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April 19, 2013

Mr. Thomas Keon, Mayor  
Members of the Board of Trustees  
Village of the Branch  
40 Route 111  
Smithtown, New York 11787

Report Number: 2013M-43

Dear Mr. Keon and Members of the Board of Trustees:

One of the Office of the State Comptroller's primary objectives is to identify areas where local government officials can improve their operations and provide guidance and services that will assist them in making those improvements. Our goals are to develop and promote short-term and long-term strategies to enable and encourage local government officials to reduce costs, improve service delivery, and account for and protect their entity's assets.

In accordance with these goals, we conducted an audit of the Village of Village of the Branch (Village) for the period June 1, 2011, to October 31, 2012, which addressed the following question:

- Has the Board delegated discretionary functions to independent contractors?

The results of our audit and recommendation have been discussed with Village officials and their comments, which appear in Appendix A, have been considered in preparing this report. Village officials generally agreed with our recommendation and indicated they planned to take corrective action. Appendix B includes our comment on the issue raised in the Village's response letter.

### **Background and Methodology**

The Village of Village of the Branch is located in the Town of Smithtown, Suffolk County. The Village covers approximately one square mile and has a population of approximately 1,800. The Village provides various services to its residents, including street maintenance, fire protection, public safety, and community services. The expenditures to provide these services are accounted for in the general fund. The Village's operating expenditures for the fiscal years ended

May 31, 2011 and May 31, 2012 totaled \$829,784 and \$736,394, respectively, funded primarily with real property taxes, State aid, and permit fees.

The Village is governed by a Board of Trustees (Board), which comprises four elected Trustees and an elected Mayor. The Board is responsible for the general oversight of the Village's operations. The Mayor is the Village's chief executive officer. The Board is responsible for annually appointing Village officers and for approving contracts with and payments to professional service providers.

We interviewed Village officials, reviewed Office of the State Comptroller's opinions and publications, and reviewed Village contracts, budgets, and financial statements. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

## **Audit Results**

A village generally may retain professionals as independent contractors and consultants to advise and assist officials and employees in the performance of their duties. In addition, a village may contract with private entities for the performance of functions that are purely ministerial in nature. However, unless expressly authorized by statute, a village may not contract with a private party to perform village functions that involve the performance of police powers or other discretionary functions. In addition, as a rule, the functions of collection and custody of public funds are undertaken with a high degree of public trust and, therefore, in the absence of express statutory authority, they may not be delegated to an independent contractor.

The Village Building Inspector serves the Village as an independent contractor rather than as a public officer. The Village building inspection function includes certain duties and responsibilities that involve the performance of police powers to enforce local building and zoning laws, and the exercise of judgment or discretion that cannot be delegated to an independent contractor. Under Village Code, a Building Inspector is responsible for, among other things, issuing certain permits, examining premises to determine whether provisions of law have been complied with, enforcing laws relating to building construction, and issuing notices and orders necessary to enforce compliance with the law. Additionally, a Building Inspector collects applicable permit fees.

The Village Code states that the Department of Buildings is headed by a Village official designated as the Building Inspector. The Code further states that the Building Inspector shall be appointed by the Board for a one-year term, with compensation fixed by the Board. Under the Code, the Building Inspector also may appoint employees, as authorized by the Village Board, to carry out the functions of the Building Department. The reference in the Code to the Building Inspector as a Village official with the power to hire Village employees indicates the establishment of the Village office of Building Inspector. Consistent with the Code, each year at its reorganization meeting, the Board makes one-year appointments to various offices, including

the Village Building Inspector. This annual appointment further indicates that the Board intended that this individual serve as a Village officer, and not as an independent contractor.

However, we found that the Village Building Inspector did not take an oath of office and, as generally required of a Village officer, does not reside within the Village.<sup>1</sup> In addition, the Village and this individual have entered into a contract which provides for an annual fee for basic services of \$8,000 plus 50 percent of certain permit fees. This type of arrangement is usually indicative of an independent contractor relationship. Requests for payment are submitted monthly by voucher. The Building Inspector receives an Internal Revenue Service Form 1099, and does not receive any fringe benefits. During our audit period, this individual received \$84,197, nearly \$73,000 of which was based on fees collected for building permits. Because there is no cap on the amount of fees paid to the Building Inspector, the Village cannot know whether the individual's compensation is excessive in any given year. If it is excessive (e.g., more than reasonable compensation paid to inspectors in other comparable villages), then the Village may also have made a poor business decision in basing the compensation on the amount of fees collected.

In light of the existence of a contract between the Village and the individual performing the building inspection functions, the lack of an oath of office and compliance with residency requirements, and the presence of other factors which indicate an independent contractor relationship between the Village and this individual, discretionary Village functions, such as fee collections and police powers, are not being performed and exercised by Village officers as required by Law. The Village Clerk has stated she is aware of the general principle that the police powers and discretionary functions of village officers may not be performed by independent contractors; however, the Board has not ensured that the status of the individual serving as Building Inspector is that of a Village officer and not an independent contractor.

## **Recommendation**

1. The Board should ensure that anyone performing discretionary functions, such as fee collections, police powers and building inspections on behalf of the Village meets all the requirements for holding Village office, including being properly appointed to the office, taking and filing an oath of office, meeting residency requirements and being compensated by salary through payroll with appropriate deductions. No one who performs these functions should be engaged as an independent contractor.

The Board has the responsibility to initiate corrective action. A written corrective action plan (CAP) that addresses the findings and recommendations in this report should be prepared and forwarded to our office within 90 days, pursuant to Section 35 of the General Municipal Law. For more information on preparing and filing your CAP, please refer to our brochure, *Responding to an OSC Audit Report*, which you received with the draft audit report. We

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<sup>1</sup> Village Law generally requires that a village officer be a village resident. However, it also authorizes village boards of trustees to provide, in lieu of any other residency requirement imposed by law, that any appointed village officer may reside within the county. At the time of our audit, the Village had not enacted a local law allowing the Building Inspector to be a resident of the county.

encourage the Board of Trustees to make this plan available for public review in the Clerk's office.

Sincerely,

Andrew A. Sanfilippo  
Executive Deputy Comptroller  
Office of the State Comptroller  
Division of Local Government  
and School Accountability

## **APPENDIX A**

### **RESPONSE FROM VILLAGE OFFICIALS**

The Village officials' response to this audit can be found on the following page.

INCORPORATED

# Village of The Branch

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Chairman, Planning Board  
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Chairman, Zoning Appeals  
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Village Clerk  
265-3315

MAUREEN HERNANDEZ  
Deputy Clerk  
265-3315

THERESA MEQUIA  
Treasurer  
656-3412

ANNA MEQUIA  
Court Clerk  
724-5217

JERRY HARRIS  
Building Inspector  
979-8989

CHRISTOPHER RING  
Attorney  
582-4000

April 4, 2013

Mr. Ira McCracken  
Office of the State Comptroller  
NYS Office Building Rm. 3A10  
250 Veterans Memorial Highway  
Hauppauge, NY 11788-5533

Re: Report of Examination 2013M-43

Dear Mr. McCracken:

We have reviewed the draft of the subject report. We agree with the findings therein and will implement the recommendation. Beginning with fiscal year 2013-2014 the building inspector will become an employee of the village and be compensated by salary through payroll with appropriate deductions. A local law will be enacted allowing residence in Suffolk County.

We also noted that the report states that the village provides waste management services which we do not. This service is provided through the Town of Smithtown.

We appreciate the very professional manner in which the audit was conducted.

Yours Truly,

Thomas Keon  
Mayor

cc: Maureen Hernandez, Village Clerk

See  
Note 1  
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## **APPENDIX B**

### **OSC COMMENT ON THE VILLAGE'S RESPONSE**

Note 1

We have deleted the statement regarding waste management services.