

# TOWN OF LLOYD TOWN BOARD

## PUBLIC HEARING

OCTOBER 17, 2016

**Present:** Supervisor Paul Hansut  
Councilmember Kevin Brennie  
Councilmember Michael Guerriero  
Councilmember Jeffrey Paladino

**Also present:** Christine Chale, Attorney  
Rosaria Peplow, Town Clerk  
Kate Jonietz, Secretary

**Absent:** Councilmember Joseph Mazzetti

Supervisor led the Pledge of Allegiance

**7:00PM** Supervisor opened the Public Hearing on proposed “Local Law F - 2016; A local law amending Chapter A110 entitled ‘Towing List’ of the Code of the Town of Lloyd”

Supervisor stated that this public hearing is an opportunity for the public to speak in regards to the proposed changes in the Local Law. He would like the public hearing to be conducted in a civil manner and without debate. The Town board will hear the concerns of the public, take those concerns, and move forward. Christine Chale, attorney for the proposed towing ordinance, is present and will address any questions or concerns. There will be no time limit on the comments from the public but he asked that no one repeat what someone else has already said.

### **PRIVILEGE OF THE FLOOR**

Albert P. Roberts stated that he and James Horan are attorneys for Autos by Joseph. They drafted and sent a letter to the Town Board articulating their concerns with the Town’s proposed towing law. He would like the letter to be part of the formal proceedings and introduced into the record. The comments contained in the letter are readily understandable. They concur with Peter O’Connell’s (attorney for Empire State Towing Recovery Association) commentaries concerning the Town of Lloyd’s towing ordinance to a certain degree. There is one major disagreement which is the distinction between consensual and non-consensual towing. The statute is difficult to read, there are double negatives in it but nothing that cannot be resolved by strong heads and willing minds working together to come up with a compromise.

Roberts said they are respectfully requesting to adjourn this public hearing for a period of thirty days to allow his firm and Attorney Peter O’Connell’s firm, if he so chooses, to meet with the Town’s special counsel to work out changes for a more legally enforceable towing law. This is an area of complicated law that has been litigated many times in both the federal district courts and the state supreme court. He is not asking the Town Board to be a panel of judges. He would like the opportunity to resolve the issues in a very amicable fashion with Mr. O’Connell who represents the Towing Association and whomever the Board chooses.

They have some serious concerns on the draft towing law. In their opinion the draft violates quite a number of precepts that have previously been decided by the courts in New York State and in federal courts. The proposed law is in violation, which they

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understand to be very fundamental precepts in this area of law. If the law is adopted as drafted it will have very serious consequences to their client. He said he must emphasize their goal is not litigation rather a workable law that is fair to all. If the law is adopted as drafted it will have to be challenged. This is not a threat but just a reality of doing business under the present towing law. Everyone can agree that it is not in anyone's best interest, not in the interest of the taxpayers or the towing industry. The letter they have submitted is rather comprehensive, citing a number of cases. He believes Mr. O'Connell's memo has articulated some areas of concern and the issues between consensual and non-consensual towing have not been litigated and they would prefer to try to work out the issues and make it workable for all. James Horan is also present this evening and has done extensive research on the litigation of all the cases and they would gladly address any question posed to them.

Supervisor said that the Town Board traditionally leaves the public hearing open for a month so he did not feel a need to adjourn the public hearing. They will leave it open for a month for any written or additional comments.

Roberts replied that under the municipal home rule law, if there are any substantial changes to the law the Town Board would have to have another public hearing.

Supervisor replied that the Board was aware of that.

Brennie interjected that the law is the same law that has been proposed since August 5, 2016.

Roberts said he is in possession of the draft dated September 9<sup>th</sup>.

Brennie said that is the latest draft.

Supervisor explained that he did not think anyone is in a rush. If counsel is willing to speak with them, it is fine.

Roberts said that the direction has to come from the Town Board.

Roberts inquired whether there would be an adjourn date and if it would be thirty days from today.

Supervisor replied that the public hearing will remain open. If there is more information, at the November Regular Town Board meeting the Board will make the decision whether to leave it open longer.

Roberts thanked the Town Board for the opportunity to speak with them.

Paladino asked Roberts to elaborate on consensual and non-consensual towing and if it was directly contradictory to Mr. O'Connell's comments.

Roberts replied that Mr. O'Connell's letter of September 21, 2016 commented that the local municipalities had different rules for consensual and non-consensual towing. They do not disagree with that. They are saying that consensual towing is subject to the same rules as in the Pistolesi v. Calabrese case and the implication is if the police officers direct a car to be towed that brings it into the category of non-consensual. That is subject to the circumstances at the particular scene. If an individual is in an accident and capable of determining which tow truck operator they would like to use, they have that opportunity and it is not governed by the amendments in the federal legislation.

Brennie said the police officer would select from the list and not make a unilateral decision to call anyone.

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Roberts responded that if the individual at the scene is capable of making a decision, the powers with which the federal legislation has exempted do not exempt consensual towing.

Brennie and Paladino both communicated that they were not following what Roberts was saying.

Christine Chale, Town attorney for the towing ordinance, interjected that she would like to ask Roberts if it his understanding that the proposed local law does not include the exception. In two places it states “if a person is able to direct police officers as to the choice of tow then that will be the tow, not a tow off the list”. The only exception to that is an emergency situation where the police have the need to direct a particular tow. She asked Roberts is that not the way he reads the law.

Roberts replied that they are saying the law is not as clear it could be and that is why they are suggesting there should be some wording changes to articulate that in a better fashion.

Chale directed Roberts to turn his attention to the two places in the law that clearly says that, if they are able to, the individual is allowed to direct the tow, with the exception of an emergency. The officers need to be able to act in the best interest, safety and welfare of the client. She asked Roberts if that is not correct.

Roberts said that it did reference that but he is suggesting that it be better articulated in the local law.

James Horan, also attorney for Autos by Joseph, said that prior to the Fast Act of 2015 a local or state municipality only had the ability to regulate for purposes of safety and for purposes of setting rates for non-consensual tows. The cases that dealt with non-consensual tows dealt primarily with issues of illegally parked cars on private property where there is a sign posted the owner has the right to tow the vehicle. The statute said that in that case the municipalities set the maximum rate that the tow operator or property owner would charge for towing the vehicle. In that case the owner of the vehicle was not aware of the tow, had no relationship or was not even present at the tow. That is what a non-consensual tow is according to at least part of the congressional record. There is a discussion of non-consensual tows in the 1999 ACE towing case. Non-consensual tows would be an abandoned vehicle, a stolen car, or an impound because clearly the owner of the vehicle is not consenting to the vehicle being removed. The distinction in the case about consensual versus non-consensual tow is whether or not the owner of the vehicle understands that the vehicle is being towed. If someone has a very broad definition of a non-consensual tow and reads the statute to say any time a police officer calls off the list that that is a non-consensual tow. Many tow operators may require the owner of the vehicle to sign a consent form saying that they consent to the vehicle being towed to the location and these are the estimated tow charges. The owner of the vehicle will sign an authorization to tow the vehicle. The statute specifically says that a state or local municipality may regulate where if the consent or authorization of the owner or operator of the vehicle is not present. In that case one is saying that the owner is not arguably contractually bound to the tow company for purposes of that tow. It raises another issue under the Garage Man’s Lien Law. Under the Garage Man’s Lien Law where the owner of the vehicle does not consent to the tow and the tow is made at the direction of a police officer the towing company has no right to charge storage for the vehicle until such time as the vehicle owner has been notified

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and they have an additional obligation to notify any lien holder if there is a car loan or UCC filed against the car.

Paladino asked if this was about any tow in town. He wanted to know if Horan was arguing if the tow was consensual or non-consensual.

Horan said that is what the federal government applies to tow.

Paladino said that could apply to any town.

Horan said that it could. Mr. O'Connell cites the New York City provisions. New York City does not permit the owner of the vehicle to choose who tows the vehicle. The New York City regulations state that the vehicle must be towed by whomever the police say.

Paladino asked if he was saying that whether it is legal is being challenged.

Horan replied no that was the issue that was decided in the ACE case which happened before 2001.

Brennie inquired as to what part of the towing ordinance is unfair.

Horan replied that they are not saying it is unfair but are trying to explain what the law is.

The federal statute intent is to deregulate, limited to the carriage of property by motor vehicles of any kind of service that delivers or hauls property. The statute is a deregulation statute which is patterned after the federal airline deregulation statute. The states and municipalities cannot set rates for towing in consensual situations. One of the issues in the case is that consensual tows cannot be regulated. There is a provision in the Town of Lloyd local statute that the owner of the vehicle has the right to have whatever tow they want. In that case it becomes consensual and arguably the Town is now preempted from setting a rate on the tow.

Brennie said they did not set a rate on consensual tows.

Horan said the person that does not select off the list is a non-consensual tow; the rate in the nonconsensual tow can be set.

Brennie said that is what they did.

Horan said there are different restrictions. The US Supreme Court said in the case of consensual tows any of those restrictions may only be set for safety reasons. The Pistolesi v. Calabrese case said that two businesses in the same location is not considered to be a safety reason.

Guerrero said it was his understanding that Pistolesi was taken off the towing list and his two companies were banished.

Horan said as far as he is aware the case is still in litigation.

Brennie commented that was the case that Horan cited.

Horan said he did and that he believed it is still in litigation. The case was decided, the federal court said the restriction was not binding. The fact that Pistolesi was removed from the list may be for a different reason than what was cited in the case.

Guerrero said that there were two businesses at the same location and both on a village tow list.

Horan said because of the issues that arise for federal preemption, he thought it is important that the Town make the distinction between consensual and non-consensual tows in the local law to prevent any future challenges. There is no clearly articulated distinction between consensual and non-consensual tows.

Chale asked Horan if he was arguing that there is no distinction whatsoever or is the distinction not as clear as he would like it to be.

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Horan responded that he would prefer that the distinction be more explicit particularly if the owner calls the company they wish, which is allowed in the law; he believes that is clearly a consensual tow. If there is an automobile accident, the vehicle has been damaged but is not creating an emergency situation and the owner of the vehicle does not know anyone in the area and says pick whomever off the towing list, one could make a case.

Brennie asked what the issue is because he is not clear as to what Horan is actually advocating. He questioned whether Horan was saying that the Town cannot have a tow list.

Horan said the federal statute says a town may not regulate a consensual tow.

Chale interjected that is what needs to be clarified. The Town can absolutely have a tow list.

Supervisor did not feel that this was the time to debate that.

Horan said the additional issue which they cite in their letter to the Town Board regards out of town participants. The New York Court of Appeals in the case of Wharram vs the City of Utica, under general municipal law 80 has said that a town cannot prohibit tow companies from outside the municipality who can provide reasonable response times from being on their tow list. The other issue that was raised in the letter is the requirement that in order to be on the list the tow operator had to have an auto body shop. The case of Richard's Service Station, Inc. vs Town of Huntington, dealt with many issues under New York laws, prior to the federal statute. In that case they said there was no rational reason to require a body shop to be on the tow list and it impacted unfairly upon independent tow operators who did not have a body shop.

Guerriero said that is not in the Town of Lloyd proposed towing ordinance.

Horan replied it was because in order to be on the list a tow operator has to have a DMV shop license. It does not make a difference whether it is a body shop or a repair shop license because there is no necessarily rational relationship.

Brennie interjected that the restrictions Horan is referring to were in the old code from 1990 and not in the new one.

Horan said he did not believe the statute was really in effect when the 1990 law was drafted. Since 1990 there have been a large number of cases regarding the tow truck industry at the federal and state level, primarily at the federal level because of the statute. It is not the clearest issue because of the interactions with federal law and the New York State traffic law which prohibits registration of tow trucks by municipalities. Registration is left at the state level. The DMV would expect certain requirements on equipment.

Chale said she would like to clarify one question in regard to what Horan was speaking about. There is a provision in the Town of Lloyd's law that speaks to a peripheral types of equipment for cleaning up a site. She assumed Horan was not objecting to that portion of the law.

Horan replied that he was not at all.

Supervisor said he appreciated their letter and their comments.

Alberts said he did not speak with Chale previously because there was one meeting he attended that there was a concern with the costs with the time the attorney was putting in. His firm will gladly communicate with her suggested changes and she can do what

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she would like with them. He wanted to clarify that they did not do that because he thought there was a prohibition against that.

John DiValentino, resident, said the attorney who spoke this evening said New York City does not allow independent towing. One of the reasons is that New York City has its own tow trucks and the police department does everything. What is important is a question he would like to know the answer to. Di Valentino said he was involved in towing in 1983 when William Miller was supervisor. They went through what to do with tow trucks and the problem was the same. They worked out certain deals. He felt that the situation with the towing is a repeat of 1983. The law seemed to work until 1990 and he does not know what happened after that.

Guerrero said at that time all the tow drivers were racing to the accident and that was why they initially made the list.

DiValentino said they were not allowed to go to the accident unless they were called.

Brennie said that is exactly the way it is now.

Supervisor adjourned the public hearing at 7PM and said that it will remain open until the next Regular Board meeting of November 16, 2016.

Respectfully submitted,

Rosaria Schiavone Peplow  
Town Clerk