REPORT TO THE TOWN BOARD ON EMINENT DOMAIN

On December 4, 2018, the Huntington Town Board voted in favor of Town Board Resolution Number 2018-571, which authorized the Town Attorney and other appropriate Town departments to research the procedure for eminent domain and study the legality and feasibility of condemning the National Grid Generation, LLC owned property that is the site of the Northport Power Station (hereinafter referred to as the "subject property" or "Power Plant" or "Northport Power Plant"). The following report is in accordance with Resolution Number 571. The report will first discuss the procedure for condemning real property pursuant to the Eminent Domain Procedure Law (EDPL) before discussing the practical, financial, and legal issues involved in a potential condemnation of the subject property.

Background Facts

The Northport Power Plant has a tax map number of 0400-010.00-01.00-003.002. The Northport Power Plant is housed on an approximately 275 acre site on the shore of Long Island Sound. The subject property is owned by National Grid and situated in the Town of Huntington, County of Suffolk, and State of New York. The Property is also located within the Northport-East Northport Union Free School District. Pursuant to the Power Supply Agreement, the property taxes are paid by the Long Island Power Authority ("LIPA"). For the 2018-2019 tax year, the Property was assessed at $30,233,050, with true taxes of $84,273,115.24, and total taxes of $83,882,872.24.

The Power Plant is the largest power generating station on Long Island, with a generating capacity of at least 1,500 Megawatts. Northport is a dual fuel natural gas/oil fired steam electric generating facility with four generating units. Each of the four generating units is capable of generating at least 375 Megawatts and has a turbine speed of 3,600 revolutions per minute.

Northport includes four (4) smoke stacks each of which is approximately six-hundred (600) feet tall.

Procedural Requirements

In addition to the procedural requirements under the EDPL, the EDPL imposes an obligation on the condemnor at all stages prior to or subsequent to an acquisition by eminent domain to make, "every reasonable and expeditious effort to justly compensate persons for the property". EDPL § 301. The specifics of the just compensation requirement are addressed later in this memorandum.

The first procedural requirement is to conduct a public hearing. *See* EDPL § 201. Notice of the public hearing must be given at least 10 days, but no more than 30 days, prior to the public hearing. The Notice must be published in a newspaper of general circulation (in at least 5 successive issues if a daily publication and at least 2 successive issues if a weekly publication) and must state the purpose, time and location of the hearing, and must set forth the proposed location of the public project, including any proposed alternate locations. *See* EDPL § 202. Moreover, the public hearing must take place at a location "reasonably proximate to the property which may be acquired...." EDPL § 201.

The condemnor must also serve, at least 10 days, but no more than 30 days, prior to such public hearing, a Notice to each assessment record billing owner (condemnee) or his or her attorney of record. The Notice must be served either by personal service, or certified mail, return receipt requested. The Notice to the record owners shall state the purpose, time, date, and location of a public hearing and shall clearly state that those property owners who may subsequently wish to challenge condemnation of their property via judicial review may do so only on the basis of issues, facts, and objections raised at such hearing. *See* EDPL § 202.

At the public hearing, the condemnor must outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent, including maps and property descriptions of the property to be acquired and of adjacent parcels. The condemnor must also review the project pursuant to the State Environmental Quality Review Act. Any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project. A record of the hearing shall be kept, including written statements submitted. *See* EDPL § 203.

Within 90 days after the hearing, the condemnor must issue its determination and findings concerning the proposed public project, and publish a brief synopsis of such determination and findings in at least 2 successive issues of a newspaper of general circulation. The determination and findings shall specify:

(1) the public use, benefit or purpose to be served by the proposed public project;

(2) the approximate location for the proposed public project and the reasons for the selection of that location;

(3) the general effect of the proposed project on the environment and residents of the locality;

(4) such other factors as it considers relevant.

See EDPL § 204 (B).

The condemnor must also serve, by personal service or certified mail, return receipt requested, a summary of its determinations and findings upon each assessment record billing owner or his or her attorney of record whose property may be acquired. Such notice shall:

(1) include the information required by EDPL § 204 (B);

(2) state that copies of the determination and findings will be forwarded to such individuals upon written request and without cost;

(3) inform such individual that, pursuant to EDPL § 207, there are 30 days from the completion of the condemnor's newspaper publication requirement to seek judicial review of the condemnor's determination and findings; and

(4) inform such individual that, under EDPL §§ 207 and 208, the exclusive venue for judicial review of the condemnor's determination and findings is the appellate division of the supreme court in the judicial department where any part of the property to be condemned is located.

See EDPL § 204.

The property owner has thirty (30) days from publication to seek judicial review of the determination and findings. EDPL §207. In such a judicial review, the court shall either confirm or reject the condemnor's determination and findings. The scope of the review is limited to whether: (1) proceeding was in conformity with the federal and state constitution; (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority; (3) the condemnor's determination and findings were made in accordance with the procedure set forth in EDPL Article 2 and Article 8 of the environmental conservation law (SEQRA); and (4) a public use, benefit or purpose will be served by the proposed acquisition. EDPL §207. The condemnor has three years from the latter of publication of its determination and findings or entry of the final order or judgment on judicial review to file a verified petition to acquire title to the property. *See* EDPL §401.

To obtain title to the subject real property, the condemnor must file a verified petition and notice of pendency on twenty (20) days notice to the property owner(s). *See* EDPL §402. Venue is the supreme court in the judicial district where the real property to be acquired is situated. The property owner may be served pursuant to the CPLR or by certified mail, return receipt requested. If service is made by mail, then additional notice provisions apply, such as

publication requirements and posting handbills. The verified petition seeks an order to acquire the property and for permission to file an acquisition map and shall contain the following:

> (a) Statement providing compliance with the requirements of EDPL Article 2;
>
> (b) Copy of the proposed acquisition map to be filed and the name and places of residence of the condemnees of the property to be acquired;
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> (c) Description of the real property to be acquired and its location, either by metes and bounds or section, block and lot number and by reference to the acquisition map and notice of pendency attached to the petition;
>
> (d) The public use, benefit or purpose for which the property is required;
>
> (e) Request that the court direct entry of an order authorizing the filing of the acquisition map in the office of the appropriate clerk and that upon such filing, title shall vest in the condemnor;
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> ***
>
> (g) If the property is to be used for the construction of a major utility transmission facility, as defined by Public Service Law §120 or major steam electric generating facility as defined in Public Service Law §140 with respect to which a certificate of environmental compatibility and public need has been issued under such law, a statement that such certificate relating to such property has been issued and is in force.

See EDPL § 402(B)(3)(a)-(e), (g). Once an order is obtained and the acquisition map filed, title is vested in the condemnor. Thereafter, Article 5 of the EDPL governs the procedure for a judicial determination of just compensation. Article 5 is relevant when the condemnee and condemnor are unable to determine a mutually agreeable amount for just compensation. The just compensation provisions originate in Article 3.

As mentioned previously, Article 3 imposes a duty on the condemnor at all stages prior to or subsequent to an acquisition by eminent domain to make, "every reasonable and expeditious effort to justly compensate persons for the property". EDPL § 301. The condemnor must appraise the subject property and make a written offer of settlement. EDPL §302 *et seq.* Upon receiving an offer from the condemnor, the condemnee has ninety (90) days to either accept, reject or receive the offer as an advance payment. *See* EDPL §304. The offer is deemed rejected if the condemnee fails or refuses to notify the condemnor of his/her/its intent within 90 days. If the offer is accepted, then the condemnee conveys title in consideration thereof. In the event an offer is accepted as an advance payment and that payment exceeds a subsequent court award pursuant to Article 5, then on motion, the court shall enter a judgment in favor of the town for the amount in excess. *See* EDPL §304(H).

Article 5 governs the procedure to determine claims of property owners for just compensation. Within thirty days from the order conveying title to the condemnor, the condemnor must serve and publish a notice of acquisition on the condemnees. EDPL § 502(B). The notice of acquisition, *inter alia*, directs the condemnee to file a written claim or notice of appearance with the condemnor and the clerk of the court of the county in which the order granting title was filed. EDPL §502(B). If a claim includes compensation for fixtures or any interest other than the fee in real property acquired, the condemnee shall include a schedule of fixture items. EDPL §503(C). Thereafter, the proceeding proceeds in accordance with rules adopted by the respective judicial departments for appraisal exchange, pre-trial conferences and trial. See EDPL §506 *et seq.*

[redacted]

[redacted][1]

Financing

The power to spend Town funds is a condition precedent to the power to borrow money. In other words, a Town must first identify the power to spend Town funds for a specific purpose before determining whether bonds can be issued pursuant to the New York Local Finance Law ("Local Finance Law") to finance the specific purpose. In this case, in order to determine whether the Town has the power to issue bonds pursuant to the New York State Local Finance Law to finance the acquisition of the Northport Power Plant, one must first determine whether the Town has the power to spend funds to acquire and operate an electric utility system.

As discussed in greater detail below, Article 14-A of the New York General Municipal Law ("General Municipal Law" or "GML") provides authority for a town to acquire and operate an electric utility system. Specifically, that section authorizes towns to "construct, lease,

[1] "Just compensation" means "market value," which is measured by a property's highest and best use. "Highest and best use" is in turn defined as the use of a parcel of property that produces the highest value for that property in the marketplace on the date of the taking. The New York Court of Appeals has confirmed the distinction between valuation in condemnation and valuation in tax certiorari cases in *Allied Corporation v. Town of Camillus*, 80 N.Y.2d 351, 604 N.E.2d 1348, 590 N.Y.S.2d 417 (1992), *rearg. den.*, 81 N.Y.2d 784, 610 N.E.2d 393, 594 N.Y.S.2d 720 (1993). The Court noted that "[t]he relevant consideration in assessment cases is the property's value on the taxable status date - not its future use or value or the intentions of the owner" (80 N.Y.2d at 360, 590 N.Y.S.2d at 422). [redacted]

purchase, own, acquire, use and/or operate any public utility service...." General Municipal Law § 360(2).[2] Moreover, General Municipal Law § 362 provides that a municipality "may finance the cost of such public utility service in whole or in part ... pursuant to the local finance law." Local Finance Law § 11.00(a)(5) provides that the maximum term of any bonds or notes issued by the Town to finance the cost of acquiring the electric utility system would be thirty years. Any bonds issued by the Town would be subject to the provisions of the Local Finance Law regarding the structuring, sale and issuance of bonds by the Town. It should also be noted that the Town is authorized to issue bonds for capital acquisition or improvements only and cannot finance the cost of operating the system.[3]

[redacted]

[2] Critically, any action would have to be submitted for the approval of the electors of the town at the next general election or a special election. See General Municipal Law § 360(5).

[3] While it is clear that a town generally has the power to acquire and operate an electric utility system, the specific issue of whether the Town of Huntington has the authority to acquire and operate the Northport Power Plant under Article 14-A will be addressed in much greater detail later in this memo. If that question is answered in the negative, then the Town would not have the authority to issue bonds to finance the acquisition of said plant.

[4] [redacted]

[redacted][6]

There are also a number of unknown variables that would have a profound impact on the Town's potential acquisition of the Northport Power Plant. For one thing, there is the matter of whether the Amended and Restated Power Supply Agreement (PSA) transfers to the Town if the Town condemns the power plant. While the PSA is silent with respect to condemnation, the agreement may be assigned by either party to a non-party with the prior written consent of the other party (in this case, LIPA). Thus, LIPA would have the right to decline any request for an assignment from National Grid to the Town.

[redacted]

[5] The impact on the School District will be discussed in greater detail below.

[6] Whether the Town would be able to profit is a question that cannot be answered at this point as this memo obviously does not purport to be a complete analysis of the finances of acquiring and operating the power plant. If the Town Board is interested in pursuing this matter further, it would need to retain an accounting firm to conduct a public benefit analysis. The purpose of such an analysis would be to determine the price to pay to acquire the Northport Power Plant whereby the financial benefits of owning the plant would provide a benefit to the public. The law firm of Lewis & Greer, P.C. has obtained three quotes for such a study ranging from $30,000 to $95,000. An accounting firm would clearly have to consider, among other things, the cost of operating the plant. If the plant is operated by the Town of Huntington, union wages, pension benefits, and health insurance would seemingly make it difficult for the Town to make a profit. On the other hand, if the Town contracts with a company to operate the power plant, there would appear to be little leverage on the part of the Town in contract negotiations.

[redacted]

Another consideration is that this process would require a mandatory referendum. Any such resolution to construct, lease, purchase, acquire, etc., shall be submitted for the approval of the electors of the town at the next general election to be held not less than ninety days after the adoption of such resolution or at a special election called in the same manner as provided in the town law for submission of a proposition at a special town meeting or a special town election. General Municipal Law § 360(5). There is also a publication requirement for the resolution.

Legal Considerations

1. **Does Article 14-A of the General Municipal Law give a municipality the authority to establish, own and operate a public utility such as the Northport Power Plant?**

Article 14-A of the General Municipal Law permits a municipality to operate, establish and own a public utility under certain limited conditions as outlined by Section 360 of the General Municipal Law. Section 360(2) states the following:

> *Notwithstanding any general or special law, any municipal corporation may construct, lease, purchase, own, acquire, use and/or operate any public utility service within or without its territorial limits,* ***for the purpose of furnishing to itself or for compensation to its inhabitants,*** *any service similar to that furnished by any public utility company specified in article four of the Public Service Law.*

Emphasis added. Furthermore, General Municipal Law Section 360(6) permits the acquisition by the municipality through condemnation of private property. Section 360(6) states the following:

> *Such municipal corporation may for such purpose acquire the public utility service of any public utility company operating pursuant to article four of the public service law or any other utility service within or without its territorial limits,* ***by purchase, or by condemnation in the manner provided by law for condemnation by such municipal corporation of private property*** *for public use. Such municipal corporation shall have the power to construct or acquire by purchase or condemnation any transmission line or*

pipes connecting it with any source or sources of gas, either natural, artificial or mixed or electric power or production and to share with other municipal corporations the cost of such transmission lines or pipes.

Emphasis added.

Thus, there is no doubt that General Municipal Law Section 360 authorizes municipalities to own and operate a power-generating facility. However, the grant of authority in Section 360 is limited, in that it allows the operation of such facilities "**for the purpose of furnishing to itself or for compensation to its inhabitants"** gas and electric service. The New York Attorney General offered an opinion of this issue in *1989 N.Y. Op. Atty Gen. (Inf.) 142 (N.Y.A.G.) WL 435059.* The New York State Attorney General examined the legislative history of Section 360, and found that the legislature enacted Section 360 to combat what they perceived as oppressive rates being charged by utility companies. In response, municipalities were authorized to compete with private power suppliers in an effort to provide **less expensive power to residents**. *See 1989 N.Y. Op. Atty Gen, supra;* see also *Legislative Bill Jacket L1934, ch 281.*

The New York State Attorney General opinion then went on to state that "a municipal-owned facility whose entire power output is sold to a public utility does not serve either of the purposes set forth in Section 360 since the power is not furnished to the municipality itself or the municipality's inhabitants." The conclusion was that General Municipal Law Section 360 does not authorize a municipality to own and operate a power-generating facility for the sole purpose of selling power to a public utility. Nevertheless, this opinion did not address the issue herein of whether a municipality that owns and operates a power plant can, on a **limited basis,** sell power to a public utility. The opinion only addresses the issue of whether a municipality can own and operate a power plant for the **sole purpose** of selling power to a public utility; that answer is no.

2. Does Article 14-A of the General Municipal Law authorize a town to purchase through condemnation or otherwise a power plant where town residents would consume only a portion of the power?

General Municipal Law Section 361(1) relates to service beyond the territorial limits of the municipality and states as follows:

> *Whenever a surplus of such public utility service exists over the amount thereof required by the municipal corporation and the residents thereof, such municipality* ***may sell such surplus outside the municipal corporation to persons, public or private corporations or other municipal corporations.*** *Any such municipal corporation, by agreement with any other municipal corporation which is authorized to exercise the powers specified in the preceding section, may extend such service to such municipal corporation under such terms and conditions as may be agreed upon between them provided that if at the time of such extension, a public utility service is actually being furnished in such other municipal corporation, such extension shall not be effected without approval of the public service commission.*

Emphasis Added. Section 361(1) indicates authorization for a local municipality to sell or provide service to areas outside of its territorial area. The New York State Comptroller offered an opinion on this issue as it related to the Town of LeRoy. *See Opns St Comp, 1980 No.80-782 (N.Y.St.Cptr), 1980 WL 8119.* The State Comptroller opined that the Town of LeRoy would be permitted to purchase the entire natural gas public utility under 14-A of the General Municipal Law (sections 360-366), notwithstanding the fact that approximately 60 percent of the service area extends beyond the Town. In citing Sections 360(2) and 361(1), the opinion states that "the statutory provisions which authorize the Town to furnish to itself or its inhabitants a service similar to that furnished by a public utility should not be construed so narrowly that the Town cannot furnish such a service, merely because the utility involved serves an area larger than the Town. Indeed Section 361(1) anticipates such a circumstance." However, the opinion in interpreting the General Municipal Law sections states that the proper interpretation of the interplay between Sections 360(2) and 361(1) is not the size of any surplus **but whether the**

Town, in good faith, purchases the utility for the purpose of furnishing a service to itself or its inhabitants in accordance with the statutory mandate.

An analysis of the present situation would seem to indicate that approximately 15% of the power generated by the Northport Power Plant would be used for the Town of Huntington and its inhabitants. Therefore, there would be a surplus of 85%. Moreover, whether the Town was purchasing the Northport Power Plant to furnish power to itself and residents in accordance with the statutory mandate is questionable. The legislative history permits the municipality to purchase (through condemnation or otherwise) a utility, but for the purpose of providing less expensive power to its residents. Moreover, while a municipality can sell any surplus power outside of its jurisdictional territory, it seems reasonably clear that a municipality is not authorized to go into the power supply or utility business. **A municipality acquiring a public utility must in good faith purchase said utility for the purpose of servicing its residents and itself.** Whether the condemnation of the Northport Power Plant by the Town of Huntington would pass the "smell test" would be up to the Court. There is no relevant judicial interpretation that I was able to locate that would give us a conclusive answer. However, in my opinion there would at a minimum be strong scrutiny whether the condemnation of the Northport Power Plant was for the legislature purpose of providing cheaper power to itself and residents, due to the capacity of the plant, history of the litigation and the Northport Power Plant's importance to the region.

3. May a Municipality located within the Long Island Lighting Company's former service area establish a public utility service to provide gas or electric power without the Long Island Power Authority's agreement?

In 1998, the Suffolk County Attorney requested an opinion from the New York State Attorney General on whether a municipality may condemn the transmission and distribution

system, facilities and other assets of the Long Island Lighting Company ("LILCO") and/or LIPA and use them to operate a municipal utility. The issue was whether such action by a municipality is inconsistent with or preempted by State Law governing LIPA, and therefore prohibited.

The New York State Attorney General concluded in its opinion *1998 N.Y. OP. Atty Gen 1033 (N.Y. A. G.) WL 161777,* **that condemnation by a municipality in the service area of LILCO** (defined as LILCO's franchise area in New York Public Authorities Law Section 1020-b(17)) **of any portion of the transmission and distribution system, facility or other asset of LILCO is preempted by Title 1-A of Article 5 of the Public Authorities Law.** In citing said law, the opinion stated that the New York State Legislature authorized LIPA, subsequent to the acquisition of LILCO, to provide power to ratepayers in the service area. The opinion went on to state that the existing legislative scheme vests LIPA with the authority, in its discretion, to transfer assets to municipal utilities or enter into agreements with municipal utilities in the service area. These provisions are part of a specific statutory scheme which preempts the field, and which cannot be overridden by inconsistent local legislation or other local action.

As we know, the Northport Power Plant was a former LILCO plant, but is currently owned by National Grid, a private entity. Therefore, an argument can be made that the former LILCO plant would be exempt from this opinion, and the State legislative scheme, because it is not an asset of LIPA but a privately owned power plant. However, in Section 1020-a of the Public Authorities Law, the legislature very specifically articulated its reason for enacting the LIPA Act. The Legislature declared that a "situation threatening the economy, health and safety exists in the 'service area' and as a response to the crisis, created LIPA, anticipating lower rates and a more efficient reliable and economic supply of electricity." The Court in *Suffolk County v. Long Island Power Authority,* 177 Misc. 2d 208; 673 N.Y.S.2d 545 (Sup. Ct. Nassau Cty. Mar.

24, 1998), citing the Court of Appeals in *Citizens for the Orderly Energy Policy, Inc. v. Cuomo,* 78 N.Y.2d 398, 576 N.Y.S.2d 185 (1991), stated that "the recurring and unavoidable theme reflected in the legislative history is that the intended *sine qua non* objective of the Act was to give LIPA the authority to save ratepayers money by controlling and reducing utility rates." The Court went on to state that LIPA was therefore vested with very broad powers. Included in these very broad powers is that LIPA became the owner of LILCO's transmission and distribution facilities, all regulatory assets including Shoreham and LILCO's rights and obligations under independent power producer contracts. LIPA was also required to enter into agreements with LILCO affiliates or subsidiaries including a power supply agreement **whereby a LILCO affiliate would sell electric power to LIPA and an energy management agreement whereby a LILCO affiliate would purchase fuel for LIPA's use in operating its generating facility.** See *Suffolk County v. Long Island Power Authority,* supra.

Therefore, it can be argued that the LIPA Act prohibits a local municipality from owning, condemning and operating a power plant in any part of the former LILCO's service area regardless of whether National Grid or LIPA owns the power plant. In fact, there is a 1999 New York State Attorney General Opinion that comes to this very conclusion. The 1999 Attorney General Opinion (*1999 N.Y. Op. Atty. Gen. 1064 (N.Y.A.G.) WL 1488846*) was issued when the Town of Southold wanted to establish a public utility service to supply gas and electric power without LIPA's consent and agreement pursuant to the provisions of General Municipal Law Sections 14-A and Section 360(6).

The opinion first cites Public Authorities Law Section 1020-g(n) which provides that "LIPA shall acquire from LILCO all franchise and utility service responsibilities for all ultimate consumers of gas and electricity within LILCO's former service territory, including the

responsibility to provide safe and adequate service. Section 1020-h(1)(a) sets forth a legislative determination that the public use of the former LILCO property by LIPA is 'deemed superior to the public use of such property by any other person, association, or corporation.'" As such, "LIPA has the exclusive responsibility to ensure safe and adequate public utility service in LILCO's former service area...." The 1999 Attorney General Opinion then cites the 1998 Attorney General Opinion and *Long Island Lighting Co., v. County of Suffolk*, 119 A.D.2d 128 (2nd Dept. 1986), in stating that "the LIPA statute clearly establishes that LIPA, upon exercising its right to purchase the assets or securities of LILCO, in its sole discretion, may transfer acquired assets to municipal utilities or enter into cooperative or contractual arrangements with municipalities in the service area. Only LIPA is authorized to determine whether assets should be transferred and the terms and conditions of transfer." Once again the LIPA enabling legislation is a specific statutory scheme which preempts the field, and cannot be overridden by inconsistent local legislation or other local action.

The 1998 Attorney General opinion stated that a municipality in the service area of LIPA may not condemn the transmission and distribution system, facilities and other assets of LIPA and use them to operate a municipal utility. The 1999 Attorney General opinion goes further and states that "**a municipality located** within **LILCO's former service area may not establish a public utility service to provide gas or electric power without LIPA's agreement.** LIPA has exclusive authority to ensure power in LILCO's former service area. LIPA may in its sole discretion, enter into contracts with municipalities providing for transfer of any of its assets to a municipal electric agency established pursuant to Article 14-A of the General Municipal Law and permitting construction, acquisition, ownership, operating and/or use of transmission facilities." Emphasis added.

Thus, the opinions of the New York State Attorney General and other relevant law indicate that pursuant to the LIPA Act, the Town of Huntington would not be permitted to condemn the Northport Power Plant and own and operate the plant under General Municipal Law 14-A without the consent and agreement of LIPA.

4. Would the acquisition of the Northport Power Plant serve a public use?

EDPL § 204(B)(1) provides that a condemnor must determine the public use, benefit or purpose to be served by the proposed public project. National Grid currently owns the property and uses the property and structure for the Northport Power Plant. In the scenario analyzed herein, the Town of Huntington would be using the property upon which the Northport Power Plant is situated for the exact same purpose as it is currently used for. Is this permitted under Eminent Domain Law?

The answer to this question appears to be yes. A case that is on point is a Suffolk County case *In re County Park at Great River, Town of Islip, Suffolk County*, 333 N.Y.S.2d 686, 70 Misc. 2d 232 (Special Term, Suffolk Cty. Mar. 30, 1972). In this case, the County of Suffolk commenced condemnation proceedings against a private entity to take a private golf course and marina. The County of Suffolk was permitted to take the golf course and marina and pay just compensation even though the use was not changing. In essence the golf course and marina went from private hands to public hands. While the court did not specifically address the issue of whether a municipality can take property by eminent domain and use it for the exact same purpose, this scenario was before the court and neither the court nor the landowner raised any concerns.

Impact on Northport-East Northport School District

As discussed above, the acquisition of the Northport Power Plant through eminent domain would make the property exempt from taxes and consequently deprive the Northport-

East Northport School District of critical revenue. LIPA/National Grid currently pay more than $55 million dollars in school taxes. The School District has weighed in on the potential condemnation of the power plant and advised that if this became a reality, the Board of Education would have to dramatically reduce staff at all levels, eliminate proposed capital improvements, eliminate extra-curricular and academic offerings, and significantly increase class sizes, among other measures.

Assuming that the Town's operation of the power plant results in a net profit, there does not appear to be a legal mechanism to make the School District whole. Moreover, even if the Town of Huntington could legally formulate a plan to make the School District whole by making annual payments and compensating it for lost tax revenue from the Plant, condemnation would still have a deleterious impact on the School District. This impact derives from the fact that taking the Northport Power Plant off the tax roll would lower the District's tax levy base and consequently the amount of new money that it can collect from the taxpayers. For example, assuming a tax levy base of $100 million and a 2% allowable increase under the tax levy law, the District's tax levy could increase to $102 million for the following year. However, if the $55 million dollars paid by National Grid/LIPA is removed, the tax levy base becomes $45 million and the District can only increase the levy by $900,000 (2% of $45 million). Accordingly, under this scenario, there is a loss of $1.1 million in tax revenue to the District ($2 million - $900,000).

Such a plan to reimburse the School District for lost tax revenue from the condemnation of the Power Plant would have practical consequences as well. Currently, there is little interplay between the Town of Huntington and the local school districts situated within its borders. For this reason, there is no prohibition against a school board trustee also serving as a member of a town board. Indeed, local school districts are creatures of the State, and receive nearly all of

their non-property tax revenue from the State. A payment of millions of dollars from the Town of Huntington to the Northport-East Northport School District would fundamentally change the nature of the Town's relationship with the School District as well as neighboring districts. The School District would also be subject to the whims of future Town Boards who could decide not to make such payments in the future based on budgetary considerations or other less benign reasons. Only an agreement of indefinite duration between the Town and School District could provide the latter with comfort that its finances were not in total flux from year to year. Lastly, one would assume that the other school districts based in the Town would likewise seek aid from any profits generated by the Town's operation of the Power Plant, and a failure to provide same could lead to feelings of ill-will.

Summary

Clearly a potential acquisition of the Northport Power Plant by the Town of Huntington would raise a host of legal and practical considerations, with a town wide impact, especially upon the Northport-East Northport School District. If the Town Board is interested in pursuing this concept, the next step would be to engage an accounting firm to analyze the public benefit of operating the Northport Power Station.

Even after such an analysis is procured, the challenges that the Town would need to address are considerable. First, a majority of the voters at a mandatory public referendum must approve the acquisition of the Power Plant. This would be a tall order as the Power Plant lies exclusively within the confines of the Northport-East Northport School District and voters outside of that school district might deem such an acquisition too provincial and/or not in their best interests. [redacted]

[redacted] Second, the Town Board would have to be willing to, at a minimum, double its outstanding debt, and such bonding action would obviously require a supermajority of the Board. Third, there does not appear to be any legal mechanism by which the Town could make the School District whole for the loss of the $55 million that National Grid/LIPA currently pays; there would also be a loss of an additional approximately $30 million in tax revenue to other municipalities, including the Town, library, and fire district. Lastly, and perhaps most significantly, condemnation of the Northport Power Plant would trigger serious legal challenges. Such challenges would likely raise at least the following two questions: (1) Can the Town condemn the Northport Power Plant if it only uses a fraction of the power generated for its own residents?; and (2) Can the Town condemn a facility within LILCO's former service area? While both questions would be matters of first impression for the courts, the Attorney General opinions cited above, as well as the purpose behind the relevant statutes, strongly suggest that the answers to both questions are "No."