

REAL PROPERTY LAW § 240(2); TOWN LAW § 198(12).

There is no requirement or authority for a referendum on the conveyance by a town improvement district of an easement in real property.

October 1, 1997

Richard J. Horwitz, Esq.  
Town Attorney  
Town of Penfield  
3100 Atlantic Avenue  
Penfield, New York 14526-9798

Informal Opinion  
No. 97-42

Dear Mr. Horwitz:

By letter and subsequent clarifying telephone conversation, you have requested an opinion regarding a commercial development in the Town of Penfield. The Home Depot desires to develop property over an easement possessed by a town-wide consolidated sewer district in which sanitary and storm sewers had served a prior commercial development. Home Depot is being required to install in a different location larger replacement sewers that will accommodate its store and serve area businesses. All work in installation of the new sewers will be performed by the developer at no expense to the sewer district. Once completed and accepted by the sewer district, the new sewers will be dedicated to and become part of the consolidated sewer district.

You have asked whether conveyance of the property subject to the easement to Home Depot for its construction is subject to a permissive referendum. We conclude that no referendum is required or authorized.

A municipality may conduct a referendum only when there is a constitutional or statutory grant of power to do so. Op Atty Gen (Inf) No. 90-24; 1981 Op Atty Gen (Inf) 154. Representative government is the general rule and direct action by the people, through a referendum, is the exception and must be expressly authorized by State law. Matter of McCabe v Voorhis, 243 NY 401 (1926); Mills v Sweeney, 219 NY 213 (1916); Matter of Grossman v Town of Southampton, 170 Misc 2d 822 (Sup Ct Suffolk Co 1996).

An easement is an interest in and over real property (Todd v Krolick, 96 AD2d 695 [3d Dept 1983], affd, 62 NY2d 836 [1984]; Real Property Law § 240[2]) which is "created by grant, express or implied, [and] can only be extinguished by abandonment,

conveyance, condemnation, or adverse possession [and] . . . it remains as inviolate as the fee". Gerbig v Zumpano, 7 NY2d 327, 330 (1960).

Under Town Law § 198(12), sale or lease of property located in an improvement district, such as the consolidated sewer district, is not subject to a referendum. However, a public hearing is to be conducted when the value of the improvement district property to be sold or leased exceeds one thousand dollars (\$1,000). Id.

We conclude, then, that there is neither a requirement nor authority for a referendum on the conveyance by a town improvement district of an easement in real property.

The Attorney General renders formal opinions only to officers and departments of the State government. This perforce is an informal and unofficial expression of the views of this office.

Very truly yours,

JULIA RYAN CHRIST  
Assistant Attorney General