State of Vermont
County of Addison

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v.	)	Docket No. 143-8-18 Ancv
The Town of Bristol, the Selectboard of the Town of Bristol, and Vermont Gas Systems, Inc.	)	

MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS

Date: November 1, 2018

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TABLE OF CONTENTS

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1. Introduction

The Town of Bristol ("Town") and Vermont Gas Systems, Inc. ("VGS") have moved pursuant to V.R.C.P. 12(b)(6) for dismissal of the Complaint on the grounds that the Complaint fails to state a claim. They assert principally that the License Agreement ("Agreement") constitutes a license rather than an easement under an 1895 precedent and a 1971 precedent, and, if it was an easement, that the conveyance falls within the exception to 24 V.S.A. § 1061(a) set forth in subsection (c)(i). The motions overlook the governing statutes and Dillon's Rule, misunderstand 150 years of settled law, and, most importantly, fail to take into account the actual wording of § 1061. The motions also ask the Court to adopt contested facts, which is impermissible in ruling on a motion to dismiss.

2. The Agreement Grants VGS the Right to Use Town Right-of-Ways In Perpetuity; It Is a Conditional, Enforceable Contract Subject to the Condition that VGS Obtain a § 1111 Permit, An Act 250 Permit and Any Other Required Permits

The Agreement grants VGS the right to operate its gas pipeline within the town right-of-way "in perpetuity." (Paragraph A, on p.1). The Town has no right to demand removal of the pipeline unless and until VGS abandons use of the pipeline. (Paragraph A). The Agreement contains no reservation of rights by which the Town may revoke or withdraw from this agreement[1]. The Agreement contemplates not only continued operation by VGS in perpetuity, but also continued operation by "a new entity other than VGS" in the event of merger, restructuring or other reorganization." (Paragraph K.4, on p.11)

An agreement such as this exposes the public to enormous risk. See Paragraphs 28-36 of the Amended Complaint (which, in considering motions under V.R.C.P. 12(b)(6), must be accepted as true). The risk will accompany the gas pipeline in perpetuity.

The overarching effect of the Agreement is that even if the current Bristol selectboard is turned out of office at the next election because of voter concern about the "License Agreement," the people of the Town will be bound by the agreement, in perpetuity.

Other clauses of the Agreement state that construction is to be completed by the end of 2019 "contingent upon timely approvals from all local and state governing authorities." One permit that "may be required" is an Act 250 permit. (Paragraph B.10, on p.4; Paragraph J.2, on p.10).

The Agreement recognizes that a permit from the Town also will be required under 19 V.S.A. § 1111. (Paragraph B.1, on p.2, Paragraph D.8, on p.6). This Agreement is <u>not</u> that permit.

The Agreement reserves to the Town 100% of its rights to control, maintain, alter, relocate or

[1] VGS's assertion (Motion p.5) that the Agreement is revocable is not supported b any citation to the Agreement and is contradicted by Paragraph A.

abandon any town road. (Paragraph D.7, on p.6). Traffic control duties arise under the Agreement that are the same as or similar to those which arise when any utility trims trees, digs up water mains, or installs new poles. (Paragraphs E.1-4, pp. 6 and 7.)

The Agreement is a contract. The common law of contracts recognizes and enforces contracts that are contingent upon future events. Under the Restatement of Contracts, 2d, § 225, a mutual exchange of promises such as this is not rendered unenforceable because implementation depends on a future condition. Instead, actual performance awaits fulfillment of the condition:

> (1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
>
> (2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
>
> (3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

The Vermont Supreme Court has adopted § 225. *Sisters & Bros. Inv. Grp. v. Vt. Nat'l Bank*, 172 Vt. 539, 542 ; 773 A.2d 264, 268 (2001).

The most common examples of § 225 in Vermont are contracts to purchase real estate that are contingent upon bank financing. The Restatement of Contracts, 2d, § 225, Illustration 8, sets forth these facts as an example of a binding contract:

> 8. A contracts to sell and B to buy a house for $ 50,000, with the provision, "This contract is conditional on approval by X Bank of B's pending mortgage application." Approval by X Bank is a condition of B's duty. B is under no duty that the X Bank approve his application, but a court will supply a term imposing on him a duty to make reasonable efforts to obtain approval. See §§ 204, 205.

The same rule applies to receipt of government permits. A binding contract can be conditioned upon receipt of government permits. Performance is not required until the permits are obtained. In a state such as Vermont with multiple state and local permitting requirements that apply to subdivision

and development of land, any other theory of contract law would be unworkable.

It is plainly wrong to assert that the present absence of a § 1111 permit means this agreement is not a binding contract and can be terminated at any time, as VGS argues (p.4). Permitting under § 1111, like a zoning permit or an Act 250 permit, is a government permit that must be obtained by VGS before it commences construction. The fact that the same body that has executed the Agreement also will decide on the § 1111 permit does not remove the need for that permit, nor does it mean the Agreement is not a contract. Under the Restatement, the selectboard has a duty to act in good faith in granting or denying the § 1111 permit. Restatement of Contracts, 2d, § 225, Illustration 3, citing Restatement of Contracts, 2d, § 205; *Carmichael v. Adirondack Gas Corp.*, 161 Vt. 200, 208-209, 635 A.2d 1211, 1216-1217 (1993) (applying Restatement of Contracts, 2d, § 205).

3. Under Chapter 71 of Title 30 and Dillon's Rule, § 1061 Provides Bristol's Sole Authority to Permit Gas Pipelines in Town Rights-of-Way

a. *The "License Agreement" Is an Easement Because It Grants Irrevocable Rights to Use the Land in Perpetuity to VGS and VGS's Successors*

An agreement irrevocably allowing the use of land in perpetuity is an easement, not a license, because a license is terminable at will by the grantor at any time. *Clark v. Glidden*, 66 Vt. 702, 708, 15 A. 358, 361 (1887); William E. Burby's Handbook of the Law of Real Property (West, 1965) p.94. Professor Burby's treatise explains (emphasis added):

> A license authorizes the use of land that is in the possession of one other than the licensee. It is created by mutual consent and is thus distinguished form a privilege conferred by law[2] or one that is incident to an estate in land…
>
> In general, the difference between a license or a profit or an easement is that a license may be revoked at the will of the licensor.

[2] The licenses granted by statute or Charter, which the Town and VGS have cited, actually are not even licenses are common law. They are privileges "conferred by law" rather than by mutual consent, and therefore do not constitute common law licenses.

Professor Burby's treatise has been relied on by the Supreme Court of Vermont. *See, e.g., Marshall v. Bruce*, 149 Vt, 351, 353, 543 A.2d 263 (1988); *Anello v. Vinci*, 142 Vt. 583, 586, 458 A.2d 1117 (1983).

The Town relies on partial quotations from Black's Law Dictionary for its definitions of a license and of an easement. Motion p. 14. The complete quotations bear reading, since Black's Law Dictionary actually agrees with Professor Burby's distinction.

> **License**. A license is ordinarily considered to be a mere personal or revocable privilege to perform an act or series of acts on the lands of another. A privilege to go on the land of another. A privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property. Such privilege is unassignable.
>
> **Easement**. A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning water flows. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant), rather than for the benefit of specific individuals (an easement in gross). The land having the right of use as an appurtenance is known as the dominant tenement and the land which is subject to the easement is known as the servient tenement.
>
> A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the other.
>
> An interest which one person has in the land of another. A primary characteristic of an easement is that its burden falls upon the possessor of the land from which it issued and that characteristic is expressed in the statement that the land constitutes a servient tenement and the easement a dominant tenement. An interest in land in and over which it is to be enjoyed, and is distinguishable from a "license" which merely confers personal privilege to do some at on the land.

Black's Law Dictionary (West, 6th Ed. 1990) (citations omitted). An irrevocable agreement that authorizes the grantee "in perpetuity" to install, operate and repair a buried gas pipeline within specified real estate is not a license. Obviously, it is "right of use" and it is not "revocable." It confers on or vests in the grantee an interest or estate in the property. It is an "easement in gross." Professor Burby agrees. "An affirmative easement is one that authorizes the doing of some act on

the servient estate." An "easement in gross" is one that was not "created for use in connection with specific land." Handbook of the Law of Real Property pp. 64-65.

Vermont common law differs from Black's Law Dictionary and Professor Burby's treatise in one semantic respect. Vermont common law refers to easements that are valid only for the holder's lifetime alternatively as "personal easements" and "easements in gross." These are easements, without any doubt, but they terminate when the holder dies. *Barrett v. Kunz*, 158 Vt. 15, 18, 604 A.2d 1278 (1992); *First Nat'l Bank v. LaPerle*, 117 Vt. 144, 152 86 A.2d 635, 640 (1952). Even if the Agreement terminates upon cessation of business by VGS, and is not assignable to another entity, it would be an personal easement or an easement in gross. However, the fact that VGS enjoys the potential for perpetual life means that VGS has obtained the right to use town rights-of-way for installation, operation, repair and replacement of its gas pipeline so long as the grass shall grow and the waters shall run.

The discussion in *Clark v. Glidden* of licenses reinforces the conclusion that the Agreement is not a license. *Clark v. Glidden* surveyed the common law and also the law of equity. The Court quoted with approval the common law precedent which explains the nature of a license:

> … a license is a mere personal privilege; that even where money has been paid for it, is revocable at law, at the pleasure of the licensor; that the death of either of the parties will terminate it; that even when under seal the licensor may revoke it at will; and when it affects lands a conveyance of them will revoke it.

The Court concluded that under the law of equity a license may become irrevocable under certain circumstances. The Court's discussion highlights the distinction between a license and an easement, because, if a right is an easement, the courts need not resort to equitable principles to find an agreement to be irrevocable:

> It seems that, at law, the licensor may revoke his license at any time, even after the licensed act has been executed; that a sale of the realty upon which the right rests is deemed to be an act of revocation; and that such license could not be enforced

> against the *bona fide* purchaser of the realty without notice. But when the licensor has stood by and allowed the licensee to perform acts and spend money in reliance on his license, a court of equity will interfere and protect the licensee in the use of the aqueduct until its decay, on the ground of equitable estoppel.

66 Vt.at 710-711, 15 A. at 362 (citation omitted).

The Agreement grants VGS and its successors the right to use Town highway rights-of-way "in perpetuity" so long as applicable state and local permits are obtained. See Paragraphs 1.A and K.4. It is not revocable at the will of the Town. Therefore it is an easement – an interest in real estate.

b. Chapter 71 of Title 30 Grants the Right to Install Telegraph, Telephone and Electric Lines Within Highway Rights-of-Way and Authorizes Selectboards to Regulate This Right

Chapter 71 of Title 30 establishes utilities' rights and obligations within municipal highway rights-of-way. The chapter dates to 1847. (Act # 17 of the Laws of 1847). It has remained largely unchanged since 1847.

It applies only to "lines of telegraph, telephone and electric wires" except that § 2502 was amended to include wireless communications facilities and broadband facilities in 1995 and 2007. Gas lines are not included.

The chapter grants the right to construct telegraph, telephone and electric lines within highway rights-of-way and empowers selectboards to regulate this right. 30 V.S.A. § 2502 grants the right, and the remainder of the Chapter grants selectboards the authority to regulate. Sections 2503 and 2505 provide that at the request of affected landowners selectboards can compel relocation of wires and poles onto different streets or in a different manner. The selectboard's decision is not appealable to court. Lines constructed in violation of the selectboard's order can be removed by the town, at the utility's expense. 30 V.S.A. § 2504. A landowner's consent is required before the utility can cut a tree down while constructing or repairing a line. Absent landowner consent, the

utility must appeal to the selectboard. The selectboard then must decide if the cutting is necessary. 30 V.S.A. § 2506. Damage to a landowner's property during construction must be assessed by the selectboard and paid prior to construction, unless the utility files an action in Superior Court and posts a bond. 30 V.S.A. §§ 2511, 2512.

Since 1847, the chapter has had a number of changes. As noted above, wireless and broadband facilities have been added. Another change, adopted in 1991, added the words "subject to the provisions of 19 V.S.A. § 1111" to § 2502. Section 2502 now reads:

> Lines of telegraph, telephone, and electric wires, as well as two-way wireless telecommunications facilities and broadband facilities, may, subject to the provisions of 19 V.S.A. § 1111, be constructed and maintained by a person or corporation upon or under a highway, in such manner as not to interfere with repairs of such highway or the public convenience in traveling upon or using the same.

Thus, Chapter 71 currently grants the right to utilities to install telegraph, telephone and electric wires, as well as wireless and broadband facilities, within town highway rights-of-way, subject to the control of Select Boards set forth within Chapter 71, and, in addition, whenever § 1111 applies, also subject to that section. Chapter 71 remains silent about gas lines.

c. The Precedent Cited by the Town Relies on Chapter 71; the Precedent Cited by VGS Relies on Inapplicable Language in VGS's Predecessor's Charter Authorizing Its Use of Burlington's Streets

The Town relies upon the 1895 decision in *Western Union Tel. Co. v. Bullard*, 67 Vt. 272. VGS relies upon *Vermont Gas Systems, Inc. v. City of Burlington*, 130 Vt. 75, 286 A.2d 276 (1971). Both parties argue that these cases hold that permission granted by a municipality to use its highways rights-of-way constitutes a license, not an easement.

Neither case supports the Town's and VGS's proposition. These cases had nothing to do with what constitutes a license as opposed to an easement or with the nature of rights granted by municipalities to utilities.

Western Union did not address what constitutes a license, or an easement, or the nature of rights granted by a municipality, because it applied what is now Chapter 71. 67 Vt. at 274. Then, as now, these statutes were limited to telegraph, telephone and electric wires and poles. See also the prior Western Union case involving the same parties, *Western Union v. Bullard*, 65 Vt. 634 (1893), and the precedent cited in the 1895 Western Union case, *Rugg v. Commercial Union Tel. Co.*, 66 Vt. 208 (1894). Then, as now, these statutes – not any municipality -- granted Western Union the right to use town rights-of-way, subject to selectboard supervision. The town had granted Western Union neither a license nor an easement. Mr. Bullard had been notified of the planned line that Western Union was constructing pursuant to statute, but he did not complain to the selectboard about its location until after the line had been constructed. Therefore, ruled the Court, he lost his opportunity to object to Western Union's "license" – the license granted to it by statute, not by the town. VGS has no such legislative license.

The Supreme Court ruling in the *Vermont Gas Systems* also did not address what constitutes a license, or an easement, or the nature of rights granted by a municipality. The ruling relied on another act of the General Assembly, the charter the General Assembly had granted to VGS's predecessor corporation. That charter authorized the corporation to install its gas lines in Burlington's streets. 130 Vt. at 77, 286 A.2d at 276 ("The placing of the gas mains in question within the limits of the city streets was done pursuant to authority granted by an Act of the legislature in 1852 to a predecessor company…. The gas lines in question here were installed pursuant to this authority.") The Supreme Court referred to this statutory right as a "legislative license." "The legislative license to occupy the streets with these installations was at all times subject to the paramount right of the municipality to discontinue or relocate such streets." 130 Vt. at 79, 286 A.2d at 277. Again, the municipality had granted the utility neither a license nor an

easement.

These cases do not hold that the irrevocable grant of permission by a town to a utility to use its highway right-of-way in perpetuity is a license rather than easement. These cases address the nature of rights granted by statutes. None of these statutes apply to Bristol's "License Agreement".

d. Under General Rules of Statutory Construction and Dillon's Rule, § 1061 Provides the Only Authority for the "License Agreement"

The principal statutes relied on by the Town in support of its argument that selectboards have the general authority to grant non-easement licenses for gas pipelines are 19 V.S.A.§§ 303, 304(a)(1) and (a)(21). Section 303 states that town highways "shall be under the general supervision and control of the" selectboard. Section 304(a)(1) states that it is the duty of selectboards to lay out, construct, maintain and alter, widen, vacate and operate town highways, and § 304(a) (21) grants selectboards the authority to issue permits under 19 V.S.A. § 1111.

These statutes, when considered as a whole, contradict the Town's argument. Subsection (a)(22) of § 304 specifically addresses utility infrastructure within highway rights of way. Subsection (a)(22) grants selectboards the authority to "regulate the location and relocation of wires and poles pursuant to 30 V.S.A. chapter 71." (Emphasis added.) There is no subsection that authorizes selectboards to permit or regulate the location and relocation of gas pipelines.

As noted above, the Agreement is not a § 1111 permit.. The Agreement states that in the future a § 1111 permit will be applied for and reviewed. The statutory grant of authority in 304(a)(21) to issue § 1111 permits is limited to what it says – granting § 1111 permits. It does not grant authority to issue an easement.

The Town's argument that the general grant of authority in § 304(a)(1) includes the authority to grant permits for all utility infrastructure within highway rights-of-way necessarily means that the specific grant of authority in subsection (a)(22) of the same statute is surplusage. This

interpretation is untenable. It flies in the face of the frequently repeated rule that the legislature cannot have intended to have enacted a statute containing useless language. *See, e.g., Fletcher Hill, Inc. v. Crosbie*, 2005 VT 1, ¶ 17, 178 Vt. 77, 872 A.2d 292 ("[W]e presume that legislative language is inserted advisedly and not intended to create surplusage.")

If town selectboards possess general authority under §§ 303 and 304 to allow and regulate all utility infrastructure within town highway rights-of-way pursuant to the general authority granted selectboards under Titles 19 and 24 , this general authority has yet to be recognized by any court. Not only the cases cited by the Town and VGS, but every other reported case has relied on Chapter 71 or (as in *Vermont Gas Systems*) on specific charter language in recognizing municipal authority to permit or regulate utility lines within town rights-of-way. *See, e.g.*, *Western Union v. Bullard*, 65 Vt. 634, supra, and *Rugg v. Commercial Union Tel. Co.*, *supra*.

More importantly, if the general authority of selectboards suffices to grant them the authority to license placement of all utility infrastructure within Town highways, there was no need for the legislature to adopt and repeatedly re-adopt Chapter 71 for wires and poles over the past 150 years. Under the Town's theory, all of Chapter 71 is surplusage. It has been surplusage since Chapter 71 was first adopted in 1847, because 19 V.S.A. §§ 301, 303 and 304, which the Town relies upon, predate the adoption of Chapter 71 in 1847 (Sections 301-304 apparently date back to 1787, according to the notes following § 301.)

The Town's and VGS's argument cannot be reconciled with Dillon's Rule. Dillon's Rule is that "a municipality has only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof." *City of Montpelier v. Barnett*, 2012 VT 32, ¶ 20, 191 Vt. 441 (emphasis added, quotation omitted).

Under Dillon's Rule, if any fair, reasonable, substantial doubt exists about the authority of a

town, the doubt must be resolved against the town.

> In practice, Dillon's Rule operates as a canon of construction requiring that grants of power to municipalities be read as limited to those clearly enumerated. See *Valcour v. Vill. of Morrisville*, 104 Vt. 119, 130, 158 A. 83, 86 (1932) ("[I]f any fair, reasonable, substantial doubt exists concerning [a grant of power,] it must be resolved against the [municipality], and its power denied.").

City of Montpelier, supra, at ¶ 20 (emphasis added).

Here, the legislature has granted authority to telegraph, telephone and electric utilities to locate their lines within municipal rights-of-way, and authorized selectboards to regulate those lines -- but the legislative grant is limited to telegraph, telephone and electric lines, both in Title 30 and in Title 19.

There exists no specific statute which authorizes a selectboard to grant, or a utility to obtain, the right to use town highway rights-of-way in perpetuity – other than Chapter 71 (which is limited to telegraph, telephone and electric), 19 V.S.A. § 304(a)(22) (which also is limited to telegraph, telephone and electric) and 24 V.S.A. § 1061.

Section 1061 encompasses all conveyances of real estate by municipalities. Under Dillon's Rule, the town's authority arises out of, and necessarily is limited by, § 1061.

4. Section 1061 Does Not Exempt Agreements to Allow Use of Town Rights-of-Way for the Purpose of Bringing Natural Gas to a Town

a. The Law Prior to 1994

Many Vermont Town Charters explicitly grant that town's selectboard the authority to "convey real estate" or "sell real estate." These Town charters generally do not separately list various types of interest in real estate, such as fee interest, easements, or leases, that the selectboard may convey or sell. *See, e.g.*, Burlington City Charter § 3-1 ("convey such property as the purposes of the corporation may require"), Chester Charter, § 111-201(a) ("convey… real estate"), and Colchester

Charter § 113-103(d) ("sell… such property as its interests may require.") However, the intent of these charters is clear – by granting the power to "convey real estate" or "sell real estate" the legislature has authorized each of these town selectboards to convey any and all interests in real estate.

The Town of Bristol's Charter does not explicitly authorize the selectboard to convey real estate. The Town of Bristol's Charter does not explicitly authorize the Bristol Selectboard to convey licenses to use town real estate, or easements to use town real estate. The Town of Bristol's Charter grants the selectboard the powers of selectboards under general law of Vermont. 24A V.S.A. § 108-201.

Prior to 1994, 24 V.S.A. § 1061 authorized a Town's elected agent to "convey real estate." The statute did not differentiate among fee interests, easements, leases or other forms of real estate interests. An elected agent had the authority to convey fee interests, easements or other real estate interests because the statute authorized town agents to "convey real estate."

b. <u>The 1994 Amendment and its Involved-Real-Estate and Directly-Related Exemptions</u>

Section 1061 was amended in 1994. Section 1061, in subdivisions (a) and (b), now grants the Bristol Selectboard the authority to convey real estate -- but only on specified conditions. These subsections state:

> "(a)(1) If the legislative body of a town or village desires to convey municipal real estate, the legislative body shall give notice of the terms of the proposed conveyance by posting a notice in at least three public places within the municipality, one of which shall be in or near the municipal clerk's office. Notice shall also be published in a newspaper of general circulation within the municipality. The posting and publication required by this subsection shall occur at least 30 days prior to the date of the proposed conveyance. Unless a petition is filed in accordance with subdivision (2) of this subsection, the legislative body may authorize the conveyance.
>
> "(a)(2) If a petition signed by five percent of the legal voters of the municipality objecting to the proposed conveyance is presented to the municipal clerk within 30 days of the date of posting and publication of the notice required by subdivision (1) of

this subsection, the legislative body shall cause the question of whether the municipality shall convey the real estate to be considered at a special or annual meeting called for that purpose. After the meeting, the real estate may be conveyed unless a majority of the voters of the municipality present and voting vote to disapprove of the conveyance.

"(b) As an alternative to the procedures set forth in subsection (a) of this section, the legislative body may elect to have the voters decide, at an annual or special meeting warned for that purpose, whether the real estate should be conveyed. If a majority of the voters of the municipality present and voting vote to approve the proposed conveyance, the real estate may be conveyed."

The statute evidently was based upon a pre-existing statute, 24 V.S.A. § 1973. Section 1973, adopted in 1969, allows the public to petition for a vote to overrule a selectboard's adoption of a new ordinance.

The statute is subject to three exemptions (emphasis added):

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, the legislative body of a town or village may authorize the conveyance of municipal real estate if the conveyance:

(1) Is directly related to the control, maintenance, construction, relocation or abandonment of highways.

(2) Is directly related to the control, maintenance, operation, improvement or abandonment of a public water, sewer or electric system.

(3) Involves real estate used for housing or urban renewal projects under chapter 113 of this title.

c. The "License Agreement" Involves Highway Land But Is Directly Related to the Selectboard's Goal of Bringing Natural Gas Service to Bristol, Not to Highway Use

When the entirety of § 1061 is considered, the intended meaning of subsection (c)(1) becomes evident. The statute contains two types of exemptions: 1) an exemption for conveyances that "involve*"* town "real estate" that is being used for certain purposes (this is subsection (c)(3)); and 2) exemptions for a conveyance that is "directly related" to specified town functions (subsections (c)(1) and (2)).

The "involved real estate" exemption from public vote applies only to land being used for public housing or urban renewal. The "License Agreement" does not involve land being used for public housing or urban renewal purposes. It involves land being used for town highways, but that is not the test.

The exemption the Town relies upon does not hinge upon whether the current use of the land is for highway purposes; it hinges on whether the conveyance is "directly related" to the Town's "control, maintenance, construction, relocation or abandonment" of its highways. The "License Agreement" states that its purpose is to bring natural gas to Bristol, and the effect of the Agreement will be to do so; therefore, it is "directly related" to how natural gas service will be brought to Bristol.

The purpose and the effect of the Agreement leave *unchanged* how the Town will control, maintain, construct, relocate or abandon its highway rights-of-way. The only transportation-related impacts are not changes -- during construction, traffic will be flagged and managed the same as happens when any utility cuts trees, digs sewer or fiber optic lines, etc. An agreement the purpose and effect of which leave unchanged how the Town will control, maintain, construct, relocate or abandon its highways, is not "directly related" to the Town's "control, maintenance, construction, relocation or abandonment" of its highways.

The term "directly related" connotes cause-and-effect or a similarly direct connection without intervening agency or influence. In January of 1994, just prior to when the legislature adopted the "directly related" exemptions, the Supreme Court had used the "directly related" concept to mean cause-and-effect. In *Benning v. State*, 161 Vt. 472, 475, 641 A.2d 757, 758 (1994) the Court had quoted an earlier decision in which it had upheld the State's motorcycle helmet law on the grounds that the law is "directly related to highway safety. " Similarly, in 1987, in *A.*

Brown Co. v. Vermont Justin Corp., 148 Vt. 192, 531 A.2d 899, 196 (1987), the Court had upheld a contract damages award by ruling that the damages were "sufficiently directly related to the breach as to be held to be with the reasonable contemplation of the makers of such a contract. A few years earlier, in *State v. Canerdy,* 132 Vt. 131, 136-137, 315 A.2d 237 (1974), the appellant challenged the admissibility of a DUI breath test. The Court responded that an expert witness had testified "the breath sampling method is directly related to the capillary blood level in the lungs." More recently, in *In re C.H.*, 2018 VT 76 ¶ 7, the Court held that "direct" refers to "the absence of any intervening agency or influence."

Here, the legislature chose not to apply the "involved land" standard to conveyances pertaining to town highways. It obviously knew of and rejected that approach, choosing to apply it to lands used for public housing and urban renewal. The legislature chose instead a narrower exemption. It exempted from the opportunity to petition for public vote conveyances that are "directly related" to the town's "control, maintenance, construction, relocation or abandonment" of its highways. Agreements, for example, to allow a neighboring town to plow a town road or to relocate a town highway would fall within the exemption. They directly relate to control and relocation.

An agreement that leaves unchanged how the Town will control, maintain, construct, relocate or abandon those rights-of-way does not fall within the exemption. An agreement to allow use of the town right-of-way for a buried gas pipeline is one example. Another likely example is an easement agreement to allow installation of an underground gasoline or diesel storage tank to serve a roadside gas station. Both require notice to the public in order to allow the opportunity to petition for a vote.

5. The Town and VGS Ask the Court to Erroneously Apply VRCP 12(b)(6)

A motion under V.R.C.P. 12(b0(6) should not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.

> "A motion for failure to state a claim may not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Kaplan v. Morgan Stanley & Co*., 2009 VT 78, ¶ 7, 186 Vt. 605, 987 A.2d 258 (mem.) (quotations omitted). "We assume that all factual allegations pleaded in the complaint are true, accept as true all reasonable inferences that may be derived from plaintiff's pleadings, and assume that all contravening assertions in defendant's pleadings are false." *Mahoney v. Tara, LLC*, 2011 VT 3, ¶ 7, 189 Vt. 557, 15 A.3d 122 (mem.) (quotation, brackets, and ellipses omitted).

Dernier v. Mortgage Network, Inc., 2013 VT 96 ¶ 26, 195 Vt. 113, 87 A.3d 465.

The Town's and VGS's motion rely on facts that they assert in their motion -- without giving the Plaintiffs the opportunity for discovery to test these factual assertions. They ask that the Court accept as factually correct that the "License Agreement" will significantly change how the Town will control, maintain, construct, relocate or abandon its highway rights-of-way, or that the "License Agreement" for some other factual reason is "directly related" to these functions. Since the statute makes clear that mere use of the same land does not suffice, the conveyance must be shown to be "directly related" to these listed functions if the exemption is to apply.

Other than the factual allegations in the Town's motion, there is no support for this theory.

The Defendants' request is unfair and unlawful. Plaintiffs are entitled to, and seek, the opportunity for discovery to test the Defendants' theory. This issue then can be decided pursuant to V.R.C.P. 56.

6. Compelling Public Policy Under Vermont Constitution Articles 6 and 20 Supports Interpretation of the Remedial Statute In Favor of Allowing the Public to Be Heard

Compelling public policy supports Plaintiffs' interpretation. Every American citizen has a fundamental, constitutionally protected right to vote, *Reynolds v. Sims*, 377 U.S. 533 (1963), but

in Vermont, this right enjoys special protection because of our state constitution. Vermont government officials such as selectboards are "at all times, in a legal way, accountable to [the people]." Vt. Const. ch. I, art. 6. Chapter 1, article 20 provides one means of accountability, the right to instruct. Article 20 states:

> That the people have a right to assemble together to consult for their common good--to instruct their Representatives--and to apply to the Legislature for redress of grievances, by address, petition or remonstrance.

The selectboard is one level of representative government in Vermont.

The right of Vermonters to hold these representatives accountable, and to instruct them, is an individual right, and it is one that can only be exercised through the ballot box. *Skiff v. South Burlington S.D.*, 2018 VT 117 ¶¶ 28-30.

The 1994 amendment to § 1061 implements these constitutional rights. The amendment creates a "legal way" of achieving accountability by creating a new opportunity for the public to be heard via the ballot box. The legislature applied the existing ballot-box means of reviewing of new ordinances to review of conveyances of town real estate.

As a remedial measure that implements the constitution and broadens the opportunity for public participation, the 1994 amendment must be interpreted broadly. *Town of Killington v. State*, 172 Vt. 182, 191, 776 A.2d 395, 402 (2001). The only downside to allowing the public to petition for a vote when the right to use town rights-of-way, forever, is at stake is potential for delay of municipal business. The benefit, however, is priceless – exercise of the right to be heard.

Conclusion

The motions to dismiss should be denied. They misunderstand the governing statutes, overlook Dillon's Rule, and ask the Court to adopt contested facts.

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