

[3.0] I. INTRODUCTION: MISUSE OF PUBLIC OFFICE AND MUNICIPAL RESOURCES

Use of municipal resources in New York State is governed by the New York State Constitution, which contains a provision specifically regulating gifts or loans of public monies to private entities. Specifically, the law states, in part, that “[n]o county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking.”¹ This provision prohibiting use of municipal resources for non-governmental purposes limits a municipality’s expenditures to ensure that the focus of municipal spending is the public good and that municipal resources are used only for government purposes. Therefore Article VIII, § 1 of the State Constitution, the so-called “Gift and Loan Clause,” serves as a way to control the use of municipal monies and resources. It aims to ensure that private citizens do not use municipal resources for their own benefit and thereby helps to preserve government resources for the public. Such a provision establishes the parameters for use of municipal resources as well as the behavior of the public officials charged with their oversight. Where municipal resources are spent or used in ways inconsistent with the doctrine of the Gift and Loan Clause, public officials may be held responsible for serving their own interests rather than those of the public. Moreover, municipal statutes, such as those adopted by New York City, set forth a code of conduct for public officials intended to prevent any use of public office for private gain. The role of a public official is to serve the public, just as the function of municipal resources is to benefit the public. The laws and cases discussed in this chapter investigate that idea and provide a survey of the current jurisprudence.

This chapter explores the statutes, opinions, and case law governing use (and defining misuse) of municipal resources and public office, exploring the restrictions in place to preserve use of municipal resources and public office for the good of the public, rather than for the benefit of

1 N.Y. Const. Art. VIII, § 1; N.Y. Const. Art. VII, § 8(1) similarly prohibits use of state funds for private purposes. Cases decided under one of these provisions inform interpretation of the other. See, e.g., *Union Free Sch. Dist. No. 3 of Town of Rye v. Town of Rye*, 280 N.Y. 469, 21 N.E.2d 681 (1939) (“section 1 of article VIII was formulated for the protection of the finance of local units, and similar provision made in article VII to protect the finances of the State”); *Markovics v. Eckert*, 166 Misc. 2d 989, 638 N.Y.S.2d 278 (Sup. Ct., Monroe Co. 1996) (applying Article VII case (*Schulz v. State of N.Y.*, 86 N.Y.2d 225, 630 N.Y.S.2d 978 (1995)) to interpret Article VIII); *Schulz v. State of N.Y.*, 198 A.D.2d 554, 603 N.Y.S.2d 207 (3d Dep’t 1993) (applying Article VIII cases to interpret Article VII); *In re United Nations Dev. Dist.*, 72 Misc. 2d 535, 339 N.Y.S.2d 292 (Sup. Ct., N.Y. Co. 1972) (same).

private interests. It aims to provide an overview of the state of the law in this area, as well as providing an example of statutory provisions for the City of New York and a proposal for a model law governing use and misuse of municipal resources. While by no means an exhaustive summary, this chapter will hopefully provide a working knowledge of these important provisions.

[3.1] II. NEW YORK STATE CONSTITUTIONAL PROVISIONS

The primary source and appropriate starting point for a discussion about misuse of public office and municipal resources in New York State is the New York State Constitution, specifically the Gift and Loan Clause excerpted above.

[3.2] A. History of the Gift and Loan Clause

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

2 *New Windsor Volunteer Ambulance Corps., Inc. v. Myers*, 442 F.3d 101, 112 (2d Cir. 2006) (citation omitted).

3 *Sun Printing & Pub. Ass’n v. Mayor of City of N.Y.*, 152 N.Y. 257, 46 N.E. 499 (1897).

4 *Landmark West! v. City of N.Y.*, 9 Misc. 3d 563, 571, 802 N.Y.S.2d 340 (Sup. Ct., N.Y. Co. 2005).

[3.3] B. What Is a Public Purpose?

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

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

The question of whether a particular use or expenditure is for a public purpose is the key determination of whether an action is permissible or prohibited by the Gift and Loan Clause. Various court opinions, informal

5 *Schulz v. Warren Cnty. Bd. of Supervisors*, 179 A.D.2d 118, 122, 581 N.Y.S.2d 885 (3d Dep’t 1992) (quoting *Sun Printing*, 152 N.Y. at 265).

6 *See, e.g., Town of Rye*, 280 N.Y. at 474 (holding that “[p]ublic moneys should be used for public purposes; therefore, gifts or loans of public money or property may not be made to an individual or private corporation or association or private undertaking” (emphasis in original)). Note, however, that “there is no prohibition against gifts of moneys to a public corporation for a public purpose, at least where the local unit does not borrow the money so given or loaned.” *Id.* (emphasis original). By contrast, Article VIII, § 1 does prohibit a municipality from using its credit to aid even a public corporation or association. *Id.*

7 *Landmark West!*, 9 Misc. 3d at 568–69, citing *Schulz*, 179 A.D.2d at 121–22.

8 *Schulz*, 179 A.D.2d at 122.

9 Informal Op. of Att’y Gen. of the State of N.Y. No. 92-30 (Op. Att’y Gen. (Inf.)).

10 *Landmark West!*, 9 Misc. 3d at 569.

Attorney General's Opinions, and informal Comptroller's Opinions provide guidance and suggest that defining public purpose relies on the touchstone of whether the primary beneficiary is the public or a private entity. There are some bright-line prohibitions, where municipal resources are being used for obvious non-governmental purposes. In such situations, the Gift and Loan Clause serves to reinforce what might be seen as clear and intuitive rules of conduct regarding the behavior of governmental officials and the use of governmental resources.

However, other violations of the Gift and Loan Clause are less obvious, if not counterintuitive. For example, a school district may not expend municipal resources to exhort the public to vote in favor of the proposed school budget.¹¹ Moreover, even good intentions can be problematic, if the actions of a municipality violate the Gift and Loan Clause. Intent is trumped by the application of the public purpose standard, which requires an examination of who truly benefits from the municipal action, even if done with a worthy and seemingly public-serving purpose. As in all situations, the determination of whether an action is prohibited by the Gift and Loan Clause is a question of whether the action itself furthers a municipal obligation, sometimes leading to results that appear to frustrate good intentions but are consistent with the public purpose test.

While it may be in the best interest of a municipality to encourage recycling, for example, a town may not make gratuitous payments to private individuals who voluntarily assist the town in coordinating volunteers from not-for-profit organizations in providing services in connection with the town's recycling program.¹² Such payments would be prohibited gifts from a municipality to private citizens, however noble the intentions and however helpful the private citizens in carrying out actions intended to benefit the municipality, since the municipality has no obligation to pay

11 See *Phillips v. Maurer*, 67 N.Y.2d 672, 499 N.Y.S.2d 675 (1986) (holding that advertisement exceeded the publication of information "reasonably necessary to educate the public (Educ. Law § 1709(33))"; *Schulz v. State of N.Y.*, 86 N.Y.2d 225, 235, 630 N.Y.S.2d 978 (1995) (holding that the guidelines set forth in *Phillips* "express the constitutional line of demarcation under article VII, § 8(1)").

12 Informal Op. of the Comptroller of the State of N.Y. No. 2002-9 (Op. State Compt. (Inf.)). "[A]rticle VIII, [Section] 1 is applicable even if the private activity is not undertaken for profit and serves a laudable purpose. Accordingly, as a general rule, a town may not make outright contributions to a private individual or entity even if in furtherance of a proper municipal purpose. There is no violation of [A]rticle VIII, [Section] 1, however, if municipal moneys are paid to a private individual or entity in furtherance of a proper municipal purpose pursuant to a duly authorized contractual arrangement under which the municipality receives fair and adequate consideration." (internal citations omitted).

such individuals without a contractual commitment or statutory requirement.

Thus, as the decisions and opinions suggest, each case is evaluated on its own merits based on whether the use of the municipal funding or resource furthers a municipal obligation, and the outcome in a particular case will depend on how the court or opining agency answers that question. If the answer is that the intended use of municipal resources is seen to conflict with or otherwise inhibit the performance of governmental obligations, then there is no public purpose, and the action violates the Gift and Loan Clause.

[3.4] C. What Is Prohibited?

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

[3.5] 1. Actions Taken by the Municipality

[3.6] a. Municipal Spending

When a municipality spends public funds or expends municipal resources, it must do so in furtherance of a public purpose. Thus, municipalities cannot pay vendors or contractors a bonus or any form of additional compensation in excess of the fixed contract amount, even to reward outstanding performance,¹³ because the payment of supplementary compensation is considered beyond the contractual duty of the municipality, so the municipality would be voluntarily providing the additional funding. In other words, the municipality would be gifting the supplementary payment to the private vendor. Such an action, which is beyond the municipality's obligation, has been deemed not for a public purpose and therefore prohibited by the Gift and Loan Clause. The public

¹³ Cf. Op. State Compt. (Inf.) No. 80-752 (concluding that payments of salaries to village employees in excess of amount set in collective bargaining agreement would violate the Gift and Loan Clause); *Lecci v. Nickerson*, 63 Misc. 2d 756, 313 N.Y.S.2d 474 (Sup. Ct., Nassau Co. 1970) (concluding that the "termination pay" provided for in a collective bargaining agreement is a form of earned compensation, not a reward or gratuity granted at retirement, and therefore not a violation of the Gift and Loan Clause).

resource, municipal funding, is being spent to enrich a private entity. Thus, as the Court of Appeals has held, “a governmental entity may not compensate a person who performs an act which the government had no duty to undertake.”¹⁴

Additionally, a municipality cannot accept payment for less than adequate consideration in a transaction with a private citizen.¹⁵ Just as providing overpayment is a gift to a private citizen, permitting underpayment is also considered a gift to a private citizen. When a municipality sells a municipal asset to a private entity for less than its value, the municipality is giving the private entity the benefit of a lower price, at a cost to the public, which receives less than what it is owed for the sale.¹⁶ The discount provided to the private citizen is itself a gift, since the municipality is accepting less than the value of the service or item. Informal opinions have found, in cases discussing underpayment and the general provision of discounts from municipalities to the members of the public, that there is no government purpose where the primary beneficiary is a private citizen, so there is no public purpose to such a transaction.

It follows that any type of outright gift, however notable, from a municipality to a private citizen or entity, is also prohibited by the Gift and Loan Clause, even if the municipal contribution is in furtherance of a proper municipal purpose.¹⁷ The New York State Comptroller has specifically found that the voluntary payment of a stipend by a municipality is prohibited by the Gift and Loan Clause as impermissible use of municipal

14 *Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 353, 422 N.Y.S.2d 932 (1979) (citation omitted). The Court in *Corning* held that, in the absence of authorizing legislation, a municipality could not reimburse municipal officers for legal expenses incurred in the successful defense of a civil rights action brought against them for acts performed in their official capacity, as such reimbursement “would constitute a gift of public funds for a purely private purpose, a matter expressly forbidden by our Constitution.” *Id.* at 350 (citation omitted). *See also* Op. Att’y Gen. (Inf.) No. 2002-4, where the Attorney General similarly determined that without “express or implied authority” to commence a lawsuit, a municipality may not reimburse an individual member of a legislative body for litigation expenses incurred in bringing an unsuccessful legal action.

15 *See* Op. State Compt. (Inf.) No. 81-228.

16 The N.Y. State Comptroller has held that a transfer of property is a gift if it is given “without or for only nominal consideration.” *Id.*

17 Note that, however, the value of the gift may be an essential fact. The Comptroller has held, in an informal opinion, that a school district may present to a retiring school official a framed, canceled bond as a token of appreciation to a long-time employee without violating the Gift and Loan Clause, because such a gift would be of nominal value. *See* Op. State Compt. (Inf.) No. 99-11. This opinion suggests that perhaps gifts of nominal value would not be prohibited by the Gift and Loan Clause, since they are not in fact prohibited provision of a municipal resource for private benefit.

funds.¹⁸ As viewed in the above examples, the Gift and Loan Clause serves an important function as a check on municipal authority, and ensures that when municipal resources are expended, they benefit the public at large and cannot be used for the benefit of certain individuals, a real and longstanding concern.

[3.7] b. Use of Municipal Resources

Further, a municipality cannot use its resources to maintain private property. As noted above, the Attorney General has determined, in several informal opinions, that a municipality cannot use public resources to maintain a private street.¹⁹ The reasoning remains the same in each issued opinion: the provision of these services would afford a private entity an unconstitutional gift of public funds, in violation of the Gift and Loan Clause. For example, although a municipality may establish standards for the maintenance of private roads, unless the road is itself public, a municipality has no authority over such a road, and therefore no responsibility to maintain it. Therefore, without the legal obligation to maintain, there is no governmental purpose and no permissible use of public funding and resources in maintaining the private road. The intended beneficiary in such instances would be private property.²⁰

It follows that a municipality cannot regularly plow and sand a private road belonging to a disabled individual, except in an emergency situation, because doing so would not be performed to further a town purpose and therefore be a prohibited gift under the Gift and Loan Clause.²¹ In this example, as in previously discussed cases, a municipality's laudable intentions are secondary to its obligation to uphold the Gift and Loan Clause (and to act only where there is statutory authority), with the result that the test of public purpose always controls the use of municipal resources. While it is no doubt praiseworthy for a municipality to want to help a citizen who may be without the resources or ability to help himself or herself in the absence of a statutory obligation to provide aid, the municipality is gifting services to the citizen, thereby violating the Gift and Loan Clause. The same is true if a municipality mistakenly acts in

18 Op. State Compt. (Inf.) No. 2002-9.

19 The New York State Comptroller has agreed in an informal opinion, stating that "a town may not use town personnel and equipment to remove snow from private roads and driveways." Op. State Compt. (Inf.) No. 90-59.

20 See Ops. Att'y Gen. (Inf.) No. 87-2; No. 92-30; No. 99-17.

21 See Op. State Compt. (Inf.) No. 90-59.

furtherance of a governmental obligation, such as if a municipality provides lighting for a private right-of-way, under the erroneous belief that the right-of-way was a village street.²² Because the municipality is providing its services for the benefit of private citizens and not as required for the upkeep of public streets, “unless the lighting is intended primarily to further a village purpose and only incidentally benefits the private right-of-way,” such an action is prohibited as an unconstitutional gift in violation of the Gift and Loan Clause.²³

These applications of the Gift and Loan Clause to the maintenance of private property underscore the relevance of the public purpose standard and serve as a reminder that this constitutional provision is intended to preserve municipal resources for the public good. In each example, the municipality has acted beyond its legal obligation, and in doing so has bestowed a special benefit on private citizens. If a road is private, there is no public purpose in maintaining it, and therefore no authority to use public funds. This restriction serves the dual function of limiting the activities of a municipality to those required to serve the public and preventing members of the public from unfairly benefiting from the services provided by municipal resources.

[3.8] 2. Actions Taken by the Public Servant

Where public servants themselves use municipal resources, the same rules apply. Municipal resources and funding cannot be used for non-governmental purposes, meaning that public servants are not permitted to use public resources for private benefit. Such actions would be a misuse of public office for personal gain. For example, while town equipment and town personnel could be used to perform work on private property if the primary purpose of such work furthers a “proper town purpose,” the Comptroller has opined that municipal equipment is acquired for municipal purposes only.²⁴ Therefore, if a public servant uses a municipal resource, such as the town snow plow, for his own personal use, including running his own snow-clearing business, such use would be inconsistent

22 See Op. State Compt. (Inf.) No. 93-25.

23 *Id.*

24 Op. State Compt. (Inf.) No. 92-42 (“It is a general rule that, because town equipment is acquired for town purposes, and town personnel is hired to perform services for the town, a town may not perform work on private property in furtherance of purely private purposes even if fair and adequate consideration is paid to the town under a contract. It is not an improper use of town equipment and personnel, however, to perform work on private property if the work primarily furthers a proper town purpose and is undertaken pursuant to a statutory or contractual obligation, although the work may also provide an incidental private benefit.” (internal citations omitted)).

with the pronouncement from the Comptroller limiting use of municipal equipment for a public purpose. Further, a municipal employee may not use the services of the county attorney for personal legal representation, as this would be considered a prohibited use of public resources in violation of the Gift and Loan clause.²⁵

When a municipal employee co-opts municipal resources for private use, he or she receives a personal benefit from public resources in violation of the Gift and Loan Clause. Court decisions and informal opinions have consistently found that use of municipal funding or resources to benefit a private citizen or entity is a prohibited unconstitutional gift. Since the primary purpose in each circumstance was to provide a private benefit, there was no governmental purpose to permit use of the municipal resource. The actions of these municipal employees did not further the function of the municipality, but instead furthered the personal interest of the employee himself or herself. Therefore, because of their misuse of government resources for personal benefit, these public servants misused their public office as well. Just as the Gift and Loan clause operates to limit the uses of municipal resources to ensure the beneficiaries remain the public, it also works to restrict the actions of municipal employees. Where there is no public purpose, a municipal officer's use of municipal resources is for his or her own personal benefit and abuses the privileges of public office.

An examination of cases and opinions on impermissible uses of municipal resources reveals a common and familiar thread: the presence or absence of a governmental purpose. Though a municipality's role may be broad, and in some cases include actions which provide an incidental private benefit, the limitation imposed by the Gift and Loan Clause provides a check on the ability of a municipality and its officers and employees to use municipal resources for private purposes. Such a restriction preserves municipal resources for the benefit of the public rather than allowing these resources to be used for the advantage of a select few. Just as private citizens are not permitted to receive the benefit of public services in the absence of a governmental obligation to act, public servants are not permitted to use municipal resources for their own use, personally profiting from public office to the detriment of the municipality and of the public at large.

25 See Op. Att'y Gen. (Inf.) No. 97-20.

[3.9] D. What Is Permitted?

The Gift and Loan Clause is designed to prevent the use of municipal resources for private purposes. What is permissible is use of municipal resources for municipal purposes. So, for example, a municipality properly uses its municipal resources to repair public roads and properly uses municipal funds to buy property from a private citizen to construct a town hall (provided the consideration for the purchase is not excessive). Generally speaking, municipal resources can be used to further a public purpose, the touchstone of the Gift and Loan Clause. The permitted uses of municipal property are united by the common finding of public purpose, a standard that remains the central focus of this and any analysis of misuse of public office and public resources.

[3.10] 1. Compensation

While courts have determined that municipal payment of compensation beyond what is fixed by law or contract is prohibited by the Gift and Loan Clause,²⁶ compensation consistent with the terms and conditions of employment is not considered conferring a gift on a public employee.²⁷ Specifically, compensation has been defined to include an employee's base pay, earned sick leave benefits, accrued vacation time, and fringe benefits,²⁸ as well as health and life insurance benefits, military leave, and pensions.²⁹

Whether payment is held to be proper compensation or unjust advantage depends upon the terms and conditions of employment. If the payments are outside of the compensation package, then they are a prohibited gift; if they are not outside of the package, then they are not a gift and are permitted under the Gift and Loan Clause. Once again, the key question is whether the municipality is using public funds to meet an agreed-upon obligation or to bestow a gift. If the municipality goes beyond the bound-

26 See, e.g., *Corning v. Vill. of Laurel Hollow*, 48 N.Y.2d 348, 354, 422 N.Y.S.2d 932 (1979).

27 *Id.* ("This is not to question the power of the municipality to enact an ordinance empowering it to defend its officials who in the future may be charged with violating the law in the performance of their duties. Such a considered policy decision would raise no constitutional objections, for the cost of the defense would simply be considered additional remuneration" (citations omitted)); *Local 456 Int'l Bhd. of Teamsters v. Town of Cortlandt*, 68 Misc. 2d 645, 649, 327 N.Y.S.2d 143 (Sup. Ct., Westchester Co. 1971) (holding that an agreement to pay health and life insurance benefits constitutes compensation as one of the terms and conditions of employment, permissible under the Gift and Loan Clause).

28 See *Taylor v. McGuire*, 100 Misc. 2d 834, 837, 420 N.Y.S.2d 248 (Sup. Ct., N.Y. Co. 1979).

29 *Local 456*, 68 Misc. 2d at 649–50.

aries of its obligation, or acts in situations where it has no obligation, it is performing an act it had no duty to undertake. This, by definition, is not a governmental obligation.

The same is true when a municipal employee acts purely in his or her own interest or entirely in the interest of a private entity, actions which reflect a misuse of official position. The beneficiary receives a gift from the municipality, which is precisely the evil the Gift and Loan clause was intended to prevent. But when a municipality, or a municipal employee acting on behalf of the municipality, uses municipal resources to provide a public service or for a governmental purpose, the use is permissible, as the beneficiary is the public and the municipality is properly using its own resources to further its own obligations to serve the public. Therefore, a finding of a municipal obligation appears to be the determining factor in such cases, consistent with the Gift and Loan Clause analysis.

[3.11] 2. Incidental Private Benefit

A municipality may provide an incidental private benefit in furtherance of a governmental obligation. This means that where the primary purpose of a municipal action is to serve the public good, a municipality may use governmental funds and/or resources even if the result also bestows a benefit on private property or private citizens. As held by the Office of the State Comptroller, “when towns make expenditures to maintain, repair, or improve private property, they will not contravene [the Gift and Loan Clause] so long as the expenditures only incidentally benefit the private property owner.”³⁰ The examples that follow demonstrate that where a public purpose is the principal reason for municipal action, the incidental grant of a private benefit would not violate the Gift and Loan Clause. Note that, however, the private benefit must be incidental, so that the outcome cannot be the use of municipal funds for the sole purpose of assisting private individuals or private property, which would be a prohibited action.³¹

Applying this principle, a municipality may expend municipal funds to pay for an improvement to private property if doing so furthers a public purpose. For example, a town may use government monies to alleviate a

30 Op. State Compt. (Inf.) No. 2002-4.

31 “There also may exist, however, situations when it would not contravene article VII, [Section] 1 to expend municipal moneys to maintain, repair, or improve private property because the expenditure would further primarily a proper municipal purpose and only incidentally benefit the private owner. It is well established that an incidental private benefit will not invalidate a project which has as its primary object a proper public purpose.” Op. State Compt. (Inf.) No. 89-50 (citations omitted).

drainage problem on private land if doing so would meet the municipality's legal obligation to address the drainage issue, even if the municipal action would be performed entirely on personal property.³² The municipality would certainly be using public monies to improve private land, but would be acting pursuant to a public purpose, as the municipality would be acting in the interest of the public as a whole (and pursuant to its municipal obligation) by using its legally appointed powers to construct or improve drainage in the town.³³ Further, a town may use tax funds to dredge a privately owned waterway within the town if the town determines that the dredging will provide "at most, only an incidental benefit to the private owner and will primarily serve town purposes."³⁴ To ensure that municipal action is consistent with the Gift and Loan Clause, thereby permitting it, a municipal action must be pursuant to a public purpose. Here, actions otherwise consistent with the finding of public purpose and municipal obligation have an unexpected private benefit, but are not performed with the primary intention of granting this private benefit. The key factor is the incidental nature of the private benefit, accompanying an otherwise required or permissible public action. Therefore, a private benefit does not necessarily invalidate a municipal action, but a private entity cannot be the primary beneficiary of the governmental spending.

This distinction is illustrated in an opinion rendered by the Office of the State Comptroller on the subject of the use of town personnel and equipment, a subject discussed above. When a municipality regularly plows and sands a private road belonging to a public official, for the purpose of helping the official, it provides a prohibited gift of municipal resources in violation of the Gift and Loan Clause (and the public official would arguably be misusing his office to benefit himself).³⁵ However, if the residence is also used as the official's public office, the municipality would have an obligation to plow the private property to provide access to the municipal office and would not be providing a gift of free plowing services.³⁶ The same would be true if the municipality plowed *any* private driveway in the event of an emergency to render the road immediately

32 See Op. State Compt. (Inf.) No. 89-20.

33 See *id.*

34 Op. State Compt. (Inf.) No. 2002-4.

35 See, e.g., Op. State Compt. (Inf.) No. 90-59.

36 *Id.*

accessible, an action within the scope of a town's police powers in the interest of public safety.³⁷

In the latter two instances, both held to be valid in an informal opinion, the use of municipal resources is permitted, even though there is a private benefit, because “the private benefit received by the property owner is only incidental to the primary public benefit.”³⁸ It is possible to view the private benefit as more than incidental in these examples, especially where the municipality is providing a service that saves a private entity from expending private funds, such as plowing or drainage, but because the governmental obligation is the primary objective, the Gift and Loan Clause is not triggered.³⁹ If the balance is flipped, and the public use is incidental to the private use, then the municipal action is once again within the territory of actions prohibited by the Gift and Loan Clause because the absence of governmental obligation signifies the gift of municipal monies or resources.

[3.12] E. Conclusion

The Gift and Loan Clause provides a framework for understanding the scope of permissible uses of municipal resources and public offices, setting forth a standard to be applied to the behavior of public officials and the use of governmental funds and property. This code of conduct is rooted in an understanding that municipalities, and their resources, are designed to serve the public and spend their resources on the public good. The Gift and Loan Clause specifically addresses the concern that municipalities will become captured by private interests, whether those of its own officials or of a small group of individual citizens, whose goals are not necessarily aligned with those of the general public. When a municipality makes a gift of its resources to private entities, it deprives the public at large of the benefit of that resource. By following the guiding principle of the public purpose, as examined in the cases and opinions discussed in this section, a municipality can preserve its resources for the benefit of all citizens.

37 *Id.*

38 Op. State Compt. (Inf.) No. 90-59.

39 See, e.g., *Denihan Enterprises v. O'Dwyer*, 302 N.Y. 451, 458, 99 N.E.2d 235 (1951) (“Of course an incidental private benefit, such as a reasonable proportion of commercial space, is not enough to invalidate a project which has for its primary object a public purpose, but the use is not public where the public benefit is only incidental to the private.”).

When, however, a taxpayer believes that a municipality has violated the Gift and Loan Clause, the statute itself cannot provide an immediate means to halt the action. Instead, for injunctive relief, the taxpayer can look to section 51 of the General Municipal Law (Gen. Mun. Law).

[3.13] III. GENERAL MUNICIPAL LAW SECTION 51

When a taxpayer believes that a municipality or a municipal official has wrongfully used or spent, or is about to wrongfully use or spend, municipal property in violation of the Gift and Loan clause, the taxpayer may challenge that improper action through a suit brought pursuant to Gen. Mun. Law section 51 (Section 51).

[3.14] A. Legal Standard

To maintain a Section 51 action, the proponent must: (1) establish his or her status as a taxpayer, and (2) “allege an official act which causes waste or injury, imperils the public interest or is calculated to work public injury or to produce some public mischief.”⁴⁰ The legal standard focuses exclusively on whether an official act meets the showing of “collusion, fraud, or personal gain,”⁴¹ and does not evaluate “questions of legislative policy or administrative discretion.”⁴²

A contract or a transaction that violates the Gift and Loan Clause may form the basis of a Section 51 action.⁴³ Section 51 therefore offers a legal remedy to enforce the prohibitions of the Gift and Loan Clause and may be used to void a particular transaction or action as wasteful and illegal.⁴⁴ Taxpayers can also sue under Section 51 to prevent official acts that are either fraudulent or a waste of public property, in violation of the Gift and

40 *Schulz v. Warren Cnty. Bd. of Supervisors*, 179 A.D.2d 118, 121 n.2, 581 N.Y.S.2d 885 (1992) (citing, *inter alia*, *Korn v. Gulotta*, 72 N.Y.2d 363, 534 N.Y.S.2d 108 (1988)).

41 *Duffy v. Longo*, 207 A.D.2d 860, 865, 616 N.Y.S.2d 760 (2d Dep’t 1994).

42 *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 134, 256 N.Y.S.2d 584 (1965) (citing *Campbell v. City of N.Y.*, 244 N.Y. 317, 328, 155 N.E. 628 (1927)).

43 *See Schulz*, 179 A.D.2d 118.

44 *See, e.g., id. See generally Korn*, 72 N.Y.2d 363 (non-Gift and Loan Clause Section 51 declaratory judgment action).