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VIA HAND DELIVERY
October 15, 2018

Angela Anderson, COM
Vermont Superior Court
Addison Civil Division
7 Mahady Court
Middlebury, VT 05753

Re: Bigelow et al. v. The Town of Bristol, et al.
Dkt. No. 143-8-18 Ancv

Dear Angela:

Please find enclosed for filing in the above-referenced matter, Vermont Gas Systems, Inc.'s Motion to Dismiss Amended Complaint, Notice of Appearance and Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.

Justin A. Brown

JAB/ams
Enclosures
cc: James Dumont, Esq.
Kevin Brown, Esq.

STATE OF VERMONT

SUPERIOR COURT **ADDISON UNIT**	**CIVIL DIVISION** **Docket No. 143-8-18 Ancv**

DIANA BIGELOW, et al.,)
)
Plaintiffs,)
)
v.)
)
THE TOWN OF BRISTOL, et al.,)
)
Defendants.)

VERMONT GAS SYSTEMS, INC.'S MOTION TO DISMISS AMENDED COMPLAINT

Defendant Vermont Gas Systems, Inc. ("VGS") moves pursuant to V.R.C.P. 12(b)(6) to dismiss Plaintiffs' Amended Complaint for Declaratory Relief.[1] Plaintiffs seek a declaration from this Court that the License Agreement entered into by VGS and Defendant Town of Bristol ("Town") is void because the Town "convey[ed] municipal real estate" to VGS without complying with the notice or voting requirements contained in 24 V.S.A. § 1061. The Amended Complaint fails as a matter of law because the Town provided VGS with a license to construct and operate a natural gas distribution network within the Town's public rights of way. A license does not constitute a conveyance of real estate because any rights of VGS to use the rights of way are permissive only and can be rejected by the Town. Because no conveyance of real estate occurred, the requirements of 24 V.S.A. § 1061 were not triggered and therefore could not have been violated.[2]

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[1] Plaintiffs filed the original complaint on August 9, 2018. Plaintiffs subsequently amended the complaint and served VGS with the same on August 15, 2018. This Motion therefore refers to the Amended Complaint.

[2] VGS reserves the right to move under V.R.C.P. 21 to request that the Court drop VGS as a defendant if the Court declines to grant the Rule 12(b)(6) motions presently before it. The basis for the Rule 21 motion is that VGS is neither a necessary nor permissive party under V.R.C.P. 19 and V.R.C.P. 20 because, *inter alia*, no relief against

I. Allegations

Plaintiffs allege the following in the Amended Complaint[3]:

VGS provides natural gas to customers in Vermont. (Amended Compl. ¶ 6). The License Agreement covers VGS's construction and operation of a natural gas distribution network within highway rights of way owned by the Town. (Amended Compl. ¶19-21; License Agreement ¶ A). Plaintiffs own or rent their homes in the Town. (Amended Compl. ¶ 4). On July 17, 2018, some Plaintiffs asked the Town's Selectboard to (1) provide public notice of the terms of the License Agreement, or (2) hold a public vote before executing the License Agreement with VGS. (Amended Compl. ¶ 37). Plaintiffs assert (which is a legal conclusion) that the License Agreement provides VGS with an easement—a conveyance of real estate—and not a license. (Amended Compl. ¶ 26).

Plaintiffs allege that the Town was required to provide either public notice or a public vote to comply with the requirements of 24 V.S.A. § 1061(a)-(b). Because the Town provided neither public notice nor a public vote before executing the License Agreement, Plaintiffs allege that the Town violated the statute and thus the License Agreement is void. (Amended Compl. ¶¶ 38, 42, 46). Plaintiffs allege that the Town's actions have caused them harm. (Amended Compl. ¶¶ 39-43).

VGS is requested by the Complaint. Rule 21 motions can be brought "at any stage of the action and on such terms as are just." V.R.C.P. 21.

[3] For purposes of this motion all factual allegations in the Amended Complaint, and all reasonable inferences drawn therefrom, are treated as true. *See Richards v. Town of Norwich*, 169 Vt. 44, 49 (1999). The Court should not, however, accept as true "conclusory allegations or legal conclusions masquerading as factual conclusions." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (cited with approval in *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1); *Aranoff v. Bryan*, 153 Vt. 59, 62-64 (1989) (declining to accept as true conclusory statements in complaint with no factual basis).

The License Agreement is attached to and incorporated into the Amended Complaint. (Compl. ¶ 20). The License Agreement speaks for itself and should be considered by the Court in ruling on this Motion to Dismiss.[4]

II. Section 1061 Does Not Apply Because The Town Provided VGS With A License, Which Is Not A Conveyance Of Real Estate.

This Court's interpretation of a statute is a "question of pure law." *Heffernan v. State*, 2018 VT 47, ¶ 7. "Statutory interpretation begins with the plain language of a statute, and, if the language is clear, [the] analysis ends there." *Id.* The plain language makes clear that Section 1061's requirements are triggered only if the Town's Selectboard "convey[s] municipal real estate." 24 V.S.A. § 1061(a)(1). The License Agreement provided VGS with a license (and not an easement as argued by Plaintiffs) to construct and operate the distribution pipeline within the Town's rights of way. VGS's ability to construct and operate the pipeline is permissive; the Town can terminate that ability. Because no real estate interest in the Town's rights of way will transfer to VGS, Plaintiffs' claim fails as a matter of law.

A. VGS's ability to construct and operate the distribution pipeline in the Town's rights of way is permissive and thus constitutes a license and not an easement.

Utilities possess statutory licenses (and not easements) to construct and operate their lines in public rights of way. *See e.g.,* 19 V.S.A. § 1111; *see also* 30 V.S.A. § 2502. This is because "[n]o vested interest can be acquired [by utilities] in the location of streets and highways so as to impinge upon the judgment of those public officials whose duty it is to build, locate and relocate these highways." *Vermont Gas Systems, Inc. v. City of Burlington*, 130 Vt. 75, 77 (1971). Accordingly, the position of utilities is "an ancillary rather than a primary user of the

[4] *See Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 10 n.4 ("When the complaint relies upon a document . . . such a document merges into the pleadings and the court may properly consider it" in ruling on a Rule 12(b)(6) motion).

roadways with [their] interest in the public way subordinate to that of the public." *Id.* at 78. Since a utility's ability to operate its lines in public rights of way is "permissive" and can be rejected based on public "need", "convenience", or "security", licenses and not easements exist within these rights of way. *See id.* at 80; *see also Vermont Gas Systems, Inc. v. City of Burlington*, 153 Vt. 210, 215 (1989).

"[A] license is the authority to do some act or acts upon the land of another and does not pass an interest in the land." *Toussaint v. Stone*, 116 Vt. 425, 428 (1951). By contrast, "[a]n easement is more than a mere personal privilege; an easement invests the holder with privileges that cannot be deprived by the mere will or wish of the proprietor of the servient estate." 25 Am. Jur. 2d *Easement and Licenses in Real Property* § 1 (2014); *N. Sec. Ins. Co., Inc. v. Rossitto*, 171 Vt. 580, 582 (2000) ("Rights-of-way are easements, legally recognized property interests, of which the owner is entitled to 'reasonable' use."). Accordingly, "[w]hile an easement is an interest in land that grants the right to use that land for a specific purpose, a license is merely a personal privilege to do some particular act or series of acts on another's land without possessing any estate or interest therein." 25 Am. Jur. 2d *Easement and Licenses in Real Property* § 3 (2014).

Based on the plain meaning of the License Agreement,[5] VGS's ability to construct and operate the distribution pipeline is permissive and can be terminated by the Town. It is therefore a license and not an easement as a matter of law. This is clear based on the following provisions of the License Agreement:

[5] *See also OfficeMax Inc. v. W.B. Mason Co.*, 2011 WL 2173789, at *5 (D. Vt. June 2, 2011) ("If [an] instrument is clear and unambiguous, it is to be given effect according to its language, for the intention and understanding of the parties must be deemed to be that which their writing declares.") (quoting *Randall v. Clifford*, 119 Vt. 216, 122 A.2d 833, 837 (Vt. 1956)).

- VGS's authority to construct and operate the pipeline in the Town's rights of way is conditioned on the Town issuing a statutory permit (i.e., license) to VGS pursuant to 19 V.S.A. § 1111. (*See* License Agreement ¶ B1).

- While the Town "expresses its agreement in principle" with the issuance of a Section 1111 permit, the License Agreement repeats in two places that the Town retains "plenary authority to control the use of the Town's public highways and rights of way pursuant to 19 V.S.A. § 1111 . . . ." (*See* License Agreement ¶ B1); (see also License Agreement ¶ D8) ("Nothing herein shall alter the Town's rights and authority to control its highways and highway rights of way pursuant to 19 V.S.A. § 1111 . . . .").

- The Town retains the right to "modify a street and/or road within the Town right of way" and requires VGS to "relocate affected VGS facilities at no cost to the Town indefinitely." (License Agreement ¶ D7).

- Section A states: "VGS shall operate the distribution network and be responsible for its maintenance and, if requested by the Town, for removal of abandoned pipeline in perpetuity." The License Agreement defines "abandoned" as meaning that "VGS, its successors and assigns, has been issued a final and binding regulatory or legal determination that VGS no longer will use the pipeline distribution network to serve the area." (License Agreement ¶ A). VGS must remove abandoned distribution network after the Town makes such a determination. (Id.).

- The Town may modify the License Agreement itself in the event "of a substantial change in circumstances affecting the work to be performed by VGS." (License Agreement ¶ B2).

The License Agreement does not provide VGS with the right to construct the pipeline and it does not provide a guarantee that the Town will issue VGS a Section 1111 permit. The License Agreement does, however, provide the Town with the right to require the removal of the pipeline, the right to modify the layout of the streets at VGS's expense, and the right to modify the terms of the Agreement. The License Agreement maintains the Town's "plenary authority" to control its rights of way. Clearly no conveyance of real estate has occurred given VGS's permissive use of the rights of way.

Even assuming the Town issues VGS the requisite Section 1111 permit to construct and operate the distribution pipeline, that permit does not grant VGS any property interest. *See, e.g.,*

Hinesburg Hannaford CU Approval, 2015 WL 6086100, at *7 (Vt. Super. Ct., Envtl. Div. Sept. 16, 2015) (holding, in Act 250 permit application, that "Applicant does not need any property interest in the Town-owned right-of-way, but rather only a permit to place a drainage pipe" in the "highway pursuant to 19 V.S.A. § 1111(c)"). Rather, that Section 1111 permit would allow VGS to construct and operate the distribution pipeline only if the conditions of issuance are met. *See* 19 V.S.A. § 1111(c); see also License Agreement ¶ D7 (terms of License Agreement incorporated into Section 1111 permit as conditions). The Town may suspend the Section 1111 permit for noncompliance, 19 V.S.A. § 1111(g); bring an action in Superior Court for civil or injunctive relief, *id.* § 1111(h); accept assurances of discontinuance including schedules of abatement for a violation, *id.* § 1111(i); and issue utility relocation or adjustment orders, *id.* § 1111(a)(3). VGS's ability to construct and operate the distribution pipeline may be suspended or revoked under the terms of the statute incorporated into the License Agreement. VGS therefore has received nothing more than a license from the Town.

B. Licenses (not easements) are provided by municipalities to utilities to use public rights of way under Vermont law.

The Vermont Supreme Court has determined on at least two occasions that a municipality's termination of a utility's use of a public right of way constitutes the termination of a license. The termination of a license leaves the utility "without any interest in the land of any kind." *City of Burlington*, 130 Vt. at 77. If utilities had easements in public highway rights of way (Plaintiffs' position), utilities would need to be compensated by municipalities whenever highways are relocated and utility lines abandoned. Vermont law does not support such a result.

In *City of Burlington*, the issue was whether the utility should be compensated for being required to relocate gas lines beneath streets the City wished to abandon for urban renewal. 130 Vt. at 77. The lines had been buried beneath the streets pursuant to a statutory license (the

statute was enacted in 1852) and were subject to the City's right to close/relocate them. *Id.* at 78. The Court concluded:

> The streets here represent acquisitions by the City of Burlington, and are not property of [the utility]. . . . The **legislative license** to occupy the streets with these [gas line] installations was at all times subject to the paramount right of the municipality to discontinue or relocate such streets. With the termination of this license with respect to a particular street the [utility] was left **without any interest in the land of any kind**, and no compensable interest, as against the municipality, existed either before or after termination.

Id. at 77-79 (emphasis added).[6] Eighteen years after the *City of Burlington* decision, the Vermont Supreme Court held: "Whenever a commercial enterprise utilizes a public right-of-way, it accepts the risk that it may be required to change its location at its own expense as the public convenience or security requires." *City of Burlington*, 153 Vt. at 215.

As discussed above, VGS's ability to construct and operate the distribution pipeline is heavily circumscribed. That ability is subordinate to the Town's right to modify the layout of the streets and to require VGS to move or abandon pipeline at VGS's expense. Since the License Agreement is permissive and not an easement to access the Town's rights of way, the law does not require any compensation for pipeline relocation or abandonment. When the license to use that street's public right of way is terminated by the Town, VGS is without any interest in the real estate under Vermont law. The fact the parties memorialized this law in the License Agreement (i.e., no compensation by the Town to VGS for the relocation or abandonment of gas lines, see License Agreement ¶ D7) further supports that the License Agreement provided VGS with a license and not an easement.[7]

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[6] On reargument, the Court awarded some compensation to the utility for the relocated gas lines pursuant to the Urban Renewal Act, 24 V.S.A. § 3209. The Urban Renewal Act's definition of real property includes improvements and fixtures thereon. *See City of Burlington*, 130 Vt. at 82.

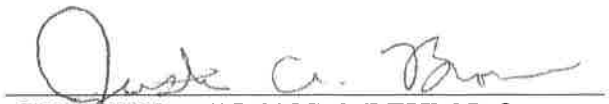
[7] If the License Agreement conveyed an easement to VGS (which it did not), it would be irrational for VGS to agree in the same Agreement that the Town can take away that property right without compensating VGS for the loss of the right. *See Reynolds v. Sterling Coll., Inc.*, 170 Vt. 620, 622 (2000) ("This court will, where possible, avoid

III. Conclusion

As detailed above, both the plain language of the License Agreement and Vermont case law on the use of public rights of way make clear that VGS's use of the Town's streets is not a conveyance of real estate. For all of the foregoing reasons, and those set forth in the Motion to Dismiss filed by the Town of Bristol, this Court should dismiss Plaintiffs' Amended Complaint pursuant to V.R.C.P. 12(b)(6).

DATED in Burlington, Vermont this 15th day of October, 2018.

VERMONT GAS SYSTEMS, INC.

By: 

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construing the contract in a manner that leads to harsh and unreasonable results or places one party at the mercy of the other.").

STATE OF VERMONT

SUPERIOR COURT	**CIVIL DIVISION**
ADDISON UNIT	**Docket No. 143-8-18 Ancv**

BIGELOW et al.,)
)
Plaintiff,)
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v.)
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THE TOWN OF BRISTOL et al.,)
)
Defendant.)

CERTIFICATE OF SERVICE

I, Justin A. Brown, counsel for Defendant Vermont Gas Systems, Inc. ("VGS"), do hereby certify that on October 15, 2018, I served VGS's Motion to Dismiss Amended Complaint and Notice of Appearance, via U.S. Mail and email, first-class postage prepaid, to the following:

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Dated at Burlington, Vermont this 15th day of October, 2018.

VERMONT GAS SYSTEMS, INC.

By: _____

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