

GENERAL CITY LAW §§ 81, 81(1), 81(3), 81(4), 81(6), 81(7), 81-e; NEW YORK CONSTITUTION §§ IX, IX § 3(d)(1), IX § 3(d)(4); MUNICIPAL HOME RULE LAW §§ 10, 2(5), 2(12); PUBLIC OFFICERS LAW §§ 3(9), 5

The city's charter, rather than General City Law § 81, governs with respect to the terms of office of zoning board of appeal members and the date on which their terms commence.

January 13, 2012

Janet M. Insardi  
Assistant Corporation Counsel  
City of Peekskill  
City Hall  
840 Main Street  
Peekskill, New York 10566

Informal Opinion  
No. 2012-2

Dear Ms. Insardi:

You have requested an opinion relating to whether the provisions of General City Law § 81 or the City's charter govern with respect to the terms of office of appointed members of the City's zoning board of appeals, and also the date on which their terms commence.

The relevant state statute provides that the zoning board of appeals (hereinafter, "ZBA") has either three or five members, as established by local law or ordinance. General City Law § 81(1) (as amended in 1993). The terms of the members of the ZBA are staggered and fixed so that one member's term expires at the end of each official year. *Id.* § 81(3),(4). Thus, the members of a three-member ZBA have staggered three-year terms, and the members of a five-member ZBA have staggered five-year terms. Appointments to fill vacancies are for the unexpired portion of the term. *Id.* § 81(7).

Your predecessor explained that the City's charter, by contrast, provides that the ZBA has seven members, and every member serves a three-year term. Under provisions that apply to all appointive officers, their terms begin on the day after their appointment, unless a different date is specified in each appointee's certificate of appointment. As a historical matter, appointments made to the City's ZBA have conformed to the provisions of the charter rather than the provisions of the General City Law. Further, appointments to fill vacancies have been for full three-years

terms. As a result, the terms of the members of the ZBA are not evenly staggered, as contemplated by General City Law § 81, but expire throughout the year, frequently with the terms of several members ending within the same year, and sometimes on the same day.

The general question posed is which, as between the relevant portions of the City's charter or General City Law § 81, governs with respect to the number of ZBA members and the length and expiration date of their terms. We conclude that the provisions of the City's charter govern.

As an initial matter, the continuation of a seven-member ZBA is not in doubt. When the City created a seven-member board, such a board was expressly authorized by state law, *see* Act of July 24, 1976, ch. 744, § 1, 1976 McKinney's N.Y. Laws 1522, *codified at* General City Law § 81(1) (McKinney's 1989). And the continuation of such a board is explicitly permitted by General City Law § 81(6), until such time as the City's common council chooses to reduce the number of members the ZBA has.

With respect to the effective date of an appointment to the ZBA and the length of an appointee's term, we are of the opinion that the provisions of the City's charter also govern. An explanation of this answer requires an overview of home rule authority.

Article IX of the New York Constitution and Municipal Home Rule Law § 10 grant to local governments the power to adopt and amend local laws relating to a local government's "property, affairs or government," or addressing certain enumerated subjects, including the terms of office of its officers, so long as the local laws are consistent with the Constitution and the *general* laws of the State. For home rule purposes, a general law is one that in terms and in effect applies alike to "all counties, all counties other than those wholly included within a city, all cities, all towns or all villages." N.Y. Const. Art. IX, § 3(d)(1); Municipal Home Rule Law § 2(5). In contrast, a special law is one that in terms and in effect applies to one or more, but not all, of the local governments in one of the same groups. N.Y. Const. Art. IX, § 3(d)(4); Municipal Home Rule Law § 2(12).<sup>1</sup> In broad terms, therefore, a local government can adopt a local law that is inconsistent with a state law if that state law is not a general law, but instead is a special law.<sup>2</sup>

---

<sup>1</sup> These definitions are unique to the home rule context and do not apply in areas in which a local government has no home rule authority. Op. Att'y Gen. (Inf.) No. 92-1; 1980 Op. Att'y Gen. 164.

<sup>2</sup> As stated above, Municipal Home Rule Law § 10 grants local governments power to adopt local laws amending special laws except to the extent that the Legislature restricts the adoption of such a local law with respect to the enumerated subjects insofar as they relate to other than the local government's "property, affairs or government". An example of such a restriction is found in Public Officers Law § 3(9), relating to the residency of certain

A special law will supersede local laws, however, when the special law relates to a state concern, in which case a local law must be consistent with it, *see, e.g., Matter of Kelley v. McGee*, 57 N.Y.2d 522, 539 n.14 (1982), or when the Legislature, in enacting the special law, has evinced an intent to preempt the field of regulation, in which case local legislation is superseded even if it does not expressly conflict with the special law, *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97 (1987).

We previously have opined that section 81 of the General City Law is a special law for home rule purposes because General City Law § 81-e exempts New York City from its provisions. Op. Att'y Gen. (Inf.) No. 96-18; Op. Att'y Gen. (Inf.) No. 95-20. Further, there is no indication that the Legislature intended section 81 either to relate to a matter of state concern or to preclude further regulation in the field by local governments. *Cf.* Op. Att'y Gen. (Inf.) No. 99-6 (no evidence that Legislature intended comparable provision of Village Law to be preemptive or relate to matters of state concern); *compare Matter of Cohen v. Board of Appeals of Village of Saddle Rock*, 100 N.Y.2d 395 (2003) (provision of Village Law imposing statewide standard for area variance review preempted local zoning law). Because we believe the Legislature has not indicated an intent to supersede existing inconsistent local laws, by enacting either a general law, or a special law that preempts the field or that relates to a substantial state concern, we are of the opinion that the City's charter continues to govern with respect to the effective date and length of appointments to the ZBA.

Your predecessor specifically asked whether the City had the power to appoint a new appointee to a full three-year term, even though the incumbent being replaced did not have three years remaining of his or her term. He explained that the City's charter provides that "the term of each appointive officer shall commence on the day next succeeding the appointment unless a different date is specified in the Certificate of Appointment." Thus, when the City first established its ZBA and the original members were appointed, their appointments took effect either the following day or upon the date specified in their certificates of appointment. Their terms expired three years after their appointment.

Because the charter does not provide a specific date on which ZBA members' appointments commence or terminate, we believe that appointments properly have

---

employees of New York City, which begins, "Neither the provisions of this section [requiring residency within the political subdivision], nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation . . . shall apply . . ." This special law relates to a matter of substantial state concern and therefore New York City could not make its local residency law apply to the city employees covered by the special law. *Uniformed Firefighters Ass'n v. City of New York*, 50 N.Y.2d 85 (1980).

been made for full three-year terms running from the day following appointment or the date provided in the certificate of appointment. See *People ex rel. Smith v. Kenyon*, 241 A.D. 177 (3d Dep't) (where no time fixed for beginning of term of county highway superintendent, incumbent takes office for term fixed by law, running from date of appointment); *aff'd*, 265 N.Y. 537 (1934); 1974 Op. Att'y Gen. (Inf.) 284 (same, county commissioner of jurors); 1971 Op. Att'y Gen. (Inf.) 179 (same, county/city commissioner of social services); 1965 Op. Att'y Gen. (Inf.) 42 (same, county commissioner of public welfare); compare *DiPaola v. Reilly*, 22 A.D.2d 910 (2d Dep't 1964) (city council intended to establish successive three-year terms for ZBA that commenced May 1 and appointees were appointed only for the remainder of the holdover terms of their predecessors pursuant to Public Officers Law § 5), *rev'g* 35 Misc. 2d 269 (Sup. Ct. Nassau Co. 1962).

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

KATHRYN SHEINGOLD  
Assistant Solicitor General  
in Charge of Opinions