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DPU[1] authority to grant pipeline survey access does not include: drilling or excavation; destruction of trees or brush; violation of conservation or agricultural preservation restrictions; or violation of wetlands protection law

by Michael Pill, Esq., Attorney at Law[2] (May 21, 2014)

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[1] Massachusetts Department of Public Utilities.

Preface: How can landowners and restriction holders use this memorandum?

This memorandum is written for the following purposes:

(1) To raise legal questions that hopefully will be answered in good faith by Tennessee Gas Pipeline Company, L.L.C. (hereafter called "Tennessee Gas") concerning the company's Northeast Expansion Project, before the company submits a petition to the Massachusetts Department of Public Utilities (hereafter called the "DPU") to request an order to force its way onto land where the owners have refused to grant permission for entry.

(2) As a legal resource for owners of land, and holders of conservation and agricultural preservation restrictions on land, which may be crossed by the proposed gas pipeline.

NOTE: **Landowners who wish to submit this memorandum to the DPU as part of their response to a petition by Tennessee Gas for entry onto their land should be sure to include with it a cover letter stating their name(s), property address(es) and complete contact information, with a written request asking the Department to rule upon the questions of law set forth below in this memorandum.**

(3) To enable Massachusetts legislators and the DPU to consider the legal issues set forth below, which appear never to have been raised in any prior DPU proceeding.

Introduction: What does Tennessee Gas Pipeline Company, LLC propose to do?

Tennessee Gas Pipeline Company, L.L.C. (hereafter called "Tennessee Gas") has embarked on a campaign seeking to persuade both private and public landowners to grant the company permission to enter private property. Tennessee Gas wants to collect information on the route for its Northeast Expansion Project, proposing construction of a natural gas pipeline across northern Massachusetts and New York. The company distributed

a two page document entitled “Survey and Environmental Fieldwork for Tennessee Gas Pipeline Company, LLC: An Information Guide for Private Property Owners” (hereafter called “Information Guide”).

Thorough reading of the Information Guide makes it clear the company wants to do far more than just conduct a survey that identifies boundaries for a future pipeline easement. For example, the Information Guide includes the following description”:

> What is a geotechnical survey?
> In order to design the pipeline it is important to gather information about the types of soil and underground rock in areas where the pipeline would cross features such as large rivers or roads. At specific sites a truck mounted drilling rig will drill a 3- to 6-inch-wide hole and obtain soil and rock samples. Two four small trucks with trailers will support this work. Tennessee will need landowner directions and permission to move these vehicles to and from the site. After the samples are collected, the borehole is completely filled and the work site restored. Each boring typically takes 1 to 3 days, depending on the type of soils and the depth of the boring. …

What will be the depth of such holes? With what material will the boreholes be filled? The “samples collected”, which Tennessee Gas apparently intends to remove and keep, are part of the real estate belonging to the landowner.

The Information Guide goes on to describe additional excavation to be conducted as part of an archeological survey, in these words:

> Shovel tests are conducted if visibility is obscured by vegetation or if there is a likelihood of buried artifacts. Soils from shovel tests are screened and any artifacts collected. Holes are then filled and sod is replaced.
>
> * * *
>
> Sometimes a site is found that can yield important information about the past. In this case, Tennessee’s archeologists may need to return to conduct further work. …

“[A]ny artifacts collected” (and presumably removed from the property by Tennessee Gas) are the property of the landowner, an issue not addressed by the Information Guide.

The phrase “shovel test” quoted above from the Information Guide refers to archeological excavation. The Tennessee Gas “Petition for Order Authorizing Surveys” on land of Nicholas Hryckvich in Sandisfield, Massachusetts (Mass. Dept. of Public Utilities, Docket No. D.P.U. 13-66)[3] acknowledges such excavation will occur when it states (at paragraph 11) “Any area that is excavated by hand for the purpose of conducting the archeological survey will be restored by Tennessee to a condition reasonably consistent with its condition prior to the excavation.”

The Information Guide acknowledges that even so-called “civil surveys” conducted “to mark features such as angle points and property lines” may be more intrusive than a surveying crew placing stakes in the ground, as follows:

> Occasionally, incidental damages can result which are typically very minor but understandably important to Tennessee and landowners. Tennessee will fairly compensate landowners for any documented damages if they occur.

While the Information Guide does not disclose the nature of such “incidental damages,” the Tennessee Gas “Petition for Order Authorizing Surveys” on land of Nicholas Hryckvich in Sandisfield, Massachusetts (Mass. Dept. of Public Utilities, Docket No. D.P.U. 13-66)[4] described the cutting of timber and brush this way (at paragraph 11):

> During the survey work, no trees or timber more than two (2) inches in diameter will be cut down or removed from any property. Tree branches or small brush, however, may be cut or trimmed in order for the civil surveyors to obtain a line-of-sight.

Growing “trees or timber”, regardless of diameter, are part of the property belonging to the landowner.

[3] Online at http://www.env.state.ma.us/dpu/docs/siting/13-166/102413tpptn.pdf
[4] Online at http://www.env.state.ma.us/dpu/docs/siting/13-166/102413tpptn.pdf

The Tennessee Gas Information Guide contains at least one misrepresentation that violates the Massachusetts Consumer Protection Act, G.L. c. 93A, §§ 2 & 9, and the Massachusetts Attorney General's regulations at 940 C..R. 3.05 & 3.16. It states "Identification of wetlands does not affect or alter your existing uses of the land and future uses will remain your prerogative, subject to existing regulations."

The key phrase quoted above is "subject to existing regulations." The Massachusetts Wetlands Protection Act, G.L. c. 131, § 40, Massachusetts Department of Environmental Protection Wetlands Regulations at 310 C.M.R. 10.00, together with any local wetlands protection bylaw or ordinance, effectively prohibit many activities in wetland areas, buffer zones (land within 100 feet of a wetland area), and riverfront areas (land within 200 feet of a river or perennial stream), without permission from the municipal Conservation Commission. Once these areas are delineated by Tennessee Gas, and that delineation becomes a matter of public record, the local Conservation Commission will have the necessary basis to issue an enforcement order stopping any unauthorized activity.

1. G.L. c. 164, § 72A authorizes only "making a survey"; it does not authorize drilling or excavation, or destruction of trees or brush.

A Tennessee Gas form letter to landowners who do not grant the company permission to enter their property states "It is Tennessee's preference and intent to continue to work with each landowner that has not consented to the survey without having to petition the Massachusetts Department of Public Utilities under Chapter 164, Sections 71A, 75B and 75D, for an order to enter your property to perform the requested surveys."

G.L. c. 164, § 72A,[5] originally enacted by 1927 Mass. Acts, c. 66 (except for the second sentence added by 1968 Mass. Acts, c. 152), states as follows:

> The department may upon petition authorize an electric company to enter upon lands of any person or corporation for the purpose of making a survey preliminary to eminent domain proceedings. The department shall give notice of the authorization granted, by registered mail, to the landowners involved at least five days prior to any entry by such electric company. The company entering upon any such lands shall be subject to liability for any damages occasioned thereby, to be recovered under chapter seventy-nine.

In 1927, when the above quoted statute G.L. c. 164, § 72A was enacted to authorize entry onto private land "for the purpose of making a survey preliminary to eminent domain proceedings", the overhead electric transmission lines of the day would have required nothing more than land surveying to delineate right of way boundaries. This was also long before enactment of environmental legislation requiring archeological or environmental investigations.

G.L. c. 4, § 6 sets forth the following rule for defining the word "survey" in the above-quoted G.L. c. 164, § 72A, with these words:

> In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute: …Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

[5] G.L. c. 164, § 75D, enacted by 1950 Mass. Acts, c. 462, provides that "The provisions of section seventy-two A shall be applicable to natural gas pipe line companies."
G.L. c. 164, § 75B states that any company "which holds a certificate of convenience and necessity issued under [15 U.S.C. 717f] shall be considered as a natural gas pipeline company within the meaning of this chapter upon filing with the department a certified copy of such certificate."

If the word “survey” is a “technical word” that has “acquired a peculiar and appropriate meaning in law”, then G.L. c. 112, § 81D, defines the “Practice of land surveying” as follows:

> [A]ny service or work, the adequate performance of which involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for adequate evidence to the act of measuring and locating lines, angles, elevations, natural and manmade features in the air, on the surface of the earth, within underground workings, and on the beds of bodies of water for the purpose of determining areas and volumes, for the monumenting of property boundaries, for locating or relocating any of the fixed works embraced within the practice of civil engineering, and for the platting, and layout of lands and subdivisions thereof, including the topography, alignment and grades of streets, and for the preparation and perpetuation of maps, record plats, field note records and property descriptions that represent these surveys.

If, on the other hand, “survey” is to be “construed according to the common and approved usage of the language” then dictionary definitions are appropriate authority. *Commonwealth v. Zone Book, Inc.* 372 Mass. 366, 369 (1977) (”When a statute does not define its words we give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose. [Citations omitted.] We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions.”), quoted by *Doherty v. Planning Board of Scituate,* 467 Mass. 560, 569 (2014).

The Merriam Webster Unabridged Dictionary (online edition 2014) defines the noun “surveying” as

> the action or occupation of one that surveys; specifically : a branch of applied mathematics that teaches the art of determining the area of any portion of the earth's surface, the lengths and directions of the bounding lines, and the contour of the surface and of accurately delineating the whole on paper — see GEODETIC SURVEYING, HYDROGRAPHIC SURVEYING, PLANE SURVEYING

The Merriam Webster Unabridged Dictionary (online edition 2014) definition of the noun "survey" states as follows

> 1 a (1) : a critical examination or inspection often of an official character for an implied or specified purpose: the action of ascertaining facts regarding conditions or the condition of something to provide exact information especially to persons responsible or interested
> <survey of a state's roads>
> <a survey of the schools in the area>
> <unemployment surveys>
> (2) : an examination of a ship or a part of its cargo or equipment to determine its condition, responsibility for damage, and disposition to be made
> (3) : a study of a specified area or aggregate of units (such as human beings) usually with respect to a special condition or its prevalence or with the objective of drawing conclusions about a larger area or aggregate : a systematic collection and analysis of data and especially statistical data on some aspect of an area or group
> <a telephone survey of major U.S. companies … in the atom business — Ray Cromley>
> <made a survey … of farm production in the Midwest — Current Biography>
> b : a report, study, or document presenting the results of such an examination
> c : POLL 9a
> 2 a : the action of looking at something from a high or commanding position : a general or
> comprehensive view
> <resumed her survey of the landscape — Anne D. Sedgwick>
> b : a broad undetailed consideration or treatment of something : a history, exposition, or description presenting the outlines only
> <competent surveys of the literatures of India, China, and Japan — Times Literary Supplement>
> <continue his illustrated survey of the music of southern Africa — London Calling>
> see SURVEY COURSE
> 3 a : the process of surveying an area of land or water : the operation of finding and delineating the contour, dimensions, and position of any part of the earth's surface whether land or water
> <a topographic and hydrographic survey of a locality — C. H. Deetz>
> b : a measured plan and description of a portion of an area or of a road or line through an area obtained by surveying
> c : an organization (such as a government agency) engaged in surveying

In contrast to G.L. c. 164, § 72A, Connecticut General Statutes (C.G.S.) § 48-13, entitled “Inspection and testing prior to condemnation,” is much broader, as follows (underlining added):

> Upon filing a notice of condemnation of a condemning authority, either before or after the institution of a condemnation proceeding and after reasonable notice to the property owner or owners affected, the Superior Court or any judge thereof may authorize such condemning authority to enter upon and into land and buildings sought or proposed for public uses for the purpose of inspection, survey, borings and other tests. Such condemning authority shall be responsible to the owner or owners of such property for any damage or injury caused by such entrance and use, and such court or judge may require the filing of a bond or deposit of surety to indemnify the owner or owners of property for such damage. This section shall not limit or modify rights of entry upon private property otherwise provided for by law.

Unlike G.L. c. 164, § 72A, which authorizes only “making a survey”, C.G.S. § 48-13 quoted above expressly authorizes “inspection, survey, borings and other tests”. If the Massachusetts legislature wanted to give G.L. c. 164, § 72A the wider scope of C.G.S. § 48-13, it could have done so.

In other statutes, the Massachusetts Legislature has done just that. For example, G.L. c. 6C, § 3(24), grants to the Massachusetts Department of Transportation the following power (underlining added):

> The department shall have all powers necessary or convenient to carry out and effectuate its purposes including, without limiting the generality of the foregoing, the power to: … (24) enter upon any lands, waters and premises in the Commonwealth, after 30 days notice by registered or certified mail and without the necessity of any judicial orders or other legal proceedings, for the purpose of making surveys, soundings, drillings and examinations as the department may deem necessary, convenient or desirable for carrying out the purposes of this chapter and such entry shall not be deemed a trespass nor shall an entry for such purposes be deemed an entry under any condemnation proceedings which may be then pending; provided,

> however, that the department shall provide reimbursement for any actual damage resulting to such lands, waters and premises as a result of such activities; … .

A virtually identical grant of authority to the division of highways will be found in G.L. c. 81, § 7F. In similar language, G.L. c. 21, § 63 authorizes the Department of Conservation and Recreation as follows (underlining added):

> Whenever the department deems it necessary to make surveys, soundings, drillings or examinations to obtain information for or to expedite the construction of its watershed system, parks, recreational facilities or other projects under its jurisdiction, the department, its authorized agents or employees, may, after due notice by registered or certified mail, enter upon any lands, waters and premises in the Commonwealth for the purpose of making surveys, soundings, drillings and examinations as they may deem necessary or convenient for the purposes of this section, and such entry shall not be deemed a trespass nor shall an entry for such purposes be deemed an entry under any condemnation proceedings which may then be pending. The department shall make reimbursement for any injury or actual damage resulting to such lands, waters and premises caused by any act of its authorized agents or employees and shall, so far as possible, restore such lands to the same condition as prior to the making of such surveys, soundings, drillings or examinations.

G.L. c. 91 App., § 1-4 (fifth paragraph), grants the same authority to the Massachusetts Port Authority in these words:

> The Authority and its authorized agents and employees may enter upon any lands, waters and premises in the Commonwealth for the purpose of making surveys, soundings, drillings and examinations as it may deem necessary or convenient for the purposes of this act, and such entry shall not be deemed a trespass, nor shall an entry for such purposes be deemed an entry under any condemnation proceedings which may be then pending. The Authority shall make reimbursement for any actual damages resulting to such lands, waters and premises as a result of such activities.

Reading into G.L. c. 164, § 72A the much broader statutory language found in the above quoted Massachusetts statutes "is contrary to the well-established rule of statutory construction that 'where the Legislature has employed specific language in one paragraph,

but not in another, the language should not be implied where it is not present.'" *G.E.B. v. S.R.W.,* 422 Mass. 158, 170 (1996), quoting *Beeler v. Downey,* 387 Mass. 609, 616 (1982).

In *Burlington Northern and Santa Fe Railway Company v. Chaulk,* 262 Neb. 235, 631 N.E.2d 131 (2001), the court construed Nebraska Revise Statutes (Neb. Rev. Stat.) § 76-702 authorizing a potential condemnor "to enter upon any land for the purpose of examining and surveying same in contemplation of bringing or during the pendency of condemnation proceedings." After citing other Nebraska statutes granting potential condemnors more extensive rights, the court reached the following conclusion, which is applicable here:

> These examples demonstrate that the Legislature is capable of granting a condemnor authority to enter upon property to conduct activities such as tests, investigations, and data gathering in contemplation of filing condemnation actions. The authority granted a condemnor such as BNSF under §76-702, however, does not include entry upon property for testing or investigating, and, instead, is limited to entry upon land for the purpose of "examining and surveying." It is presumed that the Legislature knowingly limited the precondemnation activities a condemnor may conduct upon property pursuant to § 76-702, and, even if this limitation is by legislative oversight, it is not the office of the courts to legislate into existence greater authority to enter upon land to conduct precondemnation activities than that granted under the statute. [Citation to prior Nebraska case omitted.]

262 Neb. at 244, 631 N.E.2d at 139.

Tennessee Gas tries to evade the limitations of G.L. c. 164, § 72A by calling all of its activities "surveys" in the company's Information Guide. That gambit was attempted in *Missouri Highway and Transportation Commission v. Eilers,* 729 S.W.2d 471, 472-473 (Mo.Ct.App. 1987), but the court saw through it with the following analysis:

> The Commission contends a soil survey is within the ambit of the "survey" authorized by the statutes. Eilers argues to the contrary.
>
> This court does not believe § 227.120(13) or § 388.210(1) authorize a

precondemnation soil survey. First, eminent domain statutes must be strictly construed. *Maryland Plaza Redevelopment v. Greenberg,* 594 S.W.2d 284, 292 (Mo.App.1979). Neither § 227.120(13) nor § 388.210(1) specifically mention a soil survey and thus the statutes on their face do not support the Commission's position. Second, statutory language should be interpreted according to its plain and ordinary meaning. *State ex rel. LeBeau v. Kelly,* 697 S.W.2d 312, 314 (Mo.App.1985). The word survey is commonly used to indicate the measurement of land. 83 C.J.S. Survey p. 920 (1953). A survey is "an actual examination of the surface of the ground." *Hahn v. Cotton et al,* 136 Mo. 216, 37 S.W. 919, 920 (Mo.1896), and "merely evidence of location and boundary." *Gibson v. Chouteau et al,* 39 Mo. 536, 562 (Mo.1865). *See also, Indiana State Highway Commission v. Ziliak et al,* 428 N.E.2d 275, 279 (Ind.App.1981) (a survey is an act of viewing and measuring surface areas). Drilling holes and taking rock cores are not activities ordinarily within the ambit of a survey. *Hicks v. Texas Municipal Power Agency,* 548 S.W.2d 949 (Tex.Civ.App.1977).

Third, when the legislature has intended for a survey to mean something different from an "examination of the surface," it has so stated. For example, § 60.530 RSMo 1978 speaks to "geodetic surveys," § 242.720 to "survey of the lands both surface and underground," and § 256.010 to "scientific, geological and mineralogical survey." If the legislature had intended to include a soil survey within § 227.120 or § 388.210, it would not have used the singular term "survey."

Interpreting G.L. c. 164, § 72A to authorize all of the activities proposed by Tennessee Gas also would amount to impermissible judicial legislation. "Judges may not legislate simply because a statute lacks provision for a particular event or contingency." *Simmons v. Yurchak,* 28 Mass. App. Ct. 371, 376-377 (1990), citing *Prudential Insurance Co. of America v. City of Boston,* 369 Mass. 542, 546-547, (1976) ("It is the function of the court to construe a statute as written and an event or contingency for which no provision is made does not justify judicial legislation.").

The *Prudential* case cited *Harry Alan Gregg, Jr. Family Foundation, Inc. v. Commissioner of Corporations and Taxation,* 330 Mass 538, 544 (1953), where the court quoted an earlier decision stating the rule in these words:

> But we have no right to conjecture what the Legislature would have enacted if they had foreseen the occurrence of a case like this; much less can we read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.

King v. Viscoloid Co., 219 Mass. 420, 425 (1914).

The rule against judicial legislation has been specifically applied in the context of land regulation. *Mantoni v. Board of Appeals of Harwich,* 34 Mass. App. Ct. 273, 276 (1993) ("If the Legislature through inadvertence failed to amend G.L. c. 240, § 14A to provide a requirement of notice to the Attorney General when a constitutional claim is made, then it is the Legislature that must correct this omission."). The principle has been followed even in hardship cases. *Bronstein v. Prudential Insurance Co. of America,* 390 Mass. 701, 708 (1984). In *Mitchell v. Mitchell,* 312 Mass. 154, 161 (1942), the court put it this way:

> If the omission was intentional, no court can supply it. If the omission was due to inadvertence, an attempt to supply it by including the omitted case would be tantamount to adding to a statute a meaning not intended by the Legislature. This is not a case where any intent on the part of the Legislature to incorporate the omitted case can be ascertained with a reasonable degree of certainty under the rule applicable to the interpretation of statutes.

The rule that a statutory right to enter land to make a survey does not authorize cutting trees dates back nearly a century to *Dancy v. Alabama Power Co.,* 198 Ala. 504, 73 So. 901, 902 (1917), where the court analyzed the issue this way (underlining added):

> The rights of entry, examination, and survey are to be exercised by persons only, not by or with animals or vehicles; the statute only conferring these rights upon "officers, agents or servants." It is plain that the object the statute would subserve can be fully and only accomplished by the view of persons representative of the corporations described therein. <u>The terms "examinations" and "surveys," as employed in the statute, have only the ordinary signification attributed to them by the lexicographers. As indicated before, the statute does not undertake to authorize any permanent injury to or destruction of the land (and standing timber is land in legal contemplation) by the exercise of the limited rights created by the statute.</u> All that the statute contemplates-

> all that it could validly contemplate-in respect to damage consequent upon the entry and examinations and surveys on the land is such as is inflicted necessarily by the entry and movement of surveyors over the land and in the efficient use of their instruments to effect the purpose in view. This may include the tramping down of herbage and the minimum of injury to growing crops; but in no event can it rightfully include the injury or destruction of any form or character or amount of growing trees or timber. If the purpose of the entry cannot be effected within the limited, the defined, rights created by the statute, it must be foregone.

In *Indiana State Highway Commission v. Ziliak,* 428 N.E.2d 275, 279 (Ind. Ct. App. 1981), the court held that a statute similar to G.L. c. 164, § 72A did not allow archeological excavation, and cited an earlier decision holding the same statute did not authorize destruction of timber or crops, as follows (underlining added):

> Indiana Code 32-11-1-1 which is currently effective provides that the Commission may examine or survey property before they initiate proceedings to condemn it. The question becomes, then, whether the word "survey" as used in the statute contemplates the intensive type of archaeological survey which the Commission proposes. We concur with the Ziliaks and the trial court that it does not. In the absence of legislative expression that words in a statute are to be given technical meanings, we shall give those words their plain, ordinary, and usual meanings. *Indiana Dept. of State Revenue v. Food Marketing Corp.*, (1980) Ind.App., 403 N.E.2d 1093, trans. denied. Our interpretation of the ordinary connotation of the word "survey" relates to an act of viewing and measuring surface areas. Here the Commission seeks to deny the Ziliaks the use of their property for up to two months and to damage it by removing the topsoil and either digging holes of an unspecified depth that are five feet square or trenching five feet wide and sixty feet long. Clearly, this type of activity is not encompassed in the ordinary meaning of the term "survey." In fact, less destructive activity by a power company's surveyors was held by this court to constitute a "taking" of property. See *Indiana & Michigan Electric Co. v. Stevenson*, (1977) 173 Ind.App. 329, 363 N.E.2d 1254, trans. denied. In *Indiana & Michigan Electric Co.* we wrote in interpretation of IC 32-11-1-1 that "a public utility's right to enter private property for the purpose of examination and survey confers no license to engage in a course of destruction of crops, timber, etc." 363 N.E.2d at 1259. We conclude now likewise that the Commission's right to enter private property for the purpose of examination and survey confers no license to engage in the process of conducting archaeological digs.

To the same effect is *Hicks v. Texas Municipal Power Agency,* 548 S.W.2d 949, 955-956 (Tex. Ct. Civ. App. 1977), where the court held a statute authorizing "examination and survey" did not "include by necessary implication the right to conduct core drilling operations."

The final sentence of G.L. c. 164, § 72A states "The company entering upon any such lands shall be subject to liability for any damages occasioned thereby, to be recovered under chapter seventy-nine." That provision does not expand the meaning of the key term "survey" in the first sentence of §72A. The issue was addressed this way by *Dancy v. Alabama Power Co.,* 198 Ala. 504, 73 So. 901, 902 (1917) (underlining added):

> The statute under consideration was not drawn to authorize the taking, the injury, or the destruction of property in the exercise of the power of eminent domain. If it was interpreted as so intending, the result would be to require the pronouncement that it was violative of section 235 of the Constitution, and hence was invalid when enacted. It does not purport to assure the payment of "compensation *** before such taking, injury, or destruction." The provision therein for the payment of damages, consequent upon the entry for "examinations and surveys" of the land contemplates only the satisfaction of the demand for damages after they have been inflicted by the "examinations and surveys" authorized by the statute.

The issues raised above by this memorandum are questions of first impression in Massachusetts. The only published Massachusetts appellate decision interpreting G.L. c. 164, § 72A, *Town of Carlisle v. Dept. of Public Utilities,* 353 Mass. 722 (1968), does not address any of these issues. For example, the order for entry onto land in that case did not authorize cutting of any trees, as follows:

> The assertion in the petition for appeal that the order authorizes the cutting of trees is an unsupported conclusion of law not admitted by demurrer. [Citations omitted.]
>
> The order does not mention trees, and does not in terms or by indirection authorize the cutting of trees. The petitioners' brief to the extent that it alleges the contrary

cannot be considered. We take the order on its own wording.

353 Mass. at 723-724.

2. G.L. c. 164, § 72A must be strictly construed because it infringes upon an owner's common law property right to exclude others from one's land

Notwithstanding the authorities cited above in the preceding section of this memorandum, Tennessee Gas might try to argue that the word "survey" in G.L. c. 164, § 72A, should be construed so broadly that it includes everything the company wants to do. The Tennessee Gas form agreement entitled "Survey Permission" states that landowner(s) who sign the document grant the company permission "to enter upon my/our land for the purpose of performing civil and environmental surveys and studies that include, but are not limited to, project routing, characterization of land as to property ownership, topographic features, descriptions, cultural resources, wetland delineation and archeology [Underlining added]." In the opinion of the author of this memorandum, any landowner who signs such a grant of permission has given Tennessee Gas a blank check to do whatever it wants on the property which is the subject of the agreement. Such landowners should consider writing to Tennessee Gas to rescind the grant of permission before the company enters their land.

When Tennessee Gas invokes G.L. c. 164, §§ 72A & 75D to force its way onto someone's land, it is infringing on historic property rights, described with these words in *Goulding v. Cook,* 422 Mass. 276, 278 (1996):

> [T]he concept of private property represents a moral and political commitment that a pervasive disposition to balance away would utterly destroy. The commitment is enshrined in our Constitutions. Where the line is crossed and the commitment threatened, even in the interests of the general public, just compensation is required. See art. 10 of the Declaration of Rights of the Massachusetts Constitution; Fifth Amendment to the United States Constitution.

Being able to say “Get off this land!” is an integral part of the right to own real estate. *Opinion of the Justices,* 365 Mass. 681, 689 (1974) (“If a possessor interest in real property has any meaning at all it must include the general right to exclude others. [Citation omitted.]”); *United States v. Karo,* 468 .S. 705, 729 (1984) (Stevens, J., dissenting) (“The owner of property, of course, has a right to exclude from all the world, including the Government, and a concomitant right to use it exclusively for his own purposes.”).

Statutes such as G.L. c. 164, §§ 72A & 75D must be construed strictly because they infringe on property rights. *Phillips v. Pembroke Real Estate, Inc.,* 443 Mass. 110, 118-119 & n. 12 (2004) (“[S]tatutes like MAPA [Massachusetts Art Preservation Act] that alter common-law property rights and impose new obligations totally unknown at common law are ordinarily construed strictly [citation omitted] unless the obvious legislative purpose behind the statute would be defeated by doing so.”), citing *Cororan v. S.S. Kresge, Co.,* 313 Mass 299, 303 (1943) (“[S]tatutes and building laws made in derogation of the common law are to be construed strictly. [Citations omitted.]”).

If the Massachusetts Legislature intended to grant Tennessee Gas the right to do whatever it wants on someone else’s land, then that intention should have been expressly stated. *Kerins v. Lima,* 425 Mass. 108, 110 & n. 4 (1997) (“Since G.L. c. 231, § 85G derogates from the common law, it therefore is to be strictly construed [citation omitted] and a court ‘will not presume that the legislature intended … [ellipsis by the court] a radical change in the common law without a clear expression of such intent.’”), quoting *Commercial Wharf East Condominium Assoc. v. Waterfront Parking Corp.,* 407 Mass. 123, 129 (1990), *S.C.,* 412 Mass. 309 (1992).

The decisions from other states cited above are consistent with the following Massachusetts court rule requiring strict construction of eminent domain statutes: “Where it is sought to take land by eminent domain, there must be strict compliance with the statutory authority and all precedent conditions must be performed before land can be taken for public uses from a private owner against his will.” *Burwick v. Mass. Highway Dept.,* 57 Mass. App. Ct. 302, 307 (2003), quoting *Radway v. Selectmen of Dennis,* 266 Mass. 329, 335 (1929). While G.L. c. 164, § 72A is not itself an eminent domain statute, it is part of the eminent domain statutory scheme because the entry onto property it authorizes sets the stage for an eminent domain taking.

3. Drilling or excavation requires a temporary easement taken by eminent domain

The issue of whether drilling or excavation requires a temporary easement (which must be either purchased or taken by eminent domain) has not yet been addressed by a Massachusetts court. Decisions in other states hold consistently that drilling or excavation requires an eminent domain taking.

The author’s research found only one decision to the contrary, *Puryear v. Red River Auth. of Texas,* 383 S.W.2d 818, 820-821 (Ct.Civ.App.Tex 1964), but that holding was rejected and effectively abrogated by *Hailey v. Texas-New Mexico Power Co.,* 757 S.W.2d 833, 835 (Ct.App.Tex. 1988) (“[W]e refuse to further erode the strict construction of our eminent domain statutes to permit core drilling or soil boring as incidental to a lineal survey. We reverse the order of the trial court insofar as it permits TNP to conduct core drilling, soil boring and subsurface soil testing on the land of appellants.”). *Puryear* was held to be “distinguishable on its facts”, and not followed, by *Hicks v. Texas Municipal Power Agency,*

548 S.W.2d 949, 955-956 (Ct.Civil.App.Tex 1977), rejecting the "argument that the right to survey may include by necessary implication the right to conduct core drilling operations."

The rule was succinctly stated this way by *Schneider v. Brown,* 33 Ohio App. 269, 272, 169 N.E. 307, 308 (1929) (underlining added):

> The commissioners exercised all of the prerogatives of ownership in entering upon the premises of the plaintiffs in error, without his consent, in drilling six holes, and in occupying said premises with their equipment, derricks, etc., for a period of two weeks. Such exercise of authority over said property was in complete violation of the rights of ownership inherent in the plaintiffs in error, and can only fairly be construed as being a taking of such property for public use. [Citations omitted.]

A much more detailed discussion of the taking issue is set forth in *Jacobsen v. Superior Court of Sonoma County, Dept. No. 2,* 192 Cal. 319, 322-325, 328-329, 219 P. 986, 988-989, 990-991 (1923), where the court relied upon both federal and state constitutions in holding that a water district could not conduct "excavations, borings, and subsoil examinations" under a statute (California Code of Civil Procedure former section 1242) providing that "'The state, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof … .'" 192 Cal. at 328-329, 219 P. at 990-991. The California Supreme Court in Jacobsen held that

> [I]t is clear that whatever entry upon or examination of private lands is permitted by the terms of this section cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property.

192 Cal. at 329, 219 P. at 991.

In *Property Reserve, Inc. v. Superior Court,* 224 Cal.App.4th 828, 846, 168 Cal.Rptr.3d 869, 883 (2014), the court had this to say about the decision in *Jacobsen* (italics by the court): "The starting point of our analysis is, *Jacobsen, supra,* 192 Ca. 319, 219 P. 986.

"Despite its age, *Jacobsen's*, holding applies today: a condemnor may not engage in precondemnation activities that will work a taking or damaging unless it first files a *condemnation suit* that provides the affected landowner all constitutional rights against the state's exercise of eminent domain."[6]

Citing *Jacobsen v. Superior Court, supra,* the court in *County of Kane v. Elmhurst National Bank,* 111 Ill.App.3d 292, 443 N.E.3d 1140 (1982), held that borings require an eminent domain taking even if authorized by statute, in these words:

> [T]he part of the order authorizing soil borings and a geologic study without the landowners' consent or a prior condemnation proceeding would be invalid even if statutorily authorized. Such drilling and excavation, even where subsequent backfilling has been required, has been properly recognized as a substantial interference with the landowners' property rights rather than a minimally intrusive preliminary survey causing only incidental damage.

The court declined to go that far in *Mackie v. Mayor and Commissioners of Town of Elkton,* 265 Md. 410, 421-422, 290 A.2d 500, 506 (Ct.App.Md. 1972), but did acknowledge both that the need for taking a temporary easement follows logically from holding that core drilling and excavation are not allowed by statute authorizing only surveying, and that such a taking is constitutionally required:

> Mackie argues also that what the appellees propose to do amounts to a 'taking' within the meaning of Section 40 of Article III of the Maryland Constitution for which compensation must be determined and paid prior to entry. While we expressly refrain from so holding, that quite well may be the practical effect of our decision today which, it must be understood, goes no further than a determination that the learned judge below erred when he held that Section 11 empowered the appellees to do what they propose to do on Mackie's property.

[6] The decision in *Property Reserve*, *Inc.* was the subject of a dissent (224 Cal.App.4th at 866, 168 Cal.Rptr.3d at 901), concluding "I would reverse the trial court decision denying entry for the purpose of conducting geological surveys." As of May 17, 2014, a petition for review was pending before the California Supreme Court.

There is no blinking the fact that public agencies must, from time to time, have the kind of information which can be obtained only by the sort of activities proposed by the appellees if public works are to be accomplished efficiently and economically. Indeed Mackie agrees that he must yield to the contemplated intrusions but only if and when an easement for the purpose is first condemned. In this regard Mackie reminds us that in *State Roads Comm'n v. Jones*, 241 Md. 246, 250, 216 A.2d 563 (1966), we quoted with approval the statement of Mr. Justice Holmes, taken from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), and which bears repetition here:

> 'The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U.S. 598, 605, 28 S.Ct. 331, 52 L.Ed. 637, 13 Ann.Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.'
>
> 'We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'

The court held that drilling and removal of soil samples constitute a taking in *Missouri Highway and Transportation Commission v. Eilers,* 729 S.W.2d 471, 473-474 (Mo.Ct.App. 1987), with these words:

> The Commission proposes to enter Eilers' land with a four wheel drive wagon, drill ten to twelve holes and remove approximately five pounds of soil from the property. The Commission may also drill a two-inch core of the subsurface rock. All this is to be done without the landowner's consent. Although the soil survey is not an intrusion of an overwhelming magnitude, it is still an intrusion and interference with Eiler's rights as a private landowner. A soil survey conducted without Eilers' consent subverts his right to use and enjoy his property in fee simple absolute. This is not constitutionally permissible. Accordingly, the soil survey amounts to a "taking" and the Commission may not conduct the soil survey until it receives Eilers' consent or intiates judicial proceedings and pays the damages for a temporary easement before entering the land. [Citations to Missouri authorities omitted.]

Following a detailed review of authorities cited above from other states, the court in *National Compressed Steel Corp. v. Unified Government of Wyandotte County/Kansas City,* 272 Kan. 1239, 1248-1255, 38 P.3d 723, 730-735 (2002), did not expressly state that "subsoil testing" constitutes a taking, but reached the following conclusion holding that it exceeds the scope of the governing statute authorizing pre-condemnation entry onto property:

> The power of eminent domain must be exercised in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right. The power of eminent domain may be exercised only on the occasion and in the mode and manner prescribed by the legislature. Statutes conferring and circumscribing the power of eminent domain must be strictly construed.
>
> Here, the Unified Government's purpose for environmental testing is not to correct an environmental problem or to protect the public from groundwater pollution but to determine the economic viability of the condemnation project. We agree that environmental contamination is relevant to appraising the value of property sought to be condemned. However, subsoil testing is beyond the scope of the examination authorized by K.S.A. 26-512. Therefore, we reverse the district court's denial of National's petition for injunction.

Kansas Statutes Annotated (K.S.A.) 26-512, cited above, states "The prospective condemner or its agents may enter upon the land and make examinations, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for actual damages thereto."

In *Burlington Northern and Santa Fe Railway Company v. Chaulk,* 262 Neb. 235, 244-246, 631 N.E.2d 131, 139-140 (2001), the court held that proposed "core drilling" tests, to be conducted under authority of a statute authorizing only entry "upon any land for the purpose of examining and surveying same in contemplation of bringing or during the pendency of condemnation proceedings", "amount to a temporary taking which must be accomplished in

the mode and manner prescribed by the Legislature for the exercise of the power of eminent domain."

Prior DPU orders authorizing entry onto land have allowed excavation for archeological surveys.[7] But there is no indication any of the legal authorities set forth in this memorandum were brought to the agency's attention in those cases, nor has the author's research found any record of appeal to the Supreme Judicial Court under G.L. c. 25, § 5. Indeed, the DPU orders in those cases state that the only appearances were by attorneys for the petitioners seeking entry onto land.[8]

4. Destruction of trees or brush is a trespass under G.L. c. 242, § 7

G.L. c. 242, § 7 states as follows (underlining added):

> A person who without license willfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for three times the amount of the damages assessed therefor; but if it is found that the defendant had good reason to believe that the land on which the trespass was committed was his own or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable for single damages only.

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[7] *Tennessee Gas Pipeline Co., LLC,* 2014 WL 689718 at *3 (DPU Order also available online at www.nofrackedgasinmass.org/notgp/wp-content/uploads/2014/04/DPU-Order-Granting-Access-for-Survey-Sandisfield.pdf) (2014) (DPU order states "(2) areas excavated in the conduct of archeological surveys must be restored to a condition reasonably consistent with their condition before excavation;… .").

Mill River Pipeline, LLC, DTE 04-26, 2004 WL 1909686 at *__(No Westlaw pagination) (2004) (DTE order states "(3) areas excavated for purposes of conducting archaeological surveys on the affected properties must be restored to a condition reasonably consistent with their condition before construction; … ."

Maritimes & Northeast Pipeline, LLC, DTE 01-48-A and 01-48-B, 2001 WL 1824065 at *4 and 2002 WL 1162709 at *3 (2002) (Both DTE orders state in identical language that "(3) areas excavated for purposes of conducting archaeological surveys on the affected properties must be restored to a condition reasonably consistent with their condition before construction; … .").

Massachusetts Municipal Wholesale Electric Co., DPU 96-45-A and 96-45-B, 1996 WL 553051 at *3 and 1996 WL 553078 at *3 and (1996) (Both DPU orders state in identical language that "(3) areas excavated for purposes of conducting archaeological surveys on the affected properties must be restored to a condition reasonably consistent with their condition before construction; … .").

[8] *Id.*

The Merriam Webster Unabridged Dictionary (online edition 2014) defines the statutory term “underwood” as “1 : undergrowth, underbrush 2 : the sprout growth in a cutover forest which is reproducing itself.” The same dictionary defines “undergrowth” as “1 : low growth more or less completely covering the floor of a forest and including seedlings and saplings and shrubs and herbs 2 : a condition of incomplete or imperfect growth”. It defines “underbrush” as “1 : shrubs, bushes, or small trees growing beneath large trees in a wood or forest : brush 2 : a tangled, obstructing, or impeding mass”.

The measure of single damages for violation of G.L. c. 242, § 7 is replacement cost. *Ritter v. Bergmann,* 72 Mass. App. Ct. 296, 298-299 (2008). There “The judge determined the “restoration” and “replacement cost” damages to be $43,594. This amount included costs associated with site preparation, individual selection and planting of the trees, and a one-year warranty on each tree.” Id. The Appeals Court held

> The judge was within his discretion to credit Ritter's expert that “the ‘installed cost’ for the replacement trees is 2.5 times their wholesale price, and that such pricing ... is standard in the industry.” The judge's finding that the cost of restoration was reasonably necessary was amply supported by the evidence.

72 Mass. App. Ct. at 307.

While the DPU has granted permission to cut brush and even trees up to two inches in diameter, as part of entry onto land authorized under G.L. c. 164, § 72A, it appears from the prior DPU decisions[9] that no one has ever brought the tree trespass statute (G.L. c. 242, § 7)

[9] *Tennessee Gas Pipeline Co., LLC,* 2014 WL 689718 at *3 (DPU Order also available online at www.nofrackedgasinmass.org/notgp/wp-content/uploads/2014/04/DPU-Order-Granting-Access-for-Survey-Sandisfield.pdf)
(2914) (DPU order states “(1) no trees or timber shall be cut down on or removed from the Hryckvich Property, except that brush, limbs, or trees less than two inches in diameter may be cut down and removed from vegetated areas on the Hryckvich Property in locations where surveyors need to obtain a line of sight; … .”).

to the agency's attention. The only appearances in those cases were by attorneys for the petitioners seeking entry onto land,[10] and there is no record of any appeal to the Supreme Judicial Court under G.L. c. 25, § 5.

It is difficult to understand how DPU can lawfully grant permission to cut trees of any diameter, or even brush without requiring an eminent domain taking (if the landowner does not grant permission with an agreement for replacement cost compensation), when such conduct is expressly outlawed by statute. No Massachusetts court decision reconciles G.L. c. 164, § 72A with G.L. c. 242, § 7. This is an issue of first impression in Massachusetts.

5. Ordering a landowner to violate a conservation or agricultural preservation restriction requires compliance with Mass. Const., Amend. Art. 97

Mount Grace Land Conservation Trust's Executive Director Leigh Youngblood wrote the following letter dated May 13, 2014, addressed to James D. Hartman, Agent-Right of Way SR II, Tennessee Gas Pipeline Co., LLC, 1615 Suffield Street, Agawam, MA 01001, under the subject heading "Land Subject to Conservation Restrictions" (hereafter called the "Mount Grace letter"):

Mill River Pipeline, LLC, DTE 04-26, 2004 WL 1909686 at *__(No Westlaw pagination) (2004) (DTE order states "(1) no trees or timber shall be cut down or removed on the affected properties; (2) small brush or tree branches may be cut down and removed on affected properties, but only in areas where surveyors need to make a line of sight and to the extent needed to make a line of sight; … ."

Maritimes & Northeast Pipeline, LLC, DTE 01-48-A and 01-48-B, 2001 WL 1824065 at *4 and 2002 WL 1162709 at *3 (2002) (Both DTE orders state in identical language that "(1) no trees or timber shall be cut down or removed on the affected properties; (2) small brush or trees may be cut down and removed on affected properties, but only in areas where surveyors need to make a line of sight; … .").

Massachusetts Municipal Wholesale Electric Co., DPU 96-45-A and 96-45-B, 1996 WL 553051 at *3 and 1996 WL 553078 at *3 and (1996) (Both DPU orders state in identical language that "(1) no trees or timber shall be cut down or removed on the affected properties; (2) small brush may be cut down and removed on the affected properties, but only in areas where surveyors need to make a line of sight; … .").

[10] *Id.*

Mount Grace Land Conservation Trust (Mount Grace) is a nonprofit, charitable organization that has been working with private landowners and public agencies in a 23-town region of north central Massachusetts since 1986 to protect land and encourage land stewardship. To date, we have helped hundreds of landowners conserve more than 27,000 acres.

The majority of the land conserved with the assistance of Mount Grace is permanently protected with conservation restrictions, pursuant to Mass. General Llaws (M.G.L.), Chapter 184, sections 31-33, which is also the case with the land of Robert and Lisa Adams located on Hatchery Road in Montague.

Tennessee Gas has requested permission from the Adamses and other public and private landowners to conduct a range of surveys on their conserved land. Please be advised that some of the survey methods described in your. “Information Guide for Private Property Owners” would constitute prohibited activities under all standard conservation, agricultural, or watershed restriction documents. The following language is taken from Mount Grace’s Hatchery Road Agricultural Preservation Restriction (APR) (Franklin County Registry of Deeds, Book 3714, Page 313, recorded on12/28/2000):

PROHIBITED ACTIVITIES

(1) No use shall be made of the Property, and no activity thereon shall be permitted, which is inconsistent with the intent of this grant, as stated in the Statement of Purpose.
(2) No non-agriculturally related temporary or permanent structure… shall be constructed, placed or permitted to remain on the Property…

(6) [Prohibited:] The excavation, dredging, depositing or removal from the Property of loam, peat, gravel, soil, sand, rock, or other mineral resources, or natural deposits unless related to the uses, activities and purposes expressly permitted herein, including but not limited to, the conduct of sound agricultural, forestry, or wildlife management practices.

Landowners cannot grant permission to others to violate the terms of conservation restrictions on their land. Representations to landowners made by Tennessee Gas, as reported to Mount Grace, that conservation restrictions are not a barrier to the request to survey are inaccurate.

Such inaccurate representations violate the Massachusetts Consumer Protection Act, M.G.L., chapter 93A, sections 2 & 9, and the state attorney general’s regulations at 940 C.M.R. 3.05 & 3.16.

In addition, any right to enter upon land granted by the MA Department of Public Utilities to Tennessee Gas, pursuant to MGL Chapter 164, section 72A, would not constitute eminent domain, nor would it include a right to violate any conservation restriction duly approved by agencies of the Commonwealth, including but not limited to, the MA Department of Agriculture, MA Department of Conservation Services, MA Department of Conservation and Recreation, and the MA Department of Fish & Game.

If you or your company's legal counsel disagree with anything set forth above, please let me know your position, with citation(s) to applicable legal authorities. If you fail to provide a substantive response, I will have to assume that my understanding set forth above is accurate.

Tennessee Gas must cease seeking permission from landowners to conduct activities on already conserved lands that would constitute violations of any conservation restriction, protections approved for their public benefits and purchased at public expense.

Thank you for your attention to this matter. I look forward to hearing from you.

To date, no response to the above-quoted letter has been received from Tennessee Gas.

Mass. Const., Amend. Art. 97 (hereafter called "Article 97") states as follows (underlining added):

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefore, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

The Article 97 legislative vote requirement set forth above applies wherever land was "taken or acquired for Art. 97 purposes" which are stated above to be "the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources." *Mahajan v. Dept. of Environmental Protection,* 464 Mass. 604, 612 (2013), citing *Selectmen of Hanson v. Lindsay,* 444 Mass. 502, 504-506 (2005). Article 97 is retroactive. *Opinion of the Justices,* 383 Mass. 895, 918 (1981) ("The two-thirds voting requirement applies to the disposition of all lands and easements taken or acquired for the stated purposes, regardless of when they were taken or acquired.").

Article 97 makes no exception for pipelines. On February 19, 1998, the Massachusetts Executive Office of Environmental Affairs promulgated "EOEA Article 97 Land Disposition Policy," which includes the following "Statement of Policy" and "Conditions for Disposition Exceptions":

> I. Statement of Policy
>
> It is the policy of EOEA and its agencies to protect, preserve and enhance all open space areas covered by Article 97 of the Article of Amendment to the Constitution of the Commonwealth of Massachusetts. Accordingly, as a general rule, EOEA and its agencies shall not sell, transfer, lease, relinquish, release, alienate, or change the control or use of any right or interest of the Commonwealth in and to Article 97 land. The goal of this policy is to ensure no net loss of Article 97 lands under the ownership and control of the Commonwealth and its political subdivisions. Exceptions shall be governed by the conditions included in this policy. This policy supersedes all previous EOEA Article 97 land disposition policies.
>
> An Article 97 land disposition is defined as
>
> a) any transfer or conveyance of ownership or other interests;
>
> b) any change in physical or legal control; and
>
> c) any change in use, in and to Article 97 land or interests in Article 97 land owned or held by the Commonwealth or its political subdivisions, whether by deed, easement, lease or any other instrument effectuating such transfer, conveyance or change. A revocable permit or license is not considered a disposition as long as no

interest in real property is transferred to the permittee or licensee, and no change in control or use that is in conflict with the controlling agency.'s mission, as determined by the controlling agency, occurs thereby.

II. Conditions for Disposition Exceptions

EOEA and its agencies shall not support an Article 97 land disposition unless EOEA and its agencies determine that exceptional circumstances exist. A determination of "exceptional circumstances." is subject to all of the following conditions being met:

1. all other options to avoid the Article 97 disposition have been explored and no feasible and substantially equivalent alternatives exist (monetary considerations notwithstanding).

   Note: The purpose of evaluating alternatives is to avoid using/affecting Article 97 land to the extent feasible. To that end, the scope of alternatives under consideration shall be commensurate with the type and size of the proposed disposition of Article 97 land, and must be performed by the proponent of the disposition to the satisfaction of EOEA and its agencies. The scope of alternatives extends to any sites that were available at the time the proponent of the Article 97 disposition first notified the controlling agency of the Article 97 and, and which can be reasonably obtained: (a) within the appropriate market area for private proponents, state and/or regional entities; or (b) within the appropriate city/town for municipal proponents.

2. the disposition of the subject parcel and its proposed use do not destroy or threaten a unique or significant resource (e.g., significant habitat, rare or unusual terrain, or areas of significant public recreation), as determined by EOEA and its agencies;

3. as part of the disposition, real estate of equal or greater fair market value or value in use of proposed use, whichever is greater, and significantly greater resource value as determined by EOEA and its agencies, are granted to the disposing agency or its designee, so that the mission and legal mandate of EOEA and its agencies and the constitutional rights of the citizens of Massachusetts are protected and enhanced;

4. the minimum acreage necessary for the proposed use is proposed for disposition and, to the maximum extent possible, the resources of the parcel proposed for disposition continue to be protected;

5. the disposition serves an Article 97 purpose or another public purpose without detracting from the mission, plans, policies and mandates of EOEA and its appropriate department or division; and

6. the disposition of a parcel is not contrary to the express wishes of the person(s) who donated or sold the parcel or interests therein to the Commonwealth.

The significance of Article 97 for the present case is twofold. First, if an eminent domain taking of a temporary easement is required for Tennessee Gas to conduct excavation or borings, then Article 97 applies to the taking of such easements.

Second, as set forth above in the Mount Grace letter, excavation, borings and the cutting of brush or timber may violate the provisions of conservation or agricultural preservation restrictions applicable to specific parcels of land. If so, then such violation requires compliance with Article 97.

It is difficult to understand how the DPU can lawfully order landowners to permit actions on their property by Tennessee Gas which violate conservation or agricultural preservation restrictions. The holders of such restrictions are essential parties to any DPU proceeding under G.L. c. 164, § 72A.

As part of any DPU filing under G.L. c. 164, §§ 72A & 75D, Tennessee Gas should be required to:

(a) disclose which parcels of land in the path of its proposed pipeline are subject to conservation or agricultural preservation restrictions;

(b) submit true and complete copies of such restrictions as part of its petition to the DPU;

(c) notify the holders of such restrictions in the same manner as owners of the land are notified; and

(d) allow restriction holders to participate in the proceedings in the same manner as the owners of the fee.

All such restrictions are recorded in the local registry of deeds, whose records can be searched online at www.masslandrecords.com. The restrictions likely are referred to in the

landowner's deed or are readily discoverable through review of the landowner's chain of title in the registry of deeds online public records. The Commonwealth has many fine real estate conveyancing attorneys and non-lawyer title examiners who can provide this information to Tennessee Gas for a reasonable cost.

6. A pipeline company without a federal "Certificate of public convenience and necessity" is subject to all state and local laws, including wetlands protection

Tennessee Gas does not yet have a "Certificate of public convenience and necessity" (hereafter called the "certificate") for its Northeast Expansion Project. The certificate is issued by the Federal Energy Regulatory Commission (FERC) under authority of 15 U.S.C. 717f(c). See also 18 C.F.R. 157.1-157.14.

Entry onto private land prior to eminent domain taking does not require Tennessee Gas first to obtain the certificate. *Walker v. Gateway Pipeline Co.,* 601 So.2d 970, 975-976 (Ala. 1992). Similarly, Tennessee Gas could exercise eminent domain under Massachusetts state law without such a certificate. *Robinson v. Trancontinental Pipeline Corp.,* 306 F.Supp. 201, 206-207, *affirmed* 421 F.2d 1397 (5th Cir. 1970), *cert. denied* 90 S.Ct. 1695, 398 U.S. 905, 26 L.Ed.2d 64 (1970); *Midwestern Gas Transmission Co. v. Baker,* 2006 WL 461042 (Ct.App.Tenn. 2006), and cases cited at *10 & n. 26.

But without that certificate, Tennessee Gas presently has no legal basis to claim exemption from any Massachusetts legal requirement. This includes wetlands regulation under G.L. c. 131, § 40 and the Massachusetts Department of Environmental Protection

(DEP) Regulations at 310 C.M.R. 10.00, and local wetlands protection bylaws and ordinances.[11]

Generally, any "activity" that "alters" a wetland, a 100-foot wetland buffer zone around a wetland, or a 200-foot riverfront protection area falls within the jurisdiction of a municipal conservation commission and the state Department of Environmental Protection (DEP). 310 C.M.R. 10.01(2) (entitled "Purpose") and 10.02(1) (entitled "Areas subject to Protection Under M.G.L. c. 131, § 40").

The regulations, at 310 C.M.R. 10.02(2)(a) (entitled "Activities Subject to Regulation Under M.G.L. c. 131, § 40"), provide that with stated exceptions, "Any activity proposed or undertaken within an area specified in 310 CMR 10.02(1), which will remove, fill, dredge or alter that area, is subject to Regulation under M.G.L. c. 131, § 40 and requires the filing of a Notice of Intent …" with the local conservation commission.

Nothing in the stated exceptions excludes proposed Tennessee Gas activities like excavation, borings, or cutting of trees and brush within a wetland or other "area subject to protection" under 310 C.M.R. 10.02(1)(a)-(e).[12]

The term "activity" is defined by 310 C.M.R. 10.04 to include "any form of … excavating … the destruction of plant life; and any other changing of the physical characteristics of the land." The definitions in 310 C.M.R. 10.04 provide that "Alter means to change the condition of any Area Subject to Protection Under M.G.L. c. 131, § 40. Examples of alterations include, but are not limited to, the following: (c) the destruction of vegetation;…."

[11] In Massachusetts, where a municipality may be classified as either a city or a town, a bylaw is local legislation enacted by a town meeting, while an ordinance is local legislation enacted by a city council.
[12] For buffer zone and riverfront area activities governed by 310 C.M.R. 10.02(2)(a)1 and 10.02(2)(b), there is an exemption for "Minor Activities" that include (310 C.M.R. 10.02(2)(b)1.g) "Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design purposes (e.g., installation of monitoring wells, exploratory borings, sediment sampling and surveying)."

Based on the regulations cited above, and in addition to any other applicable legal requirements, Tennessee Gas must file Notices of Intent and obtain Orders of Conditions under state wetlands protection regulations (310 C.M.R. 10.00) for all proposed cutting of trees and brush, excavation and borings.

In addition, the company must comply with municipal wetlands protection bylaws and ordinances. These are matters of public record, which can be obtained either directly from the local conservation commission, or from the city or town clerk.