MEMORANDUM OF LAW

To: Town+Gown: NYC Utilidor Working Group
From: Mackenzie Callahan and Rianna Ramana, New York Law School
Date: June 29, 2026
Re: Untangling Legal Impediments related to Modern Infrastructural Solutions under Local Roadways.

I. Introduction

This memorandum analyzes potential legal barriers to implementing modern subsurface infrastructure solutions beneath New York City roadways, which are technically referred to as public rights of way ("PROW"), using, as the case study, Proposal IP-24, *Enforcing the Removal of Abandoned Utility Infrastructure,* from the Utilidor Preliminary Value Engineering Study (Utilidor VE Study). This legal research project is undertaken on behalf of Town+Gown: NYC and its Utilidor Working Group, a collaborative initiative that brings together academic researchers, public agencies, and industry experts to improve the planning and management of the City's built environment.[1]

New York City's subsurface PROW is occupied by a dense and complex network of utility *distribution* infrastructure,[2] some of which is public water and sewer system utility infrastructure and some of which is utility infrastructure owned and maintained by private utility companies occupying the subsurface PROW under various franchise agreements, with some dating back to the late nineteenth century. Over time, a significant amount of the private utility infrastructure became obsolete and was abandoned in place, becoming "dead" infrastructure that remains embedded beneath the PROW, along with the "live" subsurface infrastructure. This historical abandonment in place conflicts with the City's ability to create meaningful subsurface

[1] See Town+Gown Working Groups: Urban Resource Recovery (URR).
[2] Distribution infrastructure is distinct from generation and transmission infrastructure, in practice and in law.

PROW space for future infrastructure needs. As demand for all utility services increases demand for subsurface PROW capacity, this historical practice poses a growing constraint on efficient implementation of modern utility subsurface practices and systems, which can include utilidors.

The Utilidor VE study identified a number of initiatives, of which IP-24 is one, that would proactively move the City and the owners of subsurface PROW utility infrastructure to modern construction practices and infrastructural solutions. IP-24 recommended that, on future projects, the City enforce the required removal of utility lines that are no longer needed instead of allowing abandonment in place, which, over time, would help reduce the cost of all future projects, create more available space for new utilities, and avoid the risk of abandoned utility collapse leading to road settlement issues. The two NYC Administrative Code (Ad. Code) provisions that relate to IP-24 are Ad. Code, § 19-143 *Excavations for public works* and Ad. Code § 24-521 *Excavations for public works*.[3] These two provisions have virtually identical language, with differences due to the first being in the Ad. Code related to the NYC Department of Transportation (DOT) and the second being in the Ad. Code related to NYC Department of Environmental Protection (DEP):

> a. Public service corporations whose pipes, mains or conduits are about to be disturbed by the regulating or grading of any street, **shall**, on the receipt of the notice provided for in the preceding subdivision, **remove or otherwise protect and replace their pipes, mains and conduits, and all fixtures and appliances connected therewith or attached thereto, where necessary,** under the direction of the [DOT] commissioner. *(Emphasis added)*
>
> b. Public service corporations shall protect their property. Public service corporations whose pipes, mains or conduits are about to be disturbed by the constructing, altering or repairing of any sewer, culvert, water main or pipe, **shall**, on the receipt of the notice provided for in the preceding subdivision, **remove or otherwise protect and replace their pipes, mains and conduits, and all fixtures and appliances connected therewith or attached thereto, where**

[3] See Appendix A for full text of both provisions.

> **necessary**, under the direction of the commissioner of design and construction in accordance with chapter fifty-five of the charter, unless otherwise directed by the mayor pursuant to such chapter. *(Emphasis added)*

The questions presented for the legal analyses discussed below consist of

(i) whether Ad. Code, §§ 19-143 and 24-521 (collectively, the Ad. Code provisions) permit implementing IP-24;

(ii) whether the City can amend the Ad. Code provisions by local law; and

(iii) whether state law pre-emption issues present any limitation to local amendment of the Ad. Code provisions.[4]

Short answers to these questions, as further analyzed below, are:

(i) <u>The Ad. Code provisions, as currently written, permit implementing IP-24, because mandating private utilities to remove or otherwise protect and replace their subsurface infrastructure, including abandoned utility infrastructure, is within the City's police power.</u> The Ad. Code provisions permit the City to mandate removal of abandoned utility subsurface infrastructure as a core function of the City's authority, as an exercise of its municipal police powers. The municipal police power of the City includes the regulation of matters that affect "public health, safety, morals and general welfare" of its citizens,[5] which long been confirmed in caselaw as a municipal function.

(ii) <u>The City can amend the Ad. Code provisions by local law.</u> Legislative history analysis of the Ad. Code provisions reveals that they were originally enacted by local law, which means they

[4] This analytical framework would apply to other Utilidor VE study initiatives related to other Ad. Code provisions or NYC Rules.
[5] McQuillin, supra note 26.

can be amended by local law, subject to considerations of state law pre-emption, discussed below.

(iii) Amending the Ad. Code provisions as an exercise of municipal police powers will not present any state pre-emption law limitations. Ad. Code §§ 19-143 and 24-521 are not subject to state pre-emption concerns as a result of the "home rule" authority that that gives the City the power to enforce local laws relating to matters of local concerns. Further, caselaw on field pre-emption and conflict pre-emption of local laws find state pre-emption when the local law affects matters of state concern, such as that of the New York State Public Service Commission. Those cases focused on the comprehensive regulatory scheme governing macro-level utility system-wide operations and management within service areas in the state, typically focusing on generation and transmission infrastructure, including siting and system adequacy planning, which is distinct from local police power regulations with respect to the public rights of way within the local jurisdiction and involve *distribution* infrastructure. This statewide comprehensive regulatory scheme does not cover local governments' management of its PROW, including the private utilities' subsurface *distribution* infrastructure located under the PROW.

II. Subsurface PROW Academic Context

The legal and policy issues surrounding the subsurface PROW go to the core of how New York City allocates, governs, and optimizes the subsurface PROW, which one of its most constrained and valuable public assets, and are not merely technical concerns.[6] As modern cities become increasingly dependent on dense, interdependent infrastructure systems, the inefficiencies embedded in current subsurface PROW practices impact significant public health,

[6] See TAB 5 of UtilityRegulationWorkBookBrooklynLawSchool.pdf for an analysis of the roadway in New York.

safety, welfare and convenience concerns that also have environmental[7] and economic[8] consequences.

At present, New York City's subsurface PROW condition reflects what scholars have termed the "spaghetti subsurface problem"—a condition in which decades of uncoordinated utility installation have produced a congested and disordered network of pipes, conduits, and cables beneath city streets.[9] This condition is the product of historically rational but collectively inefficient decisions by both public and private actors, each installing infrastructure independently under a direct burial model that lacks long-term coordination.[10]

The negative consequences of this system are substantial. Direct burial increases infrastructure density, limits the ability to inspect or maintain assets, and leads to predictable failures requiring disruptive and costly street excavations.[11] These repeated excavations degrade roadway conditions, increase congestion, and generate additional environmental and social costs.[12] Moreover, because buried infrastructure cannot be easily accessed or monitored, utilities are often forced into reactive maintenance regimes, further exacerbating inefficiencies and risks.[13]

Utilidors—integrated, accessible tunnels housing multiple utility systems—offer a fundamentally different model. By consolidating infrastructure within a managed, transitable environment, utilidors can reduce the need for repeated excavation, improve maintenance and

[7] See Street Excavation Emission Calculator and A Tool for Estimating GHG Emissions from Street Excavation Charan Kukunoor 08/2024.
[8] See WorthStreetLCCBAUtilidorvsTradCostsNYUWagner.pdf and LifeCycleCostBenefitAnalysisSupportCreationSmartCityInfrastructureAuthority.pdf.
[9] Terri Matthews, *Analyzing and Resolving Recursive Collective Action Problems in the Public Right of Way: Utilidors for New York City as a "Smart" City* 2 (2021) (M.S. thesis, N.Y.U. Tandon Sch. of Eng'g).
[10] *Id.* at 66.
[11] Terri Matthews & Debra F. Laefer, *Local Public Right of Way for Surface and Subsurface Resource Integration*, 2022 Civ. Eng'g & Env't Sys. 2-3.
[12] *Id.*
[13] *Id*.

inspection capabilities, and enable long-term system planning.[14] They also create opportunities for technological integration, including real-time monitoring and "smart city" applications, which are largely infeasible under current direct burial practices.[15] Despite these benefits, utilidor implementation in New York City has been non-existent, not only because of technical design and construction issues, but also due to perceived institutional and legal barriers.

Central among these perceived barriers are the subsurface PROW franchise agreements, some of which date back to the late nineteenth century,[16] which are City grants to the private utilities of the privilege to occupy and use subsurface PROW space. These franchise agreements also reflect outdated technological and economic assumptions[17] and have resulted in fragmented subsurface PROW governance. Transaction costs economics explains such fragmentation as a structural characteristic of long-term contracting within complex capital-intensive systems that are necessarily incomplete and evolve into ongoing governance frameworks rather than fixed, fully specified rule sets.[18] Because these arrangements involve high levels of asset specificity, long time horizons, and mutual dependency, they tend to become path-dependent and resistant to change—even when they no longer produce optimal outcomes.[19] In effect, the parties are locked into a "stuck" relationship in which existing governance structures persist due to institutional inertia, transaction costs, and the absence of a coordinating mechanism capable of realigning incentives.

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[14] Matthews, *supra* note 1, Abstract.
[15] Matthews & Laefer, *supra* note 3, at 3.
[16] These are "legacy" franchises due to absence of termination dates that have accrued over time to Con Edison for electricity in the five boroughs and gas in Manhattan and The Bronx; National Grid for gas in the other four boroughs; and Verizon and Empire City Subway for a significant portion of telecommunications services.
[17] Matthews, *supra* note 1, at 114.
[18] *See* Oliver E. Williamson, *Revisiting Legal Realism: The Law, Economics and Organization Perspective* 386 (1996).
[19] *Id.* at 394-95.

An historical account of municipal franchise contracting for private utilities serving the public underscores this dynamic as one of bilateral dependency that is not incidental but inherent in asset-specific long-term contracts. Once utilities made large, sunk[20] investments in infrastructure under the PROW as permitted by franchises, whether term-limited or not, both the private firm and the municipality became mutually dependent.[21] The utilities could not redeploy its assets, while the municipality relied on the incumbent utilities for continuous service provision.[22] This resulting mutual lock-in makes exit or refranchising prohibitively costly and renders re-competition effectively unfeasible,[23] transforming franchise contracts into to a reciprocally dependent relationship where relational governance regimes, requiring ongoing adjustment and administrative oversight, is more appropriate, rather than discrete, enforceable bargains—further entrenching the path-dependent and "stuck" character of these institutional arrangements.[24]

In the context of New York City's subsurface PROW infrastructure, legacy franchise agreements operate in precisely this manner: they have structured ongoing relationships between the City and private utilities but lack the flexibility within the "four corners" of the agreement to accommodate modern subsurface infrastructure. The state-level regulatory oversight—particularly by public utility commissions—raises potential issues of pre-emption that *could* limit the City's ability to unilaterally restructure subsurface PROW governance.[25] Taken together,

[20] Literally and figuratively.
[21] George L. Priest, *The Origins of Utility Regulation and the "Theories of Regulation" Debate*, 36 J.L. & Econ. 289 (1993).
[22] *Id*.
[23] George L. Priest, *The Origins of Utility Regulation and the "Theories of Regulation" Debate*, 36 J.L. & Econ. 289 (1993).
[24] *Id.*
[25] Matthews & Laefer, *supra* note 3, at 2.

these factors demonstrate why franchise agreements and subsurface governance in the context of modern construction methods and infrastructure designs are critical issues for legal analysis.

The current system produces suboptimal outcomes not because stakeholders act irrationally, but because the institutional framework channels rational behavior into collectively inefficient results—a classic "recursive collective action problem."[26] This is closely tied to the bilateral dependency caused by asset specificity and long-term franchises.[27] That dependency helps explain why even known inefficiencies persist—coordination failures are not episodic, but structurally embedded in the governance form itself.[28]

III. Analyses

A. Whether Ad. Code, §§ 19-143 and 24-521 Permit Implementing IP-24

As discussed below, caselaw—in particular *City of New York v. Consolidated Edison Co. of New York, Inc.* ("*Con Edison*"), 114 A.D.2d 217 (1st Dep't 1986), —supports the ability of the City to implement IP-24. This caselaw confirms police power authority that municipalities retain over the subsurface PROW, as the Ad. Code provisions provide, even with various existing franchises, which also originate in City's police powers over the PROW. The Ad. Code provisions, read together in the context of this case law would permit the City to mandate the removal of abandoned private utility subsurface infrastructure when the Ad. Code provisions apply. These cases also hold that when private utilities place their physical assets under the PROW pursuant to franchises, they do so subject to the City's continuing police power authority over public health, safety, welfare and convenience concerns with respect to the PROW. That includes the power, evidenced in the Ad. Code provisions, to require removal or relocation of

[26] Matthews, *supra* note 1, at 66.
[27] George L. Priest, *The Origins of Utility Regulation and the "Theories of Regulation" Debate*, 36 J.L. & Econ. 289 (1993).
[28] *Id.*

infrastructure, at the utilities' expense, when the City determines it necessary for street reconstruction or reconfiguration of the PROW. Regulating the City's PROW is a core municipal function under law and the Ad. Code provisions evidence such function. *Con Edison* does not foreclose municipal mandates governing the physical presence of subsurface utility assets under the PROW; instead, by it distinguishing between the City's core municipal function of regulating the City's own streets and regulating utility operations, which remains within the authority of the New York State Public Service Commission (PSC), it confirms the City's power to mandate the physical presence of such subsurface *distribution* utility assets. Thus, the requirements under the Ad. Code provisions mandating removal of subsurface infrastructure during reconstruction of the PROW is an exercise of municipal police power over street management, not as regulation of utility service or operations, and therefore not subject to PSC pre-emption.

Municipal police power has long been understood to encompass the authority to regulate matters affecting the "public health, safety, morals and general welfare," particularly with respect to the use and maintenance of PROWs and public streets.[29] Courts applying New York law repeatedly invoke this same formulation—public health, safety, welfare, and convenience—when describing municipal authority over the PROW, especially where utilities physically occupy the subsurface PROW. As discussed below, that recurring language is significant because it demonstrates doctrinal continuity across decades of case law recognizing that utilities occupy the PROW subject to the City's continuing obligation to manage the PROW in the public interest.

The seminal case defining the boundary between municipal authority over the physical management of streets, PROWs, and State utility regulation is *Con Edison*. The decision is

[29] See 6A Eugene McQuillin, The Law of Municipal Corporations § 24:1 (3d ed.) ("The police power is the power to enact regulations to promote the public health, safety, morals, peace and general welfare of the community.").

particularly instructive because it synthesizes and applies longstanding New York precedent recognizing that municipalities retain broad police power authority over the physical use, reconstruction, and clearance of the PROW, including the ability to impose street-related requirements on utilities that occupy the PROW.[30] The case arose out of the City's attempt to regulate utility activity within the street system, where Consolidated Edison challenged municipal conditions affecting its infrastructure located in the NYC PROW. Critically, the decision confirmed that utilities occupy the PROW subsurface subject to the City's paramount control and obligations tied to that occupancy and did not eliminate municipal authority over physical street management.

As the court explained, "a public utility… is required at its own expense to remove or protect and replace its underground facilities whenever the public health, safety or convenience require that to be done."[31] The court's express reliance on "public health, safety or convenience" is particularly important because it mirrors the traditional formulation of municipal police powers recognized in McQuillin and throughout New York municipal law jurisprudence. This principle reflects the core allocation of risk: utilities may use the public streets for private purposes pursuant to contract agreements also authorized by the same police powers, but they do so subject to the City's continuing authority to reconstruct, alter, or clear the PROW in the public interest. Consistent with this, the governing franchise framework authorized the City, in the event of utility noncompliance, to "break through or remove or relocate… at the expense of the Company," underscoring that the City is not required to negotiate or absorb the cost of relocation necessitated by public works.[32]

[30] *City of New York v. Consolidated Edison Co. of New York, Inc.* ("*Con Edison*"), 114 A.D.2d 217 (1st Dep't 1986).
[31] *Id.*
[32] *Id.*

The court further rejected any suggestion that a utility may impede municipal street projects based on disputes over cost allocation or timing, holding that *Con Edison* "does not have the option to leave the interferences in place… nor may *Con Edison* effectively bring such projects to a halt through nonaction" while attempting to litigate cost responsibility.[33] Accordingly, *Con Edison* confirms that municipal police power over streets includes the authority to compel relocation or removal of utility facilities in the PROW necessary to effectuate public construction and safety objectives, with costs properly borne by the utility as a condition of its occupancy. Critically, this decision confirms the long-standing boundary between permissible exercises of local police power and impermissible regulation of utility operations. Municipal police power has historically been defined as the authority to enact regulations to protect the public health, safety, and general welfare, and it extends specifically to the control, maintenance, and reconstruction of PROWs and public streets, including the imposition of conditions governing the occupation, relocation, or removal of facilities located within them.[34] Under this framework, courts recognize that municipalities retain authority over streets as public assets. Consequently, a City can require the coordination, relocation, and physical adjustment of street installations to manage its own infrastructure, not to dictate utility service policy.[35]

Earlier New York Court of Appeals decisions—upon which *Con Edison* rests—likewise recognize that utilities occupy municipal streets subject to the City's superior police power authority over the PROW. In *New York & Queens Gas Co. v. City of New York*, 227 N.Y. 324 (1919), the Court recognized that utility use of public streets exists only by permission of the

[33] *Id.*
[34] 6 Eugene McQuillen, *The Law of Municipal Corporations* § 24:62 (3d ed. rev. 2023).
[35] *City of New York v. Consolidated Edison Co. of New York, Inc.* ("*Con Edison*"), 114 A.D.2d 217 (1st Dep't 1986).

municipality and remains subordinate to the City's obligation to manage streets for public purposes.[36] Although framed in terms of municipal street control, the decision reflects the same underlying public welfare rationale later articulated expressly in *Con Edison* and related cases. Similarly, in *Transit Commission v. Long Island Railroad Co.*, 253 N.Y. 345 (1930), and *New York City Tunnel Authority v. Consolidated Edison Co. of New York, Inc*., 294 N.Y. 320 (1945), the Court treated conflicts involving infrastructure occupying public space as questions of coordinating competing public uses within the PROW, rather than as matters exclusively pre-empted by State utility regulation.[37] In each instance, the Court's reasoning rested on the premise that municipalities must retain sufficient authority over streets and subsurface public space to protect public safety, convenience, and welfare interests associated with transportation, infrastructure coordination, and street reconstruction. These decisions collectively establish the doctrinal foundation later synthesized in *Con Edison*: namely, that while utility operations may be regulated by the State, municipalities retain primary authority over the physical condition, reconstruction, and safe management of their streets and subsurface PROW. Taken together, these cases repeatedly frame municipal authority over streets and public infrastructure through the lens of protecting public health, safety, welfare, and convenience—the core attributes of municipal police power identified by McQuillin and reflected in the City's authority under the Ad. Code provisions.

The same framework appears in later decisions recognizing municipal authority over public infrastructure and land use. In *In re Consolidated Edison Co. of New York, Inc. v. Lindsay*, 24 N.Y.2d 309 (1969), the Court acknowledged that the City possesses broad police

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[36] *New York & Queens Gas Co. v. City of New York*, 227 N.Y. 324 (1919).
[37] *N.Y.C. Tunnel Auth. v. Consol. Edison Co. of N.Y., Inc.*, 294 N.Y. 320 (1945); *Transit Comm'n v. Long Island R.R. Co.*, 253 N.Y. 345 (1930).

power authority to regulate the use of streets and public spaces in the interest of safety and public welfare.[38] Again, the Court invoked the same traditional police power concepts—public safety and welfare—that recur throughout New York municipal jurisprudence governing the PROW. Likewise, in *In the Matter of the City of New York (Public School 161 Site Acquisition)*, 31 N.Y.2d 745, 746–47 (1972), the Court recognized that municipalities exercise core sovereign authority over land use and infrastructure projects involving public property, including decisions affecting the physical condition of municipal facilities and PROW.[39]

B. Whether the City Can Amend the Ad. Code Provisions by Local Law

The issue of whether the Ad. Code provisions permit the implementation of IP-24 having been analyzed above, the next question is whether the City can amend the Ad. Code provisions in the context of the Utilidor VE study, to clarify or expand on such provisions.[40] The New York City Administrative Code contains the legal provisions governing specific City agency operations at a level of detail excluded from the Charter, where the shorter-form source of authority, powers, and duties for City agencies reside.[41] To determine whether the Ad. Code provisions can be clarified or expanded upon, it is necessary to analyze the legislative history of the Ad. Code provisions to determine if the origins of these provisions were enacted originally by local law, which can be amended by local law,[42] or by state law, which cannot.

Initial legislative history analysis of the Ad. Code provisions reveals that the current version of Ad. Code § 19-143 was added in 1994, by local law, and the current version of Ad.

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38 *In re Consol. Edison Co. of N.Y., Inc. v. Lindsay*, 24 N.Y.2d 309 (1969) (discussing scope of municipal police power over streets and public safety).
39 *In the Matter of the City of New York (Public School 161 Site Acquisition)*, 31 N.Y.2d 745, 746–47 (1972).
40 For example, clarifying the Ad. Code provisions along the lines of 17 N.Y.C.R.R. § 131.13, a NYS DOT Rule with respect to abandoned subsurface infrastructure or requiring, as part of the City's permitting process, that private utilities remove their abandoned infrastructure when working on their subsurface infrastructure below the PROW.
41 *Basics of the New York City Charter and Administrative Code for Litigators*, NEW YORK CITY LAW DEPARTMENT CLE PROGRAM, (May 10, 2010), p. III-52-53.
42 Or perhaps by rule. The legislative history also supports that both Ad. Code provisions are of local nature.

Code, §24-521 was added in 1995, by local law. Since "it should not be assumed that the provision is only a local law,"[43] it is necessary to conduct analysis to trace them through the various state law revisions of the City's administrative code. This analysis revealed the earliest known expressions of the Ad. Code provisions, with provisions almost identical to current provisions set forth in the introduction above traces at least back to the 1920s, which the cases analyzed above provided an historical identification of predecessor local law provisions.[44] The relevant text in both Ad. Code provisions has remained largely unchanged over this period, with changes noted in the charts below.[45]

The preliminary conclusion that the Ad. Code provisions were originally enacted by local law, which would permit local amendment for clarification purposes and expansion within the legal framework discussed above, was however subject to additional analysis of three state legislative recodifications of the City's administrative code in 1937, 1963 and 1985. Over the last century, the State has codified and recodified the City's administrative code. These recodifications renumbered, added and removed various administrative code provisions and were intended for simplicity and efficiency purposes. The intent of these state recodifications to reorganize administrative code provisions, some of which were enacted locally and some of which were enacted by state legislation, to provide the City of New York with an administrative code "in harmony with and supplemental to the New York City Charter" [46] and not to change their original legal status.[47]

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[43] If the provision was originally enacted by state law, then "it has the force of state law" and will not be pre-empted. However, state-enacted law can be more difficult to amend through local law provisions. See, *Basics of the New York City Charter and Administrative Code for Litigators*, supra note 25, at II-8.

[44] Discussions with the NYC Law Department indicated that earlier versions of these local laws may go back to at least the 1898 consolidation and even earlier dating back to the late 1800s,

[45] *Basics of the New York City Charter and Administrative Code for Litigators*, supra note 25 at III-34-35.

[46] Governor's Bill Jacket 1937, Chapter 929, NEW YORK LEGISLATIVE SERVICE, INC. (Legislative Document #56 of 1938).

[47] *Basics of the New York City Charter and Administrative Code for Litigators*, supra note 25, at III-58; see also II-8.

Moreover, the Ad. Code provisions predate the codification of the Code of Ordinances and the New York Charter, having originated prior to the enactment of the Administrative Code by Chapter 929 of 1937. Administrative code provisions that predate this enactment, as the chart outlines below, are "generally treated as having the force of local law,"[48] and thus the City may amend the Ad. Code provisions by local law in the future.

Ad. Code § 19-143	
Current Ad. Code § 19-143	L.L. 104/1993, § 1: § 19-155 became § 19-143 as part of the overall recodification in 1994; amended the notice requirement to public service corporations. Notice was changed from "at least 24-hours," to "at least 48-hours."
Formerly Ad. Code § 19-155	L.L. 14/1985, § 2 added Sub. C. This required that people must check any city capital budget and lead to the creation of a 5-year "no work" after major reconstruction. This section was also renumbered and became § 19-144.
Recodification of NYC administrative code (1985)	Chap 907/1985 § 1 This 1985 recodification of the City's legislation for simplicity, clarity, and accessibility of the City's legislation into a consolidated code without changing the original nature of the laws.
Formerly § 83-5.0 Recodification of NYC administrative code (1963) Citing References: *See*, *City of New York v. Consolidated Edison Co. of New York, Inc. ("Con Edison")*, 114 A.D.2d 217 (1st Dep't 1986).	Comprehensive recodification of the City's legislation; aimed to consolidate existing state and local laws without changing the original nature of the laws. This consolidation separated the DOT and DEP Ad. Code provisions into two "new-numbered" sections. The DOT Ad. Code provision was numbered § 83-5.0. There was no substantial change to this recodification. Chapter 100 of 1963 § 130 takes out the culvert, etc., text that went in § 510 for the predecessor agency/agencies to DEP.

[48] *See*, *Basics of the New York City Charter and Administrative Code for Litigators*, supra note 25 at III-56.

Formerly § 693a-3.0 Recodification of NYC administrative code (1937) Citing References: *See*, *City of New York v. Consolidated Edison Co. of New York, Inc. ("Con Edison")*, 114 A.D.2d 217 (1st Dep't 1986).	Comprehensive reorganization of the City's legislation in 1937; provided the City of New York an administrative code "in harmony with and supplemental to the New York City Charter" and did not change the original nature of the laws. Chapter 929 of 1937, § 1
Formerly Code Ch. 23, Art. 9, § 94, Subd 2 Citing References: *See*, *Transit Commission v. The Long Island Railroad Company*, 253 N.Y. 345 (1930).	Chapter 677 of 1928 **This is originally local law.** This provision was cited in the 1924 Code of Ordinances. However, this provision is likely older as it can be traced back to the 1897 revised ordinances.

Ad. Code § 24-521	
Current Ad. Code § 24-521	L.L. 77/1995, § 16: Created the Department of Design and Construction (DDC), and amended this provision, § 24-251, to allow the DCC the authority to exercise the power therein.
	L.L. 104/1993, § 5: Amended § 24-521 notice requirement to 48-hours. *See*, § 19-143 which references the same notice requirement change.
Recodification of NYC administrative code (1985)	Chap 907/1985 § 1 This 1985 recodification of the City's legislation for simplicity, clarity, and accessibility of the City's legislation into a consolidated code without changing the original nature of the laws.
Formerly § 683a4-17.0 Recodification of NYC administrative code (1963)	Chap 100/1963 § 510—refers to culvert, etc., text from the prior ad code that went to the predecessor agency/agencies to DEP Comprehensive recodification of the City's legislation; aimed to consolidate existing state and local laws without changing the original nature of the laws.

	This consolidation separated the DOT and DEP Ad. Code provisions into two "new-numbered" sections. The DOT Ad. Code provision was numbered § 83-5.0. There was no substantial change to this recodification. Chapter 100 of 1963 § 510 put the culvert, etc., text to formerly § 683a4-17.0 for the predecessor agency/agencies to DEP.
	This is originally local law, too.

C. Whether State Law Pre-emption Issues Present any Limitation to Local Amendment of the Ad. Code Provisions[49]

a. Public Service Commission

A concern for amending the Ad. Code provisions is the State legislation creating the New York State Public Service Commission (the "PSC"), namely the Public Service Law (the "PSC Law").[50] The PSC Law, originally enacted in 1907 and subsequently amended, establishes the PSC as a state regulatory body charged with supervising and regulating public utilities operating within New York State. In particular, the PSC is empowered to oversee the terms and conditions of utility service, including the regulation of rates, service quality, infrastructure investment, and the approval of utility practices affecting the provision of gas, electric, telecommunications, and related services. It functions as a centralized administrative regulator intended to ensure that utility services are provided in a manner consistent with the public interest, while balancing the financial integrity of regulated entities. Because the PSC exercises broad and continuing jurisdiction over utility rates and service conditions, any local amendment to subsurface governance that indirectly affects utility operations may raise questions of conflict or field pre-

[49] This analytical framework would apply to other Utilidor VE study initiatives related to other Ad. Code provisions or NYC Rules.
[50] N.Y. Pub. Serv. Law §§ 1–66 (McKinney 2024).

emption under state law. For completeness, the full text of the PSC Law is reproduced in Appendix B.[51]

a. Home Rule

Under New York law, municipalities possess "home rule" authority, which grants them the power to adopt local laws relating to their property, affairs, or government, as well as certain matters of local concern, so long as those laws are not inconsistent with the State Constitution or State general laws.[52] However, this authority is not absolute. As the New York Court of Appeals has emphasized, local governments remain subordinate to the State, and their enactments must yield where the State has chosen to regulate.[53] Accordingly, although New York City exercises broad authority over its streets and PROWs, including the management of subsurface infrastructure, that authority remains subject to state law and may be displaced or pre-empted where the Legislature has spoken.

b. Types of Pre-emption

i. Express Pre-emption. Express pre-emption occurs where the State Legislature has explicitly stated its intent to preclude local regulation in a particular area. When such language is clear, any conflicting or supplementary local law is invalid.[54] In *Jancyn Manufacturing Corp. v. County of Suffolk*, the Court of Appeals upheld a local ordinance because the relevant state statute did not contain explicit pre-emptive language—illustrating that express pre-emption requires a clear and direct statement. Notably, *Jancyn* involved regulation of

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[51] See also UtilityRegulationWorkBookBrooklynLawSchool.pdf.
[52] N.Y. Const. art. IX, § 2(c); N.Y. Mun. Home Rule Law § 10(1).
[53] *See Adler v. Deegan*, 251 N.Y. 467, 485 (1929) (Cardozo, J., concurring) (explaining that matters may be of both state and local concern, but local laws must give way when the State has acted).
[54] *See Jancyn Manufacturing Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96-97 (1987).

septic system additives and wastewater-related environmental impacts, rather than physical infrastructure occupying municipal streets or subsurface PROWs. Thus, unlike the present matter—which concerns abandoned private utility infrastructure physically located beneath the municipal PROW—the ordinance in *Jancyn* did not implicate municipal control over below-ground structures embedded within City streets. Applied here, with respect to the objective of IP-24, if the PSC Law contained language that explicitly prohibits local laws concerning private utility infrastructure in the municipal PROW, including placement and removal, any attempt to implement IP-24 through local law would likely be pre-empted and invalid.[55]

There is no basis for express pre-emption in the PSC Law, which does not contain language explicitly prohibiting local governments from regulating the placement or removal of abandoned utility infrastructure within or below municipal PROW. New York courts require a "clear expression of legislative intent" to find express pre-emption, and absent such language, courts will not infer displacement of local authority.[56] Accordingly, the PSC Law does not expressly pre-empt amendment of the Ad. Code provisions.[57]

ii. Field Pre-emption. Field pre-emption arises when the State has so thoroughly regulated a particular area that it can be inferred the Legislature intended to occupy the entire field, leaving no room for local supplementation. Even in the absence of explicit language, courts will find pre-emption where

[55] *Id.*
[56] *Id.* at 96.
[57] As well as Ad. Code § 24-521.

the statutory scheme is comprehensive and detailed.[58] In these instances, discussed below, the Court invalidated various local laws regulating the location of major utility facilities, holding that the State's comprehensive regulatory framework for siting such infrastructure precluded local interference. In the context of IP-24, field pre-emption could represent a potential issue to address because private utilities operating in the subsurface PROW are subject to extensive oversight by the PSC, and local laws may be precluded under field pre-emption analysis if a court were to deem the state regulatory framework sufficiently comprehensive. The Court of Appeals has repeatedly held that where the State has enacted a comprehensive regulatory scheme governing utility operations, local regulation is precluded.

In *Consolidated Edison Co. of New York v. Town of Red Hook*, the Court invalidated a local ordinance that effectively restricted the *placement and routing* of electric utility *transmission* infrastructure, reasoning that the PSC's statutory authority over utility siting and system planning reflected a unified statewide regulatory scheme that left no room for local siting controls that would interfere with utility infrastructure deployment decisions.[59]

Importantly, the infrastructure at issue in *Town of Red Hook* consisted of above-ground, high-voltage electric *transmission* facilities and related regional routing decisions affecting system-wide electric service planning. The case therefore concerned macro-level siting determinations across broader geographic service territories, not the localized management of abandoned or

[58] *See Consolidated Edison Co. of New York v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983).
[59] *Id.*

inactive utility *distribution* infrastructure physically embedded beneath municipal streets. Unlike the present matter, which concerns subsurface utility *distribution* assets occupying the City's own PROWs and implicating excavation coordination, spatial conflicts, and street reconstruction, *Town of Red Hook* addressed statewide energy *transmission* planning and placement of above-ground facilities.

Further, *Town of Red Hook* primarily involves above-ground or macro-level *transmission* siting decisions—where the core regulatory concern is where utility facilities are located across a service territory—rather than the ongoing management of densely layered subsurface *distribution* infrastructure within municipal PROWs, which requires continuous coordination among multiple utilities occupying the same constrained physical space.[60] Importantly, above-ground *transmission* siting implicates discrete placement and routing determinations at a system-wide level, whereas subsurface *distribution* infrastructure involves persistent spatial allocation, excavation cycles, and co-location conflicts within already-developed municipal PROW corridors.[61]

Similarly, in *Incorporated Village of Nyack v. Public Service Commission*, the Court reaffirmed that PSC-regulated utility decisions fall within a state-controlled domain where local interference is generally precluded, in that case emphasizing PSC authority over utility service determinations and infrastructure adequacy planning rather than local control over physical street

[60] *Id.*
[61] *Id.*

regulation.[62] *Nyack* likewise concerned utility service and infrastructure planning issues at the operational and regulatory level, not the City's management of physical structures located beneath municipal roadbeds. The decision did not address subsurface congestion, abandoned subsurface *distribution* infrastructure, or municipal coordination of excavation and reconstruction activities within the PROW.

New York appellate courts have consistently applied this principle to strike down local laws that intrude upon PSC-regulated utility operations. For example, in *Consolidated Edison Co. of New York v. Village of Briarcliff Manor*, the court held that local restrictions interfering with utility infrastructure management were pre-empted where they imposed additional local constraints on how a utility could maintain and operate its electric *transmission* facilities under PSC regulation, thereby conflicting with the State's comprehensive regulatory authority over utility operations and system integrity.[63] As with *Town of Red Hook*, the facilities at issue in *Briarcliff Manor* involved operational electric *transmission* infrastructure and utility system management concerns, rather than abandoned or obsolete *distribution* facilities occupying subsurface municipal corridors. The case therefore arose in the context of utility operations and reliability regulation—not municipal management of below-ground spatial conditions within the PROW.

These cases demonstrate that when local law regulates core aspects of utility operation or infrastructure management, courts are inclined to find field pre-

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[62] *Incorporated Village of Nyack v. Public Service Commission*, 69 N.Y.2d 849, 851 (1987).
[63] *Consolidated Edison Co. of New York v. Village of Briarcliff Manor*, 208 A.D.2d 54, 59 (2d Dep't 1995).

emption where the State has established uniform regulatory control. However, field pre-emption is not absolute, particularly where municipal regulation concerns traditional local police power interests such as control over the municipal PROW, including its subsurface. The Court of Appeals has recognized that even heavily regulated industries remain subject to local laws addressing matters of substantial local concern, so long as the State has not clearly occupied the entire field.[64] Municipal control over the physical use and reconstruction of the municipal PROW has long been recognized as a core local function, which weighs against a finding that the State has fully occupied the field of subsurface PROW spatial management.[65] That distinction is especially important here because IP-24 concerns the physical removal and coordination of *distribution* infrastructure located beneath City streets—an area historically tied to municipal street management and public works functions—rather than regulation of utility rates, services, *transmission* planning, or statewide infrastructure siting policy. Accordingly, while PSC regulation of utilities is extensive, it does not pre-empt local amendments to the Administrative Code, and the City retains the authority to clarify local law provisions for implementing IP-24 or to expand them under its police powers for the Utilidor VE study.

iii. Conflict Pre-emption. Conflict pre-emption occurs where a local law directly conflicts with State law, either because compliance with both is

64 *See New York State Club Assn. v. City of New York*, 69 N.Y.2d 211, 217–18 (1987).

65 *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99 (1983); *Incorporated Vill. of Nyack v. Pub. Serv. Comm'n*, 96 N.Y.2d 402 (2001); *Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91 (1987); *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372 (1989).

impossible or because the local law stands as an obstacle to the accomplishment of the State's objectives.[66] Even where the State has not occupied the field, a local law will be held invalid if it frustrates the purpose of a State statutory scheme. In this context, a local mandate requiring utilities to remove or otherwise protect and replace their pipes, mains and conduits, including removing abandoned *distribution* infrastructure, could be challenged if it interferes with state-regulated utility operations, cost recovery mechanisms, or *generation and transmission* infrastructure management practices approved by the PSC.

Conflict pre-emption provides the most substantial doctrinal issue with respect to local amendment of the Ad. Code provisions for IP-24 or Utilidor VE study implementation. A local law is pre-empted where it either makes compliance with state law impossible or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature."[67] Under this framework, courts focus on whether the local law frustrates the operation or objectives of the state regulatory scheme. The PSC's regulatory authority over utilities is broad and includes oversight of infrastructure safety, service reliability, and operational standards. Courts have held that local laws imposing additional or inconsistent obligations on PSC-regulated utilities may be pre-empted where they interfere with state objectives. In *Consolidated Edison Co. of New York v. Village of Briarcliff Manor*, the court invalidated a

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[66] *See Matter of Lansdown Entertainment Corp. v. New York City Department of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989).

[67] *Matter of Lansdown Entertainment Corp. v. New York City Department of Consumer Affairs*, 74 N.Y.2d 761, 764 (1989).

local ordinance that imposed operational constraints including restrictions on how an electric utility could maintain, operate, and physically manage its *transmission* and *distribution* infrastructure within its service territory and, conditions affecting system maintenance and field operations under PSC jurisdiction because it conflicted with the PSC's regulatory authority.[68] Importantly, the infrastructure at issue in *Briarcliff Manor* involved active electric *transmission* and *distribution* facilities that formed part of the utility's operational system under ongoing PSC supervision. The ordinance therefore directly affected utility operations, maintenance practices, and system reliability functions. By contrast, IP-24 concerns abandoned or out-of-service subsurface *distribution* infrastructure physically occupying the municipal PROW, implicating municipal street management, excavation coordination, and subsurface spatial conflicts rather than utility service operations or statewide electric system reliability. Unlike *Briarcliff Manor*, IP-24 concerns regulation of the continued physical occupation of City streets by various *distribution* infrastructure, including the removal of inactive and abandoned *distribution* infrastructure not how utilities operate their active *transmission* systems.

By contrast, in *Jancyn Manufacturing Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96-97 (1987), the Court upheld a local ordinance imposing stricter environmental standards because it complemented rather than frustrated the state regulatory scheme, where Suffolk County's septic waste disposal

[68] *Consolidated Edison Co. of New York v. Village of Briarcliff Manor*, 208 A.D.2d 54, 59 (2d Dep't 1995).

regulations imposed more stringent requirements on on-site sewage and wastewater handling systems than state law, operating in a parallel regulatory space focused on local environmental impacts rather than displacing State permitting or infrastructure control authority.[69] As in the earlier discussion, *Jancyn* did not involve utility *transmission* infrastructure or facilities embedded beneath municipal PROWs. Rather, it concerned local environmental regulation of septic and wastewater systems, which the Court found compatible with broader state objectives. The distinction is significant because IP-24 similarly can be characterized as addressing a localized municipal concern—the physical management of subsurface street conditions and abandoned *distribution* infrastructure within City-owned PROWs—rather than attempting to displace PSC authority over utility operations, rates, or statewide infrastructure planning.

The pre-emption analysis in *Jancyn Manufacturing Corp. v. County of Suffolk*, 71 N.Y.2d 91 (1987) strongly supports the validity of amending the Administrative Code. Broadly speaking, the Ad. Code provisions are valid local laws that are not pre-empted by the state. A compelling parallel can be drawn to the NYS DOT Rule (See Appendix A), which regulates out-of-service utility infrastructure through safety-based standards and permits the state to mandate the removal of abandoned facilities. Far from signaling pre-emption, the NYS DOT Rule serves as powerful evidence that a removal mandate does not inherently conflict with state utility policy. The NYS DOT

[69] *Jancyn Manufacturing Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97-98 (1987).

framework has successfully operated since 1994 without a successful—or even sustained—pre-emption challenge from utility companies. Because a state agency already enforces a clear removal mechanism for abandoned facilities, a local law that mirrors or refines these standards for municipal streets does not introduce a novel conflict with state-level oversight.

To insulate future local law amendment of the Ad. Code provisions and other provisions that the Utilidor VE Study may require from broader conflict pre-emption concerns and ensure the smooth implementation of IP-24, any future amendments must hone clearly to its police powers with respect to the PROW. State and PSC regulation governs active utility operations and infrastructure policy, meaning local laws cannot encroach on the larger utility *generation* and *transmission* systems. For instance, in *Consolidated Edison Co. of New York v. Village of Briarcliff Manor*, a court invalidated a local ordinance because it interfered with the PSC's ongoing supervision of an active electric *transmission* facility, directly disrupting its operational and systemic functioning. Conversely, the Ad. Code provisions govern placement and removal of *distribution* infrastructure that occupy subsurface PROW space during street reconstruction projects that fall squarely under the City’s traditional police power to manage the physical condition and usability of its PROW. While municipal home rule authority is not absolute, local law amendments designed to regulate subsurface *distribution* infrastructure, including mandating the removal of abandoned infrastructure that interferes with the City’s management of congested subsurface PROW space, do not disrupt state-level utility operations. Unless a municipal mandate operates as an outright obstacle to a specific state objective under *Lansdown*, local amendment of the Ad. Code provisions and similar local laws remain a highly defensible exercise of local authority.

IV. Conclusion

Overall, the City can implement Utilidor VE Study—*IP-24: Enforce Removal of Abandoned Utilities* under the Ad. Code provisions as they stand now. Broady, both Ad. Code §§ 19-143 and 24-521 are local law and are not pre-empted by the state. Should the Utilidor VE Study items require future local law amendment of the Ad. Code provisions or other similar provisions, to clarify or to expand them, so long as amendment of these local laws remain within the City's police powers with respect to the PROW, state pre-emption should not operate as a bar.

The City's ability to amend the Ad. Code provisions by local law requires cognizance of the boundary between municipal police powers and the broad powers of the PSC, which can pre-empt certain local laws as discussed above. The functional distinction between *distribution* infrastructure and *transmission* infrastructure is a helpful way to visualize this pre-emption boundary. While the PSC has broad power and jurisdiction over private utilities, so long as local amendment of the Ad. Code provisions or other local laws related to the Utilidor VE Study remains within the municipal police power authority, it is likely that local law amendments will not be subject to state pre-emption. With respect to the Ad. Code provisions, the removal of abandoned *transmission* infrastructure in the PROW is not a regulation of utility service and therefore, not subject to the PSC.

Appendix A

NYC Ad. Code § 19-143 Excavations for public works.

a. Notice to public service corporations. Whenever any street shall be regulated or graded, in which the pipes, mains or conduits of public service corporations are laid, the contractor therefor shall give notice thereof in writing to such corporations, at least forty-eight hours before breaking ground therefor. Such provision shall be included in every contract for regulating or grading any street in which the pipes, mains or conduits of public service corporations shall be laid at the time of making such contract.

b. Public service corporations shall protect their property. Public service corporations whose pipes, mains or conduits are about to be disturbed by the regulating or grading of any street, shall, on the receipt of the notice provided for in the preceding subdivision, remove or otherwise protect and replace their pipes, mains and conduits, and all fixtures and appliances connected therewith or attached thereto, where necessary, under the direction of the commissioner.

Editor's note: For related unconsolidated provisions, see Appendix A at L.L. 1993/104.

NYC Ad. Code § 24-521 Excavations for public works.

a. Notice to public service corporations. Whenever any sewer, culvert, water main or pipe is to be constructed, altered or repaired in any street in which the pipes, mains or conduits of public service corporations are laid, the contractor therefor shall give notice thereof in writing to such corporations, at least forty-eight hours before breaking ground therefor. Such provision shall be included in every contract for constructing, altering or repairing any sewer or culvert, water main or pipe, in any street in which the pipes, mains or conduits of public service corporations shall be laid at the time of making such contract.

b. Public service corporations shall protect their property. Public service corporations whose pipes, mains or conduits are about to be disturbed by the constructing, altering or repairing of any sewer, culvert, water main or pipe, shall, on the receipt of the notice provided for in the preceding subdivision, remove or otherwise protect and replace their pipes, mains and conduits, and all fixtures and appliances connected therewith or attached thereto, where necessary, under the direction of the commissioner of design and construction in accordance with chapter fifty-five of the charter, unless otherwise directed by the mayor pursuant to such chapter.

c. The enforcement of subdivisions a and b hereof shall be pursuant to sections 19-149, 19-150 and 19-151 of the code.

NYS New York Codes Rules Regulations Sec. 131.13. Abandoned facilities.

The utility shall remain responsible for all abandoned utility facilities. The department on reasonable notice may require the removal of abandoned utility facilities and restoration of the right-of-way, when necessary to avoid interference with the operation, maintenance or reconstruction of the highway. If the utility shall fail to remove the abandoned facility within a reasonable time after such notice, the department may cause the removal of the facility. Any expenses incurred by the department arising from abandoned utility facilities shall be reimbursed by the utility or its successor.

Part 131. Accommodation of Utilities Within State Highway Right-of-Way, Subchapter B. Work Permits on State Highways, State-Owned Bridges and Culverts, Chapter IV. Highways, TITLE 17. Department of Transportation, New York Codes Rules Regulations

Appendix B

New York Public Service Law § 4 (2023).
§ 4. The public service commission.

1. There shall be in the department of public service a public service commission, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter. The commission shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate. A commissioner shall be designated as chairman of the commission by the governor to serve in such capacity at the pleasure of the governor or until his term as commissioner expires whichever first occurs. At least one commissioner shall have experience in utility consumer advocacy. No more than three commissioners may be members of the same political party unless, pursuant to action taken under subdivision two of this section, the number of commissioners shall exceed five, and in such event no more than four commissioners may be members of the same political party.

2. Notwithstanding subdivision one, whenever the commission shall certify to the governor that additional commissioners are needed for the proper disposition of the business before it, the governor may increase the membership of the commission to seven members by appointing two additional commissioners by and with the advice and consent of the senate. The terms of office of such additional commissioners and the filling of vacancies during such terms shall be governed by subdivision three, except that upon the expiration of the terms of such additional commissioners, no further appointments or reappointments shall be made to such additional offices, unless the commission shall first certify to the governor that the need for additional commissioners continues to exist.

3. The term of office of a commissioner shall be six years from the first day of February of the calendar year in which he shall be appointed, and commissioners shall serve on a full-time basis. Upon a vacancy occur[r]ing otherwise than by expiration of term in the office of any commissioner, the governor, by and with the advice and consent of the senate, shall fill the vacancy by appointment for the unexpired term.

4. Any commissioner appointed on or after July first, two thousand twenty-two, pursuant to this section shall have education and training, and three or more years of experience in one or more of the following fields: economics, engineering, law, accounting, business management, utility regulation, public policy, consumer advocacy or environmental management.