

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