the course of construction or alteration;

(2) to require that the construction or alteration of any building or structure shall be in accordance with the provisions of law and the rules, regulations and orders applicable thereto; but where there is a practical difficulty in the way of carrying out the strict letter of any provision of law relating to buildings in respect to the use of prescribed materials or methods of construction and where equally safe and proper materials or forms of construction may be employed in a specific case, he may permit the use of such materials or of such forms of construction, provided that the spirit of the law shall be observed, safety secured and substantial justice done, but he shall have no power to allow any variance from the provisions of any law in any other respect except as expressly allowed therein, or of any rule, regulation or order of the fire commissioner or of the board of standards and appeals.

The term "practical difficulty" as used in this chapter shall not include any difficulty in relation to the height or bulk of any buildings, required open spaces, dimensions of yards or courts, means of egress or of sanitation, or devices for prevention or alarm in case of fire;

(3) to issue certificates of occupancy for any building or structure situated in the city.

c. The commissioner may, by instrument in writing filed in the department, designate the borough superintendent of any borough to possess within such borough any of the powers granted to the commissioner by this section and section six hundred forty-six of the charter, and to exercise the same within such borough, in the name of the commissioner, for such times and under such conditions as he may specify. The superintendent shall also perform in his borough such other duties as the commissioner may direct. (*Derived from former* § 645 *as amended by L. L.* 1955, *No.* 112, § 5.)

**CASE NOTES**

¶ 1. Whether the Civil Service Commission had acted in good faith in taking position of borough superintendent out of the engineering class and classifying it as administrative, and whether other acts by the Commission were done with object of filling positions of borough superintendent with provisional employees to exclusion of others, *held* to present issues of fact requiring a trial on an application for an order setting aside an examination theretofore given for position of borough superintendent, and for other relief.—In re Hanning (Kern), 103 (49) N. Y. L. J. (2-29-40) 939, Col. 7 M.

¶ 2. In an action by an owner and lessee to enjoin the construction on adjoining premises of a building allegedly in violation of zoning ordinances, the action was not barred by the plaintiff's failure to appeal to the Board of Standard and Appeals from the granting of the building permit.—Lesron Jr., Inc. v. Feinberg, 13 A. D. 2d 90, 213 N. Y. S. 2d 602 [1961].

¶ 3. Petitioners were entitled to an order of mandamus directing the Building Commissioner and the Borough Superintendent to furnish a decision, order or determination with respect to their claim that they complied with the provisions of the law in connection with the alteration of a building. Such decision or order could then be the subject of an appeal to the Board of Standards and Appeals.—Walker v. Reidy, 31 Misc. 2d 915, 221 N. Y. S. 2d 564 [1961].

§ 646. **Certificate of occupancy.**—a. No building or structure hereafter constructed may be occupied or used in whole or in part for any purpose until a certificate of occupancy has been issued.

b. No building or structure or part thereof for which a certificate of occupancy has not been previously issued or required shall be occupied or used for any purpose whatever in case such building shall hereafter be altered or converted so as to decrease or increase the number of living rooms or apartments, until a certificate of occupancy has been issued.

c. No building hereafter altered or converted from one class to another class shall be occupied or used for any purpose whatever in case such building was vacant during the progress of the work, until a certificate of occupancy has been issued. In case such an alteration does not necessitate the vacation of the building during the progress of the work, the occupancy or use of the building shall not continue more than thirty days after the completion of such alteration, unless a certificate of occupancy has been issued.

d. A certificate of occupancy of a building or structure shall certify that such building or structure conforms to the requirements of all laws, rules, regulations and orders applicable to it and shall be in such form as the board of standards and appeals shall authorize.

e. (1) No certificate of occupancy shall be issued for any building, structure, enclosure, place or premises wherein containers for combustibles, chemicals, explosives, inflammables and other dangerous substances, articles, compounds or mixtures are stored, or wherein automatic or other fire alarm system is required by a provision of law to be installed, until the fire commissioner has tested and inspected and has certified his approval in writing of the

installations of such containers or fire alarm system to the commissioner of buildings, except that no such testing, inspection, or certification shall be necessary for storage tanks and auxiliary storage tanks for oil-burning equipment; provided, however, that a certificate of occupancy may be issued without such a test, inspection and certificate of approval of a fire alarm system by the fire commissioner where such fire alarm system is installed or required to be installed pursuant to an order of the fire commissioner acting within the discretion vested in him by law. No certificate of occupancy shall be issued for any building, structure, enclosure, place or premises where in any standpipe or sprinkler system is required by a provision of law to be installed until the fire commissioner has witnessed the flow and pressure test for such system and has certified his approval thereof in writing to the commissioner of buildings; provided, however, that a certificate of occupancy may be issued without such a test and certificate of approval of a standpipe or sprinkler system by the fire commissioner where such standpipe or sprinkler system is installed or required to be installed pursuant to an order of the fire commissioner acting within the discretion vested in him by law. Such approval shall be recorded on the certificate of occupancy.

(2) A certificate of occupancy may be issued for an alteration or conversion which does not change the classification of occupancy of a building, structure, enclosure, place or premises, without any test, inspection or certificate of approval by the fire commissioner of a container, fire alarm system or standpipe or sprinkler system which was installed in such building, structure, enclosure, place or premises prior to such alteration or conversion provided that such alteration or conversion does not affect or change such container, fire alarm system or standpipe or sprinkler system and provided further, that the installation of such container, fire alarm system or standpipe or sprinkler system was tested, inspected and approved in accordance with the provisions of paragraph one of this subdivision, prior to such alteration or conversion. (Subd. e as relettered from subd. f and amended by L. L. 1955, No. 112, §§ 6 and 7, December 8. Former subd. e repealed by L. L. 1955, No. 112, § 6, December 8.)

f. Every certificate of occupancy shall, unless and until set aside or vacated by the board of standards and appeals or a court of competent jurisdiction, be and remain binding and conclusive upon all agencies and officers of the city, and shall be binding and conclusive upon the department of labor of the state of New York, as to all matters therein set forth, and no order, direction or requirement at variance therewith shall be made or issued by any agency or officer of the city, nor by the department of labor of the state of New York, or any commission, board officer or member thereof. (Formerly subd. g, relettered subd. f by L. L. 1955, No. 112, December 8.)

g. The commissioner may, on request of the owner of a building or structure or his authorized representative, issue a temporary

certificate of occupancy for any part of such building or structure, provided that such temporary occupancy or use would not in any way jeopardize life or property; but no such temporary certificate shall be issued unless and until any certificate required for subdivision e of this section is issued. (Formerly subd. h as relettered subd. g and amended by L. L. 1955, No. 112, §§ 6 and 7, December 8.)

h. The term "class" as used in this chapter refers to the classification of buildings in the building code or local law regulating building as it may be amended from time to time and shall be deemed to refer also to the terms "class" or "kind" as used in the multiple dwelling law where such law is affected. (*Derived from former* § 646. *Subdivision e, paragraph 1 amended by L.* 1962, *ch.* 998, § 33.)

## CASE NOTES

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¶ 1. Charter § 646(g), providing that every certificate of occupancy shall be conclusive upon all agencies and officers of the City unless and until vacated by the court or Board of Standards and Appeals, authorizes a setting aside of a certificate of occupancy only where there has been no reliance upon the certificate by a purchaser or mortgagee. Hence where erection of cubicles in lodging house had been completed pursuant to plans approved by the Department of Buildings and a certificate of occupancy had been issued by the Commissioner of Buildings before petitioner acquired his leasehold of the lodging house, the Board of Standards and Appeals was without authority to revoke such certificate, particularly in view of provision of Multiple Dwelling Law § 61a that whenever any person has relied upon the certificate no claim that the dwelling had not, prior to issuance of such certificate, conformed to provisions of the chapter might be made against such person.—Edward v. Murdock, 283 N. Y. 529, 29 N. E. 2d 74 [1940].

¶ 2. See also, *same case*, in 175 Misc. 351, 22 N. Y. S. 2d 772, wherein Special Term of the Supreme Court, on remittitur, *held* that the Court of Appeals had decided that petitioner was a purchaser within the meaning of Multiple Dwelling Law § 301, that the Board of Standards and Appeals lacked authority to revoke the certificate as against petitioner, and that Special Term was bound by such ruling either under theory of res judicata or stare decisis.

¶ 3. A certificate of occupancy is binding and conclusive upon all agencies of the City until set aside by the Board of Standards and Appeals or by the courts (Charter § 646, subd. g).—Robitzek Investing Co. v. Colonial Beacon Oil Co., 265 App. Div. 749, 40 N. Y. S. 2d 819 [1943], aff'g 37 N. Y. S. 2d 772.

¶ 4. In action to recover rent for a gasoline filling station, defense alleging that a zoning resolution rendered unlawful the use of the premises for the purposes stated in the lease, *held* insufficient, where a certificate of occupancy had been granted author-

**izing the use of the premises for the purposes contemplated by the lease and defendant's possession for a period of nearly three years had never been questioned by any municipal agency or department. So long as the certificate of occupancy was in full force and effect, it might not be collaterally attacked.—Id.**

¶ 5. Use of an immobilized trailer on defendant's property for living purposes *held* to be a violation of charter prohibiting use of premises without a certificate of occupancy.—People v. Lederle, 132 (118) N. Y. L. J. (12–21–54) 1, Col. 8 T.

¶ 6. Even if Multiple Dwelling Law § 194 was thereafter held unconstitutional, the City of New York might not be held liable by property owner for damages occasioned by the necessity of removing a frame building on the premises in order to obtain a certificate of occupancy. In refusing to issue a certificate of occupancy the building superintendent was performing a governmental function, and moreover a public official is not required to judge the validity of a statute at his peril.—McCauslan v. City of New York, 183 Misc. 954, 52 N. Y. S. 2d 215 [1944].

¶ 7. Certificate of occupancy granted in 1920 to petitioner's predecessor by the Borough Superintendent of Buildings, *held* not to establish petitioner's right to use the entire premises in question for purposes therein described, on ground the premises as a whole had been devoted to that nonconforming use at time of adoption of the Building Zone Ordinance.—In re Furman Ave. Realty Corp., 275 App. Div. 779, 87 N. Y. S. 2d 693, aff'd 299 N. Y. 768, 87 N. E. 2d 676.

¶ 8. Board of Standards and Appeals did not have power to revoke a certificate of occupancy granted seven years prior in direct contravention of the zoning resolution without granting a demand for a review (Charter §§ 646g, 666).—In re Robitzek Investing Co. (Murdock), 271 App. Div. 250, 62 N. Y. S. 2d 737 [1946] aff'd 296 N. Y. 852, 72 N. E. 2d 82.

¶ 9. Action of Board of Standards and Appeals in revoking a certificate of occupancy of petitioner's premises for use for storage and repair of wood packing cases and storage of two auto trucks, on ground that it was issued against a building permit having nothing to do with the use provided in the certificate, and in disregard of the standards provided in the Administrative Code, *held* not to have been arbitrary. Inasmuch as the certificate of occupancy was illegally issued by a dishonest clerk, the revocation of the permit or certificate of occupancy would be sustained notwithstanding fact that improvements or investments may have been made on the strength of the illegal permit.—In re Jacobson (Murdock), 123 (38) N. Y. L. J. (2–27–50) 710, Col. 5 F.

¶ 10. In view of alterations made to building by landlord it was unlawful to occupy any part of the premises for any purpose until a certificate of occupancy had been obtained, and no license for a particular use, such as for a billiard parlor, could be obtained until the certificate was issued (Charter § 646, Admin. Code § C26–181.0, et seq.).—De Angelis v. White-All Corp., 273 App. Div. 873. 77 N. Y. S. 2d 315 [1948].

¶ 11. Petition to amend certificate of occupancy dismissed where the papers showed that no final appealable determination had been made by the Commissioner of Housing.—Nioucel v. Gilroy, 133 (13) N. Y. L. J. (1–19–55) 8, Col. 3 T.

¶ 12. The Board of Standards and Appeals was not arbitrary where it denied a certificate of change of occupancy for a three-family dwelling. The building had been erected on approved plans which called occupancy by one family, a physician's office and a garage but petitioner had erected a three-family house and permitted its occupancy without ever applying for a certificate of occupancy.—Seinfeld v. Murdock, 148 N. Y. S. 2d 359 [1955].

¶ 13. A 3-family dwelling erected prior to October 15, 1952 and occupied by 3 families prior to that time was not "erected" prior to that time within the meaning of Multiple Dwelling Law § 9(9) where the building was erected in violation of plaintiff's specifications approved by the Department of Housing and Buildings and no certificate of occupancy was ever obtained.—Seinfeld v. Murdock, 148 N. Y. S. 2d 359 [1955].

¶ 14. Petitioner filed plans for alteration of a dwelling from single to two-family occupancy. Approval of the borough superintendent was given. At that time the dwelling was located

in a two-family zone. No certificate of occupancy was issued and thereafter the area was rezoned and restricted to single family occupancy. A permit was then illegally issued by the superintendent. *Held:* the permit to construct could be properly revoked and an order that the dwelling be used only for single family occupancy was proper. Only if petitioner had completed alterations and secured a certificate of occupancy would any subsequent change in zoning be void as against the petitioner.—Matter of Smalls, 28 Misc. 2d 147, 211 N. Y. S. 2d 212 [1961], aff'd 14 A. D. 2d 548, 218 N. Y. S. 2d 1005 [1961].

¶ 15. Petitioners were entitled to an order of mandamus directing the Building Commissioner and the Borough Superintendent to furnish a decision, order or determination with respect to their claim that they complied with the provisions of the law in connection with the alteration of a building. Such decision or order could then be the subject of an appeal to the Board of Standards and Appeals. —Walker v. Reidy, 31 Misc. 2d 915, 221 N. Y. S. 2d 564 [1961].

§ 647. **Inspection of standpipe and sprinkler systems.**—Neither the commissioner nor the borough superintendent shall approve the installation of any standpipe or sprinkler system which is required to be installed pursuant to an order of the fire commissioner acting within the discretion vested in him by law until the fire commissioner has inspected such system, has witnessed the flow and pressure test for such system and has certified his approval thereof in writing to the commissioner. Neither the commissioner nor the borough superintendent shall approve the installation of any standpipe or sprinkler system which is required by a provision of law to be installed until the fire commissioner has witnessed a test of such system as prescribed by law, and has notified the commissioner in writing of his satisfaction with the results of such test. (*Derived from former* § 647 *as amended by L. L.* 1955, *No.* 112, § 8.)

§ 648. **Appeals.**—Appeals may be taken from decisions of the commissioner of buildings and of the borough superintendent acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of section six hundred forty-five of the charter, to the board of standards and appeals as provided by law. (*Derived from former* § 648 *as amended by L. L.* 1955, *No.* 112, § 9.)

**CASE NOTES**

¶ 1. In action for declaratory judgment to compel the individual defendant to remove alleged encroachments of a wall from plaintiff's premises and to direct the City of New York to remove therefrom existing violations, and to desist from putting future violations against the premises of plaintiff by reason of the wall, the City of New York *held* entitled to judgment on the pleadings, inasmuch as plaintiff had failed to exhaust her remedy by appeal to the Board of Standards and Appeals from the order of the Borough Superintendent of Buildings directing her to rebuild and repair the wall.—Breuel v. Rohan, 181 Misc. 635, 42 N. Y. S. 2d 291 [1943].

¶ 2. In an action by an owner and lessee to enjoin the construction on adjoining premises of a building allegedly in violation of zoning ordinances, the action was not barred by the plaintiff's failure to appeal to the Board of Standards and Appeals from the granting of the building permit. —Lesron Jr., Inc. v. Feinberg, 13 A. D. 2d 90, 213 N. Y. S. 2d 602 [1961].

§ 649. **Inspection.**—The commissioner, a deputy commissioner, any borough superintendent in his borough, any inspector or any officer of the department authorized in writing by the commissioner or a borough superintendent to act in his borough, may, for the purpose of performing their respective official duties, enter and inspect any building, structure, enclosure, premises or any part thereof, or anything therein or attached thereto; and any refusal to permit such entry or inspection shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. (*Derived from former* § 649.)

§ 650. **Construction clause.**—Any law, rule, regulation, contract or other document which refers or is applicable to the department of housing and buildings of the city or the commissioner of housing and buildings of the city, shall be deemed to refer to the department of buildings of the city or the commissioner of buildings of the city, as the case may be. Any law, rule, regulation, contract or other document which refers or is applicable to the deputy commissioner of housing of the department of housing and buildings of the city shall be deemed to refer to the commissioner of buildings of the city. (*Derived from former* § 650 *as added by L. L.* 1955, *No.* 112, § 10.

§ 651. **Functions, power and duties of division of housing; how exercised.**—Any functions, powers or duties conferred by this charter or by any other law upon the division of housing, either expressly or by reference to the former deputy commissioner of housing, shall be deemed to have been conferred upon the division of housing, subject to the direction and control of the commissioner of buildings, and all such functions, powers and duties shall be exercised by such division of housing under the direction and control of the commissioner. (*Derived from former* § 651 *as added by L. L.* 1955, *No.* 112, § 10.)

§ 652. **Functions, powers and duties of borough superintendents; how exercised.**—Any functions, powers or duties conferred by this charter or by any other law upon a borough superintendent shall be deemed to have been conferred upon the commissioner of buildings, and any such function, power or duty may be exercised by the commissioner of buildings or may be delegated by him to a borough superintendent in the manner provided in subdivision c of section six hundred forty-five of this charter. (*Derived from former* § 652 *as added by L. L.* 1955, *No.* 112, § 10.)

# CHAPTER 27

## BOARD OF STANDARDS AND APPEALS

§ 659. **Director of standards and appeals.**—a. There shall be a director of standards and appeals who shall be appointed by and shall hold office at the pleasure of the board of standards and appeals.

b. The director shall be a registered architect or a licensed professional engineer who, at the time of his appointment, shall have had at least ten years' experience in structural work, at least five of which shall have been in adminstrative work. He shall devote his entire time to the performance of his duties and shall not engage in any other occupation, profession or employment.

§ 660. **Staff; powers and duties.**—a. The director may appoint such engineers, architects, experts and other officers and employees as may be required to perform the duties of his office, with the approval of the board and within the appropriation provided therefor.

b. The director shall assign and supervise all members of his staff. He shall test or provide for the testing of materials and appliances and prepare and present matters before the board of standards and appeals in accordance with the rules, regulations and directives of such board, and shall prepare the calendar of such board.

§ 661. **Constitution and appointment.**—a. The board of standards and appeals shall consist of five members to be termed commissioners to be appointed by the mayor each for a term of six years, commencing at the expiration of the terms of the present incumbents.

b. Two of the members shall be registered architects and shall have had at least fifteen years' experience as architects. One shall be a licensed professional engineer and shall have had at least fifteen years' experience as an engineer engaged in structural work. One shall be a licensed professional engineer and shall have had at last fifteen years' experience as an engineer engaged in mechanical work. The mayor shall designate one of the members, who shall have had the required experience as an architect or as engineer, to serve as chairman and shall designate one of the members to serve as vice-chairman who shall act as chairman in the absence of the chairman or in the event that a vacancy exists in the office of chairman.

c. Every member of the board shall receive a salary, which shall not be reduced during his term of office except in case of a general

reduction of salaries and in proportion to reductions of salaries of other officers with similar salaries. A member shall not engage in any other occupation, profession or employment. Members shall attend the hearings and executive sessions of the board, and shall perform such other duties as may be required by the chairman.

d. Vacancies shall be filled by the mayor for the unexpired term of the member whose place has become vacant and with a person having his qualifications. (*Derived from former* § 661 *as amended by L. L.* 1957, *No.* 94.)

§ 662. **Removal by mayor after hearing.**—Any member may be removed by the mayor on proof of official misconduct, or of negligence in official duties, or of conduct in any manner connected with his official duties which tends to discredit his office, or of mental or physical inability to perform his duties; but before removal he shall receive a copy of the charges and shall be entitled to a hearing before the mayor and to the assistance of counsel at such hearing. (*Derived from former* § 662 *as amended by L. L.* 1957, *No.* 94.)

§ 663. **Meetings.**—Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All hearings before the board shall be open to the public and shall be before at least three members of the board, and a concurring vote of at least three members shall be necessary to a decision. The board shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official action. Such minutes and such records shall be public records. (*Derived from former* § 663.)

**CASE NOTES**

¶ 1. Under § 663 of the Charter, the denial of an application for a variance, *held* to require three concurring votes, just as does the grant of a variance, and hence where the board divided 2–2 on an application, no relief could be granted.—In re Donner (Murdock), 126 (115) N. Y. L. J. (12–17–51) 1673, Col. 3 F.

§ 664. **Member interested in question.**—No member of the board shall pass upon any question in which he or any corporation in which he is a stockholder or security holder is interested. (*Derived from former* § 664.)

§ 665. **Rules and regulations; bulletin.**—a. Every rule or regulation and every amendment or repeal thereof, and every order, requirement, decision or determination of the board shall immediately be filed in the office of the board and shall be a public record.

b. The director shall print and publish weekly a bulletin in which he shall publish every rule, regulation, amendment or repeal thereof made by the board, and every order, requirement, decision and

determination of the board, and the reasons therefor whenever it shall deem it practical to do so, and such other matters, including indices and digests, as the director may deem it advisable to publish.

c. At least ten days' notice of intention to adopt, amend or repeal any rule or regulation shall be given by publication in the bulletin of the board, and a public hearing shall be given before any action is taken thereon. The adopted rules and regulations and amendments and changes thereof shall take effect not less than twenty days after the publication thereof in the bulletin of the board. (*Derived from former* § 665 *as amended by L. L.* 1957, *No.* 94.)

**CASE NOTES**

¶ 1. Contention that Board of Standards and Appeals should have adopted rules with respect to the business of dry cleaning generally, as to definition of what is "dry cleaning" and as to general rules governing the term "accessory", were matters presently not properly before the court, as § 665 of the Charter provides for adoption of rules by the Board after giving of notice and the holding of a public hearing.—In re Kent Stores, Inc. (Murdock), 123 (41) N. Y. L. J. (3-2-50) 766, Col. 3 F.

§ 666. **Jurisdiction.**—The board shall have power:

1. To require the testing and to approve materials and appliances to be used pursuant to law.

2. To make, amend and repeal rules and regulations for carrying into effect the provisions of the laws, resolutions, rules and regulations in respect to any subject-matter, jurisdiction whereof is conferred by law upon the board, and to include in such rules and regulations provisions applying to specific conditions and prescribing means and methods of practice to effectuate such provisions and for carrying into effect the powers of the board.

3. To make, amend and repeal rules and regulations for the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration, structural changes in, plumbing and drainage of, elevators in, fire escapes on, adequacy and means of exit from and fire protection in all buildings within the city, which shall take the place of the industrial code and of any rules and regulations of the department of labor of the state of New York relating to the same subject-matter.

3-a. To make, amend and repeal rules, regulations and directives governing the preparation and presentation by the director of matters before the board.

4. To exercise exclusively with respect to buildings situated within the city, the same powers as are exercised by the department of labor of the state of New York elsewhere in the state.

5. To determine and vary the application of the building zone resolution as may be provided in such resolution.

6. To hear and decide appeals from and review

(a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of build-

ings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of section six hundred forty-five of the charter or,

(b) any order, requirement, decision or determination of the fire commissioner or any rule or regulation or amendment or repeal thereof made by the fire commissioner,

under the authority conferred upon them by law, by reversing or affirming in whole or in part, or modifying the order, regulation, decision or determination appealed from, and to make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have the power of the officer from whose ruling the appeal is taken, and of any officer under whose written delegation of power such ruling was made.

7. In passing upon appeals, to vary or modify any rule or regulation or the provisions of any law relating to the construction, use, structural changes, equipment, alteration or removal of buildings or structures, or vaults in sidewalks appurtenant thereto, where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the law, so that the spirit of the law shall be observed, public safety secured and substantial justice done, provided that the provisions of title D of chapter twenty-six of the administrative code and of any regulation or order issued under such title may be varied or modified only to the extent permitted by such title and only in the manner and subject to the conditions therein specified.

8. To review, upon motion of any member of the board, any rule, regulation, amendment or repeal thereof, and any order, requirement, decision or determination from which an appeal may be taken to the board under the provisions of this chapter or of any law, or of any rule, regulation or decision of the board; but no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified. The provisions of this chapter relating to appeals to the board shall be applicable to such review. (*Derived from former* § 666 *as amended by L. L.* 1955, *No.* 112; 1957, *No.* 94.)

## CASE NOTES

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¶ 1. The rules relating to the erection, repair or demolition of buildings promulgated by the City Board of Standards and Appeals must take preference over the State rules relating to the same matter and the enforcement of such rules is exclusively within the province of the city authorities.—People v. 20 E. 74th Street Corporation, 188 Misc. 488, 68 N. Y. S. 2d 73 [1947].

¶ 2. Plaintiff, contesting order of City to vacate the premises as an unlawful building, was required first to appeal from the order to the Board of Standards and Appeals.—Glazer v. City of N. Y., 129 (8) N. Y. L. J. (1–13–53) 122, Col. 1 M.

¶ 3. Although resort to the Board of Standards and Appeals to review an order of the Fire Commissioner is ordinarily the remedy of an aggrieved party in the first instance, it does not necessarily follow that this is his exclusive first remedy in every case, such as where a statute is unconstitutional or where there is no statute at all, or where the statute by its own terms does not apply in a given case.—In re 109 Beach St. Corp. (Archer), 188 Misc. 769, 67 N. Y. S. 2d 916 [1946].

¶ 4. Petition to amend certificate of occupancy dismissed where the papers showed that no final appealable determination had been made by the Commissioner of Housing.—Nioucel v. Gilroy, 133 (13) N. Y. L. J. (1–19–55) 8, Col. 3 T.

¶ 5. Application for an order reviewing and annulling respondent's determination which denied petitioner's application for certificate of occupancy *denied* where petitioners failed to first exhaust their remedies before the Board of Standards and Appeals.—Green v. Gillroy, 133 (13) N. Y. L. J. (1–19–55) 8, Col. 1 M.

¶ 6. Contention that petitioner, who asserted that orders of Fire Commissioner directing installation of fire alarm system and other fire protective devices in petitioner's summer rooming house were without justification of law, was required first to appeal to the Board of Standards and Appeals to review the Commissioner's action pursuant to Charter former §§ 666(6) and 668a before it could sue in law for an order requiring the Commissioner to rescind the orders, was rejected, as respondent by moving for an order dismissing the petition as a matter of law admitted the allegations of the petition, including the averment that the acts complained of were without justification of law. —Id.

¶ 7. Question whether petitioner's building came within purview of sections of the Administrative Code upon which were based orders requiring installation of a fire alarm system and other fire protective devices in petitioner's summer rooming house were matters which should be determined in the first instance, at least, in accordance with the administrative procedure outlined in *Matter of Towers Management Corp.* v. *Thatcher*, 271 *N. Y.* 94, which procedure contemplates a review by a specialized administrative body with an ultimate review by the courts as to whether such body acted upon substantial evidence. Accordingly, application of owner of building for an order directing the Deputy Fire Commissioner to rescind his orders was denied without prejudice to an application to the Board of Standards and Appeals and for a review of its determination before the court.—In re Sacer Realty Corp. (Archer), 68 N. Y. S. 2d 277 [1946].

¶ 8. Petitioner was not entitled to an order requiring Borough Superintendent of the Department of Housing and Buildings to revoke a certificate of occupancy and reinstate prior certificates, where it had failed to exhaust its administrative remedy of appeal to the Board of Standards and Appeals.—Built by Glick, Inc. v. Saltzman, 116 (35) N. Y. L. J. (8–19–46) 292, Col. 4 M.

¶ 9. Where plaintiff apartment house owner had theretofore obtained a judgment against defendants and their tenant enjoining them from using or permitting use of their premises, which were across the street from plaintiff's apartment house, for purposes of a retail store or other business or commercial purposes, but in violation of such judgment defendant-owners and a new tenant had allegedly converted the premises for use as a retail liquor store, an action brought by plaintiffs to impress as a lien upon the property the injunctive provisions of the judgment and to enforce such judgment, and to restrain officials of the Department of Housing and Buildings from issuing permits for the use of the premises for business or commercial purposes,

was dismissed, since plaintiff had an adequate remedy at law by enforcing their judgment under C. P. A. § 505, subd. 1, and it had a remedy against the officials of the Department of Housing and Buildings pursuant to former Charter § 666(6). Plaintiff could not lawfully claim the same relief which had already been granted and which simply needed to be enforced (144 N. Y. 326), and to grant a second injunction would be repetitious.—Shaw v. Palazzo, 79 N. Y. S. 2d 370 [1948].

¶ 10. Where the City of New York had served an order on plaintiff directing her to rebuild and repair defective parts of a wall and the plaintiff had not taken an appeal under subdivision 6 of this section, she could not thereafter maintain an action to compel the City to remove existing violations on the ground that the wall had been erected between her property and that of her neighbors by the latters' predecessor in title.—Breuel v. Rohan, 181 Misc. 635, 42 N. Y. S. 2d 291 [1943].

¶ 11. In proceeding brought under Admin. Code § 487e–2.0 (d) for prosecution of defendant for failure to comply with Fire Commissioner's direction for installation of an interior fire alarm system and a watchman time detector system in its hotel, court was without jurisdiction to review the facts for purpose of determining whether the Commissioner's order was reasonable or necessary. Defendant's remedy was to seek review of the order by the Board of Standards and Appeals, pursuant to former Charter § 666, subdiv. 6. Court could only consider whether defendant had in fact complied with the Fire Commissioner's direction.—People (Pellegrino) v. 70 Realty Corp., 192 Misc. 122, 78 N. Y. S. 2d 265 [1948].

¶ 12. Resort to the Board of Standards and Appeals is a customary remedy of an aggrieved party who wishes to appeal from an order of the Fire Commissioner. Following such a determination the defendant may then have the Board's decision reviewed by the Supreme Court, or a Special Term thereof. In special situations recourse may be had in the first instance by petition to the court, such as where a statute is unconstitutional or there is no statute at all, or where a statute by its own terms does not apply to a given case.—Id.

¶ 13. Even if the Superintendent of the Department of Housing and Buildings had an alternative, but denied the application for a certificate of occupancy in the erroneous belief that he had not, petitioner, before making application for an order compelling issuance of a certificate of occupancy, was required to appeal to the Board of Appeals.—Application of Braunsdorf, 202 Misc. 471, 111 N. Y. S. 2d 507 [1952].

¶ 14. Where tenant of gasoline service station, with consent of owner, appealed to Board of Standards and Appeals from ruling of Borough Superintendent that the service station had been abandoned and such use could not be resumed because of zoning restrictions, but the Board dismissed such appeal and then proceeded to revoke the certificate of occupancy on ground it was illegally issued, such procedure of revoking the certificate without any proceeding invoking such relief being instituted by any public official and without notice to the owner was irregular and unwarranted and prejudiced the rights of persons who had in good faith acted upon the issuance of the certificate. Under such circumstances former § 666, subd. 8 of the Charter did not permit the review, upon motion of a member of the board, of the legality of the issuance of the certificate.—Robitzek Investing Co. v. Murdock, 271 App. Div. 250, 62 N. Y. S. 2d 737 [1946], aff'd without opinion, 296 N. Y. 852, 72 N. E. 2d 32.

¶ 15. The Board of Standards and Appeals did not have power to revoke a certificate of occupancy granted seven years prior which was in direct contravention of the zoning regulation without granting a demand for review.—Id.

¶ 16. Although generally the Board of Standards and Appeals has no power to reopen and review its decisions, it may do so where there has been a material change in the factual situation.—In re Ducon Realty Corp. (Murdock), 124 (34) N. Y. L. J. (8–18–50) 273, Col. 4 F.

¶ 17. Neither the Board of Standards and Appeals nor the courts have jurisdiction to entertain an application or proceeding seeking an opinion which would be essentially of an advisory nature.—Kent Stores, Inc. v. Murdock, 278 App. Div. 946, 105 N. Y. S. 2d 111 [1951].

¶ 18. In a proceeding to review the determination of the Board of Standards and Appeals denying an application for a change of occupancy for a 2-story brick building to a 3-family dwelling under § 9, sub 9 of the Multiple Dwelling Law the property owner was not entitled to an order directing the Board to serve a bill of particulars where such information was not necessary or material in connection with petitioner's application. There is no provision in this section or section 668 for such relief.—Seinfeld v. Murdock, 148 N. Y. S. 2d 359 [1955].

¶ 19. The power of the Board of Standards and Appeals to grant individual variances in hardship and other cases is not in conflict with the power of the Board of Estimate to pass a zoning ordinance which is individual in its application.—Congregation Beth Israel v. Board of Estimate, 285 App. Div. 629, 139 N. Y. S. 2d 645 [1955].

¶ 20. The Board of Standards and Appeals has jurisdiction of an appeal from the refusal of the Building Commissioner to issue a tax abatement exemption certificate.—In re 534 E. 88th St. Corp. (Crinnion) 140 (122) N. Y. L. J. (12–26–58) 4, Col. 3 M.

¶ 21. Petitioners were not entitled to restrain Board from proceeding with an application by a property owner for a variance of zoning regulation pursuant to former § 666 (5) of the Charter. The petitioners, if aggrieved, may have the Board's action reviewed in certiorari proceedings pursuant to § 668e-1.0 of the Code.—Lacitra v. Foley, 20 Misc. 2d 922, 195 N. Y. S. 2d 285 [1959].

¶ 22. An erroneous pleading by the plaintiff of inapplicable state rules instead of applicable city rules of New York City Board of Standards and Appeals was not fatal. The Court could permit an amendment so as to conform the proof to the pleading, in view of the fact that, the amendment did not materially alter the plaintiff's theory and the defendants were not surprised.—Gorlin v. Master Construction Corporation, 15 Misc. 2d 1, 180 N. Y. S. 2d 84 [1958].

¶ 23. Where petitioner failed to appeal Fire Commissioner's order to install a sprinkler system to the Board of Standards, his appeal to the Supreme Court would be dismissed.—Matter of 20 Catherine St., Inc. (Cavaugh), 145 (122) N. Y. L. J. (6–26–61) 8, Col. 7 F.

¶ 24. Where a property owner is convicted of violating an order of the Commissioner of Buildings to discontinue the use of his property as a trailer camp, no appeal lies from the decision of the Magistrate. Only the judgment of conviction may be appealed. Furthermore, the propriety of the Commissioner's order may not be reviewed on such an appeal. The correct procedure is to review the order by an appeal to the Board of Standards and Appeals.—People v. Gillman, 6 A. D. 2d 899, 177 N. Y. S. 2d 623 [1958].

¶ 25. A criminal prosecution against the petitioner, instituted by the City's Department of Housing and Buildings for alleged violations of the Department's rules or regulations was dismissed on the ground that petitioner's building did not violate any rule or regulation. This dismissal or acquittal constituted res judicata in any subsequent criminal prosecution for the same violation. Hence, petitioner was granted an order directing the Commissioner of the Department of Housing and Buildings to remove such alleged violation from his records. A motion for dismissal by the respondent, on the grounds that the petitioner had not first exhausted her administrative remedies, was denied. Petitioner was not relegated to applying to the Board of Standards and Appeals.—Matter of Wilk, 11 Misc. 2d 106, 169 N. Y. S. 2d 473 [1957].

¶ 26. Where the Board of Standards and Appeals has the power under a zoning resolution to grant a variance without a showing of unique hardship, the variation may be made to meet the specific case in order to enable the owner to make a reasonable and profitable use of his business if it can be done without violence to the general zoning plan and without causing substantial inconvenience to the immediate neighborhood, although the applicant has no right to insist upon a decision in his favor.—Matter of St. Nicholas Russian Orthodox Church, 25 Misc. 2d 380, 201 N. Y. S. 2d 424 [1960].

¶ 27. The Board of Standards and Appeals is made up of men with special qualifications of training and experience with power to vary the application of a zoning resolution.—Matter of St. Nicholas Russian Orthodox Church, 25 Misc. 2d 380, 201 N. Y. S. 2d 424 [1960].

¶ 28. Where plaintiff did not exhaust its administrative remedy, it was not entitled to a declaratory judgment declaring an order or directive of the Department of Buildings as unlawful and void.—Namro Holding Corp. v. City of N. Y., 31 Misc 2d 480, 221 N. Y. S. 2d 67 [1961].

¶ 29. The Court would not entertain an Article 78 proceeding to review a determination of the N. Y. C. Building Department issuing a building permit for construction of a go-kart amusement ride.—In re Romon (Bldg. Dept. of N. Y. C.) 147 (55) N. Y. L. J. (3–21–62) 15, Col. 5 M.

¶ 30. In an action by an owner and lessee to enjoin the construction on adjoining premises of a building allegedly in violation of zoning ordinances, the action was not barred by the plaintiff's failure to appeal to the Board of Standards and Appeals from the granting of the building permit. —Lesron, Jr., Inc. v. Feinberg, 13 A. D. 2d 90, 213 N. Y. S. 2d 602 [1961].

§ 667. **Inspections.**—Any member of the board or any subordinate thereof shall, when authorized in writing by the chairman, and the director or any officer or employee designated by him in writing shall have power at any time to enter, inspect and examine any premises, buildings, structures, vehicles or vessels for the purpose of carrying out the duties of the board and shall report his findings in writing to the board. Refusal to permit such entry shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine or not more than fifty dollars, or both. (*Derived from former* § 667 *as amended by L. L.* 1957, *No.* 94.)

§ 668. **Procedure on appeals.**—a. An appeal may be taken by any person aggrieved or by the head of any agency.

b. Such appeal may be taken within such time as shall be prescribed by the board by general rule, by filing with the officer from whom the appeal is taken and with the board a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

c. An appeal shall stay all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken shall file with the board, after the notice of appeal shall have been filed with him, a certificate, a copy of which shall forthwith be mailed to the appellant at the address stated in the notice of appeal, that, by reason of facts stated in the certificate, a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by the supreme court, on application on notice to the officer from whom the appeal is taken and on due cause shown.

d. The board shall fix a reasonable time for the hearing of appeals, and give due notice thereof to the parties, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or attorney.

e. Any decision of the board under this section may be reviewed as provided by law. (*Derived from former* § 668.)

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¶ 1. Petition to amend certificate of occupancy dismissed where the papers showed that no final appealable determination had been made by the Commissioner of Housing.—Nioucel v. Gilroy, 133 (13) N. Y. L. J. (1–19–55) 8, Col. 3 T.

¶ 2. Application for an order reviewing and annulling respondent's determination which denied petitioner's application for certificate of occupancy *denied* where petitioners failed to first exhaust their remedies before the Board of Standards and Appeals. —Green v. Gillroy, 133 (13) N. Y. L. J. (1–19–55) 8, Col. 1 M.

¶ 3. Petition to court for review of the decision of the Board of Standards and Appeals denying application for variance was dismissed where the proceeding was not instituted within 30 days after publication of the decision in the Board's bulletin.—In re Fleischer (Murdock), 62 N. Y. S. 2d 417 [1946].

¶ 4. The 30-day period within which the applicant for a variance was required to present his petition to the Supreme Court for review of decision of the Board of Standards and Appeals did not begin to run from the time petitioner's attorney received a copy of the Board's bulletin, to which he was a yearly subscriber, but from the time of the filing of the decision in the office of the Board, or its publication in the bulletin.—Id.

¶ 5. C. P. A. § 1286, providing for a four-months' period within which to institute proceedings to review a determination, was not controlling with respect to a petition for review of a decision of the Board of Standards and Appeals of the City of New York denying an application for a variance. —Id.

¶ 6. An application for a variance under Building Zone Resolution § 7, was not directed to procuring of a reversal of the decision of the superintendent of Department of Housing and Buildings but to procuring a dispensation of compliance under the discretionary power vested in the Board of Standards and Appeals, and consequently the stay of proceedings provided for by Charter former § 668c did not cover the proceeding. Furthermore, the application in effect sought the stay of enforcement of the criminal law, and this might not be done.—In re Kesbec, Inc. (Cambell), 104 (43) N. Y. L. J. (8–20–40) 399, Col. 3 M.

¶ 7. In certiorari proceeding to review determination of Board of Standards and Appeals, usual course is for the court to examine into validity of the Board's determination upon a motion based upon a petition for the order of certiorari and the return thereto. Court has no power to try the question de novo or to substitute its discretion for that of the Board.—In re Times Sq. Realty Corp. (Murdock), 121 (57) N. Y. L. J. (3–23–49) 1052, Col. 3 M.

¶ 8. A certificate of occupancy was issued in 1939 for a gasoline station. Thereafter, the station was leased and used as a gasoline station until 1942 when operations were discontinued because of wartime restrictions. In 1944, the tenant sought permission to re-install its tanks and pumps and appealed from an order denying such permission. On the appeal, the Board affirmed the denial of permission to re-install the tanks and revoked the certificate of occupancy which had previously been obtained by the owner. Held: the revocation was effective without any proceedings invoking such relief being instituted by any public official and without notice to the owner, who was thus deprived of the benefit of its certificate without a chance to be heard.—Matter of Robitzek Investing Co., Inc., 271 App. Div. 250, 62 N. Y. S. 2d 737 [1946], aff'd 296 N. Y. 852, 72 N. E. 2d 32.

¶ 9. In a proceeding to review the determination of the Board of Stand-

ards and Appeals denying an application for a change of occupancy for a 2-story brick building to a 3-family dwelling under § 9, sub 9 of the Multiple Dwelling Law the property owner was not entitled to an order directing the Board to serve a bill of particulars where such information was not necessary or material in connection with petitioner's application. There is no provision in this section or section 666 for such relief.—Seinfeld v. Murdock, 148 N. Y. S. 2d 359 [1955].

¶ 10. Article 78 of the Civil Practice Act applies to certiorari proceedings to review determinations of the Board of Standards and Appeals. Consequently, where a Special Term order remitted to the Board a matter involving a zoning variance for a rehearing in accordance with the views expressed by the Court, the order was intermediate and not subject to appeal except by permission of the Special Term.—North American Holding Corp. v. Murdock, 6 A. D .2d 596, 180 N. Y. S. 2d 436 [1958]; aff'd 6 N. Y. 2d 902, 190 N. Y. S. 2d 708, 160 N. E. 2d 926 [1959].

¶ 11. A criminal prosecution against the petitioner, instituted by the City's Department of Housing and Buildings for alleged violations of the Department's rules or regulations was dismissed on the ground that petitioner's building did not violate any rule or regulation. This dismissal or any subsequent criminal prosecution acquittal constituted res judicata in for the same violation. Hence, petitioner was granted an order directing the Commissioner of the Department of Housing and Buildings to remove such alleged violation from his records. A motion for dismissal by the respondent, on the grounds that the petitioner had not first exhausted her admininstrative remedies, was denied. Petitioner was not relegated to applying to the Board of Standards and Appeals.—Matter of Wilk, 11 Misc. 2d 106, 169 N. Y. S. 2d 473 [1957].

¶ 12. A proceeding to review and annul a determination of the Board of Standards and Appeals was not untimely where a copy of the petition and a notice of motion was served within the 30-day period after publication of the Board's determination. It made no difference that the petition was not returnable until after the 30-day period expired.—Matter of Satin, 12 A. D. 2d 526, 208 N. Y. S. 2d 518 [1960].

¶ 13. In an action by an owner and lessee to enjoin the construction on adjoining premises of a building allegedly in violation of zoning ordinances, the action was not barred by the plaintiff's failure to appeal to the Board of Standards and Appeals from the granting of the building permit. —Lesron, Jr., Inc. v. Feinberg, 13 A. D. 2d 90, 213 N. Y. S. 2d 602 [1961].

# CHAPTER 28

## DEPARTMENT OF PUBLIC WORKS

§ 681. **Department; commissioner.**—There shall be a department of public works the head of which shall be the commissioner of public works. (*Derived from former* § 681.)

§ 682. **Deputies.**—The commissioner may appoint one or more deputies in addition to those provided for in section six hundred eighty-four. (*Derived from former* § 682.)

§ 683. **Duties of the department.**—a. It shall be the duty of the department, except as otherwise provided by this charter or by law:

1. To have charge and control over the plans and specifications for and the construction, alteration and repair of all buildings, structures and other public works paid for in whole or in part from the city treasury, including bridges and tunnels crossing navigable waters.

2. To clean, maintain and operate buildings, structures and other public works whose repair, cleaning or maintenance is paid for in whole or in part from the city treasury and to care for and clean all offices leased or occupied for public uses.

3. To have jurisdiction and control of the location, establishment, care, erection and maintenance of the public baths, public urinals and public comfort stations not located in property under the jurisdiction of the commissioner of parks.

4. To have charge and control over the location, construction, alteration and repair of, and to maintain and operate all sewers including intercepting sewers, and sewage disposal plants, and of all matters in the several boroughs relating to public sewers and drainage, to initiate and make all plans for drainage and to have charge of all public and private sewers in accordance with such plans; and to have charge of the management, care and maintenance of the sewer and drainage systems therein; and of the licensing of all cisterns and cesspools.

b. The department may employ qualified architects in private practice as consultants in connection with buildings, the cost of which shall exceed one hundred thousand dollars and such consulting or advisory service shall be performed under the supervision of the department.

All contracts for consulting service shall be made with qualified architects whose names shall appear on a panel of architects approved for the current year by the mayor and published in the city record on or before the fifteenth day of January. (*Derived from former* § 683.)

**CASE NOTES**

¶ 1. Amendment in 1937 of Charter former § 683, subd. 4, to provide that Department of Public Works "may employ qualified architects in private practice as consultants in connection with buildings, the cost of which shall exceed one hundred thousand dollars", *held* intended merely to make the employment permissive and not mandatory as originally worded, and not to have intended by use of words "as consultants" to limit the type or character of services to be performed. Hence retention of architect to render general architectural services did not violate the Charter.—Curran v. Board of Estimate, 173 Misc. 1022, 19 N. Y. S. 2d 624 [1939], aff'd without opinion, 259 App. Div. 712, 19 N. Y. S. 2d 494.

¶ 2. City of New York *held* not precluded by any provisions of the State Constitution or the Civil Service Law from awarding contracts for architectual and engineering services to private concerns in connection with a post-war planning program. The contracts involved were evidently entered into to meet technical problems which private firms were especially equipped to master; to accelerate completion of plans, and to assist in preserving intact many private engineering and architectural organizations that would otherwise be dispersed to the City's great detriment. The contracts awarded did not create any employer-employee relationship, but a contractual one. Also, the public policy of the State, as expressed in Education Law § 451, subd. 4, New York City Charter former § 683, subd. 4, and Laws of 1943, chap. 660, gives tacit approval to the practice of using private architectual and engineering firms.—In re Civil Service Technical Guild (La Guardia), 181 Misc. 492, 44 N. Y. S. 2d 860 [1943], aff'd, without opinion 267 App. Div. 860, 47 N. Y. S. 2d 114, and 292 N. Y. 586, 55 N. E. 2d 49.

§ 684. **Borough officer; bureaus.**—a. There shall be an office of the department in each borough under the supervision of a deputy commissioner to reside in the borough in which he serves.

b. There shall be in the department a bureau of architecture and such bureaus of engineering and other bureaus as may be necessary. The chief of each bureau of engineering shall be a licensed professional engineer who shall have had at least ten years' experience as an engineer in the class of work under the jurisdiction of the bureau. The chief of the bureau of architecture shall be a registered architect who shall have had at least ten years' experience as an architect. (*Derived from former* § 684.)

§ 685. **Consultation with other departments.**—In preparing and considering plans and specifications and in carrying out such plans or specifications, the department shall consult with the agency for whose use the building, structure or other public work is intended and shall consider any recommendations made by such agency. (*Derived from former* § 685.)

§ 686. **Right of entry.**—The commissioner and the officers and employees of the department when authorized by him may enter upon public or private property for the purpose of making surveys, borings or other investigations necessary for the exercise of the powers or the performance of the duties of the department. Refusal to permit such entry shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. (*Derived from former* § 686.)

§ 687. **Regulations for the discharge of sewage.**—The commissioner may adopt regulations requiring the discharge of sewage, refuse, factory waste or trade waste into the public sewers of the city, or regulating, restricting or prohibiting the use of the public sewers for the discharge therein of any material or substance, and may prescribe civil penalties for a violation thereof. Every regulation adopted pursuant to this section shall be filed with the city clerk, shall be published in the City Record and shall not take effect until so filed and published. (*Derived from former* § 687.)

# CHAPTER 28-A

# DEPARTMENT OF HIGHWAYS

§ 690. **Department; commissioner.**—There shall be a department of highways, the head of which shall be the commissioner of highways. He shall appoint one or more deputies in addition to those provided for in section six hundred ninety-one.

§ 691. **Deputies; borough offices.**—a. The department shall maintain its main office in one borough and shall maintain an office in each of the other boroughs.

b. There shall be a deputy in each borough who shall reside in the borough in which he serves.

§ 692. **Duties of the department.**—It shall be the duty of the department except as otherwise provided by this charter or by law, to have cognizance and control of the:

(a) Regulating, grading, curbing, flagging and guttering of streets and laying of crosswalks.

(b) Designing, constructing and repairing of public roads, streets and highways.

(c) Paving, repaving, resurfacing and repairing of all public roads, streets and highways, and of relaying of all pavements removed for any cause.

(d) Laying or relaying of surface railroad tracks in any public street or road, the form of rail used, the character of foundation and the method of construction, and the restoration of the pavement or surface after such work.

(e) Filling of sunken lots, fencing of vacant lots, digging down lots and licensing vaults under sidewalks.

(f) Issuance of permits to builders and others to use or open the streets.

(g) Construction and maintenance of all bridges and tunnels forming a portion of the highways, except such bridges and tunnels as cross navigable waters.

(h) Removal of encroachments on public roads, streets and highways. (*Subdivision g amended by L.* 1962, *ch.* 998, § 34.)

§ 693. **Removal of pavement.**—a. No removal of the pavement or disturbance of the surface of any street for any purpose whatever shall be made until a permit is first issued therefore by the commissioner.

b. Whenever any portion of the pavement in any street or avenue shall have been removed for any purpose, and such

pavement shall not be relaid in a manner satisfactory to the commissioner, he may, after giving notice in such manner as shall be provided by law, have such pavement, or the portion thereof which shall have been so unsatisfactorily laid, put in proper order and repair for the account of the person or corporation by whom such pavement was removed; or if such removal was for the purpose of making connection between any house or lot and any sewer or water pipes in the street, or for constructing vaults or otherwise improving any house or lot, the said work shall be done on account of the owner of the premises for whose benefit such removal was made and the cost thereof shall be a lien or charge on said premises; and the cost thereof shall be collected from the persons liable therefore in such manner as shall be provided by law.

But nothing herein contained shall be deemed to prohibit the commissioner from demanding, before issuing any such permit and as a condition thereof, the deposit of such sum of money or other security as, in his judgment, may be necessary to pay the cost of properly relaying the pavement so removed, together with the expense of the inspection thereof and the expenses incidental to the issuing of the permit and the making of refunds thereon.

# CHAPTER 29

# DEPARTMENT OF MARINE AND AVIATION

§ 701. **Department; commissioner.**—There shall be a department of marine and aviation the head of which shall be the commissioner of marine and aviation (*Derived from former* § 701 *as amended by L. L.* 1942, *No.* 31.)

§ 702. **Deputies.**—The commissioner may appoint two deputies.

§ 703. **Water front plans.**—a. The plans for the water front of the city are continued in effect and may be changed by the commissioner with the approval of the board of estimate after a public hearing before the board. Notice of such hearing shall be published in the City Record for at least seven days prior thereto. Such change shall take effect notwithstanding that any plan may have been wholly or partially physically perfected and improvements made in conformity therewith. The board of estimate before approving any change, shall refer it to the city planning commission, and the procedure thereafter shall be the same as in case of a change in the city map not initiated by the city planning commission.

b. No wharf, pier, bulkhead, basin, dock, slip, marginal street or other structure shall be laid out, built or rebuilt in the port of New York in the area included in such plans except in accordance with such plans as changed from time to time, provided that the commissioner, with the approval of the board of estimate, may from time to time change the width or location of any of the piers laid down on such plans and build or rebuild temporary wharf structures or license or permit the building or rebuilding thereof as may be provided by law.

c. The commissioner may widen, open, construct, abandon or close any marginal street or avenue included in such plans and shall maintain the widened portion of such street or avenue or the new street or avenue as a marginal street, and such new street or such street to the extent of the portion so widened shall not be a public street. Before acting under this subdivision, the commissioner shall make a report to the city planning commission including a map showing the proposed change and such other information as the city planning commission shall require. If the city planning commission makes a finding that the proposed change is in accordance with the master plan or approves the change, the commissioner may proceed with it, but if the city planning commission makes a finding that it is not in accordance with such plan or disapproves the change, then the commissioner shall not proceed unless the board of estimate by a three-fourths vote authorizes him to proceed. The city planning commission

shall act on such change within six weeks from the time when it is filed in the office of the commission and if it does not act within such six weeks the commissioner may proceed with the change. (*Derived from former* § 703. *Subdivision c amended by L.* 1962, *ch* 998, § 35.)

§ 704. **Powers of commissioner.**—a. The commissioner shall have exclusive charge and control, except as otherwise provided in this charter or by statute, of the wharf property, airports, airplane landing sites and seaplane bases owned or possessed by the city.

b. The commissioner shall have exclusive charge and control of the building, rebuilding, repairing, altering, maintaining, strengthening and protecting of such wharf property and of such airports, airplane landings or seaplane bases, and of all the cleaning, dredging and deepening necessary for and about the same.

c. The commissioner, except as otherwise provided by this charter or by statute, shall have exclusive power of regulation over

(1) wharf property in the port of New York and

(2) airports, airplane landing sites and seaplane bases in the port of New York or in the city

not owned by the city.

d. The commissioner shall have exclusive power to regulate the use of marginal streets so that they may be used to the best advantage in connection with wharf property and to regulate by license or otherwise the transfer of goods and merchandise upon, over or under all such marginal streets except as may be otherwise provided by law.

e. The commissioner shall maintain and operate all ferries operated by the city and shall construct or acquire and repair and maintain all ferry boats and ferry houses and equipment thereof and wharf property used for the purposes of the ferries. Any ferry or any wharf property necessary for the use of a ferry may be leased in the same manner as other wharf property. (*Derived from former* § 704.)

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¶ 1. Regulation of Commissioner of Docks requiring the payment of ten cents to the City by driver or owner of a taxicab each time it entered the feeder taxi lines or passenger pickup points of La Guardia Airport, and providing for refund of the payment if the space was surrendered without the driver having received a fare, *held* a valid regulation within the authority of the Commissioner of Docks to promulgate, inasmuch as Charter

§ 704 gave the Commissioner of Docks exclusive control of airports, § 885 authorized each head of an agency to make regulations for conduct of his office or department and to carry out its powers and duties, and a resolution of the Council had determined that the project of the airport was "revenue producing", so the Commissioner might obtain revenue from every available source directly connected with the management of the airport and was justified in levying charges for privilege of doing business upon such property.—Weinstein v. McKenzie, 177 Misc. 451, 30 N. Y. S. 2d 733 [1941].

¶ 2. Regulation of the Commissioner of Docks requiring payment of ten cents to City by taxicab operator each time the cab entered the feeder taxi line at La Guardia Airport did not conflict with Charter § 435, conferring upon the Police Department the duty to control vehicular traffic, since the area comprising the municipal airport was not a part of the public streets or highways, but was acquired as wharf property pursuant to § 706. Charter § 435 and Vehicle and Traffic Law § 54 apply only to public highways.—Id.

¶ 3. Furthermore, there was no unreasonable or arbitrary discrimination in the rule, as all taxicabs were subject to it.—Id.

¶ 4. Taxpayer's complaint in proceeding to set aside as illegal and against public policy the act of the Commissioner of Docks in naming the North Beach Airport "La Guardia Field", *held* insufficient, since the taxpayer did not come within purview of General Municipal Law § 55 as there was no claim that public funds had been wasted or expended illegally (216 N. Y. 459; 242 N. Y. 202; 244 N. Y. 317), New York City Charter § 704 conferred upon the Commissioner exclusive control of the City's airports so that the Commissioner and not the City Council was vested with authority to name airports, and there would seem to be no public policy violated by the naming of an airport after a living person.—In re Goldsmith (McKenzie), 102 (124) N. Y. L. J. (11–29–39) 1857, Col. 1 F.

¶ 5. The Commissioner's authority extends to all city owned property even though it may be leased and hence, he has the authority to control the terms, conditions and use of such property.—Netherland Cab Co. v. McKenzie, 105 (40) N. Y. L. J. (2–18–41) 752, Col. 6 F.

¶ 6. Section 704(d) of the Charter, granting the Commissioner of Marine and Aviation power to regulate the use of marginal streets, and § 704(b)-1.0 of the Administrative Code, providing that the Commissioner with the approval of the Board of Estimate may authorize the lessee of any marginal street to erect and maintain upon the premises sheds, warehouses and other buildings, conferred upon the Commissioner no power to make a certain agreement permitting respondent restaurant corporation to erect a lunchstand in a marginal street, where the Board of Estimate had never approved of the agreement.—Poulos v. Minetti, 197 Misc. 611, 92 N. Y. S. 2d 869 [1949].

¶ 7. Order of Commissioner of Marine and Aviation directing owner to demolish a certain bungalow on the waterfront as in a state of disrepair and unfit for human habitation, was deemed a reasonable exercise of the discretionary power vested in the Commissioner, and it was of no moment that the owner in making the application for such order may have been motivated by malice against the tenants.—In re Sundstrom (Gerretsen Realty Corp.), 128 (84) N. Y. L. J. (10–29–52) 990, Col. 8 M.

¶ 8. A lessee complied with the requirements of its lease when it obtained a "certificate of completion" issued by the Department of Marine and Aviation. The lease called for a certificate of occupancy "by the appropriate municipal department". Since the property was bounded by the Shell Bank basin, the Department of Marine and Aviation had jurisdiction.—Mandel v. Waxman, 146 (70) N. Y. L. J. (10–10–61) 16, Col. 7 M.

§ 705. **Powers of department of highways over marginal streets and places.**—The department of highways shall have charge and control:

1. of regulating, grading, curbing, flagging, guttering and draining of marginal streets or places and laying of crosswalks thereon;

2. of paving, repaving, resurfacing and repairing of marginal streets or places and of the relaying of all pavements removed therefrom for any cause. (*Derived from former* § 705 *as amended by L. L.* 1942, *No.* 31.)

§ 707. **Leases of wharf property.**—a. The commissioner, subject to the approval of the board of estimate, may lease any wharf property belonging to the city for such terms and in such manner as may be provided by law. Such leases may be sold at public auction duly advertised in the City Record for at least ten days prior thereto, and if not so sold the terms of any lease must be approved by the board of estimate by a three-fourths vote after a public hearing, notice of which shall be published in the City Record for the six days of publication of the City Record immediately prior thereto.

b. The commissioner may, subject to the approval of the board of estimate, grant temporary permits terminable at will for a period not exceeding one year to use and occupy any such property belonging to the city.

c. If the commissioner fails to agree upon terms of a lease with any person desiring to lease any wharf property, he shall, if the offer be made in writing, decline it in writing and such person may submit his proposed lease to the board of estimate at its next regular meeting, and if the board accepts the same by a three-fourths vote at such meeting or at any one of its three regular meetings next succeeding thereto, the commissioner shall promptly execute such lease. (*Derived from former* § 707.)

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¶ 1. In leasing of City-owned property under his supervision, the Commissioner of Docks might control the terms, conditions and use, and might consequently compel compliance with Rule 19 of the Dock Department prohibiting hackmen from using piers operated or leased by the City (N. Y. City Charter §§ 704, 707, 712, 885). —Netherland Cab Co. v. McKenzie, 105 (40) N. Y L. J. (2–18–41) 752, Col. 6 F.

¶ 2. Motion of taxicab company for temporary injunction restraining enforcement of Rule 19 of the Dock Department was denied, in absence of a clear showing that the Rule and certain leases imposing an obligation to comply with municipal rules were arbitrary or unreasonable.—Id.

¶ 3. To extent that rule of Department of Docks forbids trespassing by public porters or hackmen upon any pier leased or operated by the City, it was doubtless authorized by the charter, but such rule had no application to plaintiffs, who were not trespassers but licensees of certain

railroads under licenses which the railroads had the right to grant, as a natural incident of their business, and in absence of any lawful restriction upon such right.—Netherland Cab Co. v. McKenzie, 105 (111) N. Y. L. J. (5–23–41) 2144, Col. 1 M.

¶ 4. Provisions of the rule prohibiting solicitation of passengers by porters or hackmen within 20 feet of any entrance to a leased pier might not be enforced to prevent plaintiffs from going upon the pier, as they were authorized to do by their licenses.—Id.

¶ 5. Where license granted plaintiff pursuant to N. Y. C. Charter § 707 by New York City Commissioner of Docks to occupy certain hangars at Floyd Bennett Field stated that it was to begin May 1, 1940 and was revocable at will of the Commissioner and would expire by limitation of time on April 30, 1941, a tenancy at will was created between the parties and was terminated by a 30-day notice dated December 14, 1940 (Real Prop. Law, § 228). That the notice was not given with respect to the ending of any year, month or other period, was immaterial (14 Barb. 253; &c.).—Erickson & Remmert, Inc., v. McKenzie, 105 (47) N. Y. L. J. (2–27–41) 901, Col. 1 M.

¶ 6. If there were no evidence of relevant violations of the permits under which respondent operated flower and refreshment stands in ferry terminal, or if evidence of such violations were shown but the violations were of a character which could have been removed or corrected within the 48-hour period of grace set forth in the permits, then the action of the Commissioner of the Department of Marine and Aviation in revoking such permits without notice might be regarded as arbitrary.—A. E. F.'S. Inc. v. McKenzie, 269 App. Div. 316, 55 N. Y. S. 2d 448 [1945].

¶ 7. Violations of provisions of the permits occurring before the contract period could not furnish a basis for revocation, nor could alleged violations of which the Commissioner had knowledge which occurred before date of the issuance of the permit.—Id.

¶ 8. The power of the Commissioner of the Department of Marine and Aviation to revoke plaintiff's temporary permit to operate fruit, flower and refreshment stands at the St. George Terminal of the Staten Island ferry was not absolute and unqualified. Such power must be lawfully exercised, which means that it may not be used in bad faith, arbitrarily or capriciously, and that it must be resorted to for what the Commissioner has reason to believe is for the best interest of the City.—A. E. F.'S, Inc. v. McKenzie, 184 Misc. 288, 53 N. Y. S. 2d 685 [1945].

¶ 9. Plaintiff, who was operating fruits, flower and refreshment stands at St. George Terminal of the Staten Island ferry under temporary permits from the Commissioner of the Department of Marine and Aviation, and who had been notified that such permit would be revoked at a date five days hence because of alleged overcharging, might not seek a review of the Commissioner's action by means of a suit for an injunction, but his proper remedy was by a proceeding in the nature of mandamus under Article 78 of the Civil Practice Act. However, a temporary stay for 20 days would be granted to permit an appeal from the present decision or the commencement of a proceeding under Article 78.—Id.

¶ 10. Plaintiff, who operated three stands in the Staten Island Ferry Terminal Building, for the sale of refreshments, fruits and flowers, *held* to occupy "piers, docks and wharf properties" within the meaning of provision of the Commercial Rent Control Law excepting such rental space from the benefits of such act. Hence plaintiff was not entitled to an injunction restraining the City and the Commissioner of the Department of Marine and Aviation of the City of New York from terminating plaintiff's occupancy of such stands. Inasmuch as the ferry terminal was located on the margin of navigable river, and vessels were brought alongside of it and passengers and cargo discharged and received, the terminal building was to be classed as a wharf. —A.E.F.'s, Inc. v. City of N. Y., 185 Misc. 812, 58 N. Y. S. 2d 90 [1945], aff'd 269 App. Div. 1020, 59 N. Y. S. 2d 397, and also aff'd on this point by the Ct. of App., 295 N. Y. 381, 68 N. E. 2d 177.

¶ 11. Provision of the Commercial Rent Control Law excluding from the protection thereof rental space on "piers, docks and wharf properties", *held* constitutional, as the Legislature could reasonably have concluded that under prevailing conditions there

was no warrant for the regulation of rentals on such property.—Id.

¶ 12. Under § 707 of the Charter dealing with leases of wharf property, and § 981–1.0 (17) of the Administrative Code, defining "wharf property", the Commissioner of Marine and Aviation derived no power to lease or to grant a permit of a portion of a marginal street for the erection and maintenance of a lunchstand. "Wharf property" and "marginal streets" are two distinct and separate things, and a marginal street is not comprehended within the term "wharf property".—Poulos v. Minetti, 197 Misc. 611, 92 N. Y. S. 2d 869 [1949].

¶ 13. Taxpayer who was engaged in operation of a lunchroom and claimed that the Commissioner of Marine and Aviation of the City of New York had unlawfully executed an agreement with respondent restaurant corporation permitting it to erect a competing lunchstand in a marginal street, *held* properly to have brought a proceeding under C. P. A. Article 78 to restrain the Commissioner and respondent from proceeding with the erection of the lunchstand, annulling the determination of the Commissioner accepting the bid from respondent, and declaring the agreement illegal and void.—Poulos v. Minetti, 197 Misc. 611, 92 N. Y. S. 2d 869 [1949].

¶ 14. Director of the City's Bureau of Real Estate had no authority to issue a revocable 30-day permit to petitioner to occupy certain premises for the mooring and storage of boats in slips and on land including locker space where, with the exception of a small, unimportant portion of the premises, the remaining land was under water lying outshore the established mean high water line. Exclusive jurisdiction of such lands was vested in the Commissioner of Marine and Aviation.—In re Fluke (Ellard), 129 (94) N. Y. L. J. (5–15–53) 1640, Col. 3 M.

¶ 15. Fund held by City Comptroller as security for performance of lease of property at the South Ferry slip might not be used by him as security for any claim arising out of nonperformance of petitioner's obligation under separate lease of property at Pier A, North River.—Gianopoulos v. Joseph, 130 (68) N. Y. L. J. (10–5–53) 641, Col. 3 T.

¶ 16. A railroad was in occupation of certain piers under one-year permits issued under this section. In 1927, the City permitted the railroad to construct a produce terminal on the piers and agreed not to increase the annual rental for a period of 16 years. Although the 16-year period expired in 1944 the City issued permits for that year and subsequent years without increasing the rent. *Held:* the City could not reform the permits so as to increase the rent and could not recover the reasonable value of the use and occupation of the piers which was in excess of the rental fixed in the permits.—City of New York v. Pennsylvania Railroad Co., 281 App. Div. 27, 117 N. Y. S. 2d 140 [1952], aff'd 305 N. Y. 788, 113 N. E. 2d 301.

¶ 17. The lessee of a pier which was leased from the City of New York was not prohibited by charging a shipper for receiving, and guarding drums of soybean oil by reason of any provision in the permit from the City. The pier was not a public wharf and nothing, either expressed or implied, in the permit prohibited the charges sued for.—Garcia & Diaz, Inc. v. Trans World Refining Corp., 25 Misc. 2d 604, 201 N. Y. S. 2d 596 [1960].

¶ 18. A pier operator could exclude shippers from its piers where the shippers used the piers in such a way as to interfere with plaintiff's use as licensed by the City.—Garcia & Diaz, Inc. v. Transworld Refining Corp., 14 A. D. 2d 76, 217 N. Y. S. 2d 132 [1961].

§ 708. **Public wharves.**—a. The commissioner may by order set aside any wharf property belonging to the city, which has not been leased, for general wharfage purposes or for the use of any special kind of commerce, or of any class of vessel, or of any agency, and may revoke or modify such order as to any such wharf property at any time.

b. No lease of property so set aside may be made until approved by the board of estimate after a hearing, notice of which shall be given by publication in the City Record for six consecutive

days of publication of the City Record not less than seven nor more than thirty days before such hearing. (*Derived from former* § 708.)

§ 709. **Wharfage rates.**—a. The commissioner, subject to the approval of the board of estimate, shall regulate the charges for wharfage, cranage and dockage of all vessels or floating structures using any wharf property set aside under section seven hundred eight, subdivision a.

b. The rates which it shall be lawful to charge for wharfage, cranage and dockage from any vessel or floating structure which makes use of any other wharf property within the port of New York shall be fixed by the board of estimate after public hearing on recommendation of the commissioner. (*Derived from former* § 709.)

§ 710. **Assignment of wharf property to other public use.**—The board of estimate, on the recommendation of the city planning commission and after a public hearing notice of which shall be given by publication in the City Record not less than seven or more than thirty days prior thereto, may withdraw from the jurisdiction of the commissioner and assign for use for any public purpose any wharf property owned by the city and not under lease. (*Derived from former* § 710.)

§ 711. **Seal.**—The commissioner may continue the use of the seal of the department. (*Derived from former* § 711.)

§ 712. **Rules and regulations; penalties.**—The commissioner shall from time to time establish and enforce all needful rules and regulations for the proper care of all property placed in his charge or over which he shall have power of regulation and shall issue such orders as may be necessary for such enforcement. No such rule, regulation or amendment thereof, however, shall become valid and effective until a copy thereof, duly certified by the secretary of the commissioner to be a correct copy, shall have been filed with the city clerk and such rule, regulation or amendment published once a week for two successive weeks in the City Record. The violation of or failure to comply with any such rule or regulation shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment or by of fine of not more than fifty dollars, or both. (*Derived from former* § 712.)

**CASE NOTES**

¶ 1. A regulation of the Commissioner of Docks requiring the payment of ten cents to the city by the driver or owner of a taxi cab each time it entered the feeder taxi lines or passenger pickup points at La-Guardia Airport and providing for refund of the payment if the space was surrendered without the driver having received a fare is a valid regulation under this section.—Weinstein v. McKenzie, 177 Misc. 451, 30 N. Y. S. 2d 733, [1941].

¶ 2. A regulation of the Commissioner which forbids trespassing by public porters or hackmen upon any pier leased or operated by the city is a valid regulation, but such rule has no application where trespassers are in fact licensees of a certain railroad who had the right to grant as a natural incident of their business such license.—Netherland Cab Co. v. McKenzie, 105 (111) N. Y. L. J. [5–23–41] 2144, Col. 1 M.

# CHAPTER 30

# DEPARTMENT OF WATER SUPPLY, GAS AND ELECTRICITY

§ 731. **Department; commissioner.**—There shall be a department of water supply, gas and electricity, the head of which shall be the commissioner of water supply, gas and electricity. (*Derived from former* § 731.)

§ 732. **Deputies.**—The commissioner may appoint two deputies. (*Derived from former* § 742.)

§ 733. **Offices.**—The department shall maintain a main office in one borough and an office in each other borough. (*Derived from former* § 733.)

§ 734. **Jurisdiction.**—Except as otherwise provided in this charter or by statute, the department shall have jurisdiction, charge and control:

1. Of all structures and property connected with the supply and distribution of water for public use not owned by private corporations, including all fire and drinking hydrants and all water meters.

2. Of furnishing the water supply and maintaining its quality, and of the investigation for and the construction of all works necessary to deliver the proper and required quantity of water with ample reserve for contingencies and future demands.

3. Of making and enforcing rules and regulations governing and restricting the use and supply of water.

4. Of making rules and regulations, subject to the approval of the board of estimate, fixing uniform annual charges and extra and miscellaneous charges for the supply of water, meter rates and minimum charges for the supply of water by meter, annual service charges and charges for meters and their connections and for their setting, repair and maintenance and charges for water where a meter shall fail to register correctly or shall cease to record the flow of water or where a meter shall have been removed, and in cases in which no fines are fixed by provision of law, of fixing and collecting fines for violations of rules and regulations; but no fines shall be imposed against any property unless notice be mailed addressed to the owner of the property, or if his name be unknown, then to the "owner or occupant" thereof and a hearing be given.

5. Of furnishing the city or any part thereof, by contract or otherwise, with gas, electricity or any other illuminant or steam; of the selecting, locating, removing and changing of lights for the use of the city; of inspecting and testing gas and electricity used

for light, heat and power purposes, electric, gas and steam meters, electric wires and all lights furnished to the city; of the use and transmission of gas, electricity, pneumatic power and steam for all purposes in, upon, across, over and under all streets, roads, avenues, parks, public places and public buildings; of the construction of electric mains, conduits, conductors and subways in any such streets, roads, avenues, parks and public places, and the granting of permission to open streets, when approved by the commissioner of highways, and to open the same for the purpose of carrying on therein the business of transmitting, conducting, using and selling gas, electricity or steam or for the service of pneumatic tubes. This section shall not be construed to empower the commissioner to grant permission to open or use the streets except by persons or corporations otherwise duly authorized to carry on business of the character above specified.

6. Of the inspection and testing of wiring and appliances for electric light, heat and power in or on any building or structure in the city.

7. Of the examination and licensing of competent persons to be electricians and motion picture machine operators and of the establishment of grades or divisions among electricians. (*Derived from former* § 734.)

## CASE NOTES

¶ 1. Regulation promulgated by Commissioner of the Department of Water Supply, Gas and Electricity, providing that water meters shall be accepted for repair by a water meter repair company only from the owner of the meter or a licensed plumber holding the meter repair permit and shall not be accepted through plumbing supply houses, *held* invalid, as the Commissioner is not authorized either under § 734 of the Charter or § 734(4)-1.0 of the Administrative Code to promulgate the regulation, and the regulation was also unconstitutional as denying a common right to engage in a lawful private business, inasmuch as the rule would deprive plumbing supply houses of the business conducted by them of calling for water meters at requests of owners or licensed plumbers and delivering them to a water company for repair. Under § 734 of the Charter, the rule promulgated was subject to approval of the Board of Estimate, and no approval had been given in the immediate instance. Subdivision 3 of § 734 providing that the Department shall have jurisdiction of making and enforcing rules governing and restricting the use and supply of water did not embrace the repair of water meters and their transmission from the place of installation to the place of repair, and back again.—Frank Supply Corp. v. Quilty, 182 Misc. 921, 49 N. Y. S. 2d 943 [1944].

¶ 2. The Commissioner of Water Supply, Gas and Electricity in the City of New York was without authority to require installation of a water meter in the automatic sprinkler system being installed in plaintiff's five-story building where such building was in fact used as a lodging house.—Lyoles Realty Corp. v. Cannella, 73 N. Y. S. 2d 10 [1947].

¶ 3. A manhole constructed pursuant to authorization of the Department of Water Supply, Gas and Electricity, upon consent of the president of the Borough of Brooklyn, in accordance with specific provisions of law, was not governed by Administrative Code § C26-230.0 which requires that all vault covers be "flush in all parts of the sidewalk". Thus, plaintiff could not recover where she tripped over a manhole cover on an unpaved portion of a sidewalk although the cover projected from two and one-half to three inches above the surface of the surrounding dirt area.—Kaupferstein v. Brooklyn Edison Co., Inc., 266 App. Div. 879, 43 N. Y. S. 2d 23 [1943], aff'd 292 N. Y. 561, 54 N. E. 2d 686.

§ 735. **Interest in manufacture of gas, etc., and certain acts by officers, etc., of department prohibited.**—No officer, agent or employee of the department shall in any way, directly or indirectly, be interested pecuniarily in the manufacture or sale of gas or of electricity or steam, or of gas or electric or steam meters, or of any article or commodity used by gas or electric companies, or used for any purpose for the consumption of gas or of electricity or steam, or in or with a gas or electric or steam company; and no such officer, agent or employee shall give certificates or written opinions to a maker or vendor of any such article or commodity. (*Derived from former* § 735.)

§ 736. **Private companies.**—The commissioner is hereby authorized to examine into the sources of water supply of any private companies supplying the city or any portion thereof or its inhabitants with water, to see that the same is wholesome and the supply is adequate and to establish such rules and regulations in respect thereof as are reasonable and necessary for the convenience of the public; and the commissioner may exercise superintendence, regulation and control in respect to the supply of water by such water companies. (*Derived from former* § 736.)

# CHAPTER 31

# DEPARTMENT OF SANITATION

§ 751. **Definition.**—When used in this chapter "street" includes street, avenue, road, alley, lane, highway, boulevard, concourse, driveway, culvert and crosswalk, and every class of public road, square and place, except a street within any park or under the control or management of the department of parks, or a wharf, pier, bulkhead or slip by law committed to the custody and control of the department of marine and aviation. (*Derived from former* § 751.)

§ 752. **Department; commissioner.**—There shall be a department of sanitation the head of which shall be the commissioner of sanitation. (*Derived from former* § 752.)

§ 753. **Deputies.**—The commissioner may appoint three deputies. (*Derived from former* § 753. )

§ 754. **Offices of the department.**—The department shall maintain a main office in one borough and a branch office in each other borough. (*Derived from former* § 754.)

§ 755. **Powers and duties.**—The commissioner shall have charge and control of:

1. The sweeping, cleaning, sprinkling, flushing, washing and sanding of the streets.

2. The removal and disposition of ashes, street sweepings, garbage, refuse, rubbish, dead animals, night soil and offal.

3. The removal of ice and snow from the streets.

4. The removal of incumbrances from streets and of the storage or disposal of such incumbrances in accordance with regulations adopted by the board of estimate, except that such board may provide by regulation that the removal and storage of household effects or other chattels shall be a responsibility of the department of purchase.

5. The operation, maintenance and use of incinerators or other plants or equipment for the destruction or disposition of ashes, street sweepings, garbage, refuse, rubbish, dead animals, night soil and offal. (*Derived from former* § 755.)

§ 756. **Seal.**—The commissioner may adopt a seal which shall be used for the authentication of the orders and proceedings of the department in commissioning its officers and agents and otherwise as he may provide by regulation. (*Derived from former* § 756.)

§ 757. **Regulations of department.**—The commissioner may adopt regulations specifying the kind of ashes, garbage, refuse,

rubbish or other material or substance that will be collected by the city, from whom it will be taken, the manner in which it shall be arranged or sorted, the time when it will be collected and the place at which it shall be deposited for collection, and may prescribe civil penalties for a violation thereof.

Every regulation adopted pursuant to this section shall be filed with the city clerk, shall be published in the City Record and shall not take effect until so filed and published. (*Derived from former* § 757.)

§ 758. **Regulations controlling the use of sidewalks and gutters.**—The commissioner may adopt regulations controlling the use of sidewalks and gutters by abutting owners and occupants for the disposition of sweepings, garbage, refuse or rubbish, and may provide that the violation thereof shall be punishable by civil penalty, fine or imprisonment. Such regulations shall be submitted to the council and when approved by it shall be published and enforced in like manner as local laws. (*Derived from former* § 758.)

§ 759. **Enforcement of regulations.**—A regulation of the commissioner, adopted pursuant to section seven hundred fifty-seven, shall be enforced by his order. Such order shall be addressed to the owner or owners, lessees or occupants of the building, structure, enclosure, vessel, place or premises affected thereby; but it shall not be necessary to designate such owner or owners, lessees or occupants by name in such order, but the premises shall be designated in the address so that the same may be readily identified. Service of any such order may be made by delivery of a copy thereof to the owner or any one of several owners, to a lessee or any one of several lessees, or to any person of suitable age or discretion in charge of the premises, or if no person be found in charge of the premises, then by affixing a copy of such order prominently upon the premises. If such order be not complied with within the time specified therein, the commissioner shall prosecute the person or corporation liable therefor for the penalty prescribed by the regulation violated in furtherance of which such order shall have been issued and served. (*Derived from former* § 759.)

# CHAPTER 32

# DEPARTMENT OF LICENSES

§ 771. **Department; commissioner.**—There shall be a department of licenses the head of which shall be the commissioner of licenses. (*Derived from former* § 771.)

§ 772. **Deputies.**—The commissioner may appoint two deputies. (*Derived from former* § 772. *Amended by L. L.* 1962, *No.* 14.)

§ 773. **Powers of commissioner.**—a. The commissioner shall have cognizance and control of the granting, issuing, transferring, renewing, revoking, suspending and cancelling of all licenses and permits, except in the cases with respect to which and to the extent to which any of said powers are conferred upon any other person by law.

b. The commissioner shall have power and it shall be his duty to collect all fees for licenses and permits the collection of which by some other person is not authorized by law. (*Derived from former* § 773.)

CROSS REFERENCE: Power of city to require veterans to obtain local peddlers' licenses, see General Business Law, § 32 (8).

## CASE NOTES

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**Common show license,** ¶ 1
**Good character as a requirement for a license,** ¶¶ 2, 3, 5, 6
**Parking lots, licensing of,** ¶¶ 4, 6
**Used-car lot, licensing of,** ¶ 2
**Second-hand dealer's license,** ¶¶ 2, 3

¶ 1. The Commissioner of Licenses is vested with the authority to grant "common show" licenses and is authorized, in his discretion, to take such testimony, as may be necessary on which to base official action. Only if the action of the License Commissioner is arbitrary, capricious or unreasonable, may the Supreme Court interfere with his discretion. Thus, the denial of a license for a common show was upheld where the Commissioner had been deluged with protests from residents, parents, communial, educational and civic organizations in the area surrounding the premises which petitioner sought to have licensed.—Matter of Joyland Center, Inc., 145 N. Y. S. 2d 891 [1955].

¶ 2. In determining whether a petitioner should have a second-hand dealer's license to conduct a used car lot, location of the premises and the character of the applicant were relevant factors, in determining whether the license would impair the public safety or morals of the community.—Matter of DeMatteo, 11 Misc. 28, 166 N. Y. S. 2d 938 [1957].

¶ 3. The Commissioner did not abuse his discretion where he rejected the aplication of petitioner for a license as a second-hand dealer because of three convictions under different names for maintaining a house of prostitution. Good character is a necessary requirement for an applicant for a license by necessary impli-

cation, if not by the express terms of the statute.—Matter of Dorf, 20 Misc. 2d 18, 197 N. Y. S. 2d 280 [1948].

¶ 4. An applicant, who was qualified for a license to operate a parking lot, could not be denied a license on the ground that the area involved was a slum clearance area and the Federal Housing and Home Finance Agency had objected to continued use of this area for parking operations. And particularly so, in view of the willingness of the applicant to stipulate that, upon the order by its landlord to vacate premises, the license requested would be surrendered.—Matter of McDonald Parking, 9 Misc. 2d 516, 170.

¶ 5. The Commissioner of Licenses could refuse a public cart license to a corporation upon the ground that two of its officers had a record of past arrests and one had in fact been convicted many years earlier of extortion. Discretion is given the Commissioner to pass upon an applicant's fitness.—Barton Trucking Corp. v. O'Connel, 7 N Y 2d 299, 197 N. Y. S. 2d 138, 165 N. E. 2d 163 [1959].

¶ 6. The determination of the Commissioner of Licenses which denied a parking lot license for premises owned by a corporation whose sole stockholders were husband and wife was not arbitrary and capricious where the denial was based on the character of the husband and was supported by the record.—Benson Parking Corp. v. O'Connell, 31 Misc. 2d 1037, 220 N. Y. S. 2d 1010 [1961].

# CHAPTER 33

# DEPARTMENT OF PURCHASE

§ 781. **Department; organization.**—a. There shall be a department of purchase the head of which shall be the commissioner of purchase.

b. The commissioner may appoint two deputies.

c. The commissioner shall also appoint a director of purchase who shall have had at least five years' experience in purchasing with business enterprises which operate upon justified requisitions based upon stores control with perpetual inventories of stocks on hand and a director of stores who shall have had at least five years' experience as a storekeeper with a similar enterprise.

d. The commissioner shall, within ten days after receiving notice of his appointment and before entering upon the discharge of his duties, provide a bond. (*Derived from former* § 781 *as amended by L. L.* 1961, *No.* 32.)

## CASE NOTES

¶ 1. Ledger clerk in Department of Purchase whose work involved the entry of orders and making records of payment for purchases by various departments of the City government and who, in the course of her employment, slipped and fell on the floor of the municipal building, sustaining a fractured hip and wrist, *held* not to come within coverage of the Workmen's Compensation Law, as she was not engaged in hazardous employment, and the main function of the Department of Purchase is not hazardous within the statute.—Clyde v. City of N. Y., 275 App. Div. 161, 89 N. Y. S. (2d) 105 [1949].

¶ 2. The determination of the Commissioner of Purchase that the person appointed as director of purchase had the qualifications prescribed for the position by subdivision c was not subject to court review. The Commissioner's affidavit that he was satisfied that the appointee met all the prerequisites established in the Charter was sufficient to defeat the proceeding on the merits and the petitioner was not entitled to a trial of any issue. Even if possession of the prescribed qualifications was mandatory, it would be an unwarranted intrusion upon the Commissioner's executive powers, for the court, by trial or otherwise to reappraise his judgment in making the appointment.—Matter of Bergerman v. Wagner, 2 N. Y. 2d 908, 161 N. Y. S. 2d 434, 141 N. E. 2d 823, aff'g without opinion 2 A. D. 2d 398, 156 N. Y. S. 2d 616.

§ 782. **Powers and duties.**—a. The commissioner shall, except as otherwise provided by law, have sole power to purchase, store and distribute all supplies, materials or equipment required by any department, office, board, body or commission of the city, or by any office of any county wholly included in the city for which supplies, materials or equipment are required, payment for which is made from the city treasury.

b. The director of stores shall, under the direction of the commissioner, establish and maintain one or more city storehouses, shall develop and operate therein a uniform, modern system of stores control based upon perpetual inventory, and shall maintain a sufficient stock of staple commodities on hand to supply the estimated current needs of the agences for which he is authorized to purchase.

c. All purchases other than purchases for stock for estimated needs under subdivision b and all deliveries from such stock shall be upon justified requisitions. (*Derived from former* § 782 *as amended by L. L.* 1957, *No.* 4.)

**CASE NOTES**

¶ 1. The power of the Commissioner of Purchase to exclusively contract for supplies etc., is qualified by § 341 of the Charter which grants the power of purchase of election supplies to the Board of Elections.—Forbes v. Cohen, 254 App. Div. 548, 5 N. Y. S. 2d 316 [1938].

§ 783. **Board of standardization.**—There shall be in the department a board of standardization to consist of the commissioner or his representative, who shall act as chairman of such board, an inspector to be designated by the comptroller, a representative of the budget director, an engineer from the department of purchase and two persons from agencies designated by the mayor, which persons shall be selected by the heads of the agencies so designated, all of whom shall serve upon such board without additional compensation. It shall be the duty of such board to classify all supplies, materials and equipment; to adopt as standards the minimum number of qualities, sizes and types of commodities consistent with efficient operation; to promulgate and enforce written specifications for all such standard commodities. (*Derived from former* § 783.)

§ 784. **Disposition of waste material.**—All old or waste material and other personal property discarded, replaced or not required in storehouses or by any agency for which the commissioner has power to make purchases shall be surrendered to the commissioner and shall be disposed of by him under rules and regulations adopted by the board of estimate governing their redistribution, exchange, transfer, sale or other disposition. (*Derived from former* § 784.)

# CHAPTER 34

# DEPARTMENT OF INVESTIGATION

§ 801. **Department; commissioner.**—There shall be a department of investigation the head of which shall be the commissioner of investigation. He shall be a member of the bar of the state of New York in good standing. (*Derived from former* § 801.)

§ 802. **Deputies.**—The commissioner may appoint two deputies, either of whom may, subject to the direction of the commissioner, conduct or preside at any investigations authorized by this chapter. (*Derived from former* § 802.)

§ 803. **Powers and duties.**—The commissioner:

1. Shall make any investigation directed by the mayor or the council.

2. Is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency. (*Derived from former* § 803.)

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¶ 1. Charter § 803, authorizing Commissioner of Investigation to make any "investigation which in his opinion may be in the best interests of the City, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency",—"agency" being defined in former § 981 (now § 1150) as city, county, borough or other office, position, . . . or agency of government, the expenses of which are paid in whole or in part from the city treasury"—*held* not to authorize the Commissioner, in the course of a survey of the methods of clerks of the Supreme Court in Kings County, to subpœna and examine the general clerk of that court, since the power given was as to "city, county and borough" institutions whereas any examination into the methods of court clerks would be an inquiry into methods of the court, and even if an "agency of government" were to include courts an examination of the Supreme Court, which is an agency covering the entire state and whose judges are state officers, would violate the limitations of former § 981 (now § 1150), which authorizes examinattion of "city, county and borough" officers. Actually, "agency of government" could not be deemed to include state agencies, but was construable as meaning certain units which perform state functions and which either by delegation of authority or other means

have come to have definite connection with the city. Furthermore, the unlimited discretion given the Commissioner to conduct any examination which he deemed for the best interests of the City embraced only those subjects similar to those enumerated, to the end that inquiries intended, but not expressly mentioned, should not be cut off.—In re Herlands (Sutherland), 170 Misc. 131, 9 N. Y. S. 2d 956 [1939], aff'd without opinion, 257 App. Div. 935, 13 N. Y. S. 2d 279; aff'd without opinion, 288 N. Y. 708, 43 N. E. 2d 91.

¶ 2. Under Charter § 803, the investigations which the Commissioner of Investigation is authorized to make are limited to such as have a legitimate and reasonable relation to the operation of the executive branch of the City government, of which branch the Commissioner was an administrative officer.—In re Ellis, 176 Misc. 887, 28 N. Y. S. 2d 988 [1941].

¶ 3. Insertion of words "but not limited to" investigations of "the affairs, functions, accounts, methods, personnel or efficiency of any agency" did not render meaningless the words "the affairs, functions", etc., as those words were illustrative of the type of investigation the Commissioner was authorized to conduct.—Id.

¶ 4. The power of legislatures to make investigations is limited to such investigations as are in fact auxiliary to and in aid of the legislative function, and does not extend to general investigations into private affairs of citizens.—Id.

¶ 5. The Commissioner of Investigation's powers of investigation are limited to such investigations as are a means to the end of a better discharge of some duty imposed upon, or a better exercise of some power that lawfully may be exercised by the executive branch of the City government, and investigations by him are lawful only when they have a legitimate and reasonable relation to the performance of some such duty.—Id.

¶ 6. Commissioner of Investigation *held* to have been without authority to issue subpœnas duces tecum requiring two certain banks to appear and be examined relative to an executive inquiry and to produce all data since 1935 to date concerning a bank account of an attorney who was acting as counsel for a committee of the Council examining into the affairs of the Municipal Civil Service Commission, on the ground that the attorney had allegedly been connected with a membership corporation organized for purpose of legalizing lotteries, and the commissioner desired to investigate the attorney as to his integrity and qualifications to act as counsel to the councilmanic committee, as to any connections of the Police Department with the membership corporation and whether any legislator or employee was the beneficiary of any money received by the attorney therefrom. An administrative officer of the executive branch of the City government might not investigate as to whether the Council had made a wise choice in engaging an attorney in connection with its investigation, the subpœnas were not issued for purpose of aiding the exercise of any lawful power of the executive branch of the City government, and the evidence was desired as an end in itself, with the mere suggestion that it might turn up something discreditable to some one, which sort of official inquisition is judicially condemned.—Id.

¶ 7. Also, the power of the Commissioner to subpœna documents is conferred by Civil Practice Act § 406, and the court has power to determine what is a proper case for subpœnaing documents. In the immediate case the subpœnas were not issued in aid of an investigation having a legitimate and reasonable relation to the discharge of a duty or exercise of a power lawfully possessed by the executive branch of the City government, and the scope of the subpœnas was so broad as to require complete disclosure respecting the attorney's transactions with other clients, as disclosed by his bank account.—Id.

¶ 8. Petitioner, appearing individually and as president of the New York State Compensation Representatives Association, *held* entitled to the quashing of a subpoena directing him to appear before the Commissioner of Investigation of the City of New York and to produce all records relating to Workmen's Compensation cases "handled by you" during a certain period. The administration of the Workmen's Compensation Law, which is statewide in character, was not included in the term "agency" as defined by the New York City Charter former § 981 (now § 1150), and as used in § 803 of the Charter authorizing the Commissioner of In-

vestigation to make any investigation he deemed for the best interests of the City, including investigations of the affairs of any agency, 170 Misc. 131, aff'd 257 App. Div. 935, aff'd 288 N. Y. 708; 176 Misc. 887). However, the Commissioner's right to investigate frauds practiced upon the City in Workmen's Compensation cases, where it is the insurer, might receive judicial approval if investigation were confined to those cases, but the wording of the subpoena issued to petitioner would permit examination of records relating to Workmen's Compensation cases handled by petitioner on behalf of claimants against other employers.—In re Curtis (Herlands), 38 N. Y. S. 2d 964.

¶ 9. Motion to adjudge respondent bookmaker in contempt for refusing to answer questions of Commissioner of Investigation in connection with an investigation of the Comptroller's Office for purpose of learning whether bookmakers were enjoying an immunity from the payment of the gross business tax upon returns from bookmaking, was denied, on ground that bookmaking is taboo by constitutional provision (Constitution, Art. 1, § 9), and that City agencies could not be held to have been recreant in their duties in failing to collect gross business taxes from bookmakers operating illegally in New York City. If there is doubt as to whether the Commissioner had the right to proceed in the manner adopted, or whether defendant's conduct amounted to contempt, such doubt should be resolved in favor of the respondent.—In re Bromberger (Erickson), 187 Misc. 593, 62 N. Y. S. 2d 47 [1946].

¶ 10. The right to collect gross business taxes from bookmakers should be decided in a proper proceeding by the taxing authorities who may levy a tax and then proceed to collect it. The circuitous method adopted by the Commissioner of Investigation through seeking to examine a bookmaker as a witness in the course of an investigation of the Comptroller's Office for purpose of learning whether bookmakers were enjoying an immunity from the payment of gross business taxes upon returns from bookmaking, was without legal sanction.—Id.

¶ 11. Order denying motion to quash subpoena duces tecum served on petitioner, who operated a check-cashing establishment, directing him to attend at the office of the Department of Investigation to be examined under oath and to produce certain records in connection with an investigation of "gambling" and whether check-cashing establishments were operating as so-called "fronts" for gamblers, was affirmed without opinion.—Blitzer v. Bromberger, 295 N. Y. 596, 64 N. E. 2d 290 [1945].

¶ 12. In affirming a conviction of perjury for giving false testimony at a hearing before the Commissioner of Investigations conducting an inquiry into the affairs of check cashing corporation, the Court of Appeals affirmed the conviction without opinion. Defendants contention that the Commissioner was limited to an investigation to the transactions of the City offices or agencies and of the acts of the officers, subordinates and employees of these offices and agencies and had no right to investigate the acts or transactions of private individuals or corporations was rejected. —People v. Kornblith, 296 N. Y. 738, 70 N. E. 2d 547 [1946].

¶ 13. Investigation instituted by Commissioner of Investigation, at direction of the Mayor, into the affairs, functions, accounts, methods, personnel and efficiency of the Board of Education, *held* to constitute a proper exercise by the Commissioner of the powers and duties vested in him by law, particularly in view of charges made by members of the Board of Education's Advisory Committee on Human Relations to effect that there had been an administrative breakdown in the Board of Education (227 N. Y. 297). Furthermore, a holding that the Commissioner was without power to conduct an inquiry with respect to the Board of Education would hamper the Mayor in the discharge of his legal responsibilities imposed by § 523 of the Charter, which confers upon him the power to hear charges and remove members of the board.—In re Karelsen (Yavner), 59 N. Y. S. 2d 683 [1945].

¶ 14. Subject matter of Commissioner of Investigation's inquiry to ascertain whether those doing business in the milk industry in the City employed practices having the effect of increasing the price of milk purchased by the City and by the general public and whether there was a tendency to restrict competition or fix and maintain prices at artificial levels, with the ultimate purpose of the investi-

gation being to determine whether legislation and regulation were needed, *held* within the proper authority of the Commissioner.—Application of Dairymen's League Co-Op. Ass'n, 299 N. Y. 634, 86 N. E. 2d 509, aff'g 274 App. Div. 591, 84 N. Y. S. (2d) 749 [1948], rev'g 83 N. Y. S. (2d) 178.

¶15. Contention that powers of Commissioner of investigation are limited to examination of City departments and do not extend to an inquiry into methods of those who do business with the City, was rejected.—Application of Dairymen's League Co-Op. Ass'n, 299 N. Y. 634, 86 N. E. 2d 509, aff'g 274 App. Div. 591, 84 N. Y. S. (2d) 749 [1948], rev'g 83 N. Y. S. (2d) 178.

¶ 16. The Commissioner properly acted within his powers in issuing a subpoena duces tecum against milk distributor calling for production of its books and records showing the names and addresses of all its retail and chain store customers in New York City who had purchased milk from it at less than listed prices, the price charged each such store and the quantity of milk sold there, and the names and addresses of all such store customers who had received rebates in connection with sales of milk and the amounts of rebate paid each. The prices paid for milk by the City and its inhabitants were of concern to both, and the practice of granting rebates may have an important bearing upon the prices paid for milk by the City and its people. There was no showing that the subpoenas were irrelevant to the inquiry. Furthermore, that the information sought was confidential and involved trade secrets, would not excuse a refusal to produce the records.—Application of Dairymen's League Co-Op. Ass'n, 299 N. Y. 634, 86 N. E. 2d 509, aff'g 274 App. Div. 591, 84 N. Y. S. (2d) 749 [1948], rev'g 83 N. Y. S. (2d) 178.

¶ 17. Application of eight citizen taxpayers of the City of New York for a Court inquiry into alleged violations and neglect of duty by the City Collector's Office in the handling of tax liens, was denied, where neither in the petition nor elsewhere did petitioners set forth a single fact showing any violation, irregularity or neglect. A series of newspaper articles which were sought to be incorporated in the petition likewise failed to disclose any sources of information or grounds of belief for charges made upon information and belief. Moreover, the City Commissioner of Investigation had already conducted an inquiry in regard to sales of transfers of tax liens, copies of the Commissioner's report to the Mayor and the evidence taken in the investigation had been submitted to the District Attorney of New York County and he was presently in process of pursuing his own investigation, and any inquiry by the Court at the present time might prejudice the steps being taken by the District Attorney.—In re Marlow (Frontera), 122 (113) N. Y. L. J. (12–14–49) 1640, Col. 6 T.

¶ 18. Application for order prohibiting respondent, a county judge in the County of Kings in his capacity as magistrate, from proceeding under an information charging petitioner with neglect of duty in failing to report to the Mayor of the City of New York the results of an investigation conducted by petitioner as Commissioner of Investigation into the Police Department of the City, was granted, as the neglect of duty charged to the Commissioner of Investigation could be committed only where the duty was required to be performed, which in the instant case was New York County. The failure to report was a single act of omission, not divisible into several parts, and therefore the Kings County magistrate was assuming to deal with a crime which could not have been committed in Kings County.—Murtagh v. Leibowitz, 303 N. Y. 311, 101 N. E. 2d 753 [1951], reversing 278 App. Div. 512, 105 N. Y. S. 2d 752, which affirmed 106 N. Y. S. 2d 372.

¶ 19. There is no valid reason why information obtained by the Commissioner of Investigations should not be available to an investigative body of the City Council nor is there any reason why such an investigative body should not have the legal right to obtain such information as soon as it deems necessary. Thus, where the Commissioner of Investigations was subpoenaed by a special committee of the City Council for the purpose of producing information it had obtained in its investigation of welfare payments in the City, the Court refused to quash the subpoenas.—Matter of

Herlands (Surpless), 258 App. Div. 275, 16 N. Y. S. 2d 454 [1939], aff'd 282 N. Y. 647, 26 N. E. 2d 800.

¶ 20. In an investigation by the Department of Investigation into bribery, extortion and collusion in the Department of Water Supply, Gas and Electricity where employees were questioned and then instructed to complete and return on a subsequent day a 23-page questionnaire containing 70 questions, some with subdivisions, and covering the activities, not only of the witness but also his wife, brothers, sisters, parents, parents-in-law, brothers-in-law, and sisters-in-law, dependent and emancipated children and other dependents for a period of about six years, *held*, although the investigation was a proper one and a proper questionnaire could include inquiry into assets, bank accounts and property of the employee examined, wives and children, the questionnaire in issue is oppressive and the application to restrain Commission from requiring them to complete the questionnaire is granted, without prejudice to the direction to complete a proper questionnaire.—Matter of Abrahams (N. Y. C. Dept. of Investigation), 144 (47) N. Y. L. J. (9–7–60) 12, Col. 1 F.

¶ 21. Where a subpoena duces tecum was served by the Department of Investigation upon the Building Department Inspector Association in an investigation into complaints that persons having business with the Building Department were solicited to buy tickets to affairs sponsored by the employees' association, *held*, the court would not say that the subpoena served upon the Association was not within the power of the Commissioner of Investigations.—Matter of Dept. of Investigation of City of New York tion), 143 (111) N. Y. L. J. (6–9–60) 12, Col. 1 F.

¶ 22. Motion to quash subpoena issued in connection with an investigation into collusive arrangements between City employees and others regarding installations of gasoline tanks in violation of the Fire Prevention Code, was denied. The investigation was in the public interest and disclosures might, among other things, result in corrective legislation.—Matter of Vic Construction Corp. (Dept. Investigation), 144 (96) N. Y. L. J. (11–18–60) 13, Col. 8 F.

§ 804. **Complaint bureau.**—There shall be a complaint bureau in the department which shall receive complaints from the public. (*Derived from former* § 804.)

§ 805. **Conduct of investigations.**—a. For the purpose of ascertaining facts in connection with any study or investigation authorized by this chapter, the commissioner and each deputy shall have full power to compel the attendance of witnesses, to administer oaths and to examine such persons as he may deem necessary.

b. The commissioner or any agent or employee of the department duly designated in writing by him for such purposes may administer oaths or affirmations, examine witnesses in public or private hearings, receive evidence and preside at or conduct any such study or investigation. (*Derived from former* § 805.)

**CASE NOTES**

¶ 1. Under § 805 of the Charter granting the Commissioner of Investigation the right to require the attendance of witnesses in connection with an investigation, the Commissioner possesses power to subpoena documents. —In re Weiner, 183 Misc. 267, 49 N. Y. S. 2d 199 [1944]

¶ 2. Inquiry by Commissioner of Investigation into the affairs, accounts, personnel and efficiency of the Department of Hospitals with respect to the admittance of patients into City Hospitals, related to the affairs of the City. Also, a reasonable basis existed to compel the appearance and testimony of petitioner, who was the owner of an ambulance and oxygen service, and the subpoenaing of his books of accounts relative to the

selection, hiring and use of ambulances for transportation of patients to City hospitals, where reasonable ground was shown to believe that admitting physicians at Queens Hospital were recommending, for a fee, the use by prospective patients of certain private ambulance service, specifically that of petitioner.—Id.

¶ 3. That petitioner, who was chairman of an Advisory Committee on Human Relations of the Board of Education, was not an employee of the City, did not preclude the Commissioner of Investigation from subpoenaing him in connection with an inquiry into the affairs of the Board of Education.—In re Karelsen (Yavner), 59 N. Y. S. 2d 683 [1945].

¶ 4. Order affirming conviction of defendant for perjury in the second degree, predicated upon false testimony given by defendant in an investigation conducted by Commissioner of Investigation into the affairs of a check cashing corporation to determine whether it was used as a front for a gambling organization and to determine whether either the check cashing corporation or the gambling organization were defrauding the City of taxes or enjoying improper relationships with any City department, and to cooperate with the State Banking Department in its efforts to revoke the corporation's license, *was affirmed* without opinion, notwithstanding the defendant's contention that the Commissioner was unauthorized to conduct the investigation.—People v. Kornblith, 296 N. Y. 738, 70 N. E. 2d 546 [1946].

¶ 5. This section gives the Commissioner power to require the attendance of witnesses but does not give him the power to subpoena documents.—Matter of Ellis, 176 Misc. 887, 28 N. Y. S. 2d 988 [1941].

# CHAPTER 35

# DEPARTMENT OF PERSONNEL

§ 811. **Department; personnel director.**—There shall be a department of personnel, the head of which shall be the personnel director who shall also be chairman of the city civil service commission. (*Derived from former* § 811.)

§ 812. **City civil service commission.**—a. There shall be in the department a city civil service commission, consisting of a chairman and two other members not more than one of whom shall be a member of the same political party as is the chairman. Each of the members other than the chairman shall be appointed by the mayor for a term of six years commencing at the expiration of the terms of the present incumbents. Each term shall run from the first day of June of the year in which he shall be appointed. The members other than the chairman shall be removable in the manner provided for members of a municipal civil service commission in the civil service law. A vacancy in such commission shall be filled for the unexpired term. The commission shall have all the powers and duties of a municipal civil service commission provided in the civil service law or in any other statute or local law, other than such of those powers and duties as are in this charter assigned to and vested in the personnel director.

b. The commission may appoint a secretary and such other subordinates as may be necessary within the appropriation therefore.

c. The civil service commission shall have the power to hear and determine appeals by any person aggrieved by any action or determination of the personnel director made pursuant to subdivisions c, d, e, f, g or j of section eight hundred thirteen of this charter, and may affirm, modify or reverse such action or determination. Such appeal shall be taken by application in writing to the commission taken within thirty days after the action or determination appealed from. (*Derived from former* § 812.)

### CASE NOTES

¶ 1. Where it did not appear whether the ground for rejection of petitioner as probationary patrolman was the fact of Communist petition signed by applicant's mother or was based on the number of applicant's traffic violations, Court *ordered* disclosure by Police Commissioner to determine whether rejection was arbitrary and capricious.—Forde v. Adams, 207 Misc. 577, 138 N. Y. S. 2d 603 [1955].

§ 813. **Personnel director; powers and duties.**—The personnel director shall have the following powers and duties in addition to the powers and duties vested in him as the head of the department:

a. To recruit personnel;

b. To make studies and recommendations in regard to the grading and classifying of positions in the civil service for submission to the civil service commission;

c. At the direction of the civil service commission, to schedule and conduct examinations for positions in the civil service;

d. To establish, promulgate and certify eligible lists in the manner provided in the civil service law and the rules of the civil service commission;

e. To determine the appropriateness of eligible lists for the filling of vacancies in the manner provided in the civil service law and the rules of the civil service commission;

f. To investigate applicants for positions in the civil service; to review their qualifications, and to revoke or rescind any certification or appointment by reason of the disqualification of the applicant or appointee under the provisions of the civil service law, the rules of the civil service commission, or any other law;

g. To certify payrolls in accordance with the provisions of the civil service law and the rules of the civil service commission;

h. To keep records regarding candidates for appointment to the civil service and officers and employees in the civil service;

i. To develop and submit to the mayor standard rules governing working conditions, vacations and leaves of absence; and career, salary and wage plans providing for the creation, abolition and modification of positions and grades and fixing salaries of persons paid from the city treasury, subject to the provisions of this charter, the civil service law and other applicable statutes:

j. To administer the safety, incentive, and other such personnel programs of the city;

k. To institute in any agency of the city an in-service training course or courses;

l. To aid in the development of personnel divisions in agencies of the city; to consult with any interested parties in such agencies and to convene the personnel officers of such agencies from time to time as a personnel council to consider personnel matters of city-wide concern. (*Derived from former* § 813. *Subdivision e amended by L.* 1962, *ch.* 998, § 36.)

## CASE NOTES

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¶ 1. A probationary patrolman passed pre-appointment medical examinations by the Civil Service Commission and the Police Department. His probationary period expired July 31. Prior thereto, two departmental physical examinations showed him to be suffering from hypertension. Under such circumstances, the Police Commissioner had the right to dismiss him at the end of the probationary period. The notice of dismissal, dated July 30 and effective July 31, was not served until August 1, because of petitioner's absence from the City. Such service was a substantial compliance with statutory requirements. —Matter of Going v. Kennedy, 5 A. D. 2d 173, 170 N. Y. S. 2d 234 [1958], aff'd 5 N. Y. 2d 900, 183 N. Y. S. 2d 81, 156 N. E. 2d 711. See also Myricks v. Kennedy, 6 Misc. 2d 854, 161 N. Y. S. 2d 956 [1957].

¶ 2. Upon the creation of a new position of assistant deputy warden in the Department of Correction, the deputy warden eligible list was properly used for certifying applicants for the new position, that one being the most nearly appropriate for the purpose.—In re Cafaro (Schechter), 7 Misc. 2d 518, 162 N. Y. S. 2d 642 [1957].

¶ 3. A proceeding under Art. 78 of the C. P. A. to compel reinstatement of petitioner's name upon an eligible list for patrolman is not one which should be transferred to the Appellate Division for disposition. It appearing from the record that the Commission's decision was neither unfounded nor arbitrary, the petition is dismissed.—Tutora v. Civil Service Commission, 6 Misc. 2d 1076, 166 N. Y. S. 2d 35 [1957].

¶ 4. City employees under the "career and salary plan" are not entitled to paid holidays falling on days when they are not required to work. Department of Hospital employees regularly required to work on a Saturday which was Columbus Day are entitled to compensatory time. However, an employee may not demand a day's pay in lieu of compensatory time.—Osborne v. Board of Estimate, 15 Misc. 2d 250, 181 N. Y. S. 2d 593 [1958].

¶ 5. Public health inspectors who, after reclassification, were doing the work of public health sanitarians although qualified for the position of senior public health sanitarian could not complain, since their new duties were the same as their former ones.—In re Reich (Baumgartner), 140 (113) N. Y. L. J. (12–12–58) 12, Col. 2 T.

¶ 6. The reclassification of a personal property appraiser in an unlimited salary grade to be an "appraiser (personal property), Grade XVI", which grade bore a maximum salary, will not be upset by the Court. The "career and salary plan" provides that persons in unlimited salary grades shall not, upon reclassification, be subject to maximum salary limitations.—Matter of Greenwald, 17 Misc. 2d 611, 188 N. Y. S. 2d 751 [1959].

¶ 7. In an Article 78 proceeding where the papers presented an issue as to whether the reclassification of accountants' positions in the Comptroller's office corresponded with the realities of the situation, the matter was set down for trial.—In re Rainbow (Schechter), 141 (87) N. Y. L. J. (5–6–59) 11, Col. 3 F.

¶ 8. The determination by the Civil Service Commission classifying the positions of the petitioners, was upheld, since the classification had been made as the result of a careful study and analysis on the part of the Commissioner.—Matter of Hogans (Schechter), 142 (13) N. Y. L. J. (7–17–59) 4, Col. 6 F.

¶ 9. Petitioner charged with large responsibility in the supervision of 50 employees in the City's collector's office in Brooklyn was entitled to classification as administrative associate, Salary Grade 16.—In re Fuller, (Schechter), 143 (53) N. Y. L. J. (3–18–60) 13, Col. 5 T.

¶ 10. Petitioner employed in the real estate department of the Transit Authority and its predecessor since 1922 was entitled to classification as Senior Administrative Assistant, Salary Grade 18, in view of the fact that he had complete and independent authority.—In Re Myerson, (Schechter), 143 (53) N. Y. L. J. (3–18–60) 13, Col. 14.

¶ 11. An attorney engaged in the trial of paternity cases was classified as attorney Grade 18. He was not entitled to an order changing such classification to senior attorney Grade 23 since he did not supervise any other attorneys and his work did not involve complicated questions of law.—Matter of Schatkin (Felix), 142 (111) N. Y. L. J. (12–9–59) 13, Col. 2 T.

¶ 12. Nonsupervisory senior public health sanitarians were entitled to a temporary injunction restraining

Commissioner from filling positions of senior public health sanitarians, since such a program would impair the right of petitioners to advancement under promotional examinations.—Matter of Edelman (Baumgartner), 143 (6) N. Y. L. J. (1–11–60) 15, Col. 2 T.

¶ 13. Petitioner, formerly classified as a housing inspector grade 4 with unlimited salary rights, and reclassified as a supervising housing inspector grade 17 under the Career and Salary Plan reclassification, had no basis for claiming that the inclusion of the title of principal housing inspector as part of the same reclassification violated any constitutional or statutory mandate. His complaint that he was bypassed in favor of other former grade 4 personnel in making assignments to the position of principal housing inspector was met by the City's contention that the higher position was given to personnel performing those duties falling within the higher classification. *Held*: the City action was not arbitrary nor did it violate any of petitioner's rights.—Matter of Motto (Lang), 145 (13) N. Y. L. J. (1–19–61) 14, Col. 4 M.

§ 814. **Appointments and promotions.**—All appointments, promotions and changes in status of persons in the public service of the city shall be made in the manner prescribed by the constitution of the state and in accordance with the provisions of the civil service law and other provisions of law not inconsistent therewith nor with this charter. (*Derived from former* § 814 *as amended by L.* 1954, *ch.* 354.)

**CASE NOTES**

¶ 1. Validity and force of Civil Service Law § 22, relative to removal of civil service employees, has not been affected or impaired by provisions of the Charter (Charter §§ 813, 953).—In re Steibel (La Guardia), 104 (109) N. Y. L. J. (11–8–40) 1466, Col. 2 M.

¶ 2. Where petitioner expressly and in writing reserved his right to appeal the decision of the Trial Board to the Municipal Civil Service Commission or to the Courts, petitioner *held* entitled to appeal from determination of the Board of Transportation to the Civil Service Commission notwithstanding his acceptance of a reduction in title and salary in lieu of dismissal.—In re Scott (McNamara), 123 (12) N. Y. L. J. (1–18–50) 216, Col. 5 M.

§ 815. **Power of investigation.**—The commission shall have the power to make investigations concerning all matters touching the enforcement and effect of the provisions of the civil service law insofar as it applies to the city and the rules and regulations prescribed thereunder, or concerning the action of any examiner or subordinate of the commission, or of any officer or employee of the city or of any county within the city, in respect to the execution of that act; and in the course of such investigations each commissioner and the secretary shall have the power to administer oaths. The commission shall have the further power to compel the attendance of witnesses, to administer oaths and to examine such persons it may deem necessary. (*Derived from former* § 815 *as amended by L.* 1954, *ch.* 354.)

**CASE NOTES**

¶ 1. Where policeman who was refused certification could not file petition within statutory period because the predecessor of the present Civil Service Commission was abolished in the interim, and petitioner thereafter sought reconsideration but such request was refused, the present Civil

Service Commission was ordered to answer in order that the matter should be heard on the merits.—Gentile v. Civil Service Comm'r., 133 (16) N. Y. L. J. (1–24–55) 7, Col. 4 M.

¶ 2. An application for reconsideration of determination of Commissioner to certify petitioner as a patrolman was invalid where it was not made within three months of the date of the determination. The intervening change-over from the Municipal Civil Service Commission to the Civil Service Commission of the City of New York did not extend petitioners time to make application.—Gentile v. Civil Service Commission, 133 (115) N. Y. L. J. (6–14–55) 8, Col. 1 F.

§ 816. **No compensation to unauthorized employee.**—No officer of the city whose duty it is to sign or countersign warrants shall draw, sign or issue, or authorize the drawing, signing or issuing of any warrant on the director of finance or other disbursing officer of the city for the payment of salary to any person in its service whose appointment or retention has not been in accordance with the civil service law and the valid rules in force thereunder. (*Derived from former* § 816.)

§ 817. **Examinations for licenses.**—The personnel director shall, unless otherwise provided by law, have power, upon request of any person charged with the duty of issuing licenses or permits, to conduct, under rules and regulations to be established by the commission, examinations and tests to determine the qualifications of persons applying for such licenses or permits. The personnel director shall certify to the person having power to issue the license or permit the result of any such examination or test. (*Derived from former* § 817 *as amended by L.* 1954, *ch.* 354.)

§ 818. **Certifications for new positions.**—Before any new position in the city service shall be created, the director of the budget shall request of the personnel director and the personnel director, subject to the approval of the civil service commission, shall furnish a certificate stating the appropriate civil service title for the proposed position, the range of salary of comparable civil service positions and a statement of the classification and line of promotion into which such new position will be placed by the commission; and any such new position shall be created only with the title approved by the commission and certified by the personnel director.

§ 819. **Political activities forbidden.**—No member or officer or employee of the department or commission shall hold office or serve as a member of any committee in any political organization or association, nor shall he serve as a delegate to any political convention. Any member, officer or employee violating this provision shall forfeit his office or employment. (*Derived from former* § 819.)

# CHAPTER 36

## DEPARTMENT OF MARKETS

§ 831. **Department; commissioner.**—There shall be a department of markets the head of which shall be the commissioner of public markets. (*Derived from former* § 831.)

§ 832. **Deputy.**—The commissioner may appoint one deputy. (*Derived from former* § 832.)

§ 833. **Powers and duties.**—The commissioner shall have the powers of a commissioner of public markets under the agriculture and markets law, except that the construction and repair of buildings and structures under his jurisdiction shall be carried out by the department of public works, and shall enforce all laws in relation to weights and measures. (*Derived from former* § 833.)

CROSS REFERENCE: Powers of commissioner of public markets, see Agriculture and Markets Law, §§ 261 and 269.

### CASE NOTES

¶ 1. Resolution of Board of Estimate setting aside various areas for market purposes, but excluding the area formerly occupied by the Ninth Avenue Market, known as "Paddy's Market", *held* valid, with result that Commissioner of Markets was without power to issue permits for such area. Contention that setting aside of designated streets for public market purposes was the exercise of a legislative power which could only be exercised by the Council, was invalid, since under Greater New York Charter former §§ 49, 50 and 242, Board of Estimate would seem to have been possessed of a power superior to that of the Board of Alderman in the setting aside of public streets and lands for market purposes, and in any event Agriculture and Markets Law § 267, which under the Charter would seem to control the entire question of markets in the City of New York, expressly conferred the setting aside of areas for public market purposes upon the City authorities vested with power to assign lands for public uses, which in New York City would be the Board of Estimate, in view of Charter § 362.—Matter of Smith (Morgan), 167 Misc. 815, 4 N. Y. S. 2d 837 [1938], aff'd, without opinion, 254 App. Div. 672, 4 N. Y. S. 2d 844, and 278 N. Y. 667, 16 N. E. 2d 394.

¶ 2. Commissioner of Markets of New York City was without power to refuse a license on the ground that the name under which petitioner was doing business was similar to that of another licensee. Any wrong or damage resulting to the prior licensee was a matter to be dealt with by courts of equity.—Matter of Radisch (Morgan), 168 Misc. 258, 5 N. Y. S. 2d 810 [1938].

¶ 3. The Commissioner of Public Markets was authorized to lease an ice plant in the power house building in the Bronx Terminal Market. Agriculture and Markets Law § 61 vests the Commissioner with the power "of fixing fees for services, licenses and privileges and of renting space therein and entering into leases therefor". Thus, the right to enter into the lease was expressly vested by law in an agency other than the Board of Estimate and the competitive bidding requirements of Charter § 384 were not applicable. Even if approval of the Board of Estimate was necessary, it could be found in the rules and regulations for the Bronx Terminal Market, approved by the Board of Estimate whereby the Commissioner was authorized to lease space and buildings in the Terminal Market.—New Colonial Ice Co. v. Woolley, 181 Misc. 473, 41 N. Y. S. 2d 662 [1943].

# CHAPTER 37

# ART COMMISSION

§ 851. **Constitution and appointment.**—a. There shall be an art commission the members of which shall be the mayor, the president of the Metropolitan Museum of Art, the president of the New York Public Library (Astor, Lenox and Tilden foundations), the president of the Brooklyn Institute of Arts and Sciences, one painter, one sculptor, one architect, and one landscape architect, all of whom shall be residents of the city, and three other residents of the city no one of whom shall be a painter, sculptor, architect, landscape architect or active member of any other profession in the fine arts.

b. All the seven last mentioned shall serve without compensation and shall be appointed by the mayor from a list of not less than three times the number to be appointed, such list to be submitted by the Fine Arts Federation of New York. In case the Fine Arts Federation shall fail to present a list of nominees within three months from the time when any appointment is to be made, the mayor shall appoint without such nomination. In case the mayor shall fail to appoint within one year from the time when a vacancy occurs, such vacancy shall be filled by the commission.

c. In all matters which come before the commission pertaining to work under the special charge of an agency, the head of such agency may act as a member of the commission. Each president of an institution who is an ex officio member may, by a writing filed with the secretary, appoint a trustee of the institution or corporation of which he is president to serve in his place as member of the commission. Such appointment shall be revocable at any time by such president and shall terminate whenever he ceases to be president. (*Derived from former* § 851.)

§ 852. **Members; how chosen; vacancies.**—All appointments shall be for a term of three years commencing at the expiration of the terms of the present incumbents, except that appointments to fill vacancies shall be for the unexpired term and shall be made as provided in section eight hundred fifty-one. (*Derived from former* § 852.)

§ 853. **Officers.**—a. The commission shall elect a president, vice-president and secretary from its own members, whose terms of office shall be for one year and until their successors are elected and have qualified. The commission shall have power to adopt its own rules of procedure. Five commissioners shall constitute a quorum.

b. Suitable offices shall be provided for the commission, and the amount of its necessary expenses shall annually be provided in the budget. (*Derived from former* § 853.)

§ 854. **All work of art, etc., to be submitted to and approved by the commission.**—a. The term "work of art" as used in this chapter shall apply to and include all sculptures, paintings, mural decorations, mosaics, stained glass, statues, carvings or castings in high or low relief, inscriptions, monuments, fountains, arches, walls, curbing, steps, gates, fences, benches, lamps or traffic signals, erected or to be erected upon or over land belonging to the city, whether the works of art be the property of the city itself or of an institution, corporation or private individual, and whether intended for ornament, commemoration or actual use.

b. No work of art shall hereafter become the property of the city by gift or otherwise, or be purchased, commissioned, contracted for, accepted, erected or placed in or upon any public building, or allowed to be placed on or extend into or over any street, avenue, square, park, dock or pier or other public place belonging to the city, unless such work of art or a design of the same, accompanied by a specification and an estimate of the cost thereof, together with a plan showing its proposed location, and, if the commission deems it necessary or desirable, also a model, shall first have been submitted to the commission by the head of the agency having jurisdiction, and such work of art or the design thereof and its location shall have been approved in writing by the commission. No final payment shall be made for the purchase or erection of any such work of art except upon certificate signed by the president or vice-president and the secretary or executive secretary of the commission that the work has been completed substantially in accordance with the approval of the commission.

c. No building, bridge or viaduct or approach thereto, dock, pier, gate, fence, lamp or other structure shall be erected upon land belonging to the city, and no arch, bridge, structure or approach which is the property of any corporation or private individual shall extend over or upon any street, avenue, highway, park or public place belonging to the city, and no new lines, grades or plotting or layout of public ways and grounds shall be accepted or work in pursuance thereof commenced unless the design thereof, accompanied by an estimate of cost and a plan showing the proposed location, shall have been submitted to the commission and the design, and in the case of a building or other structure its location in relation to existing or projected developments in the vicinity, shall have been approved in writing by it. No final payment shall be made for the purchase or erection of any such building or structure except upon certificate signed by the president or vice-president and the secretary or executive secretary of the commission that the work has been completed substantially in accordance with the approval of the commission.

d. The approval of the commission shall be required as hereinabove provided for every such work of art or structure hereafter

purchased, commissioned, contracted for, accepted or erected, except that in the case of any building or other structure the total estimated cost of which shall not exceed two hundred fifty thousand dollars, the approval of the commission shall not be required if the mayor or the council shall in writing request the commission not to act; but nothing in this section shall be construed as intended to impair the concurrent power of the commissioner of parks to refuse his consent to the erection or acceptance of any public monument or memorial or other work of any sort within any park, square or other public place under his jurisdiction.

e. Designs for all buildings or other structures, intended for temporary use in a fixed location during a period of more than one year, shall be subject to the same forms of procedure as those adopted for permanent buildings; but the approval of such designs shall be for a period of three years only, after which the commission shall either extend the period or order the removal of the building or other structure.

f. The commission shall periodically examine all monuments, sculpture and paintings belonging to the city, shall make or approve detailed recommendations for their cleaning, maintenance and repair, and shall have general supervision over such monuments, sculpture and paintings and their cleaning, maintenance and repair. No cleaning, restoration, repair, alteration, removal or relocation of any work of art shall be contracted for. commenced, or prosecuted, unless approved in writing by the commission. No final payment shall be made for such work except upon certificate signed by the president or vice-president and the secretary or executive secretary of the commission that the work has been completed substantially in accordance with its approval. (*Derived from former* § 854.)

**CASE NOTES**

¶ 1. The remains of the Aquarium at Battery Park, or of the walls of old Fort Clinton, or Castle Clinton, which preceded it, *held* not to constitute a "monument" or a "work of art" within purview of § 854 of the Charter, and therefore the Board of Estimate, without approval of the City Art Commission, could proceed with the demolition of such structure in connection with the reconstruction of the Battery Park area to accommodate the Brooklyn-Battery vehicular tunnel. The use of the Fort had been abandoned and the Fort dismantled over a hundred years ago, and it had suffered a complete loss of identity and was incorporated, with many changes, into other structures of entirely different types. Moreover, it was not sought to preserve the remaining walls of the old Fort but merely to use them as part of the restoration and construction of the old Fort at an estimated cost of $200,000.—Hamilton v. Moses, 275 App. Div. 76, 87 N. Y. S. 2d 717 [1949], rev'g 194 Misc. 112, 85 N. Y. S. (2d) 886.

§ 855. **Time for decision limited.**—If the commission shall fail to take action upon any matter legally submitted to it within sixty days after such submission, its action shall be deemed unnecessary. (*Derived from former* § 855.)

§ 856. **Removal or relocation of works of art; duty of commission.**—In case the immediate removal or relocation of any existing work of art shall be deemed necessary by the mayor, the commission shall, within forty-eight hours after the receipt of written notice from him, approve or disapprove of such removal or relocation, and in case of its failure to act within forty-eight hours after receipt of such notice it shall be deemed to have approved the same. (*Derived from former* § 856.)

# CHAPTER 38

# THE CITY RECORD

§ 871. **Director.**—The mayor shall appoint a director of the City Record. (*Derived from former* § 871. *Amended by L.* 1962, *ch.* 998, § 38.)

§ 872. **City Record.**—a. There shall be published daily, Sundays and legal holidays excepted, under contract or by the city, a paper to be known as the City Record.

b. There shall be inserted in the City Record nothing aside from such officials matters as are expressly authorized.

c. All advertising required to be done for the city, except as otherwise especially provided by law, and all notices required by law to be published in corporation papers shall be inserted, at the public expense, only in the City Record, and a publication therein shall be a sufficient compliance with any law requiring publication of such matters or notices.

d. Nothing herein contained shall prevent the publication elsewhere of any advertisement required by law to be so published; provided, however, that no such publication shall be made unless the same is authorized by the director with the approval of the mayor and the comptroller, and in a newspaper, magazine, journal or periodical designated by the director with the approval of the mayor and the comptroller.

e. The comptroller shall cause a continuous series of the City Record to be bound as completed quarterly and to be deposited with his certificate thereon in the office of the city register, in the county clerk's office of each county and in the office of the city clerk; and copies of the contents of any part of the same, certified by such register, county clerk or city clerk, shall be received in judicial proceedings as prima facie evidence of the truth of the contents thereof. (*Derived from former* § 872. *Subdivision d amended by L.* 1962, *ch.* 998, § 37.)

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**Budget appropriation for publisher's claim,** ¶ 2
**Civil list, publication of,** ¶ 5
**Publication prior to effective date of charter,** ¶¶ 3, 4
**Written order for publication of notice,** ¶ 1

¶ 1. Newspaper publisher might not recover from City for publication of a notice to contractors and general instructions to bidders, where no written order or request was given by the City for such publication, which was commenced in 1938 at a time when the Charter restricted publication to the City Record (Charter § 872, subd. d).—Brooklyn Citizen v. City of N. Y., 258 App. Div. 657, 17 N. Y. S. 2d 765 [1940], modifying 171 Misc. 1035, 14 N. Y. S. 2d 515.

¶ 2. That no provision for payment of newspaper publisher's claim for certain City advertising had been made by way of budget appropriation, was not a valid defense, inasmuch as the pertinent Charter provisions required publication of the notices, and such requirement plainly implied that the reasonable cost thereof would be paid by the City.—Id.

¶ 3. Where publication in newspaper of certain notices pertaining to street opening proceedings and assessments had been commenced prior to effective date of the former Charter, the provisions of the 1938 Charter governed such proceedings and the publication of notices pertaining thereto, even though the proceedings were not concluded prior to effective date of the Charter. (Charter § 872, subd. c, § 962).—Id.

¶ 4. Publisher of a "corporation newspaper", within meaning of old Charter § 1526, might not recover the reasonable value of the publications inserted therein prior to effective date of Charter, since such publications were deemed to have been included in the annual payment of $20,000 received by publisher in 1937.—Id.

¶ 5. Supervisor (now director) of the City Record could not be adjudicated to have acted in an unreasonable, arbitrary or capricious manner in not printing the "Civil List" under the prevailing conditions and circumstances.—Ward v. Kelly, 109 (110) N. Y. L. J. (5–12–43) 1856, Col. 2 F.

§ 873. **List of registered voters; annual record of assessed valuation.**—a. It shall be the duty of the director of the City Record to cause the list of registered voters, made and delivered by the chairman of the boards of inspectors of election to the captains of police, and by them delivered to him, to be arranged by assembly districts, and by election districts of assembly districts, commencing with the first, and in such manner that the names of all registered voters residing at any given number of any street shall appear together; and those of each street in each election district shall appear arranged by house numbers, in consecutive order, each street separately. As soon as the entire registry of voters shall be completed, and the copies thereof made and delivered, the director shall forthwith cause the same to be printed and published in the City Record, and in the form and manner herein prescribed; and such publication shall be made within one hundred eight hours after the close of each annual registration. The registry of each assembly district shall be printed separately and shall be sold separately to persons wishing to purchase the same at a price fixed by the director not to exceed one dollar and fifty cents per copy for each assembly district.

b. It shall be the duty of the director of the City Record to cause the annual record of the assessed valuation of real estate, made and delivered to him by the tax commission, to be published either in or apart from the City Record as the director shall determine. Such publication shall be within ninety days after the delivery of such record to such director. The record of the real estate of each section, district or ward shall be a separate publication, and each shall contain an outline map of the section, district or ward therein contained. Copies of each such publication shall be sold at a price fixed by the director.

c. All moneys received under the provisions of this section shall be paid into the city treasury to the credit of the general fund. (*Derived from former* § 873. *Subdivisions a and b amended by L.* 1962, *ch.* 998, § 37.)

# CHAPTER 39

# CHIEF MEDICAL EXAMINER

§ 874. **Office; chief medical examiner.**—There shall be the office of chief medical examiner the head of which shall be the chief medical examiner who shall be appointed by the mayor from the classified civil service and be a doctor of medicine and a skilled pathologist and microscopist.

The mayor may remove the chief medical examiner upon stating in writing his reasons therefor, to be filed in the office of the municipal civil service commission and served upon such officer, and allowing him an opportunity of making a public explanation. (*Derived from former* § 874.)

§ 875. **Deputies and employees.**—The chief medical examiner may appoint and remove such deputy chief medical examiners, associate medical examiners, assistant medical examiners, junior medical examiners, medical investigators, scientific experts and other officers and employees as may be provided for in the budget. The deputy chief medical examiners, associate medical examiners, assistant medical examiners and junior medical examiners shall possess the same basic qualifications as the chief medical examiner. The medical investigators shall be physicians duly licensed to practice medicine in the state of New York and shall possess such additional qualifications as may be required by the department of personnel. *(Derived from former* § 875 *as amended by L. L.* 1961, *No.* 56.*)*

§ 876. **Office always open.**—The office shall be kept open every day in the year, including Sundays and legal holidays, with a clerk in attendance at all times during the day and night. (*Derived from former* § 876.)

§ 877. **Oaths and affidavits.**—The chief medical examiner and all deputy chief medical examiners, associate medical examiners, assistant medical examiners, junior medical examiners and medical investigators may administer oaths and take affidavits, proofs and examination as to any matter within the jurisdiction of the office. *(Derived from former* § 877 *as amended by L. L.* 1961, *No.* 56.*)*

§ 878. **Powers and duties.**—The chief medical examiner shall have such powers and perform such duties as may be provided by law in respect to the bodies of persons dying from criminal violence, by a casualty, by suicide, suddenly when in apparent health, when unattended by a physician, in prison or in any suspicious or unusual manner or where an application is made pursuant to law for a permit to cremate the body of a person. *(Derived from former* § 878 *as amended by L. L.* 1949, *No.* 109.*)*

**CASE NOTES**

¶ 1. In action against insurer, there were held to be no "legal restrictions" upon right of plaintiff to permit the autopsy demanded, and the insurer showed enough to indicate that denial of the autopsy to which it possessed a contractual right might be prejudicial to its defense.—Wolchonok v. Equitable Life Assur. Soc'y, 131 (71) N. Y. L. J. (4–14–54) 7, Col. 7 T.

¶ 2. Inasmuch as the report of the toxicologist as to the quantity of alcohol found in the brain of the deceased was made pursuant to law and in the regular course of business, it was error to exclude such report in a death action brought against the defendant bus company by the administrator of the deceased.—Iovino v. Green Bus Lines, Inc., 277 App. Div. 1002, 100 N. Y. S. 2d 148 [1950].

¶ 3. In an action against the City of New York to recover damages for an allegedly unauthorized autopsy performed on plaintiff's sister following her death in a hospital, defense alleging that the sister had died of "undetermined cause" while a patient in a hospital, that pursuant to the Administrative Code, the Department of Hospitals notified the City Medical Examiner of such death and that an Assistant Medical Examiner in performance of his duty under former § 878 lawfully performed an autopsy and in his opinion such autopsy was necessary and lawfully performed to determine the cause of death; *held:* insufficient for failure to allege that she died as a result of criminal violence, suicide, or otherwise as prescribed by former § 878. Allegation that defendant proceeded in a manner authorized by law was a mere legal conclusion.—Trammel v. City of New York, 193 Misc. 356, 82 N. Y. S. 2d 762 [1948], aff'd 276 App. Div. 781, 93 N. Y. S. 2d 299.

§ 879. **Records.**—It shall be the duty of the chief medical examiner to keep full and complete records in such form as may be provided by law. The chief medical examiner shall promptly deliver to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any indication of criminality, and such records shall not be open to public inspection. (*Derived from former* § 879.)

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**Evidence, medical examiners report as,** ¶¶ 6, 7, 19–21
**Inspection of autopsy reports,** ¶¶ 1–5, 14–18, 22, 23
**Unauthorized autopsy, action for damages based upon,** ¶¶ 8–10

¶ 1. Defendant, charged with homicide, *held* not entitled to an order under Public Health Law § 5a directing the chief medical examiner of New York City to permit him to inspect records relating to death of victim of the killing, since § 5a has no application to records of the medical examiner in New York City, and by express provision in Charter § 879 records maintained by that official, once turned over to the district attorney as they had been in the present case, are essentially confidential and are not available for inspection. Furthermore, the trial court lacked the power to require a prosecutor to reveal to a defendant awaiting trial for homicide the contents of written statements and memoranda prepared by the prosecutor's medical experts following a post-mortem examination of the victim, and even as a matter of discretion the application would be denied as the autopsy reports related to matters which the prosecutor would be obliged to establish upon the trial.—People v. English, 175 Misc. 751, 24 N. Y. S. 2d 207 [1940].

¶ 2. Defendant, charged with homicide, *held* not entitled to an order under Public Health Law § 5a directing the Chief Medical Examiner of New York City to permit him to

inspect records relating to death of victim of the killing, since under Charter § 879 such records are not open to public inspection. Section 879 of the Charter controlled, and not Public Health Law § 5a, which relates solely to records of coroners of the state, as the office of coroner has been abolished in New York City and the Chief Medical Examiner is not a substitute for a coroner. Even if there were conflict between the two laws, the provisions of the Charter would control, for it essentially modified that part of the Public Health Law which was inconsistent with it. —In re English, 175 Misc. 930, 26 N. Y. S. 2d 23 [1940].

¶ 3. Under the provisions of this section a motion by a defendant, charged with murder, to examine the autopsy report made of the victim was denied. —People v. Sturgis, 135 (14) N. Y. L. J. (1–20–56) 9, Col. 6 T.

¶ 4. In murder prosecution, County Court *held* without authority to direct the District Attorney to furnish to the defendant a copy of the medical examiner's report, inasmuch as under New York City Charter § 879 the medical examiner's report, once turned over to the District Attorney, is essentially confidential and not available for inspection. Furthermore, the medical examiner's report is not admissible evidence in a prosecution as no opportunity to cross-examine the physician who made it or to offer any evidence to contradict it is available to the defendant, who has no opportunity to be represented at the autopsy, and the remedy of discovery and inspection is limited to documents that are themselves evidence.—In re Hughes, 181 Misc. 668, 41 N. Y. S. 2d 843 [1943].

¶ 5. Where defendant, indicted for murder, first degree, for causing death of wife by administering poison, had been granted an inspection of the grand jury minutes in respect to the technical and medical testimony as to cause of death, an inspection of the medical examiner's report was denied, as such report could be helpful to defendant only if it contained evidence additional to that before the grand jury, and defendant should not have the report available to him for sole purpose of impeaching the examiner's testimony on the trial.—People v. Feldman, 115 (30) N. Y. L. J. (2–5–46)) 496, 5 M.

¶ 6. In prosecution of physicians for manslaughter in the first degree as result of the death of a person upon whom they performed an illegal abortion, admission in evidence of findings of a medical examiner who died after signing his report of an autopsy performed upon the deceased woman, *held* not to have violated defendants' rights of confrontation, inasmuch as the autopsy findings were contained in a report filed in a public office by a public officer for a public purpose embodying facts required by statute to be stated therein, and that was sufficient to permit their admission in evidence even though in the public interest such records were available only to public officials.—People v. Nisonoff, 293 N. Y. 597, 59 N. E. 2d 420 [1944], affirming 267 App. Div. 356, 45 N. Y. S. 2d 854.

¶ 7. Inasmuch as the report of the toxicologist as to the quantity of alcohol found in the deceased's brain was made pursuant to law and in the regular course of business, it was error to exclude such report in death action brought against bus company. —Iovino v. Green Bus Lines, Inc., 277 App. Div. 1002, 100 N. Y. S. 2d 148 [1950].

¶ 8. In action against the City for damages for an unauthorized autopsy, questions of fact were held to be present as to whether there was an unnecessary mutilation of the remains of the deceased by the City, and if so, whether such acts were committed without authorization of the next of kin, and what damages plaintiffs sustained. It is well settled that a cause of action will lie for an unauthorized autopsy.—Beller v. City of N. Y., 269 App. Div. 642, 58 N. Y. Supp. (2d) 112 [1945].

¶ 9. In action against City of New York to recover damages for an allegedly unauthorized autopsy performed upon plaintiff's sister following her death in a hospital, defense alleging that the sister had died "of undetermined cause" while a patient in the hospital, that pursuant to the Administrative Code the Department of Hospitals notified the City Medical Examiner of such death, and that an Assistant Medical Examiner in performance of his duty under Charter former § 878 and Administrative Code §§ 878–2.0 and 3.0 lawfully performed an autopsy and in his opinion such autopsy was necessary and lawfully

performed to determine the cause of death, *held* insufficient for failure to allege that she died as a result of criminal violence, by suicide, or otherwise as prescribed by Charter former § 878. That defendant proceeded in a manner authorized by law was a mere legal conclusion.—Trammell v. City of N. Y., 193 Misc. 356, 82 N. Y. S. 2d 762 [1948], aff'd 276 App. Div. 781, 93 N. Y. S. 2d 299.

¶ 10. In action against City of New York to recover damages as result of an allegedly unauthorized autopsy performed by City upon body of plaintiff's sister following her death in Kings County Hospital, defense asserting that the deceased left her surviving a husband and a mother and that plaintiff was therefore not the proper party to maintain the action, *held* sufficient, as the legal injury was to the right to possession of the body, which belongs to the surviving husband or wife or next of kin for purpose of preservation and burial. —Id.

¶ 11. Where a plaintiff sued the City on account of an unauthorized autopsy upon his wife, neither he nor his attorney need be given access to the "confidential medical report", which is to be distinguished from the death certificate.—Cremonese v. City of New York, 141 (82) N. Y. L. J. (4–29–59) 14, Col. 5 F.

¶ 12. In automobile accident case not involving the City, the plaintiff was not entitled to an order directing the medical examiner to furnish him a copy of the autopsy report. Contrary to defendant's contention such a report is not a privileged document but is subject to examination and inspection. However, this must be done in accordance with the statutory provisions and CPA § 324 is limited to inspection against parties to the action. Plaintiff may have the relief requested by proceeding as a taxpayer under § 51 of the General Municipal Law, § 894 of the City Charter or under § 66 Public Officers Law at the office of the Motor Vehicle Commissioner.—Walsh v. Beckman, 29 Misc. 2d 591, 215 N. Y. S. 2d 398 [1960].

¶ 13. Where there was no evidence to support a finding of suicide, taxpayer was entitled to an order directing that the autopsy report be changed so as to show the cause of death as accidental.—In re Mitchell, 146 (93) N. Y. L. J. (11–14–61) 13, Col. 3 M.

¶ 14. A defendant charged with manslaughter was not entitled to a copy or to an inspection of the Medical Examiner's autopsy report. Such report was of a confidential nature. Further, defendant's rights would be sufficiently protected in that he could ask the trial court for its inspection if discrepancies arose during cross-examination.—People v. Burton, 139 (32) N. Y. L. J. (2–17–58) 11, Col. 2 F.

¶ 15. A defendant, charged with homicide, was not barred by this section from examining autopsy report of victim's death.—People v. King, 142 (126) N. Y. L. J. (12–31–59) 11, Col. 1 M.

¶ 16. The defendant, charged with 1st degree murder, filed an application for inspection of autopsy records. *Held:* the court would grant the application, though it did not appear that the cause of death was an issue, since the autopsy was admissible in evidence.—People v. Higgins, 143 (29) N. Y. L. J. (2–11–60) 16, Col. 2 F.

¶ 17. Where defendant was charged with murder in the first degree, *held* pre-trial inspection of the medical examiner's autopsy report was available to defendant where it appeared that the report might contain evidence material in determining the issue of self-defense raised by defendant.—People v. Stokes, 144 (48) N. Y. L. J. (9–8–60) 12, Col. 3 M.

¶ 18. Plaintiff's decedent died in a hospital operated by the City of New York, *Held*: plaintiff in an action against the City was entitled to an examination of all books, records and papers relevant to the subject matter, including the hospital records relating to decedent's case and the autopsy report. The autopsy report was an exception to the hearsay rule and admissible as evidence.—Mitzner v. City of New York, 139 (48) N. Y. L. J. (3–11–58) 8, Col. 5 M.

¶ 19. A "confidential medical report" is to be distinguished from a death certificate, and the City may not be compelled to give plaintiff or his counsel access to such report.—Matos v. City of New York, 15 Misc. 2d 444, 182 N. Y. S. 2d 693 [1958].

¶ 20. As an exception to the general rule that autopsy reports are confidential, the Court directed the District Attorney to supply the defendant with a copy of the part of the Medical Examiner's report which indicated cause of death.—People v. Munoz,

140 (73) N. Y. L. J. (10–14–58) 15, Col. 2 F.

¶ 21. A defendant in a manslaughter case may examine hospital records and the Medical Examiner's autopsy report concerning the victim.—People v. Preston, 13 Misc. 2d 802, 176 N. Y. S. 2d 542 [1958].

¶ 22. In a negligence action, plaintiff was entitled to a copy of the autopsy report respecting the deceased driver of a motor vehicle involved in a collision with an auto in which plaintiff was a passenger.—Walsh v. Beckman, 29 Misc. 2d 591, 215 N. Y. S. 2d 398 [1961].

¶ 23. Where defendant was on trial for his life he was entitled to a transcript of the autopsy report prior to the trial.—People v. Johnson, 146 (61) N. Y. L. J. (9–27–61) 15, Col. 4 M.

# CHAPTER 40

# DEPARTMENT OF TRAFFIC

§ 881. **Department; commissioner.**—There shall be a department of traffic the head of which shall be the commissioner of traffic. *(Derived from former* § 1061 *as amended by L. L.* 1950, *No.* 27.*)*

## CASE NOTES

¶ 1. A traffic regulation issued pursuant to former Chapter 46 now Chapter 40 which prohibited a person from standing upon the travelled part of any street to talk with, sell or offer to sell anything to the occupant of any vehicle was not discriminatory, arbitrary or unreasonable and was applicable to hotel runners licensed under § 436–3.0 of the Administrative Code.—People v. Murillo, 148 N. Y. S. 2d 572 [1956].

§ 882. **Deputies.**—The commissioner may appoint two deputies, one of whom shall be a licensed professional engineer and shall have had at least five years' practical experience in traffic engineering. (*Derived from former* § 1062 *as added by L. L.* 1949, *No.* 2, *and amended by L. L.* 1950, *No.* 27.)

§ 883. **Powers and duties.**—The commissioner shall have the power and it shall be his duty to:

(a) Make such rules and regulations for the conduct of vehicular and pedestrian traffic in the city, in the streets, squares and avenues in the city as he may deem necessary, which rules and regulations shall not become effective until filed with the city clerk and published in the City Record. The violation of such rules and regulations shall be triable by a city magistrate and punishable by not more than thirty days' imprisonment, or by a fine of not more than fifty dollars, or both. The police commissioner may, in any emergency, suspend for a period of forty-eight hours the provisions of any such rule or regulation and shall forthwith notify the department of traffic thereof. In order to expedite the movement of traffic or to safeguard pedestrians or property, a police officer may order a person to disregard any traffic signal or any such rule or regulation.

(b) Establish, determine and control the design, type, size and location of any and all signs, signals, markings and similar devices indicating the names of the streets and other public places and for guiding, directing or otherwise regulating and controlling vehicular and pedestrian traffic in the streets, squares, parks, parkways, roads, alleys, marginal streets, bridges and other public ways of the city. Signs, signals, markings and devices shall be installed and maintained under the direction of the commissioner.

(c) Make recommendations to the mayor as to the design and location of highway lighting devices, poles and fixtures, and the type and intensity of illumination of streets and highways.

(d) Prepare and submit to the mayor a proposed comprehensive city traffic plan.

(e) Collect and compile traffic data and prepare engineering studies and surveys in regard to vehicular and pedestrian traffic.

(f) Prepare and submit to the mayor detailed reports in regard to traffic conditions in the city.

(g) Make recommendations to the mayor in regard to methods of ameliorating traffic conditions which adversely affect the welfare of the city and which cannot be remedied by traffic rules or regulations.

(h) Submit to the mayor from time to time for consideration and forwarding to the appropriate city agencies, specific proposals for amendment of the resolutions, rules and regulations of city agencies which affect traffic conditions in the city, and proposed legislation which in the opinion of the commissioner may be necessary to implement and effectuate his proposals.

(i) Prepare and submit to the mayor, for consideration and forwarding by him to the board of estimate, the council, the city planning commission and to other agencies of the city, recommendations and proposals in regard to the improvement of existing streets, street widening and the location of new streets, avenues and highways; the location and design of parking garages and parking areas; the establishment of public parking garages and parking areas; the location, type and design of off-street loading and unloading and parking facilities, and other matters relating to traffic control.

(j) Co-ordinate the efforts of and consider the reports, recommendations and suggestions of public and private agencies and civic groups in regard to traffic conditions and traffic control in the city.

(k) Prepare analyses of traffic accidents with a view to determining their causes and means for their prevention.

(l) Carry on educational activities for the purpose of promoting traffic safety and the free movement of vehicular and pedestrian traffic in the city.

(m) Establish parking meter zones, determine the design, type, size, location and use of parking meters and fix the fees for parking in parking areas and public parking garages. The parking fees so collected shall be paid into a special fund to be known as the "traffic improvement fund." The revenues of such fund, upon authorization by the board of estimate shall be used for the payment of all costs of purchase, rental, engineering, installation, operation, maintenance and repairs of parking meters, for the collection of coins, and for the payment of interest on, amortization of, or payment of

any indebtedness contracted by the city in connection with the installation, operation and maintenance of parking meters. Any revenues remaining after such payments are made shall be used for capital and other expenditures to ameliorate traffic conditions. *(Derived from former* § 1063 *as added by L. L.* 1949, *No.* 2*; subd. m as added by L. L.* 1949, *No.* 102*; section renumbered and amended by L. L.* 1950, *No.* 27.*)*

CROSS REFERENCES: Public Authorities Law, Article 7, Title 13, provides for New York City Parking Authority.

Public Authorities Law, § 1605, authorizes city to pledge parking meter revenues to New York City Parking Authority.

Vehicle and Traffic Law, § 54, authorizes parking meters, charging of fees therefor, and the regulation of parking.

General Municipal Law, §72-j, authorizes municipal ownership and operation of parking lots.

## CASE NOTES

### Index

Constitutionality of transfer of authority, ¶ 3
Bus stops in front of private business, ¶ 5
Public parking garage, authority to construct, ¶ 4
Traffic control, authority to regulate, ¶¶ 1, 2

¶ 1. The Traffic Commission has now succeeded to the powers and duties formerly belonging to the Police Commissioner in respect to the making of regulations for traffic control, and violations of such rules continue to be prosecuted and punishable as before.—Walther v. News Syndicate Co., 276 App. Div. 169, 93 N. Y. S. 2d 537 (1949).

¶ 2. The Traffic Commission has succeeded to the powers formerly belonging to the Police Commissioner in respect to the making of regulations for traffic control, and the violation of such regulations continue to be tried by a City Magistrate.—People (Joyce) v. Hogenson, 117 N. Y. S. 2d 260 (1952).

¶ 3. The delegation to the Traffic Commissioner, under former § 1061 now § 883, of the power to make rules and regulations for the conduct of pedestrian and vehicular traffic is not unconstitutional.—People v. Levine, 308 N. Y. 685, 124 N. E. 2d 322 [1954].

¶ 4. The Board of Estimate has power to authorize the Department of Traffic to construct and operate a public parking garage.—Realty Control Corp v. Wagner, 139 (47) N. Y. L. J. (3–10–58) 7, Col. 6 F.

¶ 5. Plaintiff's gasoline station was served by two curb cuts on each of two intersecting streets, pursuant to permit granted by the City. On each street, the City maintained a bus stop in front of plaintiff's premises, and buses, which ran on a close schedule, frequently partially blocked access to said premises. Since the bus stops were established in the interests of public safety and the orderly movement of traffic, their interference with plaintiff's business did not constitute a taking of property without due process of law.—Cities Service Oil Co. v. City of New York, 5 N. Y. 2d 110, 180 N. Y. S. 2d 769, 154 N. E. 2d 814 [1958], cert. den. 360 U. S. 934, 93 L. Ed. 1546, 79 S. Ct. 1453 [1961].

§ 884. **Reports.**—The commissioner shall once in each year submit to the mayor and publish in The City Record a report of the department's activities. *(Derived from former* § 1004 *as added by L. L.* 1949, *No.* 2, *as amended by L. L.* 1950, *No.* 27.*)*

§ 885. **Enforcement of laws, rules and regulations concerning the parking of vehicles.**—Notwithstanding the provisions of any other law, the department of traffic shall have the power concurrently with the police department to enforce all laws, rules and regulations regulating, directing, controlling or restricting the parking of vehicles at meters and off-street parking metered areas in the city. As used in this section, the term "parking" shall mean and include the "parking," "stopping" and "standing" of vehicles at meters and off-street parking metered areas as such terms are defined in sections one hundred twenty-nine, one hundred forty-five and one hundred forty-seven, respectively, of the vehicle and traffic law. *(Derived from former* § 1065 *as added by L. L.* 1959, *No.* 79.*)*

# CHAPTER 41

# DEPARTMENT OF AIR POLLUTION CONTROL

§ 891. **Department; organization.**—a. There shall be a department of air pollution control, the head of which shall be the commissioner of air pollution control. He shall have recognized professional education, training and experience in the fields of public health, sanitation, industrial hygiene, and air pollution control or the equivalent of all of the aforementioned or he shall be either a professional, mechanical or stationary engineer.

b. The commissioner may appoint one deputy, who shall have recognized professional education, training and experience in the fields of public health, sanitation, industrial hygiene and air pollution control or the equivalent of all the aforementioned or he shall be either a professional, mechanical or stationary engineer. *(Derived from former* § 1071 *as added by L. L.* 1952, *No.* 114.*)*

## CASE NOTES

¶ 1. The legislation prohibiting dense smoke is regulatory in character and must be interpreted in the light of this necessity and the purpose to be accomplished. A reasonable interpretation should be made and if the adduced proof shows that a defendant has complied with the literal requirements of the law, as nearly as it is practical to do so, under the prevailing circumstances, and that he has adopted the best devices presently known to all, then the letter and spirit of the legislation have been complied with.—People v. Oswald, 1 Misc. 2d 726, 116 N. Y. S. 2d 50 [1952].

¶ 2. The definitions of dust, fumes, odor and vapor as set out in the Code are clear and definite enough to present standards for the Department of Air Pollution Control. The matter of overspray and vapors which escaped from plaintiffs' spray-painting business into the outer air was within the jurisdiction of the Department and its statutes and regulations.—West Bronx Auto Paint Shop Inc. v. The City of New York, 33 Misc. 2d 29, 223 N. Y. S. 2d 984 [1961].

§ 892. **Powers and duties.**—The commissioner except as otherwise provided by law, shall have jurisdiction to regulate and control the emission into the open air of harmful or objectionable substances, including but not limited to smoke, soot, fly ash, dust, fumes, gas, vapors, odors and any products of combustion or incomplete combustion resulting from the use of fuel burning equipment or from the heating of fuels or refuse. He shall enforce all laws, rules and regulations with respect to such emissions. He shall make such investigations and studies as may be desirable for the purpose of such enforcement and of controlling and eliminating air pollution, and for such purpose shall have power to compel the attendance of witnesses and to take their testimony under oath. He shall recommend to the board of air pollution control the adoption of such rules

and amendments thereof as may be necessary or proper for the elimination or control of air pollution. (*Derived from former* § 1072 *as added by L. L.* 1952, *No.* 114.)

§ 893. **Board of air pollution control.**—There shall be in the department a board of air pollution control consisting of five members. The commissioner of air pollution control, the commissioner of health and the commissioner of buildings, or their respective duly authorized representatives, shall be ex officio members of the board. They shall serve without additional compensation. The two other members shall be appointed by the mayor each for a term of four years commencing at the expiration of the terms of the present incumbents; except that vacancies shall be filled for the unexpired term. They shall have recognized professional education, training and experience in the fields of public health, sanitation, industrial hygiene and air pollution control or the equivalent of all of the aforementioned or they shall either be professional, mechanical or stationary engineers. Such two members shall each be paid at the rate of fifty dollars per meeting. The total compensation for each for attending all meetings of the board shall in no event exceed three thousand dollars per year. The mayor may remove any of such members for cause. *(Derived from former* § 1073 *as added by L. L.* 1952, *No.* 114.*)*

§ 894. **Chairman of board; meetings.**—The commissioner of air pollution control shall be the chairman of the board. Regular meetings of the board shall be held at least once every month. Special meetings may be held at the call of the chairman. The board shall adopt its own by-laws and rules or procedure. (*Derived from former* § 1074 *as added by L. L.* 1952, *No.* 114.)

§ 895. **Powers and duties of the board.**—The board of air pollution control shall have jurisdiction to adopt and amend rules not inconsistent with any provision of law, regulating or prohibiting the emission into the open air from any source, whether fixed or movable, and whether on land or water, of any harmful or objectionable substances, including, but not limited to, smoke, soot, fly ash, dust, fumes, gas vapors and odors, and the installation, construction or alteration of equipment giving forth such emissions into the open air in so far as such emissions are affected thereby. The board shall have power to compel the attendance of witnesses and to take their testimony under oath. The board may fix fees for the filing of any document, for the issuance of permits and for the examination of plans except as otherwise provided by law. *(Derived from former* § 1075 *as amended by L. L.* 1959, *No.* 24.*)*

# CHAPTER 42

# DEPARTMENT OF LABOR

§ 900. **Department; commissioner.**—There shall be a department of labor, the head of which shall be the commissioner of labor. *(Derived from former* § 1110 *as added by L. L.* 1954, *No.* 1.*)*

§ 901. **Deputies.**—The commissioner may appoint two deputies. (*Derived from former* § 1111 *as added by L. L.* 1954, *No.* 1.)

§ 902. **Powers and duties of commissioner.**—a. The commissioner shall have the power and it shall be his duty in an existing, imminent or threatened labor dispute within the city which, in his opinion, may endanger or threaten the health, safety or welfare of the people of the city, to take such steps as he may deem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employers and employees which have precipitated or culminated in or threaten to precipitate or culminate in a labor dispute.

b. The commissioner shall have the power to hear and consider grievances of city employees or groups of city employees, to make findings and recommendations with reference to such grievances and to certify the same to the mayor for such action as he shall deem appropriate.

c. The commissioner shall have the power to hold public or private hearings, administer oaths, take testimony and receive evidence, and may promulgate, amend and modify rules of procedure and practice governing proceedings before him.

d. The commissioner may make investigations, collect, compile and publish statistical information and report to the mayor upon the conditions of labor and matters affecting employment both public and private within the city. (*Derived from former* § 1112 *as added by L. L.* 1954, *No.* 1.)

# CHAPTER 43

# NEW YORK CITY COMMUNITY MENTAL HEALTH BOARD

§ 905. **Community mental health board.**—a. There shall be a New York City community mental health board which shall consist of the commissioner of health, ex officio, the commissioner of welfare, ex officio, and seven other members who shall be appointed by the mayor. Of the appointive members, at least two shall be physicians actively engaged in private practice. The board shall be representative of interested groups in the community, and at the discretion of the mayor, may include a member of the council; an officer or employee of the department of hospitals; an officer or employee of the board of education; persons familiar with practice in courts of criminal jurisdiction or children's courts, and members or employees of voluntary health, welfare or mental health agencies. One of the members of the board shall be designated by the mayor as chairman and shall serve as such during his term as member of the board or until a successor chairman is designated by the mayor from among the members, whichever is sooner.

b. The term of each appointive member of the board shall be for four years, commencing at the expiration of the terms of the present incumbents. The term of each appointee member shall be measured from the first day of the year of appointment. In the case of a vacancy the mayor shall appoint a member to serve for the unexpired term.

c. Any appointive member may be removed by the mayor for neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

d. The commissioners of health and welfare shall serve on the board without aditional compensation and the appointive members shall serve without compensation, except that each appointive member, other than a city officer or employee, shall be allowed actual and necessary expenses to be audited and paid in the same manner as other city charges. (*Derived from former* § 1120 *as added by L. L.* 1954, *No.* 116.)

§ 910. **Powers and duties of the board.**—a. The board shall have the powers of a community mental health board under the community mental health services act, including but not limited to the power and duty to:

1. Review and evaluate community mental health services and facilities in the city;

2. Submit to the mayor and council a program of community mental health services and facilities;

3. Within amounts appropriated therefor, execute such program and maintain such facilities as may be authorized under such appropriations;

4. Within the amounts appropriated therefor, enter into contracts with the approval of the board of estimate for rendition or operation of services and facilities on a per capita basis or otherwise;

5. Arrange, with the approval of the mayor for the rendition of services and operation of facilities by other agencies of the city;

6. Make rules and regulations concerning the rendition or operation of facilities under its direction or supervision;

7. Appoint a psychiatrist, whose qualifications meet the standards fixed by the state commissioner of mental hygiene, to serve as director of the community mental health service. Such director may be employed on a full or part-time basis;

8. Prescribe the duties of such director and review the performance of his duties;

9. Perform such other acts as may be necessary or proper to carry out the purpose of the community mental health services act.

b. The board shall also have the power and duty to:

1. Submit a plan approved by the board of estimate to the state commissioner of mental hygiene pursuant to the provisions of section one hundred ninety-one of the mental hygiene law, and to comply with the provisions of article eight-A of such law and the rules and regulations of the state commissioner of mental hygiene promulgated pursuant thereto, for the purpose of obtaining state reimbursement thereunder;

2. In accordance with such plan, to utilize the services and facilities of public or private voluntary institutions, wherever practicable; and

3. To perform such other acts as may be necessary or proper to carry out the provisions of this chapter.

c. The mayor may appoint such advisory committee or committees to the mental health board as he may deem necessary or desirable to advise the board on the mental health resources and needs of the people of the city and to assist the board in the development of a sound community mental health program. (*Derived from former* § 1121 *as added by L. L.* 1954, *No.* 116.)

§ 911. **Powers and duties of director of community mental health services.**—a. The director of community mental health

services shall have the powers and duties of a director of community mental health services under the community mental health services act, including but not limited to the power and duty to:

1. Serve as chief executive officer of the board;

2. Exercise general supervision over mental health services and facilities rendered, operated or supported by the board;

3. Exercise general supervision over the treatment of patients in services or facilities which are rendered or maintained by or under the direction of the board;

4. Recommend to the board the provision of services and establishment of facilities, including contracts therefor, and other matters necessary or desirable to accomplish the purposes of the community mental health services act and this chapter;

5. Make an annual report to the board of programs under his direction, including a fiscal accounting;

6. Carry on such studies as may be appropriate for the discharge of his duties or the promotion of mental health or prevention of psychiatric disorders.

b. The director may employ and remove such officers, employees and consultants as may be necessary for the work of the board and fix their compensation within the amount appropriated for each such position or item, and approved by the board. (*Derived from former* § 1122 *as added by L. L.* 1954, *No.* 116.)

§ 912. **Director; compensation; removal.**—a. The compensation of the director shall be fixed by the board within the amount made available by appropriation therefor. In addition to such compensation, the director shall be allowed his actual and necessary expenses in the performance of his official duties, to be audited and paid in the same manner as other city charges.

b. The board may remove the director for cause, upon written charges, and after the director, upon due notice, has been given an opportunity to be heard. (*Derived from former* § 1123 *as added by L. L.* 1954, *No.* 116.)

§ 913. **Eligibility for appointment; contracts.**—a. No person shall be ineligible for board membership or appointment as director because he holds any other public office, employment or trust, nor shall any person be made ineligible to or forfeit his right to any public office, employment or trust by reason of such appointment.

b. Contracts for services and facilities under this article may be made with a public or private voluntary hospital, clinic, laboratory, health, welfare or mental health agency or other similar institution, notwithstanding that the director or any member of the board is an officer or employee of such institution or agency or is a member of the medical or consultant staff thereof. Such

contracts shall, wherever practicable, provide for compensation on a per capita basis. (*Derived from former* § 1124 *as added by L. L.* 1954, *No.* 116.)

§ 914. **Construction clause.**—The provisions of this chapter shall be carried out subject to and in conformance with the provisions of the community mental health services act, being chapter ten of the laws of nineteen hundred fifty-four, as amended, pursuant to which it is enacted. (*Derived from former* § 1125 *as added by L. L.* 1954, *No.* 116.)

# CHAPTER 44

# CITY SHERIFF

§ 1031. **City sheriff.**—There shall be a city sheriff who shall be appointed by the mayor after competitive examination conducted by the municipal civil service commission in accordance with the civil service law. (*Derived from former* § 1031.)

## CASE NOTES

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**Abolition of office, constitutionality of, ¶¶ 1–5**

¶ 1. Amendment to the Charter embodied in the proposition to abolish the offices of Sheriff and Register in the counties within the City and to create City-wide appointive offices instead, *held* to have been properly enacted as a Local Law within meaning of Constitution, Art. IX, § 8 through enactment by petition and ratification by popular vote pursuant to the authorization of City Home Rule Law § 2 and former § 44 of the Charter. The duty of determining how Local Laws may be enacted was placed upon the Legislature, as there was no provision with reference thereto in either §§ 8 or 12 of Article IX of the Constitution.—Burke v. Kern, 287 N. Y. 203, 38 N. E. 2d 500 [1941], rev'g 263 App. Div. 834, 31 N. Y. S. 2d 1015.

¶ 2. Proposition submitting to the electorate the question whether the Charter should be amended to reorganize county government by abolishing the county offices of Sheriff and Register of Deeds and creating City-wide appointive offices of City Sheriff and City Register, *held* not invalid on ground the proposition embraced more than one subject, since the subject matter was merely county reorganization.

¶ 3. Objection to the proposition that no provision was made for the electors who desired to abolish one office and not the other, was over-ruled, since the only plan submitted was to effect economy in the manner indicated, and if the voter did not approve he disapproved of the plan as a whole.—Id.

¶ 4. That the functions, powers and duties of the old officers were being assigned to the new, did not result in the amendment violating Constitution, Art. III, § 16 prohibiting the insertion by reference of an existing law, since the principle is well established that reference to procedure and jurisdiction definitely established is not violative of the constitutional provision.—Id.

¶ 5. The operative date of the amendment was not postponed until the expiration of the terms of the respective officers elected on November 4, 1941, since Constitution, Art. IX, § 8, providing that elective county officers who were in office at time that Article took effect might serve out their terms, merely meant that the county officers who were in office on January 1, 1939, might fill out their then terms, and otherwise the section vested the City with unconditioned power to abolish the county offices, and by the amendment the City chose to make the abolition immediately effective on January 1, 1942.—Id.

§ 1032. **Functions, powers and duties.**—The functions, powers and duties formerly exercised by the sheriffs of the several counties shall remain with the city sheriff. (*Derived from former* § 1032.)

# CHAPTER 45

# CITY REGISTER

§ 1051. **City register.**—There shall be a city register who shall be appointed by the mayor after competitive examination conducted by the municipal civil service commission in accordance with the civil service law. (*Derived from former* § 1051.)

## CASE NOTES

¶ 1. In view of requirement of § 1051 of the Charter that the City Register shall be appointed as result of a competitive examination, and Rule of the Civil Service Commission authorizing the Commission to open promotional examination to persons in two or more lower grades, Commission *held* properly to have opened the promotion examination for Register to assistant deputy registers instead of limiting eligibility to the single first deputy register. The Commission's action in not extending eligibility for promotion to mortgage tax deputies was not arbitrary.—Goodman v. McNamara, 122 (1) N. Y. L. J. (7–1–49) 4, Col. 5 F.

§ 1052. **Functions, powers and duties.**—The functions, powers and duties formerly exercised by the registers or registrars of the several counties shall remain with the city register. (*Derived from former* § 1052.)

## CASE NOTES

¶ 1. Person holding position of mortgage tax examiner in the office of the Register of the County of New York was a City and not a State employee, and accordingly was not entitled to additional war emergency compensation awarded to "state officers and employees" by Laws of 1943, chapter 187. Although the collection of mortgage recording taxes is a State function, the Legislature delegated such function in New York County to the Register, with the power in him to hire clerks and assistants to whom he might further delegate portions of his work, and such power to select and appoint clerks imported the right also to discharge them.—Goodman v. Ralph, 294 N. Y. 169, 61 N. E. 2d 430 [1945].

# CHAPTER 46

## PERMANENT PERSONAL REGISTRATION

§ 1061. **Permanent personal registration.**—The system of permanent personal registration set forth in article fifteen of the election law is hereby continued.

# CHAPTER 47

# DEPARTMENT OF COMMERCE AND PUBLIC EVENTS

§ 1070. **Department; commissioner.**—There shall be a department of commerce and public events, the head of which shall be the commissioner of commerce and public events. (*Derived from former* § 1130 *as added by L.L.* 1955, *No.* 5.)

§ 1071. **Deputies.**—The commissioner may appoint and at pleasure remove three deputies. The title of the first deputy shall be director of commerce, the title of the second deputy shall be director of public events, and the title of the third deputy shall be assistant to the commissioner. (*Derived from former* § 1131 *as added by L.L.* 1955, *No.* 5.)

§ 1072. **Powers of department.**—a. The commissioner shall have power:

1. To study, organize, promote, coordinate and carry out within or without the city, activities, projects and programs designed to encourage, stimulate and foster the well-being, development, growth and expansion of business, industry and commerce in the city, and the enhancement and protection of the economic life of the city.

2. To serve as a clearing house in connection with efforts to devise solutions for problems affecting business, industry and commerce in the city.

3. To promote and encourage the expansion and development of markets for New York city products.

4. To promote and encourage the location and development of new business and industry in the city, as well as the maintenance and expansion of existing business and industry, and for that purpose to cooperate with public and private agencies, organizations and individuals.

5. To study conditions affecting business, industry and commerce in the city, and to collect and disseminate such information, make such studies and carry on such educational activities as may be necessary or useful in the effective execution of the powers of the commissioner in relation to the promotion and development of business, industry and commerce in the city.

6. To maintain a business information service in order to assist business and industry in the city, and to encourage business and industry outside of the city to patronize the business and industrial establishments of the city.

7. To make to the mayor, from time to time, recommendations concerning steps deemed advisable for the promotion and advancement of business and industrial prosperity in the city and the elimination of restrictions, burdens and handicapping factors having an adverse effect on business, industry and commerce in the city.

8. To publicize the economic advantages and other factors which make the city a desirable location for business and industry.

9. To collect information and compile and distribute literature and publicity material dealing with the facilities, advantages and attractions of the city and the historic and scenic points and places of interest therein.

10. To plan and conduct publicity and information programs designed to attract tourists, vacationers, visitors and other interested persons to the city, and to encourage, coordinate and cooperate with the efforts of public and private agencies, organizations and groups to publicize the advantages and attractions of the city for such purposes.

11. To encourage and cooperate with the efforts of public and private agencies, organizations and groups in publicizing the business, industrial and commercial advantages of the city.

12. To appoint such advisory committees as may be deemed necessary or useful for the effectuation of the powers of the department. The members of such committees shall serve without compensation.

13. To take charge of, organize, manage and superintend all public ceremonies, celebrations, receptions, greetings of distinguished persons, parades and similar public functions held under city auspices by order of the mayor, unless otherwise directed by the mayor.

b. The commissioner may appoint a secretary, who shall perform such confidential duties of a secretarial nature as may be assigned by the commissioner.

c. Subject to the provisions of the civil service law, the commissioner may appoint such business and industrial consultants, statisticians, public relations experts, economists and such additional technical, secretarial and service staff as may be necessary to carry out the provisions of this chapter. (*Derived from former* § 1132 *as added by L. L.* 1955, *No.* 5.)

§ 1073. **Powers and duties of deputies.**—a. The director of commerce shall have power and it shall be his duty, subject to the direction and control of the commissioner, to take charge of and direct the activities of the department which carry out the powers specified in paragraphs one to eleven, inclusive, of subdivision a of section ten hundred seventy-two of this charter. In the event that there is a vacancy in the office of commissioner or if the commis-

sioner is unable to perform the duties of his office by reason of sickness or absence from the city, such director shall possess the powers and perform the duties of the commissioner.

b. The director of public events shall have power and it shall be his duty, subject to the direction and control of the commissioner, to take charge of and direct the activities of the department which carry out the powers specified in paragraph thirteen of subdivision a of section ten hundred seventy-two of this charter. In the event that there are vacancies in both the office of the commissioner and the office of the director of commerce, or if both the commissioner and the director of commerce are unable to perform the duties of their respective offices by reason of sickness or absence from the city, the director of public events shall possess the powers and perform the duties of the commissioner.

c. The assistant to the commissioner shall have power and it shall be his duty to render to the commissioner such assistance in the management and supervision of the department as the commissioner may direct. In the event that there are vacancies in the office of the commissioner, and the office of director of commerce, and the office of director of public events, or if the commissioner, and the director of commerce, and the director of public events are unable to perform the duties of their respective offices by reason of sickness or absence from the city, the assistant to the commissioner shall possess the powers and perform the duties of the commissioner.

d. By instrument in writing filed in the department, the commissioner may, for such times and under such conditions as he may specify in such instrument, designate the director of commerce, the director of public events or the assistant to the commissioner to possess any of the commissioner's powers and to perform any of his duties. (*Derived from former* § 1133.)

# CHAPTER 48

# DEPARTMENT OF REAL ESTATE

§ 1080. **Department; commissioner.**—There shall be a department of real estate, the head of which shall be the commissioner of real estate. The commissioner shall have had at least fifteen years of experience in managing, selling or appraising real estate.

§ 1081. **Deputy; relocation deputy.**—The commissioner may appoint one deputy, who shall have had at least ten years of experience in managing, selling or appraising real estate. The commissioner may also appoint a deputy in charge of relocation, whose ability to discharge the functions imposed upon the commissioner by law in relation to tenant relocation shall have been demonstrated by relevant executive or administrative experience and training. (*Derived from former* § 1151 *as amended by L.L.* 1960, *No.* 19).

§ 1082. **Powers and duties.**—a. The commissioner, under the direction of the board of estimate, shall exercise and perform the powers and duties imposed by law upon such board relating to the acquisition, selling, leasing, exchanging or otherwise disposing of real property of the city and the assignment to city agencies of office space owned or leased by the city.

b. The commissioner shall manage and superintend all real property of the city not used for public purposes, including real property acquired for a public purpose and not being currently utilized for such purpose, but shall not manage and superintend wharf property, real property under the jurisdiction of the New York City transit authority, real property under the jurisdiction of the New York city housing authority by virtue of an authorization granted by the mayor pursuant to the provisions of subdivision three of section one hundred twenty-five of the public housing law, or, except as otherwise provided by law, real property under the jurisdiction of the triborough bridge and tunnel authority.

c. The commissioner shall exercise and perform such other powers and duties as may be prescribed by law or delegated to him in relation to acquisition, disposition or other treatment or real property of the city.

§ 1083. **Real estate advisory commission.**—There shall be a real estate advisory commission composed of fifteen members who shall be appointed by the commissioner. The members of the advisory commission shall hold office for one year terms. The members of the advisory commission shall be qualified and experienced professional real estate men and shall serve without compensation. In

making such appointments, due consideration shall be given to the recommendations made by representative associations, civic and professional groups concerned with or engaged in the field of real estate generally.

§ 1084. **Powers and duties.**—The real estate advisory commission shall meet at least once a month. It shall be informed by the commissioner of, and advise him on, matters of procedure and policy in the operation of the real estate department, such as but not limited to sales, appraisals, leasing, management training, preparation of manuals, public and press relations, and qualifications of consultants, auctioneers, and appraisers.

# CHAPTER 49

## OFFICERS AND EMPLOYEES

§ 1100. **Head of department; whole time.**—a. Every head of a department or elected officer except councilmen who receives a salary from the city shall give his whole time to his duties and shall not engage in any other occupation, profession or employment.

b. Whenever qualifications for the appointment of persons to public office are prescribed by law, the appointing officer shall, upon making such appointment, file with the civil service commission a certificate that such appointment complies with such law. (*Derived from former* § 881.)

### CASE NOTES

¶ 1. The Commissioner of Parks and the Commissioner of Public Works did not cause a vacature of their respective offices by their acceptance of appointment to positions as associate members of the city planning commission. These positions were not incompatible and, inasmuch as they were unsalaried, they were authorized by Charter former §§ 531 and 985. The provisions of this section requiring the head of a department give his whole time to his duties must be read in conjunction with these other sections.—Childs v. Moses, 265 App. Div. 353, 38 N. Y. S. 2d 704 [1942], aff'd without opinion, 290 N. Y. 828, 50 N. E. 2d 235.

¶ 2. There is no provision in the Charter which vests in the Mayor or the Board of Estimate the power to remove Civil Service employees for violating a regulation prohibiting any employee from performing private employment outside working hours. Thus, petitioner was ordered restored to his position as social investigator in the Department of Welfare where he had been dismissed for working after office hours in outside employment in violation of a regulation of the Board of Estimate that every employee must give his whole time to his duty.—Matter of Natilson, 264 App. Div. 384, 35 N. Y. S. 2d 537 [1942], aff'd 289 N. Y. 842, 47 N. E. 2d 442.

§ 1101. **Deputies.**—a. Any head of a department may appoint and at pleasure remove so many deputies as may be provided for by law and determine their relative rank, and may appoint and at pleasure remove a secretary to the department if so provided, and, except as otherwise provided by law, shall assign to them their duties and may by instrument in writing filed in the department designate any deputy to possess any of his powers and exercise such of his duties and for such times and under such conditions as he may specify.

b. During a vacancy in the office of the head of a department, or whenever by reason of illness or absence from the city he shall be prevented from attending to the duties of his office, the highest ranking deputy not absent or under disability shall act as the head of the department. (*Derived from former* § 882.)

## CASE NOTES

¶ 1. **Welfare Commissioner's delegation of power to remove to a deputy** commissioner was not a violation of law where the delegation was made in writing in accordance with New York City Charter former § 882 (now § 1101) (254 N. Y. 397).—Apicella v. Hodson, 103 (38) N. Y. L. J. (2–15–40) 720. Col 2 F.

¶ 2. Alleged campaign promises by the candidate for mayor that, if he were elected, plaintiff would be appointed to the position of deputy commissioner in certain departments, were against public policy and gave rise to no cause of action against the City. However, the mayor had no authority to make such appointments in any event, that being the prerogative of the particular department head.—Brill v. Wagner, 5 Misc. 2d 768, 161 N. Y. S. 2d 490 [1957].

§ 1102. **Organization of departments.**—a. Any head of a department or borough president to the extent to which the organization of his department or office is not prescribed by law, may organize his department or office into such divisions, bureaus or offices and make such assignments of powers and duties among them, and from time to time change such organization or assignments as he may consider advisable.

b. Where divisions, bureaus or offices have been established by law, the mayor may consolidate any two or more divisions, bureaus or offices in any agency under his jurisdiction and change the duties of any such division, bureau or office and in like manner reverse or modify any such action. (*Derived from former* § 883.)

§ 1103. **Powers of heads of agencies over subordinates.**—The heads of all agencies shall, except as otherwise provided by law, have power to appoint and remove, subject to the provisions of the civil service law, all chiefs of bureaus and all other officers, employees and subordinates in their respective departments or offices, without reference to the tenure of office of any appointee, and to assign to them their duties. (*Deirved from former* § 884.)

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¶ 1. Even though petitioner, who had not been appointed as result of an open competitive examination, was entitled to protection of Civil Service Law § 22, subd. 2, and of New York City Charter, former § 884, (now § 1103) he was nevertheless not entitled to an opportunity to be heard orally and to be confronted by the witnesses against him as a condition to his removal.—In re Walsh (Goldwater), 171 Misc, 463, 12 N. Y. S. 2d 908 [1939].

¶ 2. Once a position is established and an appropriation made by the Board of Estimate, the appointing officer or body may select the persons who are to fill the various positions and receive the salaries attached thereto, from among those declared by the Municipal Civil Service Commission to be eligible therefor. The

rights of a civil service employee to be given a position are dependent upon the existence of the position and an appropriation of salary therefor, and when the position and salary are authorized by the Board of Estimate the individual then enjoys certain rights of priority as against other contenders.—Ross v. La Guardia, Lewin v. La Guardia, 287 N. Y. 28, 38 N. E. 2d 117 [1941], aff'g 261 App. Div. 940, 26 N. Y. S. 2d 493.

¶ 3. The chief probation officer of the Magistrate's Court was not a proper person against which to commence an Article 78 proceeding to require a hearing and restoration to the payroll of a probation officer even though the petitioner had been informed by the chief officer at the end of her probationary period that he would recommend the termination of her services.—Clardy v. Clarke, 135 (49) N. Y. L. J. (3–13–56) 6, Col. 3 F.

¶ 4. Although the petitioner was the only remaining eligible for the position of deputy medical superintendent in the Department of Hospitals, he was not, ipso facto, entitled to appointment. The power to make the appointment rested, without power of delegation, solely in the Commissioner of Hospitals.—D'Oronzio v. Rappleye, 105 (102) N. Y. L. J. (5–2–41) 1958, Col. 6 F.

¶ 5. A rule promulgated by the Fire Commissioner prohibiting members of fire department from engaging in outside employment was a proper measure for the efficient administration of the fire department. The rule is applicable to a member of the department who, prior to appointment as fireman, had received training in mechanical engineering and, in an effort to aid the war effort, had taken outside employment in a war plant averaging over 100 hours a week on both jobs. Whether, in view of petitioner's laudible motive in accepting outside employment, the Commissioner should mitigate his penalty of dismissal was a matter of discretion.—Calfapietra v. Walsh, 183 Misc. 6, 49 N. Y. S. 2d 829 [1944], aff'd without opinion 269 App. Div. 734, 54 N. Y. S. 2d 231 and 294 N. Y. 867, 62 N. E. 2d 490.

¶ 6. The plaintiff was employed as a blacksmith in the Department of Sanitation and was also employed, outside his regular working hours in a private plant. He had been advised that he would be dismissed from his position in the Department of Sanitation unless he immediately gave up his outside employment. The plaintiff could enjoin the Commissioner from suspending or dismissing him on account of his outside employment and his complaint for such relief was sufficient. A regulation prohibiting outside employment adopted by a city department exceeds the powers conferred upon such a department by the Charter and inasmuch as plaintiff did not possess an adequate remedy at law he was entitled to the equitable relief of an injunction.—Putkowski v. Carey, 182 Misc. 1023, 52 N. Y. S. 2d 42 [1944].

¶ 7. The Charter contains no provisions which vest in the Mayor or the Board of Estimate the power to remove Civil Service employees for violating a regulation prohibiting any employee from performing private employment, whether outside working hours, at home or any other place, or to make such a regulation which is legislative in nature. The Commissioner of Welfare may not incorporate such a regulation in a notice to his staff as a departmental regulation.—Matter of Natilson v. Hodson, 264 App. Div. 384, 35 N. Y. S. 2d 537 [1942], aff'd without opinion, 289 N. Y. 842, 47 N. E. 2d 442.

¶ 8. Where a petitioner had been passed over by Police Commissioner in three instances while on the eligible list for the position of patrolman and papers in certiorari proceedings did not indicate whether he had been passed over because his mother had signed a Communist party petition or because of his violations of Traffic and Hack Bureau Regulations, the matter was remitted to the Commissioner for further appropriate action. A rejection based upon the petition would be arbitrary and subject to judicial correction.—Matter of Nathanson (Adams), 207 Misc. 572 [1955].

¶ 9. An appointing officer has a nonreviewable discretion to make appointments, otherwise within his capacity, from among eligibles certified to him by the Civil Service Commission. Rules requiring that appointments be made from among qualified people are not intended to dictate the selection but to limit the group from which the selection may be made. The Police Commissioner does not have to explain his action in passing over the petitioner's name on three occasions where the petitioner failed to show in any way that the

Commissioner's action was arbitrary or capricious.—Matter of Delicati v. Schechter, 3 A. D. 2d 19, 157 N. Y. S. 2d 715 [1956].

¶ 10. The Police Commissioner was justified, in the exercise of sound discretion, in refusing to appoint the petitioner as a probationary policeman upon the ground that the latter had been subjected to disciplinary action upon four occasions while serving in the Navy. The fact that the petitioner had been honorably discharged did not preclude consideration of his record.—Matter of Verbiest v. Kennedy, 4 Misc. 2d 855, 158 N. Y. S. 2d 142 [1956]; aff'd 3 A. D. 2d 994, 163 N. Y. S. 2d 944 [1957].

§ 1104. **Officers or employees designated to serve in exempt civil service positions.**—a. Notwithstanding any provision in this charter to the contrary, the mayor or head of an agency may designate any officer or employee occupying a position in the competitive class of the civil service to serve in a position in the exempt class, and in such case, the officer or employee so designated shall thereupon enter upon and exercise all the powers and duties and receive the salary of such exempt position. The officer or employee so designated shall retain all the rights, privileges and status of his position in the competitive class.

b. The appointment of any person chosen to fill the position thus left vacant shall be temporary and shall terminate upon the return of such officer or employee to such position as provided in subdivision e of this section.

c. Such designation shall be in writing and shall be filed and remain of record in the office of such agency, in the office of the municipal civil service commission and in the office of the mayor and shall remain in force until revoked by the mayor or head of such agency, as the case may be.

d. Service in such position in the exempt class shall be credited as service in the competitive class and the status of such officer or employee in respect to pensions or otherwise shall not be adversely affected by such designation.

e. Upon the termination of his services in such exempt position, except by dismissal for cause in the manner provided in section twenty-two of the Civil Service Law, such officer or employee shall immediately and without further application return to his position in the competitive class with the status, rights, privileges and salary enjoyed by him immediately prior to his designation to the position in the exempt class. (*Derived from former* § 884 *as added by L. L.* 1939, *No.* 139.)

§ 1105. **Rules and regulations; publication.**—a. Each head of an agency may, except as otherwise provided by law, make rules and regulations for the conduct of his office or department and to carry out its powers and duties.

b. No rule or regulation made by any officer of the city except such as relate to the organization or internal management of a department shall be effective until it is filed in the office of the city clerk. It shall be the duty of the corporation counsel to compile all rules and regulations filed in the office of the city clerk and publish them in the City Record each month and annually to revise and print them in a volume or volumes.

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¶ 1. Under Charter § 885, providing that each head of a municipal agency may make rules and regulations for the conduct of his office or department and to carry out its powers and duties, and also under his inherent power, the City Treasurer possesses power to make reasonable rules not in derogation of the court's authority but in furtherance of the Treasurer's own proper purpose so to conduct his own activities with regard to funds held by him pursuant to court order as to make as difficult as possible the way of any transgressor.—Natelson v. Portfolio, 291 N. Y. 290, 52 N. E. 2d 440 [1943], rev'g 266 App. Div. 442, 42 N. Y. S. 2d 753, and aff'g 178 Misc. 772, 36 N. Y. S. 2d 578.

¶ 2. However, rule of Treasurer requiring, as a condition of the issuance of a certificate of deposit in connection with the withdrawal of monies from court and trust funds, that information be furnished as to the amount of the attorney's fee, was an unreasonable and invalid requirement, as the amount of the fee is a matter of private contract, subject to the scrutiny of the court under certain circumstances, but is not the concern of the Treasurer. Rule requiring a county clerk's certificate of the notary public's authority, and the other questions set forth in a questionnaire prepared by the Treasurer, were proper. —Id.

¶ 3. The Commissioner of Licenses, despite the ministerial character of his duties, can exercise certain supervisory and regulatory powers particularly to safeguard public morals. It was within his powers, therefore, to forbid the sale of "tipster sheets" by the licensees of public newsstands. However, a publication of "racing selections", which were based on the study of probabilities, were not contrary to public morals and their sale could not be prohibited.—Armstrong Racing Publications v. Moss, 181 Misc. 966, 43 N. Y. S. 2d 171 [1943].

¶ 4. Under Charter former § 885 (now § 1105), providing that each head of a municipal agency may make rules and regulations for the conduct of his office or department and to carry out its powers and duties, New York City Commissioner of Licenses *held* authorized to promulgate rules and regulations in connection with enforcement of General Business Law § 170 et seq., pertaining to employment agencies and their relations with the public.—Acorn Employment Service, Inc., v. Moss, 261 App. Div. 178, 24 N. Y. S. 2d 669.

¶ 5. The authority conferred by former § 885 (now § 1105), of the Charter upon each head of a municipal agency to make rules and regulations for the conduct of his office or department and to carry out its powers and duties, is administrative and not legislative, and did not justify the New York City Commissioner of Licenses, in promulgating rules and regulations in connection with the enforcement of General Business Law §§ 170 et seq., pertaining to employment agencies and their relations with the public, to impose such requirements as that the approval of the Commissioner be obtained before any employment agency might maintain night telephone service, that the bringing of an action by an employment agency against an applicant for employment for services rendered such applicant should be ground for suspension or revocation of the offender's license, and that the consent of the Commissioner be obtained in case of a sale of business records by one agency to another.—Acorn Employment Service, Inc. v. Moss, 292 N. Y. 147, 54 N. E. 2d 340 [1944], rev'g 266 App. Div. 829, 42 N. Y. S. 2d 935, and 43 N. Y. S. 2d 379.

¶ 6. The action of the Commissioner of Licenses in sending a letter to

newsstands to the effect that they might lose their licenses if they continue to sell certain nudist magazines constituted a prior restraint upon publication and amounted to censorship.—Sunshine Book Co. v. McCaffrey, 4 A D 2d 643, 168 N. Y. S. 2d 268 [1957].

¶ 7. Action of Department of Welfare in placing petitioner, who was employed as a social investigator in the Department, on medical leave of absence on May 13, 1949, on the opinion of the Department's medical staff that her behavior indicated mental disorder, and upon exhaustion of her sick leave credit and vacation allowance granting her an extended leave of absence to December 31, 1949, *held* without sanction in law. There was no statutory provision authorizing placing petitioner on leave of absence status without pay in the absence of written charges, and where such illegal action is taken, there is no jurisdiction conferred upon the department head to direct the employee to undergo a medical examination as a condition to reinstatement. If petitioner were mentally incompetent to continue her duties, charges might be made against her seeking her dismissal or she might, upon compliance with the statute, be retired if she were incapable of continuing performance of her duties for either physical or mental incapacity. —Smith v. McNamara, 277 App. Div. 580, 101 N. Y. S. 2d 375.

¶ 8. The Charter contains no provisions which vest in the Mayor or the Board of Estimate the power to remove Civil Service employees for violating a regulation prohibiting any employee from performing private employment, whether outside working hours, at home or any other place, or to make such a regulation which is legislative in nature. The Commissioner of Welfare may not incorporate such a regulation in a notice to his staff as a departmental regulation.—Matter of Natilson v. Hodson, 264 App. Div. 384, 35 N. Y. S. 2d 537 [1942], aff'd without opinion, 289 N. Y. 842, 47 N. E. 2d 442.

¶ 9. The Commissioner of the Fire Department was authorized by this section to enact a regulation prohibiting members of the uniformed force from engaging in any other business or employment and could dismiss a member who violated the regulation.—Matter of Calfapietra, 183 Misc. 6, 49 N. Y. S. 2d 829 [1944], aff'd 269 App. Div. 734, 54 N. Y. S. 2d 231 and 294 N. Y. 867, 62 N. E. 2d 490.

¶ 10. Regulations of the Commissioner of Docks requiring the payment of ten cents to the City by driver or owner of a taxicab each time it entered the feeder taxi lines or passenger pick up points at La Guardia Airport and providing for a refund if the space was surrendered without the driver having received a fare was a valid regulation within the authority of the Commissioner of Docks to promulgate. The Commissioner had exclusive control of airports and under this section was authorized, as the head of an agency, to make regulations for the conduct of his office.—Weinstein v. McKenzie, 177 Misc. 451, 30 N. Y. S. 2d 733 [1941].

¶ 11. Under the provisions of this section the Police Commissioner was authorized to make regulations for the making and keeping of speedometer test cards, and under the provisions of Administrative Code § 982-8.0 the courts are required to take judicial notices of all rules and regulations of New York City administrative boards and agencies. Hence, the introduction into evidence of a speedometer test card to prove the accuracy of a police car's speedometer was proper and it was not necessary for the People to produce in addition to the summoning officer in a motor vehicle violation case, a second witness who either tested or witnessed the testing of the summoning officer's vehicle.—People v. Jones, 10 Misc. 2d 1067, 171 N. Y. S. 2d 325 [1958].

¶ 12. This section did not empower the Commissioner of Licenses to issue a regulation which stated that self-service automatic laundries must be adequately attended at all times. There was no existing legislative policy on having self-service laundromats unattended and the Commissioner of Licenses had no power to declare such a policy or create such a legislative standard.—Thrift Wash, Inc. v. O'Connell, 11 Misc. 2d 318, 174 N. Y. S. 2d 70 [1958].

§ 1106. **Conflicts of interests prohibited.**—(1) No councilman or other officer, employee or person whose salary is payable in whole or in part from the city treasury

a. shall be or become interested directly or indirectly in any manner whatsoever except by operation of law in any business dealings with the city;

b. shall act as attorney, agent, broker or employee for any person, firm or corporation interested directly or indirectly in in any manner whatsoever in business dealings with the city;

c. shall accept any valuable gift, whether in the form of service, loan, thing or promise, or any other form from any person, firm or corporation which to his knowledge, is interested directly or indirectly, in any manner whatsoever in business dealings with the city;

d. shall represent private interests before any agency;

e. shall appear as attorney or counsel or give opinion evidence against the interests of the city in any litigation to which the city, or an agency is a party, or in any action or proceeding in the municipal term of the magistrates' courts of the city of New York in which the city or an agency or any officer or employee of the city or an agency acting in the course of his official duties is a complainant.

(2) As used in this section, the words ''business dealings with the city'' shall mean

a. any contract, work or business or the performance of or litigation arising out of or involving any such contract, work or business or the sale or acquisition of any property, the expense, price or consideration for which is payable to or from the city treasury or by any assessment levied pursuant to law;

b. or the purchase, lease, rental or letting of, or grant of license or permit in relation to, any real or other property belonging to or taken by the city, or which shall be sold for taxes or assessments, or by virtue of legal process or any provision of law by or at the suit of the city.

(3) This section shall not be construed

a. to prohibit a councilman or other officer or employee from being affiliated with, employed by or representing a person, firm or corporation whose direct and indirect interest in business dealings with the city forms an insubstantial part of its total business, provided that he has no direct or indirect interest in such business dealings and receives no part of the benefit thereof and takes no active part in connection therewith;

b. to prohibit a councilman or other officer or employee from appearing before any agency upon matters only incidentally requiring official action, which do not develop into a substantial part of the employment provided that he has not been retained for the purpose of appearing before the agency, and provided

further that the compensation in whole or in part is not contingent or dependent upon action by such agency;

c. to prohibit a councilman from appearing without compensation before any city department or agency in behalf of constituents or in the performance of public, official or civic obligations;

d. to prohibit a councilman or other officer or employee from accepting or receiving any benefit or facility which is provided for or made available to citizens or residents or classes of citizens or residents under housing or other general welfare legislation or in the exercise of the police power;

e. to prohibit any councilman or other officer or employee from holding stock or investing or holding any investment, in any corporation or any financial, business, commercial or other private transaction, provided that such stockholding or investment does not create a conflict with his official duties.

(4) As used in this section, the term "agency" shall mean a city, county, borough or other office, position, department, division, bureau, board or commission or other agency of government, the expenses of which are paid in whole or in part from the city treasury, including the board of education, the board of higher education, and the board of trustees of a community college. The term "agency" shall also include the New York city transit authority, New York City housing authority and the triboro bridge and tunnel authority, but shall not include any court or any corporation or institution maintaining or operating a public library, museum, botanical garden, arboretum, tomb, memorial building, aquarium, zoological garden or similar facility.

(5) Any violation of any of the provisions of this section shall, at the option of the comptroller, render forfeit and void the contract work, business, sale or transaction affected.

(6) Any violation of any of the provisions of this section shall constitute cause for fine, suspension or removal from office or employment.

(7) If, however, any person shall knowingly and intentionally violate any of the provisions of this section, he shall, on conviction thereof, forfeit his office and be punished for a misdemeanor. (*Derived from former* § 886 *as amend by L.* 1959, *ch.* 532.)

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¶ 1. That petitioner, who was director of airports and aviation assistant to the Commissioner of the Department of Marine Aviation, was not familiar with requirements of former § 886 (replaced by § 1106) of the Charter prohibiting an officer or employee from being interested in transactions with the City, that to a considerable extent he advised responsible City officials of his outside activities and that it was not even charged that he profited at the expense of the City, did not serve in law to condone a violation of the statute, which was enacted to prevent a possible conflicting interest.—Haslett v. Minetti, 274 App. Div. 519, 84 N. Y. S. (2d) 468 [1948], appeal denied 299 N. Y. 798.

¶ 2. The prohibition of former § 886 (now § 1106) of the Charter is absolute and cannot be waived by the City. Furthermore, the penalty of dismissal was specifically authorized by statute. —Id.

¶ 3. In action against City of New York to recover unpaid balance of the contract price of coal claimed to have been delivered to defendant, defense alleging that the Controller declared the contract forfeited pursuant to former § 886 (now § 1106) of the Charter because of a City employee had received payments and gifts in connection with performance of the contract, *held* sufficient. Assuming that there could be a recovery for deliveries made, it would, in that event, have to be predicated on the reasonable value of the coal delivered and not upon the contract. —A. R. Fuels, Inc. v. City of N. Y., 126 (61) N. Y. L. J. (9–26–51) 632, Col. 7 F.

¶ 4. Where it was conceded that respondent received a salary from the City of New York as City Councilman and at the same time received a salary from the Transport Worker's Union of which he was president and among whose members were a large number of persons employed by the City Board of Transportation, and petitioners claimed that upon such undisputed facts, former § 886 (now § 1106) of the City Charter had been violated, the Court would not direct, upon petition of seven citizens and taxpayers of the City, a summary inquiry under former Chapter 40 (now Chapter 49) of the Charter merely to reduce the examination of witnesses to writing for purpose of filing as a public record, as such an inquiry would be unjustified, a waste of taxpayers' moneys and would not constitute sound judicial discretion.—Matter of Greenfield (Quill), 189 Misc. 91, 68 N. Y. S. 2d 104 [1946].

¶ 5. The trial court erred in sustaining demurrer to charges for alleged violation of this section in 1958 by the defendant, a public official, on the ground that former § 886 (now § 1106), as amended by Chapter 532 1959, resulted in some procedural changes. The 1959 amendment did not make procedural changes. On the other hand, if the amendments are construed to be substantive in character, then afortiori, they are not applicable to events occurring prior to their effect date.—People v. Jack, 10 A. D. 2d 336, 199 N. Y. S. 2d 336 [1960]; aff'd 8 N. Y. 2d 857, 203 N. Y. S. 2d 907, 168 N. E. 2d 710 [1960].

¶ 6. Counts which charged that defendant, a public official, "knowingly and intentionally did accept gifts * * * from Sydney Unger, a person interested" in city business, were not defective because the counts did not subsequently allege that defendant had knowledge of such interests of Unger.—People v. Jack, 10 A D 2d 336, 199 N. Y. S. 2d 336 [1960]; aff'd 8 N. Y. 2d 857, 203 N. Y. S. 2d 907, 168 N. E. 2d 710 [1960].

¶ 7. Charges of 3 crimes for alleged violation of former §§ 886 now § 1106 and 901 of the City Charter, to wit, acceptance of illegal gratuities by defendant, a public official, was properly joined in one indictment with charge of conspiracy under Penal Law § 580, since crimes charged were "connected together" within the meaning of § 279 of the Code of Criminal Procedure. It was immaterial that the alleged conspiracy occurred after the alleged commission of the substantive crimes, instead of before the substantive crimes. A trial court did not have the power to grant inferentially a severance and separate trial of the conspiracy charged.—People v. Jack, 10 A D 2d 336, 199 N. Y. S. 2d 336 [1960]; aff'd 8 N. Y. 2d 857, 203 N. Y. S. 2d 907, 168 N. E. 2d 710 [1960].

¶ 8. A taxpayer was not entitled to enjoin the transfer of possession of the Transit car plant to the Consolidated Edison Company of New York, Inc., on the grounds that the Comptroller was a stockholder in two

Gerosa companies doing business not with the city of New York but with the Consolidated Edison Company. If it could be said that the position of the Comptroller with the city government together with his ultimate power of veto was sufficient to taint the contract with illegality, then in such event mere illegality was insufficient as a basis to upset the contract and particularly in the absence of any attempt to establish fraud or waste.—Gilmartin v. The City of New York, 20 Misc. 2d 235, 190 N. Y. S. 2d 967 [1959].

¶ 9. A resolution of the New York City Board of Estimate awarding a general construction contract to the second lowest bidder was presumptively valid and sustainable in view of the lowest bidder's practice of giving gifts to City employees.—Kayfield Construction Corp. v. Morris, 15 A. D. 2d 373, 225 N. Y. S. 2d 507 [1962].

¶ 10. A social worker who was employed by the Department of Welfare and who rented his unoccupied apartment to two recipients of public assistance was properly discharged for misconduct.—Dover v. Dumpson, —— Misc. 2d ——, 220 N. Y. S. 2d 102 [1961].

§ 1107. **Corrupt practices.**—No councilman or other officer or employee of the city shall give or promise to give any portion of his compensation or any money or valuable thing to any person, in consideration of his having been or being nominated, appointed, elected or employed as such officer or employee, under the penalty of forfeiting his office or employment and being forever disqualified from being elected, appointed or employed in the service of the city, and shall on conviction be punished for a misdemeanor. (*Derived from former* § 887.)

§ 1108. **Political contributions.**—No councilman or other officer or employee of the city shall, directly or indirectly, pay or promise to pay any political assessment, subscription or contribution under the penalty of forfeiting his office or employment. Any violation of this section shall be a misdemeanor. (*Derived from former* § 888.)

§ 1109. **Summary inquiry.**—A summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city may be conducted under an order to be made by any justice of the supreme court in the first or second judicial district on application of the mayor, the comptroller, the president of the council, any five councilmen, the commissioner of investigation or any five citizens who are taxpayers, supported by affidavit to the effect that one or more officers, employees or other persons therein named have knowledge or information concerning such alleged violation or neglect of duty. Such inquiry shall be conducted before and shall be controlled by the justice making the order or any other justice of the supreme court in the same district. Such justice may require any officer or employee or any other person to attend and be examined in relation to the subject of the inquiry. Any answer given by a witness in such inquiry shall not be used against him in any criminal proceeding, except that for all false answers on material points he shall be subject to prosecution for perjury. The examination shall be reduced to writing and shall be filed in the office of the clerk of such county within the first or second

judicial district as the justice may direct, and shall be a public record. (*Derived from former* § 989.)

CROSS REFERENCE: Taxpayers actions to restrain officials from performing illegal acts, see General Municipal Law, § 51.

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¶ 1. Former § 889 now 1109 of the Charter does not authorize the court to oust a public officer or to declare his office vacant. It merely authorizes the examination of officers, employees or other persons having knowledge or information concerning violation or neglect of duty, and the reduction of such examination to writing and the filing thereof in the County Clerk's office, there to become a public record. Furthermore, the papers on the present application were insufficient as they did not indicate that one or more officers, employees or other persons therein named had knowledge or information concerning alleged violation or neglect of duty.—In re Rolnick (Quill), 69 N. Y. S. 2d 13 [1946].

¶ 2. Former § 889 of the Charter (now § 1109) should be liberally construed, and every available means to examine the administration of the City department and the officers of its government should be utilized to its fullest necessary extent. However, the granting or denying of an application thereunder are matters of sound judicial discretion.—Matter of City of New York (Seligman), 179 Misc. 505, 39 N. Y. S. 2d 504 [1942].

¶ 3. Application of taxpayers for an order directing summary inquiry into use of City property and services of its employees for private purposes, particularly in connection with the paving of part of a private estate with granite blocks belonging to the City, was denied, where the application was based primarily upon a report of the Commissioner of Investigation, and a report of the Grand Jury. To conduct a new and summary inquiry under direction of the Court based upon such papers would constitute a duplication of effort, and would prove more expensive in time and money than appeared warranted, in view of the full investigation already made.—Id.

¶ 4. Where it was conceded that respondent received a salary from the City of New York as City Councilman and at the same time received a salary from the Transport Worker's Union of which he was president and among whose members were a large number of persons employed by the City Board of Transportation, and petitioners claimed that upon such undisputed facts former § 886 (now § 1106) of the City Charter had been violated, Court would not direct, upon petition of seven citizens and taxpayers of the City, a summary inquiry under former Chapter 40 (now Chapter 49) of the Charter merely to reduce the examination of witnesses to writing for purpose of filing as a public record, as such an inquiry would be unjustified, a waste of taxpayers' moneys and would not constitute sound judicial discretion.—In re Greenfield (Quill), 189 Misc. 91, 68 N. Y. S. 2d 104 [1946].

¶ 5. An application by taxpayers for an injunction to restrain Board of Elections of City of New York from including candidacy of D on the Municipal Ballot of the City for office of councilman, would not lie under former § 889 (now § 1109) of the Charter, which merely authorizes summary inquiry into a violation or neglect of duty in relation to the affairs of the City.—Lium v. Bd. of Elections, 93 N. Y. S. 2d 860 (1949).

§ 1110. **Council and officers trustees of public property.**—The council and the councilmen and all other officers and employees

of the city are hereby declared respectively trustees of the property, funds and effects of the city, so far as such property, funds and effects are or may be committed to their management or control. Such trustees are hereby made subject to all the duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be enforced by the city or by any officer thereof. (*Derived from former* § 890.)

§ 1111. **Expenses not to exceed appropriation.**—No agency shall incur a liability or an expense for any purpose in excess of the amount appropriated or otherwise authorized therefor; and no charge, claim or liability shall exist or arise against the city, or any of the counties contained within its territorial limits, for any sum in excess of the amount appropriated or otherwise authorized for the particular purpose. (*Derived from former* § 891.)

## CASE NOTES

¶ 1. Resolution of Council appointing a special committee of the Council to investigate departments of the City administering emergency unemployment relief, and providing that if in the judgment of the City an appropriation of funds were needed for anticipated expenses of the committee the necessary request should be made to the Board of Estimate, was not construable as a recognition by the Council of its own lack of power with respect to the expenditure of money and a command by the Council to the committee not to incur expenses without approval of the Board. Under the resolution a request to the Board was to be made only if in the judgment of the committee an appropriation were needed.—Barry v. City of N. Y., 175 Misc. 712, 25 N. Y. S. 2d 27 [1941]; aff'd without opinion, 261 App. Div. 957, 27 N. Y. S. 2d 425.

¶ 2. The Council was not an "agency" of the City within the meaning of former § 891 (now § 1111) of the Charter prohibiting an agency from incurring any expense in excess of the amount authorized therefor, particularly in view of former § 32 (now § 33) of the Charter providing that no councilman should be an employee of any agency in any capacity whatever. —Id.

¶ 3. Attorney employed by special committee of Council in an investigation of City departments concerned with administration of emergency unemployment relief, *held* entitled to recover from the City for services rendered, and no appropriation by the Board of Estimate was necessary, since the Council possessed express power to appoint investigating committees such power implied the power to employ counsel, the investigation required the examination of witnesses and necessitated the services of an attorney, and the necessary implication was that counsel so employed was to be paid, and former 891 (now § 1111) of the Charter and Administrative Code § 93c–3.0 were to be read as subject to such qualification. Any other interpretation would give the Board of Estimate power to cripple the Council's investigation by refusing to appropriate necessary money. Even former § 891 (now § 1111) of the Charter requires merely that there be an appropriation or that the expenses be "otherwise authorized". Also, former § 117 of the Charter recognizes the possibility of claims against the City other than claims based upon contracts for which appropriations have been made.—Id.

¶ 4. Stenographer engaged by special committee of the City Council to report the proceedings of the committee in its investigation of the local handling of emergency unemployment relief, *held* entitled to recover from the City for the value of his services, notwithstanding the failure of the Board of Estimate to make an appropriation for the necessary expenses of the committee. The City Council does not act as a departmental agency of the city when it exercises its legislative power by way of an investigation conducted pursuant to former § 43 (now § 45) of the Char-

ter, and hence former § 891 (now 1111), prohibiting an agency from incurring a liability in excess of the amount appropriated therefor, and former §§ 121, 122 and 123, providing that the Board of Estimate has in the first instance the duty to make appropriation for the governmental purposes of the City, did not preclude the grant of a judgment to plaintiff. What the resolution authorizing the special committee to make its investigation included a provision authorizing the committee to request that an appropriation for expenses be made by the Board of Estimate, did not show an intent that its action was to be subject to immediate administrative interdiction by the Board of Estimate.—Smith v. City of New York, 289 N. Y. 517, 47 N. E. 2d 35 [1943].

¶ 5. Former § 891 (now § 1111) of the City Charter, providing that no "agency" of the City shall incur a liability in excess of the amount appropriated or otherwise authorized, did not preclude attorney from recovering compensation from City for services rendered as counsel to a special committee of the City Council appointed to investigate the Municipal Civil Service Commission pursuant to the authority of former § 43 (now § 45) of the Charter. When the Council exercises its investigatory powers under former § 43 it is not an "agency" of the city, and it has the power to bind the City for th expenses of the investigation without the sanction of, or an appropriation from, the Board of Estimate.—Ellis v. City of N. Y., 180 Misc. 968, 46 N. Y. S. 2d 363 [1943], aff'd 267 App. Div. 810, 47 N. Y. S. 2d 96, and 295 N. Y. 780, 66 N. E. 2d 297.

¶ 6. In an action by court stenographers to recover the reasonable value of stenographic services furnished during the course of investigations conducted by the City Council to determine the eligibility of persons to membership in the Council the defense that the City was not liable for any expense incurred by an "agency" in the absence of an appropriation therefor was untenable and the plaintiffs were entitled to summary judgment.—Chambers v. City of New York, 173 Misc. 769, 19 N. Y. S. 2d 79 [1940].

¶ 7. In an action by an attorney to recover for professional services rendered to a special committee of the City Council in an investigation of civil service abuses, the City's defense that it was not liable because there was no prior appropriation made by the Board of Estimate for such expenditures was untenable.—Gruss v. City of New York, 179 Misc. 1053, 40 N. Y. S. 2d 816 [1943].

§ 1112. **Reports to mayor.**—The heads of departments, borough presidents and such other officers as the mayor may require shall, in addition to any other reports required by this charter, once in each year and at such other times as the mayor may direct, make to him, in such form and under such rules as he may prescribe, reports of their operations and action. Each of such annual reports shall be published in the City Record. The heads of all agencies shall, when required by the mayor, furnish to him such information as he may demand, within such reasonable time as he may direct. (*Derived from former* § 892.)

§ 1113. **Heads of departments to furnish copies of papers on demand.**—The heads of all departments, except the police and law departments, and the chiefs of each and every division or bureau thereof and all borough presidents, shall, with reasonable promptness, furnish to any taxpayer desiring the same, a true and certified copy of any book, account or paper kept by such department, bureau or officer, or such part thereof as may be demanded, upon payment in advance of ten cents for every hundred words thereof by the person demanding the same. The provisions of this section shall not apply to any papers prepared by or for the comptroller for use in any proceeding to adjust or pay a claim against the city or any agency or by or for counsel for use in actions or proceed-

ings to which the city, or any agency is a party or for use in any investigation authorized by this charter. (*Derived from former* § 893 *as amended by L. L.* 1949, *No.* 20.)

### CASE NOTES

¶ 1. This section does not apply to cases pending in court.—Moses v. Bentley, 143 (22) N. Y. L. J. (1–2–60) 12, Col. 3 F.

¶ 2. On examination before trial, police records could be used solely for the purpose of refreshing the recollection of witnesses.—Frank v. City of New York, 146 (88) N. Y. L. J. (11–6–61) 16, Col. 2 F.

§ 1114. **Inspection by taxpayers of books and papers.**—All books, accounts and papers in the office of any borough president or any division or bureau thereof, or in any city department or any division or bureau thereof, except the police and law department, shall at all times be open to the inspection of any taxpayer, subject to such reasonable rules and regulations in regard to the time and manner of such inspection as the borough president, department, office, division or bureau may make; in case such inspection shall be refused, such taxpayer, on his sworn petition, describing the particular book, account or paper that he desires to inspect, may, upon notice of not less than one day, apply to any justice of the supreme court for an order that he be allowed to make such inspection as such justice shall by his order authorize. The provisions of this section shall not apply to any papers prepared by or for the comptroller for use in any proceeding to adjust or pay a claim against the city or any agency or by or for counsel for use in actions or proceedings to which the city or any agency is a party or for use in any investigation authorized by this charter. (*Derived from former* § 894 *as amended by L. L.* 1949, *No.* 20.)

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¶ 1. Former 894 (now 1114) of the Charter should be liberally construed in favor of inspection.—In re Soso (Lincoln Hospital), 190 Misc. 448, 74 N. Y. S. 2d 184 [1947], aff'd 273 App. Div. 852, 77 N. Y. S. 2d 138.

¶ 2. Application to examine certain records of the Department of Sanitation relative to an accident in which petitioner's sister allegedly suffered injuries and for which the sister had brought an action against the City, was denied, where no showing of interest in the records sought to be examined was made other than that petitioner was a taxpayer and that her sister had brought an action against the City (167 N. Y. 398; 131 Misc. 75; 141 App. Div. 450; distinguishing 205 N. Y. 147).—Matter of Lena Costello, 100 (106) N. Y. L. J. (11–4–38) 1486, Col. 4 F.

¶ 3. Application of plaintiff, in action against a third party for personal injuries, for leave to inspect the records of Bellevue Hospital, where she had been confined as a patient as a result of the accident, in order that she might determine for purpose of aiding her action what was shown by the X-ray pictures, *held* prima facie sufficient where she alleged that she was a *taxpayer*, even though she did not allege that she was a *real estate taxpayer*, inasmuch as the City did not controvert her allegation that she was a taxpayer, the application was for a legitimate purpose, and it would seem that Charter former § 894 (now 1114) was not intended to limit an inspection to real estate taxpayers.—Mojica v. Bellevue Hospital, 169 Misc. 852, 8 N. Y. S. 2d 468 [1938].

¶ 4. Allegation that petitioner was a taxpayer, was insufficient to entitle him to an inspection of the records of the Department of Water Supply, Gas and Electricity of the City of New York, since it must appear that the petitioner pays real estate taxes (248 App. Div. 690; 253 App. Div. 795.—Doulgeris v. City of N. Y., 102 (84) N. Y. L. J. (10–9–39) 1040, Col. 2 M.

¶ 5. Petitioner, who allegedly owned an undivided one-third interest in parcel of real property, upon which he and his co-owners had been paying real estate taxes, *held* to be a taxpayer and entitled to an inspection by virtue of New York City Charter former § 894 (now 1114) and fact that he sought information in aid of litigation against the City was no bar to granting of the application (181 App. Div. 865, aff'd 223 N. Y. 670; 205 N. Y. 147).—In re Portfolio, 103 (100) N. Y. L. J. (4–29–40) 1941, Col. 1 T.

¶ 6. Statement in affidavit that affiant was a "taxpayer" was not sufficient to warrant inspection. Affiant should enumerate the real estate by lot, block and section upon which taxes had been paid within the previously three years.—Cooks Hotel & Restaurant Supply Co. v. City of N. Y., 105 (37) N. Y. L. J. (2–14–41) 695, Col. 4 M.

¶ 7. Where the petition was in fact the petition of one who swore that he was a taxpayer, the application for inspection of the records of Lincoln Hospital should be granted notwithstanding the title was misleading in that it described the matter as the application of another.—In re Suslow (Lincoln Hospital), 107 (25) N. Y. L. J. (1–30 42) 458, Col. 3 M.

¶ 8. Petitioners, who claimed to be taxpayers, would not be denied an examination pursuant to § 894 of the Charter merely because it was not alleged that they were real estate taxpayers.—In re Sosa (Lincoln Hospital), 190 Misc. 448, 74 N. Y. S. 2d 184 [1947], aff'd 273 App. Div. 852, 77 N. Y. S. 2d 138.

¶ 9. Application by alleged taxpayer for order directing Queens Borough President to permit petitioner to examine certain books and papers relative to construction of certain sewers, was denied on ground the proceeding was instituted by an individual who himself had never made a demand or request for inspection, that the petition did not comply with basic requirement of showing factu-

ally that petitioner was a taxpayer or owned real estate in Queens, and moreover the committee, of which petitioner was a member, which was sponsoring the candidacy of a person for Borough President, had been permitted to inspect records in the Borough Hall for four days. The demand of the committee for inspection could not form the basis of the instant proceeding.—In re Zoeller (Pres., Bor. of Queens), 122 (87) N. Y. L. J. (11–3–49) 1118, Col. 6 M.

¶ 10. Plaintiff's description of the books and documents of the Department of Sanitation which he sought to examine, *held* sufficiently certain, where the description was as definite as that involved in the case of *Ihrig* v. *Williams* (181 App. Div. 865, aff'd 223 N. Y. 670), which, though based on Greater New York Charter § 1545, was applicable in the present case inasmuch as the pertinent provision of the former Charter was identical with that in the 1938 Charter.—Matter of Birenbaum, 175 Misc. 351, 22 N. Y. S. 2d 722 [1940].

¶ 11. That the information sought by the plaintiff through an inspection of papers in office of the Department of Sanitation was intended to be used in an action against the City, was no ground for denying the inspection, in absence of a showing that the papers were in fact *prepared* by counsel, or *specifically and solely* prepared *for* counsel for use in the action, within the exceptiton of Charter former § 894 (now § 1114).—Id.

¶ 12. Whereas under Charter former § 894 (now § 1114) an inspection may be had of "books, accounts and papers", only "papers" prepared by or for counsel are given immunity from inspection under the exception.—Id.

¶ 13. Report made by driver or other employees on truck of Department of Sanitation covering an accident in which plaintiff claimed her husband was injured, *held* not subject to inspection by plaintiff in view of provision of Chapter former § 894 (now § 1114) exempting from inspection by taxpayers, papers prepared by or for counsel for use in actions to which City was a party (248 App. Div. 690).—Matter of Rustad, 99 (99) N. Y. L. J. (4–29–38) 2080, Col. 6 M.

¶ 14. Petitioner *held* entitled to inspection of books of minutes, vouchers, contracts or other papers in office of President of the Borough of Queens or in office of Superintendent of Highways relating to construction or repair of a certain boulevard on a certain day on which petitioner allegedly fell into an excavation at a crosswalk, notwithstanding the records were presently in the Corporation Counsel's custody in connection with defense of action brought by petitioners against the City, since the records were merely in temporary custody and were still the records of the Borough President or the Superintendent of Highways (N. Y. C Charter § 894).—In re Saladino (Harvey), 105 (106) N. Y. L. J. (5–7–41) 2050, Col. 1 F.

¶ 15. In trespass action against City of New York, wherein equitable relief and damages were sought by reason of defendant's entry upon plaintiff's land and erecting thereon a public street, plaintiff *held* entitled to examine the City by the Chief Engineer of the Highway Bureau of the Office of the President of the Borough of Queens, pursuant to C. P. A. 292a. That the plaintiff might be entitled to relief under Charter former §§ 893 and 894 (now §§ 1113 and 1114) was insufficient to warrant denial of the examination. However, the provisions of former §§ 893 and 894 exempting from examination the books and records of the Law Department, precluded the examination of the assistant corporation counsel and the records of his department.—Wilson v. City of New York, 112 (121) N. Y. L. J. (11–25–44) 1431, Col. 2 M.

¶ 16. Reports made for the Corporation Counsel for purpose of defending any action that might be brought were not subject to inspection by a taxpayer under Charter former § 894 (now § 1114).—Lustig v. City of N. Y., 117 (31) N. Y. L. J. (2–6–47) 508, Col. 7 M.

¶ 17. Motion to compel New York City Municipal Civil Service Commission to allow petitioner to inspect names of applicants for position of social investigator was denied, since the records sought to be examined did not come within General Municipal Law § 51 as the Municipal Civil Service Commission was not, within the meaning of that statute, an "officer, board or commission acting for or on behalf of any county, town, village or municipal corporation" (258 N. Y. 117; 205 N. Y. 84; 212 N. Y. 520; 184 N. Y. 564). Neither were Charter former §§ 893 and 894 (now §§ 1113 and 1114) applicable, as such

sections apply only to "city departments". Public Officers Law § 66 was likewise inapplicable.—In re Senzer (Kern), 101 (87) N. Y. L. J. (4–15–39) 1730, Col. 6 F.

¶ 18. Inspection of the records of the Municipal Civil Service Commission may not be had under Charter former § 894 (now § 1114) as such Commission is not a city "department" within meaning of the section.—Steinberg v. Bromley, 113 (31) N. Y. L. J. (2–6–45) 490, Col. 5 F.

¶ 19. Taxpayer, who was also a member of the Citizens Budget Commission, *held* entitled to an order requiring the Municipal Civil Service Commission to afford him an opportunity to inspect its books and records in its office which set forth the names, positions and qualifications of occupants of exempt positions in the City government, for the purpose of giving publicity to the qualifications of those appointed.—In re Walker (Watson), 201 Misc. 556, 115 N. Y. S. 2d 93 [1952] modified in 280 App. Div. 760, 113 N. Y. S. 2d 676, by granting the application only to the extent of directing the Civil Service Commission to permit the petitioner to examine Form P23 filed by the appointing officer of an exempt employee pursuant to Rule IV of the Commission only for specified persons whose names would be set forth in the order.

¶ 20. Even if respondent was not a City department and the papers sought were not public records, if what petitioner sought was deemed reasonable and in the public interest and not prohibited by law, the Court had the power and duty to grant the relief requested even if petitioner did not have specific and absolute statutory right thereto.—Id.

¶ 21. The Board of Education *held* neither a City department, nor a division or bureau of a City department for the purpose of inspection by taxpayer of books and records.—Kelly v. Board of Education of the City of N. Y., 141 N. Y. S. 2d 34 [1955].

¶ 22. Former 894 (now § 1114) of the Charter deals with New York City departments, and not with private institutions, such as a voluntary charitable hospital. Petition of Cenci (St. John's Hospital), 185 Misc. 479, 57 N. Y. S. 2d 231 [1945].

¶ 23. Plaintiff *held* not entitled to an order directing Commissioners of the Board of Transportation of the City of New York to submit for inspection the report of a special officer employed by the Board with respect to personal injuries sustained by person for whose death the present action was instituted, since the report was one made to a City department by one of its employed agents, and was in the nature of a confidential report.—Bragman v. Delaney, 107 (10) N. Y. L. J. (1–13–42) 174, Col. 3 F.

¶ 24. Notice of claims, or reports thereon, filed by persons other than plaintiff regarding injuries arising out of the same conditions, but subsequent to plaintiff's accident were deemed confidential under former §§ 893 and 894 (now §§ 1113 and 1114) of the Charter.—Rynes v. City of N. Y., 112 (127) N. Y. L. J. (12–2–44) 1529, Col. 1 F.

¶ 25. There is no mandatory publicity of all of the records of departments of police or of law, nor of papers prepared for the City Comptroller for use in adjusting or contesting claims, nor in the case of welfare records, nor of papers prepared for use in any investigations authorized by the City Charter. Thus, a report to the Mayor by the Commissioner of Investigation dealing with charges reflecting upon the Commissioner of Correction was exempted from inspection.—Cherkis v. Impelliteri, 307 N. Y. 132, 120 N. E. 2d 530 [1954].

¶ 26. If the judgment creditor could satisfy the Court that records in possession of Police Department of City of New York would be helpful in inquiring into the judgment debtor's property and assets, it might apply for issuance of a subpoena under C. P. A. § 782 upon notice to the Police Department. Charter former §§ 893 and 894 (now §§ 1113 and 1114) would seem to be without application, as they do not relate to issuance of subpoenas requiring production of records in court in a pending proceeding.—Finndell Amus. & Bldg. Corp. v. Cotton Club Catering Co., 102 (77) N. Y. L. J. (9–30–39) 896, Col. 4 M.

¶ 27. It would seem that remedy of plaintiff, who sought inspection of municipal records, would be not by way of an application in the action itself, but under former Charter § 894 (now § 1114).—R. W. Chessler Furniture Co. v. City of N. Y., 102 (124) N. Y. L. J. (11–29–39) 1858, Col. 4 F.

¶ 28. Although the reports, if any, made by the police officers, who were employees of the City of New York,

were confidential, such reports might be used for purpose of refreshing the recollection of the witness in an action against the City based upon an alleged assault by the two officers.—Wiater v. City of N. Y., 129 (7) N. Y. L. J. (1–12–53) 109, Col. 4 M.

¶ 29. Order denying plaintiff's application for a subpœna duces tecum directing the Police Department of the City of New York to produce at the trial of the action the records of the alleged accident which was the subject matter of the action, *was affirmed* without opinion.—Yude v. Cruise, 287 N. Y. 59, 38 N. E. 2d 126 [1941].

¶ 30. This section does not apply to the production of records in court in pending proceedings.—Cain v. City of New York, 134 (85) N. Y. L. J. (11–1–55) 11, Col. 3 M.

¶ 31. There is nothing in the provisions of this section which prevents the use of police records solely for the purpose of refreshing the recollection of witnesses upon an examination before trial. The sections, however, do operate to prevent discovery and inspection of police records.—Ojeda v. City of New York, 134 (46) N. Y. L. J. (9–6–55) 8, Col. 3 F.

¶ 32. In action against City for damages growing out of race riots, records of the Police Department would be produced on an examination of the City before trial only for purpose of refreshing the recollection of ¶ 32.1. Section 1114 does not apply to the witness.—Blumkin v. City of New York, 183 Misc. 31, 47 N. Y. S. 2d 492 [1944].

¶ 33. Civil Practice Act § 292a, as amended in 1942, placed municipal corporations in the same category as other defendants, with respect to examinations before trial, and hence the defendant City of New York would be required to appear for examination by such persons as had knowledge of the facts covered by the items and would be required to produce all records relating to the matters (37 N. Y. S. 2d 352; 263 A. D. 819). Contention that the records sought were exempt from examination by former §§ 893 and 894 (now §§ 1113 and 1114) of the Charter, was rejected, inasmuch as such sections apply only in the case of an application by a taxpayer.—Moroni v. City of N. Y., 110 (115) N. Y. L. J. (11–17–13) 7373, Col. 4 F.

¶ 34. Under the federal Rules of Civil Procedure, the City of New York, when sued in the federal district court to recover damages for wrongful death, *held* subject to examination before trial through its Commissioner of Docks or other employee having knowledge of the facts.—Conneway v. City of N. Y., 32 F Supp. 54 [1940].

¶ 35. Under New Charter § 894 and General Municipal Law § 151, petitioner *held* entitled to an inspection of records of City Comptroller's office concerning the wage scales relating to particular contracts, including Comptroller's copy of a particular certificate issued under Labor Law § 220, subd. 3a, with respect to such contracts (205 N. Y. 147; 181 App. Div. 865). Such inspection was not subject to the objection that an inspection of the general records of the Comptroller's office was sought.—Friou v. McGoldrick, 99 (115) N. Y. L. J. (5–18–38) 2414, Col. 7 T.

¶ 36. Although the marriage record index of the City Clerk of the City of New York is a public record and open to public inspection, the right to inspect it is not an unqualified or unlimited one, but is subject to the restriction that the examination must be shown to be necessary or required for judicial or other proper purposes, and on the payment of the prescribed fee. An examination would not be permitted where petitioner's real motive for his request was to obtain information to enable him to institute an action at law.—Goldsmith v. Hubbard, 183 Misc. 889, 52 N. Y. S. 2d 871 [1945].

¶ 37. Newspaper publisher *held* entitled to examine records of the Department of Licenses pursuant to § 894 of the Charter, where the publisher had a legitimate interest in the information which it sought, since it desired to ascertain what the records contained which might bear upon a controversy between itself and newsdealers pending before the State Labor Relations Board, and if the application were denied it could obtain the same relief by subpoena with greater disruption of respondent's affairs.—N. Y. Post Corp. v. Department of Licenses, 114 (85) N. Y. L. J. (10–10–45) 840, Col. 3 F.

¶ 38. Petitioner who claimed certain premises owned by him had been damaged as result of a cave-in of a sewer maintained by the City, would be permitted to examine records of Borough President for information concerning that occurrence, as well as other cave-ins in the immediate

vicinity during 1949 and 1950, in order to establish notice.—Laezza v. Office of President of Borough of Brooklyn, 127 (66) N. Y. L. J. (4–4–52) 1359, Col. 3 T.

¶ 39. Plaintiff's request that persons in the office of the Comptroller of the defendant City of New York be submitted to examination, was rejected, since the investigation made by the Comptroller's Office was manifestly to enable defendant to contest plaintiff's claim and to prepare for trial, and constituted "work product," concerning which examination is not permissible.—Kolb v. City of N. Y., 129 (7) N. Y. L. J. (1–12–53) 106, Col. 1 M.

¶ 40. That the information sought was intended to be used in action instituted by petitioner against the City, was no valid ground for denial of the inspection.—Taezza v. President of Borough of Brooklyn, 127 (66) N. Y. L. J. (4–4–52) 1359, Col. 3 T.

¶ 41. Petitioner would not be required to execute an assignment of the proceeds of his claim against the party causing his injuries as a condition for the granting of his motion for inspection of hospital records of his treatment, since a remedy to secure payment of its bill was provided the hospital by Lien Law § 189. —Schulweis v. Bellevue Hospital, 101 (133) N. Y. L. J. (6–9–39) 2666, Col. 3 M.

¶ 42. Where birth certificate issued in connection with child born to the female petitioner at Lincoln Hospital stated that it was a female child but when petitioner was discharged from the hospital a male child was delivered to her, petitioner and her husband would be granted an examination of the hospital records pursuant to former § 894 (now § 1114) of the Charter, for purpose of assisting them in locating the whereabouts of the child born to them. A legitimate and reasonable purpose for the inspection was shown, and fact that petitioners might thereafter use the information obtained in a suit against the City would not defeat the examination.—In re Sosa (Lincoln Hospital), 190 Misc. 448, App. Div. 852, 77 N. Y. S. 2d 238.

¶ 43. Application of petitioner, claiming to be executrix of decedent pursuant to a lost will, for permission to examine the records of Bellevue Psychiatric Hospital for purpose of establishing her right to be named as such executrix, was denied, as N. Y. C. such executrix, was denied, as Charter former § 894 (now § 1114) did not authorize inspection of documents otherwise privileged, and Mental Hygiene Law § 34 (9), making the records available to officers of the institution and to the Commissioner and not otherwise except on consent of the Commissioner or on an order of a judge, did not destroy the privilege as the former exception provided for a proper use of the records for scientific purposes and the latter for instances where the privilege has been waived. —In re Wegier (Josef Lieber, dec'd), 129 (103) N. Y. L. J. (5–28–53) 1799, Col. 2M.

¶ 44. Petitioner, being a taxpayer, was entitled to an order directing Bellevue Hospital to exhibit to her certain hospital records and to permit her to make copies thereof. That a suit had been instituted against the City and the information sought was intended to be used against it, was not a valid ground for a denial of the inspection.—In re Fernandez, 105 (37) N. Y. L. J. (2–14–41) 695, Col. 4 F.

¶ 45. Motion for an order directing the Police Commissioner to permit plaintiff to make transcript of minutes taken at a departmental trial of defendant, was denied.—Turetsky v. Greenwood, 105 (144) N. Y. L. J. (6–21–41) 2800, Col. 4 F.

¶ 46. In prosecution for murder, County Court properly denied defendant's motion for a copy of the report of the Ballistics Bureau of the New York City Police Department with respect to bullet found in deceased's body.—In re Hughes, 109 (120) N. Y. L. J. (5–24–43) 2031, Col. 7 M, at 2023, Col. 1 M.

¶ 47. Plaintiff, continuing as executrix her husband's action to recover the names and addresses of any witnesses appearing on the police blotter, although the City would not be required to produce the blotter for her inspection.—Greenspan v. City of N. Y., 103 (136) N. Y. L. J. (6–11–40) 2645, Col. 5 M. Reversed to extent appealed from by App. Term, N. Y. L. J. (11–8–40) 1465, Col. 5 F.

¶ 48. Motion for an order of mandamus directed to the chief engineer of the Bureau of Highways and Sewers permitting petitioner or her attorney, with a stenographer, to inspect and examine and make a copy of the records and reports of the chief engineer relating to an accident, was denied.—In re Santora, 105 (130) N. Y. L. J. (6–5–41) 2535, Col. 7 M.

¶ 49. In action against City by corporation which had waterproofed and paved a section of a highway under construction by another contractor to recover damages on ground the other contractor's contract was modified while plaintiff was performing its contract with the City, causing plaintiff damages by reason of delays and interferences with its work by the City, an order allowing the corporation an inspection, pursuant to former § 894 (now § 1114) of the Charter, of all records and communications between the Borough President and the Comptroller on file in their offices with reference to the modification of the contract and to the discontinuance and renewal of traffic on a section of the highway during the performance of the contract, was affirmed by Court of Appeals without opinion.—In re Walthaw Corporation, 295 N. Y. 700, 65 N. E. 2d 336.

¶ 50. Order permitting corporate taxpayer to inspect "all drawings, diagrams, plans, surveys, searches, blueprints, field notes, reports, engineers' notes and reports, inspectors' notes and reports, petitions, resolutions, agreements, correspondence, communications, memoranda of conferences and conversations, and all other papers" in the office of the Director of Franchises of the Board of Estimate, with respect to a bridge, catwalk, pipes, wires, tunnels and other structures in, under, along and across a certain avenue, was affirmed by the Court of Appeals without opinion.—Application of Rubel Corp., 295 N. Y. 638, 64 N. E. 2d 710.

¶ 51. Motion of petitioner, proceeding individually as taxpayer and as chairman of the Executive Board of the Committee for Smoke Control, under former § 894 (now § 1114) of the Charter for inspection of the Smoke Control Bureau records which would show what action had been taken by the Bureau on complaints received by it of violation of Local Law No. 5 of 1949 and the regulations adopted pursuant thereto, was granted, to extent that respondents would be required to list premises complained of along with the violations and their disposition. Only cases considered to be flagrant need be listed, and names of complainants need not be revealed. Petitioner might properly proceed under former § 894 (now § 1114) and was not limited to former § 889.—In re Robinson (Gillroy), 126 (96) N. Y. L. J. (11–19–51) 1290, Col. 1 T.

¶ 52. A discovery and inspection of the records of the New York City Housing Authority could not be obtained by proceeding under General Municipal Law § 51. A mandamus proceeding by a taxpayer who had been refused his right to inspect, would seem to be the proper remedy.—Helfer v. N. Y. C. Housing Authority, 104 (25) N. Y. L. J. (7–30–40) 237, Col. 1 M.

¶ 53. An application for discovery and inspection pursuant to New York Charter former § 894 (now § 1114) was required to be brought in the Supreme Court, and might not be made in the City Court.—Helfer v. N. Y. C. Housing Authority, 104 (12) N. Y. L. J. (7–15–40) 114, Col. 5 F.

¶ 54. The remedies provided for by the New York City Charter for inspection of records by taxpayers should first be exhausted before other applications would be considered (129 Misc. 177).—Cooks Hotel & Restaurant Supply Co. v. City of N. Y., 105 (23) N. Y. L. J. (1–28–41) 430, Col. 3 M.

¶ 55. Motion to examine defendant Teachers Retirement Board was denied (284 N. Y. 346; 166 Misc. 843), without prejudice to the right to inspect the public records of the for injuries, and alleging that her husband was so upset as a result of the accident that he failed to obtain the names of any witnesses and plaintiff was therefore without the name of a single witness but that a police officer had made a report of the accident and plaintiff believed the police blotter contained the names and addresses of the witnesses, *held* entitled to have the City furnish her with Board concerning the items in question.—Gill v. Bonaschi, 105 (88) N. Y. L. J. (4–16–41) 1697, Col. 1 T.

¶ 56. Applicant *held* entitled to inspect, examine and copy all records of the Tax Commission and the Tax Department relating to the determination and fixing of assessed valuation of certain premises for years for which certiorari proceedings had been instituted and for years in which no proceedings were pending where the information sought was within reason and the applicant showed a reasonable necessity therefor.—Petition of Martin Holding Corp., 137 N. Y. S. 2d 507 [1954].

¶ 57. Motion for an order under C P. A., Art. 78, to compel the City officials to allow an inspection of various reports relating to damage

**to petitioner's property, the application** being made pursuant to Charter former § 894 (now § 1114) was denied in view of the drastic nature of **mandamus, and fact that C. P. A. § 292a, when read in conjunction with § 296, now affords petitioner a complete method of obtaining the information sought (181 App. Div. 865, aff'd 223 N. Y. 670).—In re Morrison (Lyons), 108 (110) N. Y. L. J. (11-10-42) 1409, Col. 5 M.**

¶ 58. Petitioner should have proceeded under former § 894 (now § 1114) of the Charter, rather than under Administrative Code § B40–14.0, for inspection and the making of copies of records pertaining to the condition and use of the hydrant in question at or about the time of the accident. However, in the interest of time and justice, the application would be deemed as a motion under the correct provision of the Charter.—In re Agar, 114 (9) N. Y. L. J. (7–12–45) 75, 3 M.

¶ 59. Investigators' reports upon their search into the impact of crimes upon mental health involved an investigation authorized by the Charter and consequently were not open to inspection by a taxpayer.—In re McGhan (Wagner), 8 Misc. 2d 337, 170 N. Y. S. 2d 251 [1957].

¶ 60. Although the New York City Transit Authority need not open its books and records to the public, since it is not an agency of the City subject to the provisions of former § 894 (now § 1114), it must make accessible the records of its predecessor, the Board of Transportation, pursuant to Rapid Transit Law § 11.—In re Sheroak Realty Co. (N. Y. C. Transit Authority), 140 (27) N. Y. L. J. (8–7–58) 6, Col. 1 F.

¶ 61. In a negligence action, plaintiff was not entitled to move by notice of motion to compel the medical examiner to furnish a copy of the autopsy report respecting the deceased driver of the other motor vehicle since such application was not equivalent to a petition. Also, the application failed to allege that the moving party was a taxpayer.—Walsh v. Beckman, 29 Misc. 2d 591, 215 N. Y. S. 2d 398 [1961].

¶ 62. On examination before trial, police records could be used solely for the purpose of refreshing the recollection of witnesses.—Frank v. City of New York, 146 (88) N. Y. L. J. (11–6–61) 16, Col. 2 F.

¶ 63. In an assault action against a policeman, plaintiff's demand for the production of police records was denied.—Meyers v. City of N. Y., 147 (27) N. Y. L. J. (2–7–62) 14, Col. 7 T.

¶ 64. This section does not apply to cases pending in court.—Moses v. Bentley, 143 (22) N. Y. L. J. (2–2–60) 12, Col. 3 F.

¶ 65. Claimants were entitled to discovery and inspection of hospital records of prenatal care and delivery where they were the parents of the deceased fetus. Claimants were not entitled to discovery and inspection of the police report or work records.—Torres v. City of New York, 146 (56) N. Y. L. J. (9–20–61) 11, Col. 2 M.

¶ 66. In an action against the City for injuries sustained by reason of an assault upon plaintiff by a police officer, the plainttiff was not entitled to inspect the minutes of a hearing conducted by the Police Department into the complaints made to the Department by the plaintiff as such transcript was for use in an investigation only.—Olenick v. City of New York, 144 (58) N. Y. L. J. (9–22–60) 10, Col. 5 M.

¶ 67. Former §§ 893 and 894 (now §§ 1113 and 1114) of the City Charter have no reference to the production and introduction of records in court in pending litigation.—Liny v. City of New York, 146 (18) N. Y. L. J. (7–27–61) 7, Col. 1 M.

¶ 68. A person sentenced upon plea of guilty to a charge of carrying a dangerous weapon was not entitled to an order to inspect the ballistic report of the Police Department where such report was not before the Court at the time of his plea.—Brown v. Adams, 137 (54) N. Y. L. J. (3–20–57) 5, Col. 7 F.

§ 1115. **Officer not to hold any other civil office.**—Any person holding office, whether by election or appointment, who shall, during his term of office, accept, hold or retain any other civil office of honor, trust or emolument under the government of the United States, except commissioners for the taking of bail, or of the state,

except the office of notary public or commissioner of deeds or officer of the national guard, or who shall hold or accept any other office connected with the government of the city, or who shall accept a seat in the legislature, shall be deemed thereby to have vacated any office held by him under the city government; except that the mayor may accept, or may in writing authorize any other person holding office to accept, a specified civil office, in respect to which no salary or other compensation is provided. No person shall hold two city or county offices, except as expressly provided in this charter or by statute; nor shall any officer under the city government hold or retain an office under a county government, except when he holds such office ex officio by virtue of an act of the legislature, and in such case shall draw no salary for such ex officio office. (*Derived from former* § 895.)

CROSS REFERENCE: Eligibility to appointment by Governor to certain offices under Public Authorities Law, see Public Authorities Law, § 1851.

## CASE NOTES

¶ 1. Act of member of lunacy commission appointed to inquire into mental condition of defendant charged with first degree murder, in accepting office of county clerk of New York County, *held* not to have disqualified him from membership on the commission, since duties of membership on the commission were not inconsistent with or repugnant to those of office of county clerk, nor were the positions so incompatible for reasons of public policy as to result in one office being ipso facto vacated by acceptance of the other.—People v. Irwin, 166 Misc. 751, 46 N. Y. S. 2d 548 [1938].

¶ 2. Commissioner of Parks and Commissioner of Public Works *held* not to have vacated their respective offices when they accepted appointment to positions as associate members of the City Planning Commission, inasmuch as the positions were not incompatible, the new positions were unsalaried offices and former §§ 531 and former 895 (now § 1115) of the Charter authorized appointment to another civil office for which now compensation was provided. Furthermore, § 881 of the Charter, requiring the head of a department to give his whole time to his duties, must be read in conjunction with §§ 531 and former 895 (now § 1115), which expressly authorize the acceptance of the other office.—Childs v. Moses, 265 App. Div. 353, 38 N. Y. S. 2d 704 [1942], aff'g 178 Misc. 828, 36 N. Y. S. 2d 574; aff'd without opinion, 290 N. Y. 828, 50 N. E. 2d 235.

¶ 3. The recently appointed commissioners of the New York City Tunnel Authority are permitted to serve as such under provisions of §§ 531 and former 895 (now § 1115) of the Charter, which sections were enacted subsequent to Public Authorities Law, § 628. The conflict between the two statutes was to be resolved in favor of the provisions last adopted by the legislature.—In re Kantor (Jones), 115 (14) N. Y. L. J. (1–17–46) 222, Col. 4 M.

§ 1116. **Fraud of officer.**—Any councilman or other officer or employee of the city who shall wilfully violate or evade any provision of law relating to his office or employment, or commit any fraud upon the city, or convert any of the public property to his own use, or knowingly permit any other person so to convert it or by gross or culpable neglect of duty allow the same to be lost to the city, shall be deemed guilty of a misdemeanor and in addition to the penalties imposed by law and on conviction shall forfeit his office or employment, and be excluded forever after

from receiving or holding any office or employment under the city government. (*Derived from former* § 896.)

CASE NOTES

¶ 1. Petitioners, employed as station agents in the Board of Transportation of the City of New York, were City and not State employees, since the Board of Transportation, though a State instrumentality, is such only for purpose of operating the Independent Subway System as the City's agent, its expenses are paid by the City, and employees of the Board are paid out of the City treasury and are authorized to join in the City Pension System. Hence, as employees of the City, petitioners were subject to provisions of Charter former § 896 (now § 1116).—In re Ferdinand (Moses), 26 N. Y. S. 2d 382 [1941], aff'd without opinion 262 App. Div. 1001, 30 N. Y. S. 2d 842, appeal denied 287 N. Y. 854.

¶ 2. Under Charter former § 896 (now § 1116), City employees who had pleaded guilty to the crime of conspiracy to steal City revenues were forever disqualified from again holding City employment, and hence were never legally eligible to take civil service examinations nor eligible for certification for employment, and an erroneous certification by the Commission gave no legal potency to their appointment. Hence their certification or appointment was void ab initio, and provisions of the Civil Service Law relative to charges, notice and hearing were inapplicable, and they were properly dismissed summarily from their City positions notwithstanding one of the petitioners was a veteran.—Id.

¶ 3. Employees of the Board of Education of the City of New York were employees of the City within meaning of former § 896 (now § 1116) of the Charter, and hence could be charged and convicted of a violation of former § 896.—People v. Engel, 200 Misc. 60, 102 N. Y. S. 2d 166 [1951].

§ 1117. **Pensioner not to hold office.**—If a person receiving a pension or a retirement allowance made up of such pension and an annuity purchased by the pensioner from the city or any agency, or out of any fund under the city or any agency, by reason of his own prior employment by the city or any agency, shall hold and receive any compensation from any office, employment or position under the state or city or any of the counties included within the city or any municipal corporation or political subdivision of the state, except the offices of inspector of election, poll clerk or ballot clerk under the election law or commissioner of deeds or notary public or jury duty, the payment of said pension only shall be suspended and forfeited during and for the time he shall hold and receive compensation from such office, position or employment; but this section shall not apply where the pension and the salary or compensation of the office, employment or position amount in the aggregate to less than one thousand eight hundred dollars annually. (*Derived from former* § 897 *as amended by L.* 1945, *ch.* 630, *L.* 1949, *ch.* 606, *L.* 1949, *ch.* 642, *L.* 1952, *ch.* 645.)

CROSS REFERENCE: When pension and annuity may be suspended, see Civil Service Law, § 32.

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Annuity payments, ¶ 8
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Reformation of retirement application, ¶ 1

¶ 1. City employee who, in filing his application for retirement on December 7, 1937, had intended to make the application effective as of December 31, 1937, but was persuaded to make the effective date January 3, 1938 by representations of defendant's employee that he could thus secure two extra days at full pay without adversely affecting his pension rights, *held* entitled to reformation of his application so as to make it effective as of December 31, 1937, with result that his retirement was governed by the old Charter and did not come within former § 897 (now § 1117) of the former Charter, which became effective January 1, 1938, and would have caused a forfeit of his pension during 1941 and 1942 when he was employed by the Federal and was paid in excess of $1200 annually.—Breithut v. Teachers' Retirement Board, 114 (149) N. Y. L. J. (12-29-45) 1908, Col. 1 F, aff'd 271 App. Div. 822, 66 N. Y. S. 2d 617, and 296 N. Y. 1031, 73 N. E. 2d 907.

¶ 2. Qualification in resolution suspending widow's pension during term of her employment by the Board of Education, was proper.—Woods v. Wallander, 121 (86) N. Y. L. J. (5-3-49) 1580, Col. 5 M.

¶ 3. Member of Police Department who upon his own application retired from the Police Department and was granted a pension, and on the same day entered employ of the U. S. Government as a civilian adviser to the War Department, at a substantial salary, forfeited his pension allowance during the period of such employment pursuant to former § 897 (now § 1117) of the Charter. Former § 897 was in force when petitioner's right to a pension became contractual, as well as when he applied for a pension.—In re Fay (O'Brien). 195 Misc. 865, 91 N. Y. S. 2d 137 (1949, aff'd without opinion, 300 N. Y. 750, 92 N. E. 2d 457.

¶ 4. A pensioner could not be deemed to have been serving in the Armed Forces where he was not inducted as part of the ordinary military personnel nor did he receive a military rank, but rather served as a civilian employee with the Armed Forces.—McCrystal v. Sampson, 136 N. Y. S. 2d 703 [1954].

¶ 5. Member of New York City Fire Department who, after his retirement on pension in 1942, had enrolled as a member of the United States Maritime Service, *held* not entitled to have his pension payments continued during his period of employment with the Maritime Service on the theory that employment in such service did not constitute employment by a federal agency within meaning of former § 897 (now § 1117) of the Charter, but constituted service in the "Armed Forces of the United States", within the exceptions of former § 897. The functions and services of the Maritime Service are exclusively civilian in nature and are paid for with government funds, enrollment in the Service is voluntary, and severance therefrom is at will.—In re Goodell (Walsh), 185 Misc 897, 57 N. Y. S. 2d 754 [1945].

¶ 6. Provisions of Military Law § 246, as amended in 1944 and 1945 to bring members of the Maritime Service within its benefits, did not result in an implied partial repeal of former § 897 of the Charter, as § 246, subd. 9, by its terms applies only to a public employee who is a member of a pension or retirement system and therefore did not apply to petitioner who ceased to be such on the effective day of his retirement. Moreover, the provisions of § 246 confer upon a "public employee" on military duty no greater rights with respect to membership in a retirement system than he already possessed had he been present and continuously engaged in performance of the duties of his position, and merely safeguards such right only to the point of retirement.—Id.

¶ 7. Under former § 897 (now § 1117) of the Charter, the City of New York was entitled to recover the amount of pension payments made to defendant as widow of a former employee of the City Department of Sanitation during the period that the defendant was employed by the State of New York in its Department of Mental Hygiene and receiving a salary in excess of $1,200 annually. Payment of public or trust funds by municipal agents is not subject to the general rule that money paid under a mistake of law may not be recovered back.—Powell v. Lawlor, 197 Misc. 521, 95 N. Y. S. 2d 193 (1950).

¶ 8. Upon his retirement, a Justice of the Municipal Court, had elected pursuant to Greater New York City Charter § 1720 to receive an annual retirement allowance of an annuity and an annual pension but upon day of his retirement had been appointed

an official referee and continued in such capacity until his death with no part of his retirement allowance being paid to him in the meantime. Deceased, under § 5060 of the Greater New York Charter prohibiting pensioners from holding office, forfeited, during his term in office as official referee, that portion of his retirement allowance falling within classification of a pension. However, deceased's estate was entitled to recover from the trustees of the retirement system the value of the annuity, including payments which accrued more than 6 years prior to the commencement of the present proceeding. Since the retirement system occupied a relationship to the retired member similar to that of a depositary, the statute of limitations did not commence to run until demand was made for payment. In Re Fergueson (La-Guardia), 131 Misc. 270, 11 N. Y. S. 2d 590 [1939], aff'd to extent appealed from without opinion, 257 App. Div. 1048, 13 N. Y. S. 2d 647 and 281 N. Y. 678, 23 N. E. 2d 14.

§ 1118. **Officers and employees not to perform work outside public employment.**—No officer or employee of the city or of any of the counties within its limits shall detail or cause any officer or employee of the city or of any of such counties to do or perform any service or work outside of his public office, work or employment; and any violation of this section shall constitute a misdemeanor. (*Derived from former* § 898.)

§ 1119. **Action of boards.**—Except as otherwise provided by law:

1. Whenever any act is authorized to be done or any determination or decision made by any commission, board or other body, the act, determination or decision of the majority of the commission, board or other body shall be held to be the act, determination or decision of the commission, board or other body.

2. A majority of the members of any commission, board or other body shall constitute a quorum of such commission, board or other body.

3. Each commission, board or other body may choose at its own pleasure one of its members who shall be its president and one who shall be its treasurer and may appoint a secretary or chief clerk within the appropriation therefor. (*Derived from former* § 899.)

**CASE NOTES**

¶ 1. Powers conferred upon a special committee appointed by the council to investigate municipal civil service commission might validly be exercised by a single member of the committee, where the council itself expressly vested each member of the committee with the authority of the entire committee. Former § 899 (now § 899) of the Charter providing that whenever any act was authorized to be done by any board or other body, the action of the majority of the board or body should be deemed the action of the entire board or body and that a majority of the board or body should constitute a quorum thereof, applied only to situations where confusion might otherwise result as to the number of members of the board or body necessary to constitute a quorum, and as to the number necessary to act on behalf of the city.—In Re Smith (Kern), 175 Misc. 937, 26 N. Y. S. 2d 56 [1940]; aff'd without opinion, 260 App. Div. 1003, 24 N. Y. S. 2d 992, and 285 N. Y. 632, 33 N. E. 2d 556.

§ 1120. **Additional powers and duties.**—Any elected or appointed officer of the city or any board or commission or any member

thereof shall, in addition to the powers and duties vested in him or it by this charter, perform any duties and exercise any powers vested in him or in such board or commission by any other provision of law and any power necessary to carry out the powers and duties vested in him or it. (*Derived from former* § 900.)

§ 1121. **Punishment for false returns and deceptive reports.**—Any officer or employee of the city who shall knowingly make a false or deceptive report or statement in the course of his duty or shall, except as in this charter otherwise provided, receive compensation except from the city for performing any official duty, or shall accept or receive any gratuity from any person whose interests may be affected by his official action, shall be guilty of a misdemeanor and if convicted shall forfeit his office or employment. (*Derived from former* § 901.)

**CASE NOTES**

¶ 1. The Commissioner of Housing and Buildings had jurisdiction to inquire into charge that petitioner at various times while he was employed by the City and in the performance of his official duties therein he accepted gratuities in the sum of $25 from a certain person whose interests may have been affected by his official act, contrary to former § 901 (now § 1121) of the Charter even though petitioner's misconduct occurred while he was employed in another department and prior to his certification for appointment in the Department of Housing and Buildings.—Matter of Frome, 281 App. Div. 807, 118 N. Y. S. 2d 626.

¶ 2. Charges of 3 crimes for alleged violation of former §§ 886 and 901 now §§ 1116 and 1121 of the City Charter, to wit, acceptance of illegal gratuities by defendant, a public official, was properly joined in one indictment with charge of conspiracy under Penal Law § 580, since crimes charged were "connected together" within the meaning of § 279 of the Code of Criminal Procedure. It was immaterial that the alleged conspiracy occurred after the alleged commission of the substantive crimes, instead of before the substantive crimes. A trial court did not have the power to grant inferentially a severance and separate trial of the conspiracy charged.—People v. Jack, 10 A D 2d 336, 199 N. Y. S. 2d 336 [1960]; aff'd 8 N. Y. 2d 857, 203 N. Y. S. 2d 907, 168 N. E. 2d 710 [1960].

§ 1122. **Bonds.**—Unless otherwise provided by law, each officer of the city who has possession of or control over any funds of the city shall give bond for the faithful performance of his duties in such sum as may be fixed and with sureties to be approved by the comptroller. Such bonds shall run to The City of New York, and in case there is another officer who is responsible for the officer giving the bond, shall run also to such officer. (*Derived from former* § 902.)

**CASE NOTES**

¶ 1. Liability of surety company under the condition of a fidelity bond given by it to the City of New York covering a person employed by the City of New York as an accountant, should be limited to such monies which by law he was authorized to receive, which construction would be within keeping with the spirit of Public Officers Law § 11 and § 902 of the Charter, requiring such bonds to be given.—Indemnity Ins. Co. v. Farkas, 76 N. Y. S. 2d 426 [1948].

¶ 2. Inasmuch as the duties prescribed for an accountant by the Civil Service Commission might not be in-

terpreted to include authority to receive or take custody of monies payable to the City from sources entirely disconnected with his prescribed duties, the defendant, who was employed by the City as an accountant at La Guardia Airport, was not within the condition of the fidelity bond given to the City pursuant to former § 902 (now § 1122) of the Charter when he received $140 cash representing monies due the City of landing fees, and accordingly no liability attached to the surety when the money was stolen from his desk drawer.—Id.

§ 1123. **Failure to testify.**—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (*Derived from former* § 903.)

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¶ 1. The summary dismissal of a city college professor for refusing to answer questions as to his communistic affiliations while before a congressional investigating committee was unwarranted under the provisions of this section which terminate the office or employment of any city employee who utilizes the privilege against self-incrimination to avoid answering a question relative to his official conduct. Such a dismissal was violative of due process. Slochower v. Board of Education, 350 U. S. 551, 100 L. E. 692, 76 S. C. 637 [1956].

¶ 2. Charter former § 903 (now § 1123), authrizing the discharge of any officer or employee of the City who refused to waive immunity from prosecution after notice to appear before a legislative committee, *held* constitutional, as there was no denial of the privilege against self-incrimination, but the Legislature merely undertook to exercise its discretion as to wisdom of retaining in public service an employee who exercised the privilege when his official acts were under review.—Goldway v. Board of Higher Education, 178 Misc. 1023, 37 N. Y. S. 2d 34.

¶ 3. Assistant teacher of English at the Townsend Harris High School *held* to be "an employee of the City"

within intendment of former § 903 (now § 1123) of the Charter, as former § 903 was clearly intended to be all inclusive and to relate to all employees of the City or any of its agencies who were paid out of City funds. —Id.

¶ 4. Petitioner, who was employed by the Board of Education as an assistant mechanical engineer, *held* to be an employee of the City of New York within meaning of former § 903 (now § 1123) of the Charter.—In re Koral (Bd. of Educ.), 197 Misc. 221, 94 N. Y. S. (2d) 378 (1950).

¶ 5. Petitioner-teachers in public schools and in public colleges in City of New York were employees of the City of New York within meaning of former § 903 (now § 1123) of the Charter. Section 981–1.0 of the Administrative Code defines an employee as any person whose salary in whole or in part is paid out of the City Treasury, and petitioners were paid by check signed by the City Treasurer with funds from the City Treasury.—Daniman v. Board of Education; Shlakman v. Board of Education, 306 N. Y. 532 [1954], rev'd on other grounds, Slochower v. Board of Education, 350 U. S. 551, 100 L. E. 692, 76 S. C. 637 [1956].

¶ 5.1. It was immaterial whether the removal of school teachers by the Board of Higher Education was the result of an exercise of discretion by the Board (calling for reinstatement by the way of certiorari) or was the result of an automatic operation of this section involving no discretion (calling for reinstatement by way of mandamus). In either case, their right to the position from which they were discharged, was required to be determined promptly in an Article 78 proceeding. Therefore, a suit filed for back pay by the teachers 4 years after their removal came too late.—Austin v. The Board of Higher Education, 5 N. Y. 2d 430, 186 N. Y. S. 2d 1 [1959].

¶ 6. There is no inconsistency between Education Law § 2523, which provides that a regular employee of the Board of Education may not be dismissed without a hearing, and former § 903 (now § 1123) of the Charter, since with respect to the subject matter covered by former § 903, that section supersedes the provisions of the Education Law requiring a hearing on charges. In any event, a requirement for a hearing under former § 903, where the facts are not disputed, would be a useless formality.—Id.

¶ 7. Petitioner, who was employed as assistant mechanical engineer by the Board of Education of the City of New York, *held* properly dismissed under former § 903 (now § 1123) of the Charter for his refusal to answer questions asked him at a hearing by the Committee on Un-American Activities of the House of Representatives, and for asserting a privilege against self-incrimination as a basis for not answering questions as to whether he was a member of the Communist Party and had participated in certain acts of espionage against the U. S. Government in behalf of Russia.—Id.

¶ 8. Transit Authority's action in dismissing subway conductor following his refusal to testify as to whether or not he was a Communist, and his invocation of the Fifth Amendment *held* not to be arbitrary or unreasonable.—Lerner v. Casey, 2 N. Y. 2d 355, 161 N. Y. S. 2d, 141 N. E. 2d 533 [1957], aff'g 2 A. D. 2d 1, 138 N. Y. S. 2d 777 [1955].

¶ 9. Police officer properly refused to sign a waiver of immunity which would include testimony given by him not only in the pending grand jury investigation but also "in any other investigation or other proceeding before any judge or justice, court or other tribunal conducting an inquiry or legal proceeding relating to the acts of said John Doe or any other person".—Casey v. Murphy, 125 (117) N. Y. L. J. (6–18–51) 2251. Col. 4 F.

¶ 10. Where grand jury which was conducting an inquiry into the affairs of the Uniformed Firemen's Association of Greater New York had called as a witness the petitioner, who was president of the association, and he had refused to sign a waiver of immunity when requested by an assistant district attorney and without having been brought before the grand jury, petitioner *held* not to have violated former § 903 (now § 1123) of the Charter, which covers a situation where the witness is brought before the grand jury or other authorized investigative body and refuses before that body to sign a waiver of immunity.—Matter of Crane, 124 N. Y. S. 2d 26 [1953] and 127 N. Y. S. 2d 679 [1953]. On appeal, the Appellate Department declined to pass upon this question but held that

the provisions of this section were clearly violated when the petitioner at a later date and in the actual presence of the grand jury refused to waive immunity.—Matter of Crane, 283 App. Div. 785, 129 N. Y. S. 2d 229, aff'd without opinion, 308 N. Y. 880, 126 N. E. 2d 312.

¶ 11. Former § 903 (now § 1123) of the Charter becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him. It is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The teacher alone possesses the power to bring the statute into play, and the insertion of the privilege against self-incrimination is equivalent to a resignation.—Daniman v. Board of Education; Shlakman v. Board of Education, 306 N. Y. 532 [1954], rev'd on other grounds, Slochower v. Board of Education, 350 U. S. 551, 100 L. E. 692, 76 S. C. 637 [1956].

¶ 12. Former § 903 (now § 1123) is applicable to a hearing before a legislative committee.—Daniman v. Board of Education; Shlakman v. Board of Education, 306 N. Y. 532 [1954], rev'd on other grounds, Slochower v. Board of Education, 350 U. S. 551, 100 L. E. 692, 76 S. C. 637 [1956].

¶ 13. Police officers charged with misconduct in office could not refuse to testify on the ground that their testimony would tend to expose them to a penalty or forfeiture as provided in Civil Practice Act § 355. That section did not and was not intended to nullify the purpose and policy of this section. The police officers were properly committed to jail until such time as they would testify.—Matter of Delehanty (Sullivan), 280 App. Div. 542, 115 N. Y. S. 2d 614, aff'd. 304 N. Y. 727, 108 N. E. 2d 46.

¶ 14. That the position of one of the teachers who had been served with a subpœna issued by a joint legislative committee investigating subversive activities in the New York City educational system had been declared vacated by reason of his refusal to sign a waiver of immunity before testifying, was no ground for vacation of the subpœna, inasmuch as Charter former § 903 (now § 1123) required vacating of the office when an employee or public officer refused to sign a waiver of immunity.—Withrow v. Joint Legislative Committee, &c., 176 Misc. 597, 28 N. Y. S. 2d 223 [1941].

§ 1124. **Civil rights protected.**—Nothing in this charter contained shall affect any rights given or secured by section fifteen of the civil rights law, including the right of officers and employees, as citizens, to appeal to the legislature or to any public officer, board, commission or other public body for the redress of their grievances as such officers and employees. (*Derived from former* § 904.)

# CHAPTER 50

## HOUSING AND REDEVELOPMENT BOARD

§ 1130. **Constitution and appointment.**—a. There shall be a city housing and redevelopment board to consist of a chairman and two other members. The chairman shall be appointed by the mayor and shall be removable at the pleasure of the mayor. Each of the members other than the chairman shall be appointed by the mayor for a term of six years commencing at the expiration of the terms of the present incumbents. Vacancies in the board shall be filled for the unexpired term.

b. One of the members shall be designated by the board as vice-chairman for such term as the board shall determine. The vice-chairman shall possess the powers and perform the duties of the chairman when the chairman is absent or while a vacancy exists in the office of the chairman. (*Derived from former* § 1170 *as added by L.* 1961, *ch.* 375.)

§ 1131. **Salaries.**—Members of the board shall receive salaries within the appropriation therefor and shall give their whole time to their duties and shall not engage in any other occupation, profession or employment. (*Derived from former* § 1171 *as added by L.* 1961, *ch.* 375.)

§ 1132. **Staff.**—The board may employ such officers, employees and consultants as may be required to perform the work of the board within the appropriation therefor. (*Derived from former* § 1172 *as added by L.* 1961, *ch.* 375.)

§ 1133. **Removal by the mayor after hearing.**—Members of the board may be removed by the mayor for official misconduct, negligence in official duties or conduct connected with official duties which tend to discredit the office or for mental or physical disability; but before removal shall receive a copy of the charges and shall be entitled to a hearing before the mayor and to be represented by counsel at such hearing. (*Derived from former* § 1173 *as added by L.* 1961, *ch.* 375.)

§ 1134. **Powers and duties.**—The board shall have and exercise:

a. All the powers, rights and duties heretofore vested in or exercised by the comptroller pursuant to: (1) the provisions of article twelve of the public housing law known as the "limited-profit housing companies law" and (2) the provisions of chapter eight hundred forty-five of the laws of nineteen hundred forty-two, as amended, known as the "redevelopment companies law";

b. All the powers, rights and duties heretofore vested in or exercised by the mayor's committee on slum clearance, the urban

renewal board, and the mayor's representative for neighborhood conservation, pursuant to the provisions of section seventy-two-k, seventy-two-l, seventy-two-m, seventy-two-n and seventy-two-o of the general municipal law;

c. All the rights, powers and duties heretofore vested in it, or delegated to it, pursuant to article ten of the public housing law or otherwise, with regard to providing low interest loans to owners of existing multiple dwellings;

d. All the powers, rights and duties provided by any federal, state or local law or resolution, or by any order or directive of the mayor with regard to municipally-aided housing (except housing under the jurisdiction of the New York city housing authority), slum clearance, slum prevention, urban renewal, neighborhood conservation and other related programs. (*Derived from former* § 1174 *as added by L.* 1961, *ch.* 375.)

§ 1135. **Additional powers.**—The board shall:

a. Act as representative of the city in carrying out the provisions of article ten of the public housing law and sections seventy-two-k, seventy-two-l, seventy-two-m, seventy-two-n and seventy-two-o of the general municipal law including amendments, changes and revisions thereof.

b. Act as the processing and coordinating agency with respect to the activities of officers and agencies of the city engaged in the administration of laws authorizing the granting of tax exemption or tax abatement, or both, in aid of the rehabilitation alteration or improvement of multiple dwellings or the elimination of substandard conditions therefrom.

c. Act as the coordinating agency with respect to the activities of officers and agencies of the city concerning areas designated by the planning commission or analogous officer or body as districts for improvements of neighborhoods.

d. Have the exclusive power to promulgate supplementary rules and regulations, not inconsistent with the provisions of this chapter or any state statute, as may be required to carry out its functions hereunder.

e. Have the power to impose and collect charges and fees for the financing, regulation, supervision and audit of municipally-aided projects and loan programs which it is empowered to administer hereunder, which charges and fees shall be set aside in a special account for administration expenses of the board. (*Derived from former* § 1175 *as added by L.* 1961, *ch.* 375.)

§ 1136. **Continuity of programs.**—a. The board shall exercise the powers and duties assigned by this chapter in continuation of the exercise of such powers and duties by any officer or agency heretofore exercising same and shall have the power to continue any business, proceeding or other matter heretofore commenced by any officer, board, committee, commission, department, body or

agency of the city of New York including actions of the board pursuant to section twenty-d of the general city law, as added by chapter ten hundred sixty-nine of the laws of nineteen hundred sixty;

b. Any right occurring, accrued or acquired on liability incurred, by reason of any other officer, board, committee, commission, department, body or agency having heretofore exercised any right, power or duty vested in the board by this chapter, shall not be affected or impaired by this transfer and the same may be enjoyed, asserted or enforced to the same extent as if this chapter had not been enacted and transfer had not taken place;

c. Any provisions in any law, rule, regulation, resolution, contract or other document relating to the subject matter of any power, right or duty hereby transferred to the board and which applied to any officer, board, committee, commission, department, body or agency of the city of New York formerly exercising or performing such power, right or duty, shall apply to the board. (*Derived from former* § 1176 *as added by L.* 1961, *ch.* 375.)

§ 1137. **Records and funds.**—The board shall have jurisdiction and custody of all records, documents, papers, files and funds pertaining to or resulting from the exercise of any of the powers, rights or duties set forth in section eleven hundred thirty-four and section eleven hundred thirty-five of this chapter including all such records and monies now or that may hereafter come into the possession or the custody of any officer, board, committee, commission, department, body or agency of the city of New York as the result of any such business, proceeding or other matter by reason of the exercise of powers, rights and duties now vested in the board and all such records and funds shall be transmitted or credited to the board. (*Derived from former* § 1177 *as added by L.* 1961, *ch.* 375.)

§ 1138. **Audit.**—All books and records of the board shall be subject to periodic audit by the comptroller. (*Derived from former* § 1178 *as added by L.* 1961, *ch.* 375.)

§ 1139. **Validation.**—The creation and establishment of the New York city housing and redevelopment board under and pursuant to the provisions of section twenty-d of the general city law, together with all proceedings, acts and things undertaken, performed or done with reference thereto are hereby validated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any want of statutory authority or any defect or irregularity in such acts or proceedings. (*Derived from former* § 1179 *as added by L.* 1961, *ch.* 375.)

# CHAPTER 51

# TRANSITORY PROVISIONS

§ 1140. **Relation of this charter to existing law.**—It is the purpose and intent of this charter to set forth the structure of the city government and the manner in which it is to operate, in accordance with the provisions of chapter eighty-seven of the laws of nineteen hundred sixty-one, and to continue in force all provisions of the New York City Charter adopted on November third, nineteen hundred thirty-six, as amended, and all other provisions of law affecting the city and the counties within the city, not inconsistent with the provisions of this charter, in force at the time when this charter shall take effect, until repealed or amended or until continued in the revision, simplification, consolidation, codification, restatement and annotation of the administrative code of the city of New York. (*Derived from former* § 951.)

## CASE NOTES

¶ 1. Even if the Board of Estimate and Apportionment had the power to pass a resolution prohibiting a stoop line stand within 100′ of a subway entrance under the Greater New York Charter § 242 (L. 1901, Ch. 466), the resolution was intended to apply only in those cases where the entrances to or exits from subway or elevated railroads were along or adjacent to curb lines of streets. Thus, the petitioner was entitled to maintain an Article 78 proceeding to compel the issuance of a license permitting him to maintain a fruit and vegetable stand in front of his premises where the entrance to the subway involved was not placed along or adjacent to a curb line.—Matter of Chiapperini, 143 N. Y. S. 2d 735 [1955].

¶ 2. Section 166 of the Charter providing that an application to review a determination of the Tax Commission must be brought before October 25, applied only to tax assessments made in the future for a fiscal year beginning July 1, 1939, and proceeding to review assessments for the year 1938 and the first half of 1939 were governed by the time schedule prescribed by the old charter, since both in the old and new charters the period of the lapsed time to review assessments was five months, and it was clearly not intended to grant nine months in which to bring proceedings to review assessments for 1938 and the first half of 1939. Furthermore, there was nothing inconsistent in applying the limitation date provided in the 1938 Charter to review assessments made under the time schedule of that charter.—People (Kaydal Realty Co.) v. Miller; People (Vandalia Realty Corp.) v. Miller, 255 App. Div. 449, 7 N. Y. S. 2d 963 [1938] aff'd without opinion, 280 N. Y. 652, 20 N. E. 2d 1016.

§ 1141. **Rights of officers and employees preserved.**—Nothing in this charter contained shall affect or impair the rights or privileges of officers or employees of the city or of any agency existing at the time when this charter shall take effect, or any provision of law in force at the time when this charter shall take effect and not inconsistent with the provisions of this charter, in relation to the personnel, appointment, ranks, grades, tenure of office,

promotion, removal, pension and retirement rights, civil rights or any other rights or privileges of officers or employees of the city generally or officers or employees of any agency. (*Derived from former* § 953.)

**CASE NOTES**

¶ 1. Resolution of Municipal Civil Service Commission adopted on June 1, 1938, providing that persons in the office of the City Clerk who were performing duties properly pertaining to positions in the competitive class, were declared included in the competitive class, *held* not to entitle employees whose duties, consisting of issuing permits for illuminated signs, had been transferred to Department of Housing and Buildings, to a status as classified employees of such Department, where, although their positions should have been in the classified service, their employment had been terminated by action of the Board of Estimate prior to the resolution of the Civil Service Commission.—Weldon v. Rheinstein, 101 (130) N. Y. L. J (6–6–39) 2606, Col. 5 F. aff'd, without opinion, 20 N. Y. S. 2d 655, 28 N. E. 2d 972. (Derived from former § 953.)

¶ 2. Petitioner, who was committee clerk of the New York City Council, *held* to be a "legislative employee" and in the unclassified branch of the civil service, and hence was subject to removal without reference to the protection afforded veterans by Civil Service Law § 22. Furthermore, petitioner could derive no protection against removal by Greater New York Charter § 1543, even if he were deemed to be a "regular clerk", since § 1543 was not incorporated in the New Charter or in the Administrative Code and would seem to be inconsistent with the New Charter, within meaning of Charter former § 953 (now § 1141).—In re Eagleton (Hubbard), 103 (126) N. Y. L. J. (5–29–40) 2448, Col. 4 F.

¶ 3. Former §§ 953 and 963 (now §§ 1141 and 1147) of the Charter apply only to provisions of the Charter and have no application to laws passed subsequently by the City Council.—Humbeutel v. City of N. Y., 125 N. Y. S. 2d 198 [1953], aff'd without opinion 283 App. Div. 1011, 131 N. Y. S. 2d 445 and 308 N. Y. 904, 126 N. E. 2d 569.

¶ 4. The propriety of the action of the Fire Commissioner as sole trustee of the Fire Department Pension Fund in retiring a member of the Department at an allowance greatly in excess of one-half pay was not triable by the court notwithstanding the charge that the application for retirement was granted in the anticipation of the effect of new pension laws and that the Commissioner had not theretofore granted any pension in excess of one-half pay. There was no showing that the Commissioner in fixing the pension acted in bad faith or in fraud of the rights of the city or other beneficiaries of the pension fund.—Hefferman v. McGoldrick, 259 App. Div. 671, 20 N. Y. S. 2d 341 [1940].

§ 1142. **Continuity of powers and duties.**—Any agency or officer to whom are assigned by this charter any powers and duties shall exercise such powers and duties in continuation of their exercise by the agency or officer by which the same were heretofore exercised and shall have power to continue any business, proceeding or other matter commenced by the agency or officer by which such powers and duties were heretofore exercised. Any provision in any law, rule, regulation, contract, grant or other document relating to the subject-matter of such powers or duties and applicable to the agency or officer formerly exercising such powers and duties shall, so far as not inconsistent with the provisions of this charter, apply to the agency or officer to which such powers and duties are assigned by this charter. (*Derived from former* § 954. )

§ 1143. **Transfer of officers and employees in case of transfer of functions.**—Wherever by any provision of this charter functions, powers or duties are assigned to any agency or officer which have been heretofore exercised by any other agency or officer, all officers and employees in the classifid municipal civil service who at the time when this charter shall take effect are engaged in the performance of such functions, powers or duties shall be transferred to the agency to which such functions, powers or duties are assigned by this charter, without examination and without affecting existing compensation or pension or retirement rights, privileges or obligations of such officers and employees. (*Derived from former* § 955.)

§ 1144. **Transfer of records and property.**—All records, property and equipment whatsoever of any agency or part thereof, all the powers and duties of which are assigned to any other agency by this charter, shall be transferred and delivered to the agency to which such powers and duties are so assigned. If part of the powers and duties of any agency or part thereof are by this charter assigned to another agency, all records, property and equipment relating thereto shall be transferred and delivered to the agency to which such powers and duties are so assigned. (*Derived from former* § 956.)

§ 1145. **Continuity of agencies.**—a. Any agency provided for in this charter with a name the same or substantially the same as that of an agency heretofore existing shall be deemed to be a continuation of such agency heretofore existing and shall exercise its powers and duties in continuation of their exercise by the agency by which the same were heretofore exercised and shall have power to continue any business, proceeding or other matter commenced by the agency by which such powers and duties were heretofore exercised. Any provision in any law, rule, regulation, contract, grant or other document relating to such formerly existing agency shall, so far as not inconsistent with the provisions of this charter, apply to such agency provided for by this charter.

b. The director of finance shall have and exercise all the functions, powers and duties heretofore exercised by the treasurer and all the functions, powers and duties heretofore exercised by the comptroller in respect of excise and non-property taxes.

c. The real property assessment department shall have and exercise all the functions, powers and duties heretofore exercised by the tax department. (*Derived from former* § 959.)

§ 1146. **Pending actions and proceedings.**—No action or proceeding, civil or criminal, pending at the time when this charter shall take effect, brought by or against the city or any agency or officer, shall be affected or abated by the adoption of this charter or by anything therein contained; but all such action or proceedings may be continued notwithstanding that functions, powers and duties of any agency or officer party thereto may by

this charter be assigned or transferred to another agency or officer, but in that event the same may be prosecuted or defended by the head of the agency to which such functions, powers and duties have been assigned or transferred by this charter. (*Derived from former* § 962. *Amended by L.* 1962, *ch.* 998, § 39.)

**CASE NOTES**

¶ 1. Former § 302 is not applicable to street opening proceedings authorized prior to the effective date of the Charter, and expenses of such proceeding are to be liquidated as provided in the Charter in effect prior thereto.—In Re Avenue L, Brooklyn, 258 App. Div. 808, 15 N. Y. S. 2d 980 [1939].

¶ 2. Former § 92 of the Charter which effects the repeal of certain statutes, is limited in its scope by the savings clause in former § 962 (now § 1146).—In Re Avenue L., Brooklyn, 258 App. Div. 808, 15 N. Y. S. 2d 980 [1939].

¶ 3. The provisions of the old charter which required publication of notices in street opening proceedings governed such proceedings even though they were not concluded prior to the year 1938. Thus, a newspaper publisher could recover for notices published in 1938 even though under the new Charter, notice could be published only in the "City Record".—The Brooklyn Citizen v. The City of New York, 258 App. Div. 657, 17 N. Y. S. 2d 765 [1940].

§ 1147. **Existing rights and remedies preserved.**—No existing right or remedy of any character shall be lost or impaired or affected by reason of the adoption of this charter. (*Derived from former* § 963.)

**CASE NOTES**

¶ 1. Former §§ 953 and 963 (now §§ 1141 and 1147) of the Charter apply only to provisions of the Charter and have no application to laws passed subsequently by the City Council.—Humbeutel v. City of N. Y., 125 N. Y. S. 2d 198 [1953], aff'd without opinion 283 App. Div. 1011, 131 N. Y. S. 2d 445 and 308 N. Y. 904, 126 N. E. 2d 569.

§ 1148. **Capital budget for calendar year nineteen hundred sixty-two.**—a. In addition to the powers granted to the board of estimate by section two hundred twenty-one of the charter in force at the time of the adoption of this charter, and notwithstanding the provisions of such section or any other law, such board shall have the power, between the twenty-fifth day of November and the fourth day of December, in the year nineteen hundred sixty-one:

(1) to include in the capital budget for the calendar year nineteen hundred sixty-two (a) a lump sum constituting the maximum total amount of new obligations of the city which may be authorized during the calendar year nineteen hundred sixty-two to be incurred on account of projects of the type defined as assessable improvements under provisions of the charter in force at the time of the adoption of this charter; and (b) a lump sum constituting the maximum total amount of new obligations of the city which may be authorized during the period between July first and December thirty-first in the year nineteen hundred sixty-two for the repaving of streets; and

(2) to include as a capital project the repaving of any street, subject, however, to compliance with the procedure and limitations prescribed by section two hundred twenty-one of the charter in force at the time of the adoption of this charter.

b. The maximum total authorizations included pursuant to item (one) of subdivision a of this section shall be part of such capital budget as adopted by the board of estimate and shall be subject to the provisions of sections two hundred twenty-two and two hundred twenty-three of the charter in force at the time of the adoption of this charter. If such maximum total authorizations should cause the authorizations in the capital budget to exceed in the aggregate the amount stated in the mayor's certificate issued pursuant to section two hundred fifteen of the charter in force at the time of the adoption of this charter, the board of estimate may nevertheless adopt or amend the same by a majority of the whole number of votes authorized to be cast by all the members of the board.

c. After the final adoption of such capital budget, the board of estimate shall establish a schedule with respect to each such maximum total authorization, allocating each such maximum total authorization to such specific improvements or repavings, as the case may be, and in such maximum amounts as such board may specify, and may from time to time thereafter amend each such schedule. No obligations of the city shall be authorized in the calendar year nineteen hundred sixty-two for or on account of any improvement of the type defined as assessable improvements by the provisions of the charter in force at the time of the adoption of this charter or in the period between July first and December thirty-first in the year nineteen hundred sixty-two for or on account of the repaving of any street, unless such improvement or repaving is included in a schedule established or amended pursuant to this subdivision or is included as a capital project in the capital budget as finally adopted for such year; nor shall any such obligations be authorized during such periods in excess of the maximum amount of obligations which may be authorized on account of such improvement or repaving as fixed in such schedule or, if such improvement or repaving is included in the capital budget as a capital project, in excess of the maximum amount of obligations which may be authorized on account of such project as fixed in such capital budget; provided that: (1) if such improvement or repaving is included in a schedule established pursuant to this subdivision, such maximum amount may be modified by the board of estimate, as it may deem necessary within the amount fixed in such capital budget as the total maximum authorization for all such improvements or repavings, as the case may be; (2) if such improvement or repaving is included in such capital budget as a capital project, it shall be subject to the provisions of section two hundred twenty-four of the charter in force at the time of the adoption of this charter; (3) any such improvement or repaving may be added to such capital budget as a capital project in accordance with the provisions of such section two hundred twenty-four;

and (4) the maximum total authorizations fixed by the board of estimate pursuant to subdivision a of this section may not be increased during such calendar year.

§ 1149. **Pending assessable improvements; board of assessors; bureau of engineering and chief engineer of the board of estimate.**—a. Any assessable improvement, as defined in section two hundred ninety-one of the charter in force at the time of the adoption of this charter, which was finally authorized by the board of estimate prior to January first, nineteen hundred sixty-two or which was finally authorized by a local board prior to such date, if such local board had jurisdiction to authorize the same, shall be processed to completion and assessments shall be levied and collected therefor in accordance with the provisions of law in force at the time of the adoption of this charter.

b. The board of assessors established pursuant to section three hundred five of the charter in force at the time of the adoption of this charter shall continue to exercise its powers, function and duties until June thirtieth, nineteen hundred sixty-four, in order to complete its functions with respect to assessable improvements finally authorized prior to January first, nineteen hundred sixty-two. Such board shall be abolished as of July first, nineteen hundred sixty-four, and, on and after such date, all of its functions, powers and duties, including functions, powers and duties with respect to change of street grade proceedings, shall be transferred to and exercised by the department of public works or such other department or agency as may be designated by the mayor. Officers and employees in the classified municipal civil service who, on such date, are engaged in the performance of such functions, powers or duties, shall be transferred to the department or agency to which the functions performed by such officers or employees shall have been transferred, without examination and without affecting existing compensation or pension or retirement rights, privileges or obligations of such officers and employees.

c. The bureau of engineering under the board of estimate shall be abolished, as of January first, nineteen hundred sixty-two, and, on and after such date, all of its functions, powers and duties shall be transferred to and exercised by the bureau of the budget or such other department or agency as may be designated by the mayor. Officers and employees in the classified municipal civil service who, on such date, are engaged in the performance of such functions, powers or duties shall be transferred to the bureau of the budget or such other department or agency to which the functions performed by such officers or employees shall have been transferred, without affecting existing compensation or pension or retirement rights, privileges or obligations of such officers and employees. On January first, nineteen hundred sixty-two, all the functions, powers and duties of the chief engineer of the board of estimate, shall cease and terminate, except the function, power and duty of serving as a member of the city planning commission

for the period to and including December thirty-first, nineteen hundred sixty-two. The office of chief engineer of the board of estimate shall be abolished as of January first, nineteen hundred sixty-three.

§ 1149-a. **Capital budget; January first, nineteen hundred sixty-three through June thirtieth, nineteen hundred sixty-four.**—In the year nineteen hundred sixty-two, a capital budget for the eighteen-month period from January first, nineteen hundred sixty-three through June thirtieth, nineteen hundred sixty-four shall be prepared and adopted at the times and in the manner prescribed by and in accordance with the provisions of law in force at the time of the adoption of this charter with respect to the adoption of a capital budget for an ensuing calendar year. Wherever the term "the ensuing calendar year" appears in such provisions of law it shall, solely for the purposes of this section, be deemed to refer to the period from January first, nineteen hundred sixty-three through June thirtieth, nineteen hundred sixty-four, provided, however, that the capital projects which may be included in such budget for such eighteen-month period shall be those defined in section two hundred eleven of this charter. Such budget, as finally adopted, shall be governed by the provisions of section two hundred twenty-four, two hundred twenty-five, two hundred twenty-seven, two hundred twenty-eight and two hundred twenty-nine of this charter and any other provisions of law in force on and after January first, nineteen hundred sixty-three which is applicable to a capital budget adopted in accordance with the provisions of this charter.

§ 1149-b. **Administration of expense budget for fiscal year nineteen hundred sixty-two–nineteen hundred sixty-three.**—All the provisions of law applicable to the expense budget, which were in force on the date of the adoption of this charter, shall apply to such budget for the fiscal year nineteen hundred sixty-two—nineteen hundred sixty-three during the entire period of such fiscal year.

# CHAPTER 52

## GENERAL PROVISIONS

§ 1150. **Definitions.**—For the purposes of this charter:

1. The term "city" shall mean the city of New York, and unless the context otherwise requires, shall include the several boroughs.

2. The term "agency" shall mean a city, county, borough or other office, position, department, division, bureau, board or commission, or a corporation, institution, or agency of government, the expenses of which are paid in whole or in part from the city treasury.

3. The term "law" or "laws" shall include the constitution, this charter, any statute, the administrative code, any local law, and any ordinance, rule or regulation having the force of law.

4. The term "statute" shall mean an act of the legislature.

5. The term "maintenance" shall include minor repairs, and in case of doubt the mayor or an officer designated by him shall decide whether a repair is a minor repair.

6. The term "intercepting sewer" shall mean a sewer the principal purpose of which is the interception from other sewers and conveyance of sewage to treatment plants. In case of doubt the board of estimate shall decide whether a sewer is an intercepting sewer.

7. The term "wharf property" shall mean wharves, piers, docks and bulkheads and structures thereon and slips and basins, the land beneath any of the foregoing, and all rights, privileges and easements appurtenant thereto and land under water in the port of New York, and such upland or made land adjacent thereto as is vested in the department of marine and aviation when this charter takes effect or may be assigned to it.

8. The term "the port of New York" shall include all the waters of the North River, the East River and the Harlem River and all the tidal waters embraced within or adjacent to or opposite to the shores of the city.

9. The terms "three-fourths vote" and "two-thirds vote" when they apply to the board of estimate shall mean respectively three-fourths and two-thirds of the total number of votes which all the members of the board are entitled to cast.

10. The term "administrative code" shall mean the administrative code of the city.

11. The term "budget" shall mean the expense budget unless the context otherwise requires.

12. Except as in this charter otherwise provided, the term "real property" shall include real estate, lands, tenements and heredita-

ments, corporeal or incorporeal. (*Derived from former* § 981. *Amended by L.* 1962, *ch.* 998, § 41.)

**CASE NOTES**

¶ 1. Despite the definition of "agency" as contained in this section, the Commissioner of Investigation in the City of New York has no authority under Charter former § 803 to conduct a survey as to the methods and procedures of the clerks of the Supreme Court in Kings County. Thus, a motion to punish a general clerk for contempt for refusal to answer questions was denied.—Matter of Herlands, 170 Misc. 131, 9 N. Y. S. 2d 956 [1939], aff'd 257 App. Div. 935, 13 N. Y. S. 2d 279.

¶ 2. Although Charter former § 891 (now § 1150) provides that the City shall not be liable for any expense incurred by an "agency" of the City for any purpose unless there has been an appropriation therefor, it was not necessary to determine whether the Council for the City of New York was an "agency" within the purview of that section where it was conceded that the plaintiffs, pursuant to a contract with the council, rendered services to its designated committees which were necessary to the operation of the council.—Chambers v. City of New York, 173 Misc. 769, 19 N. Y. S. 2d 79 [1940].

§ 1151. **Effect of this charter on existing law.**—a. All laws and parts of laws relating to or affecting the city of New York or the municipalities consolidated therein in force when this charter as amended shall take effect are hereby repealed and superseded to the extent that the same are inconsistent with the provisions of this charter and no further.

b. All other laws and parts of laws shall continue in force until repealed, amended, modified or superseded.

c. Insofar as the provisions of this charter are the same in terms or in substance and effect as provisions of law in force when this charter shall take effect, relating to or affecting the city of New York, the provisions of this charter are intended to be not a new enactment but a continuation of such provisions of law, and this charter shall be so construed and applied. (*Derived from former* § 982.)

**CASE NOTES**

¶ 1. Former § 982 (now § 1151) of the Charter, which effects the repeal of certain statutes, is limited in its scope by the saving clause in former § 962. (now § 1146).—In re Avenue L., B'klyn, 258 App. Div. 808, 15 N. Y. S. 2d 980 [1939].

¶ 2. Former § 565 provided that an action against a city should be commenced within six months after the cause of action arose. This section was enacted in 1938 as part of the 1938 Charter but in 1937 General Municipal Law § 50-d provided a one year time limitation for the commencement of malpractice actions. The City's contention that Charter former § 565 was a new section was rejected where there were similar provisions in the old charter and former § 982 (now § 1151) provides that a new charter shall not be deemed a new enactment but rather a continuation of existing law.—Grimaldi v. City of New York, 177 Misc. 492, 30 N. Y. S. 2d 366 [1941].

§ 1152. **Time of taking effect.**—This charter shall take effect on the first day of January nineteen hundred sixty-three and thereafter shall control in respect to all the powers, functions and duties of all officers, agencies, and employees of the city as provided

herein, except that paragraph b of section two hundred eleven and chapter twelve hereof shall take effect on January first, nineteen hundred sixty-two. (*Derived from former* § 983.)

§ 1153. **Separability clause.**—If any provision of this charter shall be held invalid or ineffective in whole or in part or inapplicable to any person or situation, it is the purpose and intent of this charter that all other provisions thereof shall nevertheless be separately and fully effective and that the application of any such provision to other persons or situations shall not be affected. (*Derived from former* § 984.)

**CASE NOTES**

¶ 1. Laws of 1934, ch. 867, creating the New York City Charter Revision Commission, the members thereof to be appointed by the Mayor, for purpose of drafting and submitting to the City electors a proposed new Charter, *held* not unconstitutional on ground that under City Home Rule Law § 20 the legislative body of the City had the right to submit a new Charter to the electorate and that the Legislature of the state had no authority to authorize a Charter Commission to do it, since § 20 was changed by the Local Law, and this was within the power of the Legislature to do under Constitution, Art. 12, §§ 2, 3 and 5.—Mooney v. Cohen, 272 N. Y. 33 [1936], rev'g 160 Misc. 537, 290 N. Y. S. 343.

§ 1154. **Short title.**—This charter, adopted by the people of the city of New York under the provisions of chapter eighty-seven of the laws of nineteen hundred sixty-one, shall be known and may be cited as "The New York City Charter." (*Derived from former* § 985.)

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