



OPINIONS
of
the
NEW YORK STATE
ATTORNEY GENERAL



NEW YORK LEGAL PUBLISHING CORP.
136 Railroad Avenue Ext.
Albany, N.Y. 12205
www.nylp.com
PHONE (518) 459-1100 or 1-800-541-2681

COPYRIGHT 2009
BY
NEW YORK LEGAL PUBLISHING CORP.

PRINTED IN THE UNITED STATES

136 RAILROAD AVE. EXT.
ALBANY, NY 12205
WWW.NYLP.COM

(518) 459-1100 OR (800) 541-2681

Filing Instructions

OPINIONS OF THE NEW YORK STATE ATTORNEY GENERAL

FINAL 2008 SUPPLEMENT

Here are your supplementary pages to your 2008 Opinions of the New York State Attorney General binder. We suggest you file these pages promptly, following carefully the filing instructions below.

REMOVE THESE PAGES



None

TAB — FORMAL OPINIONS

None

TAB — INFORMAL OPINIONS

3001 – 3047

8-1-08

TAB — INDEX

1037 – 1048

12-31-08

3001 – 3047

12-31-08

TAB — RECENT JUDICIAL OPINIONS

None

TAB — STATUTORY REFERENCE TABLE

5001 – 5030

8-1-08

5001 – 5030

12-31-08

**After you have filed the above, file this page after the title page.
Correspondence concerning subscriptions should be addressed to:**



NEW YORK LEGAL PUBLISHING CORP.
136 Railroad Avenue Ext.
Albany, N.Y. 12205
PHONE (518) 459-1100 or 1-800-541-2681



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
THE CAPITAL
ALBANY, NY 12224

ADREW M. CUOMO
ATTORNEY GENERAL

(518) 474-7330

Dear Subscriber:

The Attorney General, as counsel for the State and its agencies and officials, has been rendering formal legal opinions for over 200 years. These formal opinions offer advice with respect to the legality of proposed agency actions and the extent of agency powers under state law.

Under the direction of the Attorney General, the Department of Law issues informal opinions to local government attorneys. These opinions are called "informal" in recognition of the municipal attorney's status as chief legal officer of the local government with ultimate responsibility to offer legal advice to local officials. Informal opinions assist municipal attorneys by evaluating the extent of local authority to act under state law. Informal opinions are widely solicited and often address questions of first impression.

I am pleased to continue this important service to state agencies and local governments and encourage you to seek the advice of the Department of Law. This volume contains the opinions issued in 2008.

Sincerely,

ANDREW M. CUOMO

OPINIONS

OF THE NEW YORK STATE

ATTORNEY GENERAL

Opn. No. F 2008-1

29 United States Code §§ 796c, 796d, 796d(b)(2)(B); General Construction Law § 41

Thirteen voting members of the Council constitute a quorum, and at least thirteen voting members must approve a motion for it to pass.

You have requested an opinion regarding the quorum and voting number requirements applicable to the New York State Independent Living Council (“Council”). The Council is established pursuant to 29 U.S.C. § 796d, and is responsible for developing the State’s plan for independent living. *Id.* § 796c. You have explained that the Council is composed of twenty-four voting members and several ex officio members who, by statute, may not vote, *id.* § 796d(b)(2)(B). The voting members are appointed by the Board of Regents. The ex officio members are representatives of state agencies that provide services for individuals with disabilities. *Id.*; *see also* By-Laws of the New York State Independent Living Council 2.7(2).

In Op. Att’y Gen. No. 97-F11, we concluded that the members of the Council were public officers, and that the Council was subject to the voting requirements of General Construction Law § 41. Applying section 41, we concluded that

OPINIONS

OF THE NEW YORK STATE

ATTORNEY GENERAL

Opn. No. I 2008-1

**TOWN LAW §§ 176, 176(2), 176(3), Article 11; General Construction Law
§§ 41, 110**

Pursuant to Town Law § 176(3), two fire commissioners then in office may appoint qualified persons to fill three vacancies on the board.

You have asked how to fill existing vacancies on the board of fire commissioners.¹ We understand that, due to death and resignations, three vacancies occurred on the board in rapid succession, leaving two commissioners sitting on the board.²

Article 11 of the Town Law governs the establishment and operation of fire districts. Section 176 of the Town Law outlines the powers and duties of the fire district commissioners, who constitute the board of fire commissioners. Of particular relevance here, section 176(3) provides that, “[w]henver a vacancy shall occur in any fire district office, the board of

1. Although we have a strict policy of issuing informal opinions only upon the request of the attorney for the local government, we have agreed to render an opinion in response to your request due to the unique circumstances underlying your question. The Fire District currently has no attorney, and your question directly implicates your authority to appoint one.

2. From press reports, we understand that two of the commissioners resigned at a meeting of the commissioners on the evening of February 14. Salle E. Richards, *Two Big Flats Fire Commissioners Resign*, Star-Gazette (Elmira, N.Y.), Feb. 16, 2008, at 2C. One commis-

CUMULATIVE JUDICIAL OPINIONS

2004 OPINION NO. I-1

Godfrey v. Spano, 15 Misc.3d 809, 836 N.Y.S.2d 813 (Sup.Ct. Westchester Co. 2007)

The Attorney General issued an informal opinion, authored by the Solicitor General, which concluded that the New York State Legislature did not intend to authorize same-sex marriages, but that a distinct legal question existed as to whether to recognize same-sex unions from other jurisdictions.

The court dismissed a taxpayer suit against a County Executive who issued an executive order recognizing same-sex marriages contracting in other jurisdictions where such marriages are valid. The ruling affirmed the recognition of a same-sex marriage contracted in Canada. The court noted that the legislature has not done anything here to bar the application of the doctrine of comity, under which the legal acts of foreign countries are recognized here. Courts, as a matter of comity, recognize out-of-state marriages, including common law marriages, unless barred by “positive law” (i.e., statutes) or “natural law” (incest or polygamy) or otherwise offensive to public policy.

2003 OPINION NO. F-3

Ordonez v. Brooklyn Tabernacle, 9 Misc.3d 1102A, 806 N.Y.S.2d 446, 2005 N.Y. Misc. Lexis 1854.

The court held that immigration status was not a bar to his potential recovery for lost wages in a New York court in a tort action brought under common law negligence and the Labor Law. Defendant had cited *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.E.2d 251 (2002). *Hoffman* precludes undocumented aliens from receiving back pay for work not performed because of their violation of the Immigration Reform and Control Act of 1986 (IRCA). However, the court held that *Hoffman* did not preclude New York State from enforcing state wage payments on behalf of undocumented workers. The court cited the 2003 opinion of the Attorney General to that effect. The opinion found *Hoffman* to be limited in its holding, and that nothing in *Hoffman* suggests that the IRCA mandates that undocumented workers forfeit payment for work they have already performed or that, by hiring undocumented workers, employers may evade their legal obligations to make wage payments for work that has actually been performed.

Another court reached a similar result in *Asgar-Ali v. Hilton Hotels Corp.*, 4 Misc.3d 1026A, 798 N.Y.S.2d 342, 2004 N.Y. Misc. Lexis 1547 (Sup.Ct. New York Co), in which the court denied defendant’s motion for discovery of documents relating to plaintiff’s immigration status.

CUMULATIVE STATUTORY REFERENCE TABLE (1990–2007)

ABANDONED PROPERTY LAW:

1310 — Inf. Opin. 2003-17

AGRICULTURE AND MARKETS LAW:

3 — Inf. Opin. 96-41
16 — Inf. Opin. 96-41
17(a) — For. Opin. 95-6
17(c) — For. Opin. 95-6
26 — Inf. Opin. 2006-4
74 — For. Opin. 2003-4
95-c — For. Opin. 2003-4
106 — Inf. Opin. 2005-12
107 — Inf. Opin. 2005-12
108 — Inf. Opin. 2005-12
114 — Inf. Opin. 96-15
114 — Inf. Opin. 2000-17
117-a — For. Opin. 2003-4
119 — Inf. Opin. 2005-12
124 — Inf. Opin. 2005-12
125 — Inf. Opin. 2005-12
192-g — For. Opin. 2003-4
251-z-1, et seq. — Inf. Opin. 96-41
300 — Inf. Opin. 96-49
303 — Inf. Opin. 98-49
303-a — Inf. Opin. 98-49
365 — For. Opin. 2003-4
371 — Inf. Opin. 2001-4
373 — Inf. Opin. 2001-4
Art. 7 — Inf. Opin. 2000-17
Art. 9 — Inf. Opin. 2005-12
Art. 26 — Inf. Opin. 2001-4

ALCOHOLIC BEVERAGE CONTROL LAW:

2 — Inf. Opin. 2003-13
3 — For. Opin. 2004-1
64 — For. Opin. 2004-1
64-a — For. Opin. 2004-1
65-b — Inf. Opin. 2005-14
65-c — Inf. Opin. 2005-14
65-d — Inf. Opin. 2005-14
65(1) — Inf. Opin. 2006-2
65(5) — Inf. Opin. 2006-2
65-a — Inf. Opin. 2006-2
65-b(2)(a), (b) — Inf. Opin. 2006-2
65-c — Inf. Opin. 2006-2

AG 12-31-08

65-d — Inf. Opin. 2006-2
79-c(1) — Inf. Opin. 2006-2
99-f — Inf. Opin. 2006-2
100 (2-a) — Inf. Opin. 2006-2
100 (2-b) — Inf. Opin. 2006-2
106 (17) — Inf. Opin. 2006-2
126 (2) — Inf. Opin. 2006-2
141 — For. Opin. 2004-1
128 — Inf. Opin. 98-57

ALLEGANY COUNTY LOCAL LAW NO. 1:

9 (1992) — Inf. Opin. 98-29

ALTERNATIVE COUNTY GOVERNMENT LAW:

656(2) — Inf. Opin. 95-11

ARTS AND CULTURAL AFFAIRS:

55.05 — For. Opin. 99-4
61.11 — Inf. Opin. 2002-12

BANKING LAW:

6-h — For. Opin. 96-4
14 — For. Opin. 96-4
340 — For. Opin. 2004-5
367 — For. Opin. 2004-5
367(1),(4) — For. Opin. 2006-1
369(1) — For. Opin. 2004-5
369(1) — For. Opin. 2006-1
370 — For. Opin. 2004-5
370 — For. Opin. 2006-1
371 — For. Opin. 2004-5
372 — For. Opin. 2004-5
372 — For. Opin. 2006-1
373 — For. Opin. 2004-5
373 — For. Opin. 2006-1
374(1) — For. Opin. 2004-5
374(1),(2),(3) — For. Opin. 2006-1
491(7) — For. Opin. 2004-5
595 — For. Opin. 2000-6
Art. 9-A — For. Opin. 2004-5
Art. 9-A — For. Opin. 2006-1
Art. 12-D — For. Opin. 2000-6

5001

CUMULATIVE INDEX OF OPINIONS (1990–2008)

Abolition of Position:

Town may abolish position of receiver of taxes — Inf. Opin. No: 2002-3

Absentee Voting:

Whether absentee voting is authorized in an incorporation election by Village Law article 2 — Inf. Opin. No: 2006-1

Acknowledgments:

Procedure for various documents — Inf. Opin. No: 2000-8

Administrative Tribunals:

Adjudication of local violations by tribunals must be authorized by State law — Inf. Opin. No: 97-43

Adjudication of building code violations by tribunal must be authorized by State law. — Inf. Opin. No: 2003-18

Advertising:

City bus system may sell advertising space on city buses through a competitive bidding process — Inf. Opin. No: 95-38

Agriculture and Markets, Commissioner:

May delegate his responsibilities on board of directors of NYS Thoroughbred Breeding and Development Fund Corporation to deputy — For. Opin. No: 95-6

Agricultural District:

County legislative body must take action to terminate district — Inf. Opin. No: 98-49

Air Quality:

Plans and specifications for school building facilities that are potential air contamination sources subject only to review by Department of Environmental Conservation, not the county — Inf. Opin. No: 99-5

Alcohol:

State law does not preempt “teen party host” local law — Inf. Opin. No: 2006-2

Town Property:

municipal property a town may allow the consumption of alcohol on town property, and may implement a permit system to regulate such consumption — Inf. Opin. No: 2003-13