



*New York State Assembly, Sheldon Silver, Speaker
Legislative Commission on State-Local Relations
Assemblymember Tim Gordon, Chair*

Energy

Constitutional and Statutory Authority

Counties, Cities, Towns and Villages – No local government shall be prohibited by the legislature (1) from making a fair return on the value of the property used and useful in its operation of a gas or electric utility service, over and above costs of operation and maintenance and necessary and proper reserves, in addition to an amount equivalent to taxes which such service, if privately owned, would pay to such local government, or (2) from using such profits for payment of refunds to consumers or for any other lawful purpose. [Constitution article IX, § 1(f)]

May construct, lease, use and/or operate any public utility service within or without its territorial limits, and may sell surplus over amount required by the municipality beyond its territorial limits. [General Municipal Law article 14-A] Net metering allows municipalities with qualified renewable energy systems to sell excess electricity back to their local utility. [Public Service Law §§ 66-j, 66-l]

Certain counties and all cities, villages and towns must institute residential gas, electric and steam utility service to any applicant meeting enumerated requirements. Continuation of such services assured in medical emergencies, cold weather periods and to customers who are elderly, blind or disabled. [Public Service Law article 2]

Authorized to enter into energy performance contracts in connection with public buildings and facilities of up to thirty-five years. [Energy Law article 9]

May adopt a local energy conservation construction code. [Energy Law article 11]

May not operate a temporary nuclear waste repository without a certificate by the state board on temporary nuclear waste repository siting. [Energy Law article 18]

Cities, Towns and Villages – With the consent of the municipality, gas and electric corporations are authorized to supply gas and electricity, including laying conductors in right of ways, under regulations the municipality may prescribe. [Transportation Corporations Law § 11]

Towns – After a public hearing, may grant franchises for the use of streets, highways and public places for any lawful purpose upon terms and conditions as the town may deem proper and as may be permitted by law. [Town Law § 64(7)]

Villages – The board of light commissioners may contract, in the name of any village, for a period not longer than ten years, for lighting the streets, public grounds and public buildings of the village by gas, electricity or other substance. [Village Law article 12]

Special Districts

Towns – Authorized to establish lighting districts. [Town Law article 12 § 198.6 and article 12-A § 209-a]

School Districts – May explore and develop natural gas fields, may operate any natural gas producing facility on school district property for school district purposes, and may sell excess natural gas produced. Voter approval is required in districts other than city school districts. Voter approval and an agreement are required in the case of BOCES. [General Municipal Law article 14-AA]

School Districts, Fire Districts, BOCES, special improvement district governed by a separate board of commissioners - Authorized to enter into energy performance contracts. [Energy Law article 9]

School Districts, Fire Districts – May adopt a local energy conservation construction code. [Energy Law article 11]

Public Authorities

The Green Island Power Authority is established pursuant to Public Authorities Law article 5, title 1-A.

Selected Court Cases

New York Telephone Co. v. City of Amsterdam (Supreme Ct. Montgomery County 1993) 159 Misc.2d 20, 602 N.Y.S.2d 505; affirmed 200 A.D.2d 315, 613 N.Y.S.2d 993 (3d Dept. 1994). City's power to regulate management and use of its highways, streets, and roads included power to issue permits and set fees for excavation occurring within public right of way. Such fees, however, may not exceed the cost of issuing the permit and of inspecting and regulating the permitted activity.

Delaware County Elec. Co-op., Inc. v. Power Authority of State of N.Y. (2nd Dept. 1989) 96 A.D.2d 154, 468 N.Y.S.2d 233, affirmed on opinion below 62 N.Y.2d 877, 467 N.E.2d 529, 478 N.Y.S.2d 865. Section of Public Utilities Law requiring that certain agreements effectuated pursuant to subdivision covering contract for sale, transmission and distribution of power generated by hydroelectric projects be subject to public hearing and gubernatorial approval ought to be vigorously enforced, and any possible ambiguity in its application ought to be resolved in favor of public accountability.

Consolidated Edison Co. of New York, Inc. v. City of New Rochelle (2nd Dept. 1988) 140 A.D.2d 125, 532 N.Y.S.2d 521. Ordinance requiring installation of gas lines by licensed plumbers was preempted by state regulation of obligation of gas utilities to provide customers with service.

Public Service Commission v. Village of Freeport (2nd Dept. 1985) 110 A.D.2d 704, 488 N.Y.S.2d 22. Under the standard rules of statutory construction, municipal billing and collection practices adopted under the general grant of authority contained in General Municipal Law article 14-A must comply with and yield to the later-adopted and more specific provisions of Public Service Law article 2.

Suffolk County v. Long Island Lighting Co. (E.D.N.Y.1983) 554 F.Supp. 399, affirmed 728 F.2d 52 (2d Cir. 1984). Plaintiffs may not use common law causes of action such as negligence and breach of contract regarding alleged design and construction flaws of a nuclear power plant to avoid the administrative review and dispute resolution procedures established by federal and state statutes. Common law judicial remedies are preempted by the federal and state statutory schemes.

Town of Massena v. Niagara Mohawk Power Corp. (3rd Dept. 1978) 45 N.Y.2d 482, 382 N.E.2d 1139, 410 N.Y.S.2d 276. Compliance with General Municipal Law § 360, conferring on municipal corporations power to condemn public utility facilities in order to establish municipal public utilities services, is a condition precedent to the right to condemn, but, in a concession to the pragmatic considerations associated with the lengthy process of establishing a municipal utility, flexibility in implementation of a project is necessary and strict adherence to the method approved by resolution and referendum is not required.

O'Flynn v. Village of East Rochester (1944) 292 N.Y. 156, 54 N.E.2d 343, certiorari denied 65 S.Ct. 39, 323 U.S. 713, 89 L.Ed. 574. Ordinance providing for establishment of municipal electric plant was not unconstitutional on ground of discrimination because proposed plant would not be of capacity large enough to supply demands of village and its inhabitants including industrial use of its largest single taxpayer. Any discrimination in the administration and operation of such plant may be remedied before the Public Service Commission.

Opinions of the Comptroller and Attorney General

Comptroller Opinion 2001-15, *Town Law §191*; *Town Law §202-c(1)*. A petition to dissolve a lighting district pursuant to Town Law §202-c(1) is proper only if signed by the appropriate number of "resident owners"; that is, individual owners of real property who have established a domicile within the district. Corporations are not considered to be "resident owners" for this purpose. Consequently, if there are no resident owners within a lighting district for which services have been provided, the district may not be dissolved pursuant to section 202-c of the Town Law. *Town Law §198(12)*: A town board on behalf of a lighting district whose sole asset is a service contract may, subject to mandatory referendum, sell the service contract to the town in which the district is located, and thereafter dissolve the lighting district, in order for the town to include the area encompassing the district as part of its general town lighting function.

Comptroller Opinion 99-10, *Energy Law §9-103*; *Local Finance Law §11.00(a)*. The "expected useful life" of energy facilities or equipment subject to an energy performance contract, for purposes of Energy Law, §9-103, is the estimated period over which the facilities or equipment are reasonably expected to be useful and is not necessarily equated to the period of probable usefulness prescribed in Local Finance Law, §11.00(a) for obligations issued for such facilities or equipment. The estimate should be determined pursuant to generally accepted industry standards and should be based on evidence that will provide reasonable accuracy.

Attorney General Opinion 99-27, *General Municipal Law Art 14-A, § 360*; *Public Authorities Law Art 1-A, §§ 1020-a, 1020-f, 1020-g, 1020-h*. A municipality located within the Long Island Lighting Company's former service area may not establish a public utility service to provide gas or electric power without the Long Island Power Authority's agreement.

Attorney General Opinion 99-44, *NY Const, Art IX, § 1(e)*; *Eminent Domain Procedure Law § 101*; *General Municipal Law, Art 14-A, §§ 360, et seq., 363*; *Public Service Law § 120(2)*; *Village Law § 4-412(3)(1)*. A village seeking to acquire property in a town for the purposes of public utility service under article 14-A of the General Municipal Law must use the procedures set forth in the Eminent Domain Procedure Law. Section 4-412(3)(1) of the Village Law does not apply.

Attorney General Opinion 98-13, *NY Const, Art IX, § 3*; *General Municipal Law Art 14-A*; *Public Authorities Law Art 5, §§ 1020-a, 1020-b, 1020-c, 1020-f, 1020-ff, 1020-g,, 1020-gg, 1020-h, 1020-q, 1020-s*. A municipality in the service area of the Long Island Lighting Company (LILCO) or the Long Island Power Authority (LIPA) may not condemn the transmission and distribution system, facilities and other assets of LILCO and/or LIPA and use them to operate a municipal utility.

Comptroller Opinion [97-15](#), County Law § 250; Municipal Home Rule Law § 10. A county is not authorized to establish a special district for the operation and maintenance of street lighting.

Comptroller Opinion 83-190, General Municipal Law § 360. A town may acquire a municipal utility system which will not serve all inhabitants of the town if the town board determines that such acquisition will nonetheless benefit the entire town and serve a town purpose.

Comptroller Opinion 80-113, Town Law § 64(2). A town may, for fair consideration and subject to permissive referendum, enter into a lease permitting a private utility to drill for methane gas at a town-owned sanitary landfill if the town board determines that the lease will not interfere with any town purpose.

Comptroller Opinion 79-110. A town may agree to sell the by-products resulting from operation of a “solid waste to energy generating facility” to private industry.

Comptroller Opinion 79-142. This section, relating to powers of municipal corporations operating municipal public utilities, gives implicit authority to municipalities to use any of various procedures in collecting utility bills, including resort to the services of a private collection agency.

Comptroller Opinion 79-384. A city school district is not required to conduct a public hearing prior to exploring for natural gas on school district property.