

ULSTER COUNTY ATTORNEY

BEATRICE HAVRANEK
County Attorney

CLINTON G. JOHNSON
First Assistant County Attorney



MICHAEL P. HEIN
County Executive

Assistant County Attorneys

JONATHAN T. ENGEL
KRISTIN A. GUMAER
TRACY STEEVES
MARISA J. HANSEN
ROBERT J. FISHER

Disaster Assistance Coordinator
ROBIN PERUSO

MEMORANDUM

TO: Hon. Elliot Auerbach, Comptroller

FROM: Beatrice Havranek, Esq.
Office of the County Attorney *BLH*

DATE: October 5, 2015

RE: Opinion – Electric Charging Station

ISSUE

This opinion is in response to your draft opinion to the Chairman of the Legislature, dated September 16, 2015, in regards to the above referenced matter. You raise the issue, but come to no conclusion, as to whether or not the fact that Ulster County does not charge a user fee for vehicle electric charging stations, violates the prohibition gift-giving clause of the State Constitution. It is my opinion, as set forth fully below, that it does not.

FACTS

I. The Electric Charging Station

This past spring, Ulster County (the "County") began the installation of nine electric vehicle charging stations at public county facilities. The County now has the most municipally hosted charging locations of any municipality in the state. The charging station equipment and software was funded through the Governor's ChargeNY initiative. The grant provided funding which covered the cost of the charging stations, the mounting pier, software and subscription to Chargepoint network. Funding was ten thousand five hundred fifty dollars (\$10,550.00) per station for a total of ninety four thousand nine hundred fifty dollars (\$94,950.00).

Chargepoint network allows extensive monitoring of the charging time, the amount of time vehicles occupy the station (including non-charging time), total energy consumed, rate at which energy is consumed, and zip code of driver. The County's charging stations have been on the Chargepoint network since mid- July of 2015. As of October 5, 2015, the County has

provided a total of 736 kilo watt hours to charging vehicles at its 135 charging sessions since that time. This is a total of ninety-five dollars and sixty-eight cents (\$95.68) of electricity costs and an average cost to the County of sixty-two cents (\$0.62) per charging session.

This project provides the infrastructure necessary to yield multiple levels of environmental and economic benefit. It provides infrastructure necessary for the electric vehicles currently authorized for purchase by the Ulster County Legislature (the "County Legislature") for the County's own fleet. The project further supports the Sustainable Green Fleet policy and local law recently enacted by the County.¹ It further supports County employees by providing workplace charging, provides a robust network of charging stations for area residents, and provides an attractive network of charging stations to attract regional electric vehicle drivers to the County.

Regional electric vehicle owners who have used Ulster County's charging stations have included drivers from Buffalo, Rockland County, Westchester County, New Jersey, Connecticut, Vermont, Pennsylvania and West Hollywood, California. The electric vehicle community actively seeks locations which they charge on longer road trips as well as destination locations for excursions. The County has been contacted by various drivers who have used our stations and plan to use our stations in both capacities. Electronic vehicle drivers shop, eat, recreate and otherwise spend money while their cars are charging. Copies of Facebook posts and comments taken from local newspaper articles which demonstrate this are annexed hereto and made a part hereof as Exhibit "A." Aside from the recognized environmental benefits, tourism and economic development has been the beneficiaries of this program. The program has had a net effect of promoting the County.

In addition, according to *CHARGED Electric Vehicles Magazine*, 63% of public electric vehicle charging stations are offered for free. A copy of the map depicting just a portion of the Hudson Valley and Catskill Mountain region is annexed hereto as Exhibit "B" and indicates areas where charging stations are available.

Public entities and municipalities also offer no fee charging including Metro North, the City of Rochester, and the State University at Albany. In fact, the stations installed by the City of Rochester in their municipal parking garages were funded by the same ChargeNY program as our stations.

II. Other Recent Issues

a. The Chamber of Commerce Breakfast

On November 21, 2014, I rendered an Opinion to Deputy Ulster County Comptroller Joseph Eriole, a copy of which is annexed hereto and made a part hereof as Exhibit "C". The subject of that Opinion was the issue as to whether or not the Ulster County Comptroller's (the "Comptroller") request for four hundred fifty dollars (\$450.00), representing payment to the Ulster County Chamber of Commerce (the "Chamber") for attendance at a breakfast by local high school students and guests who were not County employees, was permissible. The

¹ Proposed Local Law No: 3 of 2015 (A Local Law Establishing a Sustainable Green Fleet Policy)

breakfast took place in June of 2014 and the Comptroller sought an opinion after the Ulster County Commissioner of Finance (the "Commissioner") raised an issue as to this request. Deputy Comptroller Eriole advised that "this is for the students and their guests who are honored at the breakfast." The only documentation that was provided to me was a request for payment filed with the Commissioner by the Comptroller's office. The Comptroller advised that the basis for this request was that he was honoring local high school students for their economic development/entrepreneurial achievements.

I had requested and was promised additional documentation from both Deputy Comptroller Eriole and the Comptroller that would support the Comptroller's position that this should be paid. Although both the Deputy and the Comptroller advised that they would provide same, it was never delivered to my office.

Subsequently, I rendered a further Opinion dated February 4, 2015, to the Commissioner of Finance Burton Gulnick, Jr., that the requests for payment to the Chamber for these "guests" should be paid for the services in light of the fact that it had already rendered services on June 24, 2014; and the Chamber had an expectation that they would be paid for by the County. A copy of that Opinion is annexed hereto and made a part hereof as Exhibit "D." The issue was reviewed solely as to whether or not the County had a duty to pay the Chamber for the services it rendered. I concluded that the Chamber was due payment for the invoices it submitted under the legal theory of account stated. The Chamber rendered the services in good faith and the belief that it would be paid thereby resulting in a liability to the County to pay for the services. As I clearly stated in the conclusion of that Opinion, I did not modify my previous Opinion of November 24, 2014, to wit: that the County may not pay for tickets/and or meals of the students and their guests at the Chamber breakfast as it contravened Article VIII, Section 1 of the New York State Constitution.

Based upon the limited information provided to me, the Comptroller's program of paying for guests at the Chamber breakfast, it was my opinion that this program had not had a net effect of promoting the County.

b. The Ulster County Legislature's Calendar and Photos

On January 29, 2015, I met with Deputy Comptroller Eriole regarding his request for review of various other matters, including an issue he had with the Ulster County Legislature's (the "Legislature") invoices for calendars and photos that it was being invoiced for. Previously, the Legislature had held a photo contest for the purpose of choosing photo(s) to be used on the cover of the 2015 Ulster County Directory. The winning photo was used on the directory, some of the photos were reproduced and framed, and a calendar was created with photos from that contest. The directory and the calendars were distributed to the public free of charge; and photos that were reproduced were displayed in the Legislative offices. Annexed hereto and made a part hereof as Exhibit "E" are the invoices that Deputy Commissioner Eriole provided to me with his notes. He stated in his notes, among other things, that "We are not authorizing payment til [sic] the "policy" on such items is clarified." The invoices are from Color Page in the amount of one thousand three hundred ninety-seven dollars (\$1,397.00) and from Timely signs in the amount of two hundred thirty-four dollars (\$234.00).

I advised Deputy Comptroller Eriole that these Legislative activities had a net effect of promoting the County of Ulster and had a public purpose; and, as such, did not violate the "gift giving clause" of Article VIII, Section 1 of the Constitution. Thus, they should be paid. I offered to write an opinion, but he did not want one, nor did he want any e-mails as well. I presume the matter was resolved as the invoices were approved by the Comptroller's Office and subsequently paid by the County.

c. Public Use of Electric Charging for Electronic and Other Devices

Currently, the public has access to and has accessed electricity for electronic and other devices within and upon County property without paying a fee. The most obvious use is in Legislative Chambers in the Ulster County Office Building, where electricity is used for laptops, phones, and recording equipment by the press and the public.

It is my opinion that this free electrical access is in furtherance of a public purpose and has had a net effect of promoting the County.

THE LAW

The New York State Constitution provides that no county, city, town, village or school district may give or loan any money to, or in aid of, an individual, or private corporation or association. See N.Y. Const. Art. VIII, §1. This is commonly known as the "prohibition against gift giving."

The Gift and Loan Clause of New York State Constitution prohibits a municipality from expending money for the benefit of a private individual or concern unless the expenditure is in furtherance of a public purpose and the municipality is contractually or statutorily required to do so. See Landmark West v. City of New York, 9 Misc.3d 564 (Sup. 2005). Based upon the lack of documentation from the Comptroller's Office, which was requested on more than two occasions from both the Deputy and the Comptroller, I concluded that the payments for Chamber breakfasts for private citizens was not in furtherance of a public purpose that benefits the County. In addition, the County was not contractually or statutorily required to assume the cost of private individuals attending the Chamber breakfast. Thus, it did not meet the two pronged test in Landmark, supra, to wit: (1) it was not in furtherance of a public purpose; and (2) the County was not contractually or statutorily required to pay for the students and their guests for attendance at the Chamber breakfast. However, it was my opinion that the Chamber should be paid under the legal theory of account stated.

There were also various opinions of the State Comptroller that address this or similar issues. One that is fairly on point held that a school board would not contravene Article VIII, §1 by using public funds to pay for the meals of retiring school board members, but that payment for the remaining board members, the school district attorney, the school district administrator and the spouses of the retiring board members would be a prohibition against gift giving under the State Constitution.² In the Chamber matter, the students and their guests clearly fell under

² See Op. State Compt. 83-57.

the latter category. It should also be noted that there was no contractual obligation to pay for the retiring board members' meals.

The Court of Appeals, as well as lower courts, have held that projects receiving public funding that serve a public purpose, do not violate the State Constitution's "prohibition against gift giving" even if the funding provides an incidental benefit to a private individual.³ An incidental benefit is not enough to invalidate a project which has for its primary object a public purpose. The general rule that incidental benefit to private interests does not invalidate a proposed expenditure has been applied in upholding local expenditures against the constitutional objection.⁴

CONCLUSION

The electric charging stations in the County's public parking spaces represent an extremely low cost investment by the County that has the ability to promote and has, even in its early stages, promoted tourism within the County. This, in turn, has resulted in economic benefits to the County. Its effect on the air quality within the County is an environmental benefit no matter how it is measured. The cost of each charge is de minimis, to wit: sixty-two cents (\$.62) per charge, and is incidental to the public purpose and the public benefits that have resulted and will result. In fact, the overwhelming response to this program over the short period of time it has been in place has been positive.

I note that you have referenced in your draft, various opinions of the State Comptroller that address free water service or reductions to private individuals or entities, free or nominal cost for equipment (water pumps) to private individuals, and the gift or less than reasonable value sale of real property to a private citizens or entities by municipal entities or school districts. Factually, there can be no reasonable comparison between these activities, which the State Comptroller deemed violations against the Constitutional prohibition of gift giving, when compared to the County's no fee electric charging stations. It would be tantamount to comparing "apples to oranges." Not only is the vast difference between cost a factor, but the instances cited by the State Comptroller clearly do not arise to an incidental benefit to private interest that has a primary public purpose which is permissible and which the County's program meets.

Finally, the County's no fee electric charging stations represent the new and emerging field of public participation in the local, state and federal goals that address the environment while also providing tourism and, in turn, economic benefits to the County of Ulster. It meets the public purpose test. Thus, it is my opinion that the current program of not charging for the use of the electricity generated at the County's public charging stations does not violate N.Y. Const. Art. VIII, §1.

BH:kpc
Enclosure

cc: Hon. Michael P. Hein, Ulster County Executive (w/enc.)

s/atty/word/Opinion,Comptroller.Electric Charging Stations.092115

³ Murphy v. Erie County, 28 N.Y.2d 80 (1971); Lake George Steamboat Co., Inc. v. Blais, 30 N.Y.2d 48 (1972).
⁴ Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451 (1951).