

General Municipal Law §§ 360, 360(2), 360(3), 360(5), Art. 14-A

General Municipal Law § 360 does not apply to the Town's proposed participation in a pilot Community Choice Aggregation program and thus section 360's requirement of a referendum likewise does not apply.

June 26, 2015

Eric L. Gordon
Attorney
Town of Bedford
Keane & Beane P.C.
445 Hamilton Avenue
White Plains, New York 10601

Informal Opinion
No. 2015-1

Dear Mr. Gordon:

You have requested an opinion relating to the Town's anticipated participation in a pilot Community Choice Aggregation program as approved by the Public Service Commission. Under the program, the Town would procure electricity from a utility service on behalf of participating residents and small businesses. You have asked whether, if the Town participates in the program under the authority of General Municipal Law § 360, the Town's participation is subject to a referendum. As explained below, we are of the opinion that General Municipal Law § 360 does not apply to the Town's proposed participation and thus that its requirement of a referendum likewise does not apply.

You have explained that the Public Service Commission (PSC) has authorized Sustainable Westchester, Inc., a consortium of local governments in Westchester County, to undertake a pilot Community Choice Aggregation (CCA) program. The Town is a member of Sustainable Westchester. A fundamental component of the pilot program is that a participating local government, in this case the Town, will aggregate the energy and gas supply of its residents and small businesses and enter into a contract with a utility that distributes such services. The Town in essence will be acting as an energy broker for its constituents. Ownership and operation of the utility service will remain with the distributing utility company.

In its order instituting the proceeding to enable CCA programs, the PSC noted that a municipality might find authority to participate in a CCA program in Article 14-A of the General Municipal Law, which permits municipal involvement in the provision of gas and electric service to residents. Public Service Com'n, Case 14-M-0224, *Proceeding on Motion of the Commission to Enable Community Choice Aggregation Programs*, Order Instituting Proceeding and Soliciting Comments (issued Dec. 15, 2014), at 6. The PSC advised that, if proceeding under Article 14-A,

the municipality would need to hold a referendum on its resolution to participate in a CCA program. *Id.* at 7.

Article 14-A was enacted to authorize municipalities to establish, own, and operate gas and electric plants. L. 1934, ch. 281; 1934 N.Y. Laws 787; *see also O'Flynn v. Village of E. Rochester*, 292 N.Y. 156, 161 (1944). The specific provision of Article 14-A under consideration here is section 360. Under section 360, a municipal corporation may “construct, lease, purchase, own, acquire, use and/or operate any public utility service . . . for the purpose of furnishing to itself or for compensation to its inhabitants, any service similar to that furnished by any [gas or electric corporation].” General Municipal Law § 360(2). Section 360 further provides that, “[f]or such purpose,” the municipal corporation “may purchase gas or electrical energy from the state, or from any state agency, or other municipal corporation, or from any private or public corporation.” *Id.* Before taking such action, the town board would need to adopt a resolution, which must be submitted to a referendum. General Municipal Law § 360(3),(5).

We believe that section 360 does not apply to the Town’s proposed participation in the CCA program. With respect to the legislative purpose underlying Article 14-A, the Town would not be establishing, owning, or operating the utility itself. And with respect to the specific language of section 360(2), the Town would not be constructing, leasing, purchasing, owning, acquiring, or operating a public utility service. To the extent the Town could be deemed to be “using” a public utility service, it would not be doing so for the purpose of furnishing energy service to itself or, for compensation, to its inhabitants. Thus, the Town’s proposed participation in the pilot CCA program does not come within either the purpose of Article 14-A generally or the specific statutory language of section 360(2). Consequently, we are of the opinion that the referendum requirement of section 360(5) also does not apply to the Town’s proposed participation.

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

KATHRYN SHEINGOLD
Assistant Solicitor General
in Charge of Opinions