

EMINENT DOMAIN FACT SHEET

Vermont Gas Systems, Inc. (“Vermont Gas”) is in the process of seeking to acquire rights in your real property situated in the approved route for the Addison Natural Gas Project. Vermont Gas may use eminent domain as an alternative to direct landowner negotiations for acquiring a right to install its pipeline on private property. As a landowner, you have certain legal rights throughout the entire land acquisition process. Those rights are constitutional in nature.¹ They are also supported by Vermont state statute.² As a company operating under a Certificate of Public Good,³ Vermont Gas also has legal rights. This fact sheet describes important legal concepts and describes the land acquisition process.

I. IMPORTANT LEGAL CONCEPTS

A. Certificate of Public Good

A Certificate of Public Good or “CPG” is an approval granted through a proceeding in which the Vermont Public Service Board must decide whether a gas transmission project is in the public good. On December 23, 2013, the Public Service Board granted a certificate of public good to Vermont Gas for Phase I of the Addison Natural Gas Project, a proposed expansion stretching from Colchester to Middlebury.⁴ The CPG authorizes the route and layout of the pipeline project, and also gives Vermont Gas the power to exercise eminent domain.

B. Easement

An easement is the property right that Vermont Gas seeks to acquire for use of a portion of your land. An easement gives its holder the “right to use or control the land, or an area above or below it, for a specific limited purpose.”⁵ Accordingly, Vermont Gas’s easement running across and under your land will be limited to the construction, operation, maintenance, repair, and replacement of a natural gas pipeline and related facilities.

C. Negotiation

Negotiation refers to the process of voluntarily reaching an agreement with Vermont Gas for an easement based on discussions, often through use of attorneys. In negotiation, Vermont Gas attempts to negotiate with landowners for two key legal documents:

¹ Vermont Constitution Ch. I, art. 2 (“That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”).

² 30 V.S.A. §§ 12, 111, 112 (2014).

³ The pipeline received a certificate of public good, Pub. Serv. Bd. Docket No. 7970, in conformity with Vt. Stat. Ann. tit. 30 § 248. Vt. Stat. Ann. § 248(a)(2)(B) (requiring a company to obtain a certificate of public good before “exercise[ing] the right of eminent domain”).

⁴ Pub. Serv. Bd. Docket No. 7970 (Order of 12/23/2013). When determining whether or not a project is in the public’s interest, the Public Service Board makes several findings, including: (1) the project will not unduly interfere with the region’s development; (2) the project is required to meet present and future demand for service which could not be satisfied in a more cost effective way; (3) the project does not adversely impact overall system reliability; (4) the project results in economic benefit to the state and residents; (5) the project does not unduly effect aesthetics and the environment. Vt. Stat. Ann § 248(b) (2015).

⁵ BLACK’S LAW DICTIONARY, Easement (10th ed., 2014).

1. Agreement for Easement

An “Agreement for Easement” is a form of contract, similar to the purchase and sale agreement that you likely signed when you purchased your property. The Agreement contains the terms of the easement, which are binding on both you and Vermont Gas. The Deed of Easement (see below) is typically included as an exhibit to the Agreement. The Agreement contains the amount of compensation to be paid for the easement, the timing and mechanics for “closing” (the point at which you will sign and deliver the deed to Vermont Gas for recording), and specific conditions related to construction of the pipeline.

2. Deed of Easement

The “Deed of Easement” is the instrument setting forth the easement, which Vermont Gas will record in the land records. The Deed describes the precise length, width, and depth of the easement, generally by reference to an easement plan showing the corridor location. The Deed also sets forth terms and conditions governing the use of the easement by Vermont Gas and the landowner, including, but not limited to, the following: conditions for allowing future road and utility crossings in the easement, reversionary rights (who receives title to the land when the purported use ceases), indemnification in the event of a claim arising from use of the easement, and rights with respect to management of vegetation and runoff within the easement. As explained below, the Deed of Easement that Vermont Gas would obtain in negotiation is different from what will be acquired in eminent domain.

D. Eminent Domain

The state has the power of “eminent domain.” The state exercises its power of eminent domain by compelling a landowner to grant a deed of easement to Vermont Gas in exchange for just compensation. This process is also called “condemnation.” The law justifies a forced sale of land because the acquired property is put to a use that benefits the public.

II. LAND ACQUISITION PROCESS

A. Voluntary Negotiation

The land acquisition process begins with voluntary negotiations. Land use and limitations governing the construction and operation of the Addison Natural Gas Project will be developed in negotiations and then recognized in the Agreement for Easement and Deed of Easement.

During voluntary negotiations, you have the freedom to offer specific terms based on the unique nature of your property and your individualized negotiation objectives. You are encouraged to consult with an attorney to better ensure that your interests are represented during negotiations and in the easement agreement. As with any negotiation, the two sides exchange information about compensation and other issues in an effort to reach a mutually acceptable outcome. Compensation matters can include:

- Value of the easement taken (typically determined by square foot based on up to 125% of the utility corridor’s assessed value);

- Severance damage to value of balance of property (value of amenities, changes to development potential of land, etc.);
- Crop and timber damages;
- Consequential damages (e.g., damage to business); and
- Other damages, including reimbursement of fees and expenses.

Many more public easements are acquired through private negotiation than through eminent domain proceedings. Even when compensation is contested, use of mediation is often a preferable alternative to resorting to eminent domain.

It is important to note that you are not entitled to an appeal if you reach a negotiated agreement with Vermont Gas. Technically, negotiated agreements are voluntarily entered into between private parties, which are then enforceable in a court of law. If you negotiate an Agreement and Deed with Vermont Gas, you are legally bound to the terms of that Agreement and Deed. You are only entitled to an appeal if Vermont Gas condemns your land through the eminent domain process, as described below.

Public Service Department Assistance During Negotiation

- Access to terms and conditions for standard easement agreements, appended to this letter and posted on the Department’s website.
- Land appraisal arranged through the Public Service Department, available upon request where a mediation has been scheduled.

B. Eminent Domain and State-Ordered Condemnation

If parties cannot reach an agreement during voluntary negotiations, Vermont Gas may acquire your land without your consent by exercising its right of eminent domain. By acquiring its certificate of public good in Docket 7970, Vermont Gas received the power to condemn land in order to render adequate service to the public.⁶ In order to exercise that power, Vermont Gas must prove that the specific land is necessary to complete its project.⁷ Additionally, Vermont Gas must show that the negotiations did not end in an agreement, or that a landowner chose not to negotiate.

1. Necessity / Orderly Development Phase

The condemnation proceeding involves two components. The Public Service Board first determines whether or not a specific property parcel is necessary to develop the project, as well as whether condemnation will unduly interfere with the orderly development of the region and scenic preservation. A certificate of public good comes with an implicit power of eminent

⁶ Vt. Stat. Ann. tit. 30 § 248 (2014).

⁷ Vt. Stat. Ann. tit. 30 § 110 (2014).

domain / condemnation. That power becomes explicit when Vermont Gas identifies a specific property parcel as “reasonably needed” to complete its project.

Necessity is typically determined according to whether the precise location of the pipeline on a particular property is necessary to render adequate service. The Board will consider multiple factors such as where the corridor will be located on adjoining properties, as well as locations of natural resources such as wetlands, forested areas, and residences. With respect to orderly development and scenic preservation, the Board will often reference findings made concerning a particular town or location in the certificate of public good decision to decide whether condemnation is appropriate.

If the Public Service Board makes a finding of necessity, you may appeal its decision to the Supreme Court under 30 V.S.A. § 124. By making this appeal, you allege that your land is not necessary to the pipeline project. If you prevail on this appeal, the pipeline may be rerouted so that it does not traverse your property on the same location as proposed by Vermont Gas, or possibly not at all. It is important to note, however, that this type of appeal is rarely successful.

Moreover, in an appeal of the necessity determination, the Supreme Court exercises a limited level of review requiring deferral to the judgment of the Public Service Board as the administrative agency charged with administering the public service statutes. Absent very clear and convincing indications of error, the Vermont Supreme Court is unlikely to overturn a decision of the Public Service Board on necessity. The landowner’s attorneys’ fees and costs are not typically reimbursable at the necessity stage or in a subsequent appeal.

Some landowners may consider whether to enter a stipulation of necessity with Vermont Gas and the Department of Public Service at the outset of the condemnation proceeding. Doing so may reduce the overall duration of the eminent domain process, while also making compensation the only issue to decide.

Landowners’ Rights During Necessity Phase

- Site visit with the Public Service Board to demonstrate the proposed location of the easement on your property.
- Procedural protections, including notice, hearings, an opportunity to submit prefiled testimony, and an opportunity to conduct discovery.
- Input from the Public Service Department regarding need, alternatives, and valuation/compensation, including an independent appraisal.
- Right to stay the Public Service Board necessity determination upon appeal to the Vermont Supreme Court, unless the stay is lifted by the Court. 30 V.S.A. § 112.

2. Compensation Phase

If the Public Service Board determines that it is necessary to condemn your property and that condemnation will not unduly interfere with the orderly development of the region and scenic preservation, it must then determine the appropriate amount of just compensation. If Vermont Gas condemns your land you are constitutionally entitled to monetary compensation.

A central issue in many condemnation proceedings involves determining the amount of landowner compensation. The compensation amount will be based upon the *value of the property* on the day Vermont Gas petitions the Public Service Board to condemn that property.

The method for determining the compensation due is found in Vermont state statutes and case law.⁸ Compensation is a broad term. It is the sum of several separate value calculations, referred to as elements. The following elements are independently calculated and then added together for a final compensation value:

- Value of the property taken;
- Impairment to the value of remaining property or rights of the owner;⁹
- Consequential damages, including but not limited to the damage to the owner's business.¹⁰

If you are dissatisfied and wish to obtain a reassessment of the final compensation amount, or a redetermination for the time and manner of payment, you are entitled to an appeal.¹¹ Vermont Gas is also entitled to an appeal if it is dissatisfied with the final compensation.

The compensation appeal is limited to the compensation proceeding—a landowner cannot review the Public Service Board's underlying grant of condemnation authority to Vermont Gas. The appeal process takes the following form:

- a. Receive a compensation assessment from the Public Service Board in the form of a certified Order;
- b. Appeal the Public Service Board Order by filing with the superior court of the county where the property, or the related right, is situated;

NOTE: The appeal must be made no later than thirty (30) days after the Public Service Board certified Order is issued;

- c. Proceed in superior court to reassess the amount of compensation and/or to re-determine the time and manner of payment.

⁸ Vt. Stat. Ann. tit. 30 § 112(4) (2014) (authorizing the Public Service Board to determine the amount, time, and manner of compensation).

⁹ This criterion is also known as “severance damages” or “the difference between market value of the remaining property immediately before and after the taking.” *Erhard v. Agency of Transp.*, 2006 VT 68, ¶7.

¹⁰ Although not referenced by the Public Service Board, highway-based condemnations litigated to the Vermont Supreme Court provide some guidance as to the nature of establishing business losses that may prove persuasive for utility-based eminent domain cases. (*See, e.g., In re Chittenden Solid Waste District*, 2007 VT 28 (finding that burden of proof on business losses rests with property owner to show business loss by subtracting the value of land, at its highest and best use, from the value of the business before the taking); *S. Burlington / Shelburne Highway*, 2008 VT 68 (business loss compensation limited to “only those losses directly and proximately caused by the physical loss of property”); *Raymond v. Chittenden County Circumferential Highway*, 158 Vt. 100 (1992) (possession of land permitted for residential development did not constitute a fixed and established business, in part where business interest was indistinguishable from actual fair market value of land).

¹¹ 30 V.S.A. § 112(4).

Unlike the deferential review at the Vermont Supreme Court for an appeal of necessity, a superior court judge does not defer to the Vermont Public Service Board. Instead, any appeal is “de novo,” meaning that a new trial is held on compensation. The landowner or Vermont Gas can request a trial by jury on compensation. An appeal of the superior court judge’s determination may be taken within 30 days by either party to the Vermont Supreme Court.

Prevailing landowners in superior court on a compensation claim would generally not be entitled to an award of attorneys’ fees and costs absent a court order.

3. Nature of Deed Obtained in Eminent Domain

The rights and restrictions of a deed that Vermont Gas obtains from the Board in condemnation are often different from a deed that results from landowner negotiations. Vermont law provides certain guidance on the nature of a deed that can be obtained in condemnation. Some illustrative differences between a negotiated deed and a deed acquired in condemnation are shown below:

<u>Deed Obtained Through Negotiation</u>	<u>Deed Acquired In Eminent Domain</u>
Contains warranty / limited warranty language regarding the status of owner’s title.	Quitclaim deed only. (See PSB Docket No. 7394, Order of 8/20/2009)
Specific rights of access can vary as long as there is an “exigent circumstances” exception.	Board likely to grant unrestricted access, possibly only requiring prior notice to landowner. (See PSB Docket 7752, Order of 7/13/2012)
Specific rights negotiated as to what structures or which vegetation may remain in or near corridor.	Board likely to grant language giving unrestricted rights for vegetation control and removal of structures now or in future. (See PSB Docket No. 7394, Order of 8/20/2009)
Broad indemnification rights for future claims related to pipeline.	Board likely to require only repair of damages by VGS to property, without indemnification. (See PSB Docket No. 7775, Order of 1/25/2012)
Specific limitations on construction and maintenance practices can be negotiated.	Board likely to have little specificity, giving company broad ability to exercise secondary rights to accomplish construction and maintenance. <i>Vermont Electric Power Co. v. Anderson</i> , 121 Vt. 72 (1959)

Perhaps of more importance to many landowners is that the compensation awarded by the Public Service Board for the rights acquired in condemnations tends to be substantially less than what the utility would otherwise be willing to pay to obtain an easement through negotiation.