

Date: January 29, 2015

Re: Interstate Oil Pipeline Projects in New Jersey

Dear Mayor:

This notice will discuss the current regulatory review process for interstate oil pipelines in New Jersey. The League has received a number of requests to provide some clarity on this issue.

As an initial matter, we urge any municipality confronted with a proposed interstate oil pipeline to seek the advice of their municipal attorney. This area of the law is somewhat unclear as there are not many reported cases on the development of interstate oil pipelines in the state.

Because there is no preemptive action on the part of the Federal Energy Regulatory Commission (FERC) regarding the siting of interstate oil pipelines, they present a different statutory and regulatory framework than interstate natural gas pipelines. Nevertheless, these pipelines also present preemption issues, though as a matter of state, rather than federal law. Please note that the League issued a separate notice on interstate natural gas pipelines on January 20, 2015, available at <http://nj-njslom.civicplus.com/ArchiveCenter/ViewFile/Item/384>.

By way of background, there is currently one proposed interstate oil pipeline in the very early planning stages in the state. Named Pilgrim Pipeline, this proposed project would extend from Albany, New York to Linden, New Jersey.

While this notice will go into more detail below, here are the basic points. New Jersey pipeline companies have eminent domain authority pursuant to N.J.S.A. 48:10-1. It is not clear whether this statute is constitutional because our Supreme Court and Appellate Division have never ruled on the issue. Additionally, there are no reported or unreported cases construing the impact of this statute on municipal land use authority. However, there is an argument that municipal land use authority may be preempted in the same way State agencies exercising their statutory authority may preempt municipalities. In any event, unlike interstate natural gas pipelines, interstate oil pipelines are subject to a full environmental review by the NJDEP.

1. Eminent Domain

Pipeline companies have eminent domain authority in New Jersey. State law provides that “pipeline companies, associations may acquire by condemnation land and other property necessary for public use for right of way [pursuant to the statutory requirements for condemnation found in Title 20 of the Revised Statutes.]” N.J.S.A. 48:10-1. While this provision is found within Title 48, the public utility section of the revised statutes, a New Jersey court has held that a pipe line company need not be a “public utility” to use this provision. *Faubel v. Buckeye Pipeline Co.*, 20 N.J. Super. 116, 119 (N.J. Law Div. 1952). Consequently, it would appear that the Board of Public Utilities (BPU) would not oversee the use of eminent domain by pipeline companies, as it would with a state public utility. See N.J.S.A. 48:3-17.7.

As the statutory language cited above states, in exercising eminent domain powers a pipeline company would still need to comply with the requirements of Title 20 of the revised

statutes. These provisions provide the framework and procedures for condemnation actions in New Jersey.

A word about the constitutionality of N.J.S.A. 48:10-1, a provision enacted through P.L. 1918 c. 170. Over sixty years ago, a trial level court held that this statute was constitutional. *Texas Pipe Line Co. v. Snelbaker*, 30 N.J. Super. 171 (N.J. Law Div. 1954). However, the constitutionality of this statute has never been subject to review by the Appellate Division or State Supreme Court. In *Application of Buckeye Pipe Line Co.*, a private landowner argued that this provision was unconstitutional under the United States and New Jersey constitutions. The State Supreme Court refused to make a determination on the constitutionality of this provision, instead deciding against the landowner purely on procedural grounds. 13 N.J. 385, 389 (1953).

In his dissent to the *Application of Buckeye Pipeline Co.* case, Justice Herr opined that the Court should have ruled on the substantive constitutional issue presented by N.J.S.A. 48:10-1. *Id.* at 391. He wrote that the statute may present a constitutional vagueness issue and found fault in “[the statute’s] failure to specify the particular pipe line public uses for which the power of condemnation may be exerted.” *Id.* at 390. In sum, because there has never been a thorough Appellate Division or Supreme Court review of this statute, its constitutionality is unclear.

2. Effect of Eminent Domain on Municipal Land Use Authority

There are no cases which construe whether or not pipeline companies, exercising their eminent domain powers, are subject to municipal land use authority. Because a pipeline company is not a “utility,” for the reasons stated above, it would be unable to appeal the application of a municipal land use ordinance to the BPU. See N.J.S.A. 40:55D-19. Notwithstanding this, there may be an issue of preemption at play.

An argument can be made, by applying other decisions which construed the relationship between state eminent domain powers and municipal land use authority, that municipal land use authority is preempted. The League does not take a position on this issue. However, a discussion of other preemption cases may be helpful.

The State Supreme Court has held that municipalities cannot exercise land use authority over state highway projects. *City of Newark v. Jersey Turnpike Authority*, 7 N.J. 377 (1951); see also *New Jersey Turnpike Authority v. Sisselman*, 106 N.J. Super. 358, 366 (N.J. App. Div. 1969). In *Sisselman*, the Appellate Division held that:

... legislatively created agencies, authorized by the superior governmental entity of the State, may not be subjected to rules and regulations of local governing bodies and agencies, in the absence of clear language subjecting the state-created agency to the jurisdiction of local boards.” *Id.* at 245-246.

In Town of Bloomfield v. New Jersey Highway Authority, a majority of the State Supreme Court held that municipalities cannot regulate any component of the construction of the Garden State Parkway. 18 N.J. 237, 246 (1955). In his dissent, Justice Vanderbilt argued that subordinate uses, like gasoline and food establishments, ought to be subject to municipal regulation. Id. at 250.

An argument exists, however, that this holding may not apply to oil pipeline companies using their eminent domain authority pursuant to N.J.S.A. 48:10-1. These companies should be evaluated differently than a Highway Authority because they are not government entities. Pointedly, it is conceivable that subordinate uses attached to a pipeline may be subject to municipal regulation if they do not represent a public purpose. Keep in mind that N.J.S.A. 48:101 does not explicitly reference how to evaluate the public purpose behind these pipelines. There is a lack of clarity in the statute and the case law regarding this point.

As stated above, there are no cases which construe whether or not pipeline companies, exercising their eminent domain powers, are subject to municipal land use authority. To the extent that a valid comparison can be made between a state entity invested with statutory authority to build highways and a private company invested with statutory authority to condemn property to build pipelines, an argument may exist that such municipal land use authority over oil pipeline projects is generally superseded. However, as stated above, the League does not take a position on this issue. We urge you to discuss this issue with your municipal attorney.

3. State Environmental Review

Interstate oil pipelines are subject to a full environmental review under New Jersey State law because, unlike interstate natural gas pipelines, such a review is not preempted by the FERC. The NJDEP would consider a pipeline project to be “linear development.” Such a project would be subject to a host of requirements including, but not limited to, wetlands permits, transition area permits, Flood Area Hazard Control Act rules, Highlands approval, and/or coastal permitting. Local officials should communicate any concerns over the environmental impact of a proposed pipeline with the NJDEP.

Conclusions and Recommendations

The League urges NJDEP to do a thorough and thoughtful review of any proposed interstate oil pipelines. New Jersey’s natural resources are important to its local elected officials and the people they serve.

While this notice has discussed some issues appurtenant to interstate oil pipelines, this is a somewhat opaque area of the law. We urge you to have a thorough conversation with your municipal attorney about this notice.

If you have any questions regarding this notice please contact Ed Purcell, Esq. at (609) 695-3481 x. 137.

Very Truly Yours,

William G. Dressel, Jr.
Executive Director