

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 114
Trenton, New Jersey 08625
Attorney for the State of New Jersey,
Department of Transportation
By: Philip J. Espinosa (Attorney ID No.: 030311988)
Deputy Attorney General
(609) 376-3300

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NO.: HUD-L-607-18

JACQUELINE ROSA, :
 :
Plaintiff, :
 :
v. :
 :
BOROUGH OF LEONIA, ET AL., :
 :
Defendants. :

Civil Action

STATE OF NEW JERSEY :
DEPARTMENT OF TRANSPORTATION, :
 :
Plaintiff-Intervenor, :
 :
v. :
 :
BOROUGH OF LEONIA, NEW :
JERSEY, :
 :
Defendant. :

**COMPLAINT FOR A DECLARATORY
JUDGMENT AND FOR AN ACTION IN
LIEU OF PREROGATIVE WRITS**

The State of New Jersey Department of Transportation ("DOT") brings this action against the Borough of Leonia ("Leonia"), New Jersey, for an order declaring that Leonia's recently adopted traffic ordinances, Ordinance Nos. 2017-19, 2018-2 and 2018-5 (hereinafter collectively referred to as "the ordinances"), are legally invalid as a matter of law and permanently enjoining Leonia from enforcing the ordinances.

THE PARTIES

1. The DOT maintains its headquarters at the David J. Goldberg Transportation Complex, 1035 Parkway Avenue, Trenton, in the County of Mercer, New Jersey. Pursuant to N.J.S.A. 27:1A-1, the DOT is responsible for promoting the "efficient, fully integrated and balanced transportation system" throughout New Jersey, including the review and approval of local traffic ordinances on municipal or county roads.

2. Leonia is incorporated under the borough form of government. N.J.S.A. 40A:60-1 to -8.1. The governing body of Leonia consists of the mayor and six council members, all of whom are elected at-large. N.J.S.A. 40A:60-2. According to Leonia's website, the borough is comprised of multiple departments, including a police department.

3. Leonia is located within close proximity to the George Washington Bridge and to several state and county highways, including but not limited to, the New Jersey Turnpike, and State Routes 4, 46 and 80. In addition, a portion of State Route 93, also known as Grand Avenue, is within the municipal boundaries of Leonia.

4. Leonia is adjacent to several other municipalities within Bergen County, including Fort Lee, Englewood, Ridgefield Park, Palisades Park, and Teaneck. A portion of Bergen County Route 503, also known as Degraw Avenue and Fort Lee Road, is within Leonia.

THE DOT'S LEGAL AUTHORITY TO REGULATE TRAFFIC

5. The Legislature's purpose and intent in passing the "Transportation Act of 1966" ("Transportation Act") was:

to establish the means whereby the full resources of the State could be used and applied in a coordinated and integrated matter to solve or assist in the solution of the problems of all modes of transportation; to promote an efficient, fully integrated and balanced transportation system for the State; to prepare and implement comprehensive plans and programs for all modes of transportation development in the State; and to coordinate the transportation activities of State agencies, State-created public authorities, and other public agencies with transportation responsibilities within the State.

[N.J.S.A. 27:1A-1.]

6. The Transportation Act authorizes the Commissioner of Transportation (the "DOT Commissioner") to develop and promote efficient transportation services and coordinate the activities of the DOT with other public agencies and authorities. N.J.S.A. 27:1A-5.

7. Pursuant to N.J.S.A. 39:4-8(a), the Commissioner is not required to approve any ordinance, resolution, or regulation, unless, after investigation by the Commissioner the same shall appear to be "in the interest of safety and the expedition of traffic on the public highways."

8. The Legislature in N.J.S.A. 39:4-8(b) and (c) permits municipalities to adopt traffic ordinances without the DOT Commissioner's approval only for the traffic measures listed in N.J.S.A. 39:4-8(c), subject to the provisions of N.J.S.A. 39:4-138, and N.J.S.A. 39:4-197.

9. For example, the Legislature in N.J.S.A. 39:4-197 permits municipalities to alter speed limitations; limit the use of streets to certain classes of vehicles; designate one way streets; and regulate street parking.

10. Pursuant to N.J.S.A. 39:4-8(a), prior to the adoption of any municipal or county ordinance, resolution, or regulation, which places any impact on roadways in an adjoining

municipality or county, the governing board or body of the municipality must provide appropriate notice to the adjoining municipality or county.

11. Pursuant to N.J.S.A. 39:4-8(a), notwithstanding any other provision of N.J.S.A. 39:4-8 to the contrary, any municipal or county ordinance, resolution, or regulation which places any impact on a State highway shall require the approval of the DOT Commissioner. Impact on a State highway is defined by N.J.A.C. 16:27-2.1 to mean "any traffic control device on a non-State highway that is proposed for installation: 1. At a State highway intersection; 2. Within 500 feet of a State highway; or 3. At a distance greater than 500 feet from a State highway but has a resultant queue that extends within 500 feet or less from a State highway" and "any traffic regulation applicable to a non-State highway: 1. At a State highway intersection; 2. Within 500 feet of a State highway; or 3. At a distance greater than 500 feet from a State highway but has a resultant queue that extends within 500 feet or less from a State highway."

12. The Legislature has not established authority under Title 39, or elsewhere, for a municipality to limit access to certain streets depending on whether a person is classified

as a resident or is a person seeking to conduct business within a municipality.

13. The Legislature has not established authority in Title 39, or elsewhere, for a municipality to establish "no through" streets.

14. The Attorney General opined in 1955 that the power to designate so-called "no through" streets is not among the powers granted to a municipality by N.J.S.A. 39:4-197, nor is such power granted by any other provision of our statutes. As the Attorney General opined, "There is no inherent power vested in a municipality by which it may legally restrict the right of the public to the free use of streets and roads. Any right of the municipality to pass ordinances and resolutions regarding the flow of traffic over its streets and highways can arise only by legislative grant; and there has been none." (DOT Exhibit A)

15. This Attorney General opinion remains legally valid because, while the Legislature has amended Title 39 several times, most recently in 2008 to extend certain additional traffic regulation powers to municipalities and counties, the Legislature has never extended to municipalities the authority to adopt "no through" street ordinances, or to

limit access to municipal streets based on a residency classification or on whether a person was seeking to access a destination within the municipality.

LEONIA'S INVALID TRAFFIC ORDINANCES

16. The Mayor and Council of Leonia adopted the ordinances between December 4, 2017 and March 5, 2018.

17. The ordinances restrict traffic on certain municipal streets during certain hours, to its residents, with certain exceptions, including persons who can demonstrate a documented need to access a residence on a Leonia street and persons traveling to destinations within Leonia.

18. On or about December 4, 2017, the Mayor and Council of Leonia adopted Ordinance Number 2017-19, which amended and supplemented Chapter 194 of Leonia's Municipal Code and added two new provisions, Sections 194-25.1 and 194-49.

19. Section 194-25.1 of Leonia's Municipal Code, identified as Ordinance 2017-19, provides: "Closing of Certain Streets. No person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§ 194-49) attached to and made a part of this Chapter during the times of the days indicated in said Schedule unless that person is a resident of the said street needing access to his home or can

demonstrate or document a need to access a residence on the street or parts of streets as described.”

20. Section 194-49 of Leonia’s Municipal Code, identified as Ordinance 2017-19, provides a list of travel restrictions and road closures affecting approximately 70 roads and intersections during the hours of 6:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m.

21. On or about January 17, 2018, the Mayor and Council of Leonia adopted Ordinance Number 2018-2, which amended and supplemented Chapter 194 of Leonia’s Municipal Code, and added a new provision, Section 194-25.2.

22. Section 194-25.2 of Leonia’s Municipal Code, identified as Ordinance Number 2018-2, provides for a \$200 penalty for any person convicted of violating Section 194-25.1 “or imprisonment for a term of not exceeding 15 days, or both.”

23. On or about March 5, 2018, Leonia adopted Ordinance Number 2018-5, which amends Sections 194-25.1 and 194-149 of Leonia’s Municipal Code.

24. Section 194-25.1 of Leonia’s Municipal Code, as amended in its entirety by Ordinance 2018-5, provides: “Closing of Certain Streets. No person shall operate a vehicle on those streets or parts of streets as described in Schedule XVIII (§

194-49) attached to and made part of Chapter 194 during the times of the days indicated in said Schedule unless that person (a) Is a resident of said street needing access to his home or can demonstrate a documented need to access a residence on the street or parts of streets as described; or (b) [i]s traveling to and/or from a Leonia destination.”

25. Section 194-49 of Leonia’s Municipal Code, as amended by Ordinance 2018-5, provides an amended list of travel restrictions and road closures affecting more than 75 roads and intersections during the hours of 6:00 a.m. to 10:00 a.m. and 4:00 p.m. to 9:00 p.m.

26. The ordinances, which “close” or restrict non-residents or those not having business in Leonia from turning onto a long list of streets, have in effect made these streets “no through streets” during the hours specified in the ordinances for individuals who do not have a residence on the street or need to access a residence on the street or parts of the streets described in the ordinances.

27. The ordinances have an impact on a State highway as defined by N.J.A.C. 16:27-2.1, and were not submitted to the DOT Commissioner for approval.

28. The ordinances have an impact on adjoining municipalities and Leonia did not provide notice to the adjoining municipalities as required by N.J.S.A. 39:4-8(a) (second unnumbered paragraph).

29. According to published news reports, the purpose of the ordinances was to induce navigational apps to remove Leonia streets from their algorithms. Lisa W. Foderaro, Navigation Apps Are Turning Quiet Neighborhoods Into Traffic Nightmares, N.Y. TIMES (Dec. 24, 2017), <http://www.nytimes.com/2017/12/24/nyregion/traffic-apps-gps-neighborhoods.html>.

30. According to published news reports and Leonia's website, Leonia has been offering residents yellow hang tags in order to identify their vehicles for purposes of accessing the Leonia roads with restricted access pursuant to the ordinances. John Surico, What Happens When a City Bans Non-Resident Drivers,? CITYLAB (Apr. 18, 2018), <http://www.citylab.com/transportation/2018/04/the-small-town-that-took-on-waze/558215>; see also Leonia Safe Streets, Borough of Leonia, <http://www.leonianj.gov/depts/leoniasafeStreets/information.htm> (last visited May 15, 2018).

31. According to published news reports, the Mayor of Leonia has indicated that drivers without yellow tags may be stopped and questioned by Leonia's police department. Dave Carlin, Leonia, New Jersey: Town wants residential streets removed from GPS apps, may fine drivers \$200, WCBS-TV/CNN (Jan. 10, 2018, 5:41 AM), <http://www.wptv.com/news/local-news/water-cooler/leonia-new-jersey-town-wants-residential-streets-removed-from-gps-apps-may-fine-drivers-200>.

32. According to one published news report, Leonia's mayor stated, "The first thing the officer is going to say is, 'Do you have business in Leonia?'" Dave Carlin, Leonia, New Jersey: Town wants residential streets removed from GPS apps, may fine drivers \$200, WCBS-TV/CNN (Jan. 10, 2018, 5:41 AM), <http://www.wptv.com/news/local-news/water-cooler/leonia-new-jersey-town-wants-residential-streets-removed-from-gps-apps-may-fine-drivers-200>.

33. According to published news reports, for purposes of enforcing the ordinances, Leonia posted "Do Not Enter" signs with the words "Residents Exempt" printed below. Svetlana Shkolnikova, 'Residents and Leonia Destinations Only' to replace 'Do Not Enter' signs barring commuters, NORTHJERSEY.COM (Feb. 22, 2018 10:23 PM),

<http://www.northjersey.com/story/news/bergen/leonia/2018/02/21/1eonia-drafts-new-traffic-signage-help-businesses/359675002>.

34. According to published news reports, Leonia later proposed posting amended signs in order to appeal to Leonia's businesses. Leonia To Get Friendlier Signs Banning GWB Shortcut Seekers, CBS NEW YORK/AP (Feb. 15, 2018), <http://newyork.cbslocal.com/2018/02/15/leonia-new-road-signs>; Svetlana Shkolnikova, Leonia amends controversial road closure ordinance to boost business, NORTHJERSEY.COM (March 5, 2018 11:31 PM),

<http://www.northjersey.com/story/news/bergen/leonia/2018/03/05/1eonia-amends-controversial-road-closures-law-boost-business/390951002>.

35. According to published news reports, traffic-restricting signs remain posted on Leonia's roads and Leonia's police department continues to enforce the ordinances. Anthony Johnson, Road signs in Leonia causing rift between town, state of New Jersey, WABC-TV (May 3, 2018), <http://abc7ny.com/traffic/road-signs-causing-rift-in-new-jersey-town/3424745>.

36. On March 16, 2018, the Attorney General's Office wrote to Leonia's Counsel explaining the applicable Title 39

statutes, the 1955 Attorney General opinion, and that they render the Leonia ordinances invalid. The Attorney General's Office directed Leonia to "immediately refrain from enforcing the above referenced ordinances" and offered to facilitate a meeting between Leonia and the DOT officials to discuss other, appropriate measures to address Leonia's traffic concerns.

37. DOT traffic engineering staff and Leonia met on April 4, 2018 to discuss appropriate traffic controls in Leonia that would not violate Title 39.

38. On information and belief, Leonia continues to enforce the ordinances, through traffic control devices (signage) and municipal police enforcement efforts.

FIRST COUNT
(Declaratory Judgment)

39. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

40. The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

41. Given the circumstances here, there is a justiciable controversy between adverse parties and the DOT has an interest in this suit.

WHEREFORE, the DOT demands judgment against Leonia declaring that the ordinances are null and void, because they purport to create "no-through streets," even though pursuant to Title 39, and as further interpreted by the Attorney General's 1955 opinion, Leonia has no such authority, along with awarding to the DOT reasonable attorney's fees and costs.

SECOND COUNT
(Declaratory Judgment)

42. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

43. The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

44. Given the circumstances here, there is a justiciable controversy between adverse parties and the DOT has an interest in this suit.

WHEREFORE, the DOT demands judgment against Leonia declaring that the ordinances are null and void, because they

purport to regulate traffic based on residency classification for which Leonia has no authority, along with awarding to the DOT reasonable attorney's fees and costs.

THIRD COUNT
(Declaratory Judgment)

45. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

46. The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

47. Given the circumstances here, there is a justiciable controversy between adverse parties and the DOT has an interest in this suit.

WHEREFORE, the DOT demands judgment against Leonia declaring that the ordinances are null and void, because they create an impact on a State highway (State Route 93) and Leonia did not submit the ordinances to the DOT Commissioner for approval, along with awarding to the DOT reasonable attorney's fees and costs.

FOURTH COUNT
(Declaratory Judgment)

48. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

49. The Declaratory Judgment Act, N.J.S.A. 2A:16-50 to -62, authorizes courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

50. Given the circumstances here, there is a justiciable controversy between adverse parties and the DOT has an interest in this suit.

WHEREFORE, the DOT demands judgment against Leonia declaring that the ordinances are null and void, because they create impact on roadways in one or more adjoining municipalities and Leonia did not provide notice of the ordinance to the adjoining municipalities, along with awarding to the DOT reasonable attorney's fees and costs.

FIFTH COUNT
(Action in Lieu of Prerogative Writs)

51. The DOT repeats and reasserts all prior allegations of this complaint as if fully set forth at length herein.

52. Leonia does not have legal authority within one of the enumerated exceptions under Title 39 to restrict traffic as it has done in the ordinances.

53. Because the ordinances at issue are legally invalid, Leonia should be enjoined from further enforcing the ordinances at issue, including but not limited to the use of signage, traffic stops by police officials notifying motorists about the ordinances at issue, and the issuance of traffic citations.

54. The DOT's claim for relief is based upon an established legal right.

55. This matter involves overriding public interest considerations that call out for judicial intervention by this court through the issuance of an injunction that permanently enjoins Leonia from further enforcing the ordinances, including but not limited to the use of signage regarding the ordinances, municipal police officials notifying motorists about the ordinances, and the issuance of traffic citations based on the ordinances.

WHEREFORE, the DOT demands judgment against Leonia enjoining and restraining Leonia from further enforcement of the ordinances, including but not limited to the use of signage

regarding the ordinances, police officials notifying motorists about the ordinances, and the issuance of traffic citations based on the ordinances, along with awarding to the DOT reasonable attorney's fees and costs.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s Philip J. Espinosa
Philip J. Espinosa
Deputy Attorney General
Attorney ID No.: 030311988

Dated: June 11, 2018

CERTIFICATION PURSUANT TO RULE 4:69-4

I, Philip J. Espinosa, Deputy Attorney General, certify pursuant to Rule 4:69-4, that upon information and belief, because the ordinances are already publicly available on the internet, there are no necessary transcripts of Leonia proceedings that must be ordered in these circumstances.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s Philip J. Espinosa
Philip J. Espinosa
Deputy Attorney General
Attorney ID No.: 030311988

Dated: June 11, 2018

CERTIFICATION PURSUANT TO RULE 4:5-1

I, Philip J. Espinosa, Deputy Attorney General, certify pursuant to Rule 4:5-1 that the matter in controversy is the subject of an action entitled Jacqueline Rosa v. Borough of Leonia, et al., pending in the Superior Court of New Jersey, Law Division, Hudson County, Docket No. HUD-L-000607-18. In addition, there is no other non-party who should be joined in this action or who is subject to joinder at this time because of potential liability as to any party on the basis of the same transactional facts.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s Philip J. Espinosa
Philip J. Espinosa
Deputy Attorney General
Attorney ID No.: 030311988

Dated: June 11, 2018

DOT EXHIBIT A

Also, in 43 *Am. Jur. Public Officers* Section 461, it is said:

"Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person."

This rule has been followed in *State v. Howard*, 74A 392 (Sup. Ct. Vt. 1909) *State, Danforth, pros. v. Paterson* 34 N. J. L. 163, (Sup. Ct. 1870) *Sodekson v. Lynch, et al.* 9 N. E. 2nd, 372 (Sup. Jud. Ct. Mass. 1937) *Broderick v. City of New York* 67 N. E. 2nd 737, (N. Y. Ct. App. 1946).

While the Courts have experienced some difficulty in giving the terms "ministerial" and "discretionary" a practical working definition, *Note, 26 Mich. L. Rev.* 933 (1928), they have recently been defined with approval as follows:

"A ministerial act is one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority and without regard to or the exercise of his own judgment upon the propriety of the act being done.

"Discretion may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others." *Independent School Dist. of Danbury v. Christiansen*, 49 N. W. 2nd 263 (Sup. Ct. Iowa 1951).

While it is manifest that the proper exercise of any delegated ministerial function involves some degree of discretion, where the legislative intent may be reasonably said to include the judgment and discretion of the public officer, there can be no delegation of the discretion so conferred. Cf. *Schwartz v. Camden*, 77 N. J. Eq. 135 (Ch. 1910). When it is considered that the claims made under Section 2A:37-32 N. J. S. may be repaid without limitation as to amount, No. 21 *Opinions of the Attorney General of New Jersey*, 1954, it is reasonable to say that the legislative intent included the judgment and discretion of the State Treasurer.

Accordingly, there being no statutory authority to delegate, the duty imposed upon the State Treasurer by Section 2A:37-32 N. J. S. to determine the validity of claims for repayment of money in his custody cannot be delegated.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES J. KEHOE,
Assistant Deputy
Attorney General.

CJK:MG

MARCH 4, 1955.

HON. FREDERICK J. GASSERT, JR.,
Director, Division of Motor Vehicles,
State House,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 5.

DEAR DIRECTOR GASSERT:

Our opinion has been requested (1) as to the power of a municipality, (the Borough of Demarest in this case) to pass an ordinance establishing "no through" streets on which all traffic will be prohibited other than that whose destination is to some point on that street, and (2) if such power exists, is such an ordinance subject to your approval.

N. J. S. A. 39:4 197 provides that:

"No municipality shall pass an ordinance or resolution on a matter covered by or which alters or in any way nullifies the provisions of this chapter (the Motor Vehicle and Traffic Act) or any supplement to this chapter; except that ordinances and resolutions may be passed regulating special conditions existent in the municipality on the subjects and within the limitations following:

(1) Ordinance

- a. Altering speed limitations as provided in section 39:4 98 of this Title;
- b. Limiting use of streets to certain class of vehicles;
- c. Designating one-way streets;
- d. Designating stops, stations or stands for omnibuses;
- e. Regulating the stopping or starting of street cars at special places, such as railroad stations, public squares or in front of certain public buildings;
- f. Regulating the passage or stopping of traffic at certain congested street corners or other designated points;
- g. Regulating the parking of vehicles on streets and portions thereof including angle parking as provided in section 39:4-135 of this Title;
- h. Regulating the parking of vehicles upon grounds, other than a street or highway, owned or leased and maintained by the municipality, or any school district board of education therein, including any lands devoted to the public parking of vehicles, the entrances thereto and exits therefrom.

(2) Ordinance or resolution

- a. Designating through streets as provided in article 17 of this chapter (39:4 140 et seq.);
- b. Designating and providing for the maintenance as 'no passing' zones of portions of highway where overtaking and passing or driving to the left of the roadway is deemed especially hazardous."

The power to designate "no through" streets is not among the powers granted to a municipality by this section, nor is such power granted by any other provision of our statutes. The power to designate main traveled or major highways within the municipality as a "through street," to be marked at the entrance thereto from intersecting streets by "stop" signs is given by N. J. S. A. 39:4 197 and 39:4 140, but an ordinance designating such through street cannot be effective until it is approved by you, this because N. J. S. A. 39:4 202 provides:

"No resolution, ordinance or regulation passed, enacted or established under authority of this article, shall be effective until submitted to and approved by the director as provided in section 39:4-8 of this Title."

There is no inherent power vested in a municipality by which it may legally restrict the right of the public to the free use of streets and roads. Any right of the municipality to pass ordinances and resolutions regarding the flow of traffic over its streets and highways can arise only by legislative grant; and there has been none.

Even where the subject matter of the ordinance is within the power granted by the statute, the regulation must bear a reasonable relationship to public safety; there cannot be arbitrary action. (See *Garneau v. Eggers*, 113 N. J. L. 245, 248, 249 (Sup. Ct. 1934); *Giant Tiger Corporation v. Trenton*, 11 N. J. Misc. 836, (Sup. Ct. 1933); *Pivnick v. Newark*, 14 N. J. Super., 134 (Sup. Ct. 1951); and *Terminal Storage, Inc. v. Raritan Township*, 15 N. J. Super, 547 (Sup. Ct. 1951)

A recent New York case (*People v. Grant*, 306 N. Y. 258, 117 N. E. (2d) 542 (Ct. of App. N. Y. 1954)) is in accord with our conclusion.

In the cited case, an ordinance of the Town of North Hempstead prohibited "through or transient vehicular traffic" on streets in or near the area of New Hyde Park, the ordinance being passed as a result of complaints from residents who objected to the volume of traffic at particular hours of the day, mainly because of the large number of automobiles driven by persons going to and from work at the Sperry Gyroscope Company plant situated just north of the area. In holding the ordinance invalid the Court said,

"Political subdivisions and municipal corporations hold * * * streets for the benefit of the public, consisting of the whole of the people, and regulation of the streets is the exercise of a governmental function in that they are subject exclusively to regulation and control by the state, as a sovereign except to the extent that the Legislature delegates power over them to political subdivisions and municipal corporations."

It is our opinion that the "no through street" ordinance proposed by the Borough of Demarest, and similar ordinances proposed by other municipalities, have no legislative sanction.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: JAMES T. KIRK,
Deputy Attorney General.

JTK/LL

MARCH 4, 1955.

HONORABLE WILLIAM F. KELLY, JR.,
President, Civil Service Commission,
State House,
Trenton 7, New Jersey.

FORMAL OPINION 1955. No. 6.

DEAR PRESIDENT KELLY:

You have recently requested advice concerning the power of a municipal governing body to set minimum and maximum age limits for Patrolmen and Firemen. Your memorandum states that the City of Union City adopted two ordinances in 1925 the effect of which is to establish the minimum age at 21 and the maximum age at 30 for Patrolmen and Firemen. These age limits coincide with those set by R. S. 40:47-4, as amended. However, prior to its amendment, approved April 24, 1945, the statute provided for a thirty-five year maximum age.

N. J. S. A. 38:23A 2, enacted in 1944, provides as follows.

"When the qualifications for any examination or test for, or appointment or election to any office, position or employment under the government of this State, or of any county, municipality, school district or other political subdivision of this State, or under any board, body, agency or commission of this State, or of any county, municipality or school district, includes a maximum age limit, any person, who, heretofore and subsequent to July first, one thousand nine hundred and forty, entered or hereafter, in time of war, shall enter the active military or naval service of the United States or the active service of the Women's Army Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United

States to serve with the Army or Navy, shall be deemed to meet such maximum age requirement, if his actual age, less the period of such service, would meet the maximum age requirement in effect on the date the person entered into such service of the United States."

The public announcements issued by your Department for examinations for Patrolmen and Firemen contain the following provision with respect to age.

"Not less than 21 nor more than 30 years of age at the announced closing date for filing applications for these examinations, except that for veterans who entered active service with the armed forces after July 1, 1940 and prior to April 24, 1945, the maximum age limit is 35 years.

We are of the opinion that the age limits set by the municipal ordinance are valid and must be regarded as controlling. The governing body of each municipality is empowered by R. S. 40:47-1 to make ordinances for the establishment and regulation of a police force. R. S. 40:47-3, as amended, and R. S. 40:47-4 set up restrictions within which the municipalities must operate in the appointment of police officers. We see no reason, however, why a municipality may not make more stringent regulations so long as they comply as well with the statutory prohibitions on the subject. In 62 C. J. S., Municipal Corporations, p. 1094 it is stated,

"The appointment of police officers is generally regulated by statute setting up rules of eligibility of prospective appointees; and the municipality may prescribe requirements in addition to, although not in contravention of, those prescribed by statute."

Your announcement is correct as to municipalities which have not set any age limits and as to those in which the age limits were set at 21 years of age to 35 years of age prior to April 24, 1945. However, with respect to Union City and other municipalities with similar ordinances where the age limit was or is more restrictive than that in effect by state law, the more restrictive provisions of the municipal ordinance are controlling. Thus veteran applicants for police and fire positions in Union City must be no older at the time of appointment than 30 years of age, plus a period of time, computed in accordance with the terms of the statute. Even though prior to April 24, 1945 the statutory maximum age was 35, the age of 30 set by the ordinance was "the maximum age requirement in effect" within the meaning of N. J. S. A. 38:23A—2, *supra*.

One other aspect of your announcement requires attention. The statute R. S. 40:47—4, as amended, provides,

"No person shall be appointed a member of the paid fire or police department or force of any municipality who is less than twenty-one or more than thirty years of age * * *"

The critical time is the time of appointment. At that time the appointee must be above the minimum and below the maximum. See *Wentzell v. Steelman*, 8 N. J. Misc. 503 (Sup. Ct. 1930). Your announcement makes the announced closing date the critical time. In this respect it is incorrect. Language should be substituted to make it clear that at the time of appointment the applicant must be within the prescribed age limits.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General

By: JOHN F. CRANE,
Deputy Attorney General

JFC:b.