

LAW OFFICE OF VINTON BOVIER STEVENS

April 16, 2015

Dryden Town Board c/o Dryden Town Clerk
Dryden Town Hall
93 East Main Street
Dryden, NY 13053

Re: "Concerned Residents of Dryden"
Memorandum of Law Regarding Proposed Zoning Law Amendments
Occasioned by the Proposal of the Lansing/Freeville Reinforcement Project

Dear Members of the Town Board:

The following "Concerned Residents of Dryden" ("Concerned Residents") are concerned enough about the Dryden Town Board's ("Board") proposed Amendment to Local Law #1 of 2015, with regard to public utility development, that they retained me to represent them with regard to this matter:

Genevieve DeClerck	713 West Dryden Road, Freeville, NY 13068
Hugh Edwards	713 West Dryden Road, Freeville, NY 13068
Clifford Kraft	983 West Dryden Road, Freeville, NY 13068
Inshik Lee	879 West Dryden Road, Freeville, NY 13068
Stephen Merwin	879 West Dryden Road, Freeville, NY 13068
Linda Parks	115 West Dryden Road, Freeville, NY 13068
Sue Stein	983 West Dryden Road, Freeville, NY 13068

Attached, please find a Memorandum of Law ("Memorandum") for your consideration with regard to the proposed amendment. At the outset, as the Concerned Residents understand that the proposed amendment has been revised either during or after the April 9, 2015 Agenda Meeting, they request that the Board consider delaying the public hearing on this matter. By tabling the public hearing, Dryden Town residents will be better able to provide the Board with relevant and helpful input. Regardless, it would appear that the Board is unable to vote on this matter today, due to a failure of notice per the Municipal Home Rule Law § 20(4).

The Concerned Residents believe that the Zoning Law clearly requires a Special Use Permit review for the proposed project, and that an amendment is not required. However, they agree in principle that public utility development of 1000 feet or less, specifically benefitting Town of Dryden residences or businesses may not necessitate a special use permit.

The Concerned Residents respectfully request, however that the Board kindly ensure that:

1. Special Use Permits requirements are retained in the Zoning Law with respect to any public utility development that benefits individuals or businesses outside the Town of Dryden;
2. Any other public utility development undergoes stringent Special Use Permit reviews and that the most stringent conditions that can be considered reasonable are imposed and
3. Environmental Quality Reviews are conducted whenever presumptively required, and full public participation is elicited at public hearings regarding any amendments to the Zoning Law and any Special Use Permit reviews

It would be my pleasure to address any questions or concerns that the Board may have as a result of the Concerned Citizens' positions, and the attached Memorandum.

Respectfully submitted,

Vinton Bovier Stevens, Esq.

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In the Matter of a Proposed Amendments
To the Town of Dryden Zoning Law
Occasioned by the Proposed
Lansing/Freeville Reinforcement Project

MEMORANDUM OF LAW

By Concerned Citizens of Dryden

OVERVIEW:

I. Introduction.

II. An Amendment to the Zoning Law Has Been Introduced in Response to the Proposed Lansing/Freeville Reinforcement Project.

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2. Late Changes in the Proposed Amendment Constrain the Public's Ability to Provide Effective and Relevant Comment.
3. The Proposed Amendments Fail to Specify that Public Utility Development Exempt From Special Use Permits Requirements Must Deliver Utilities Only to Residents and Businesses in the Town of Dryden.
4. The Proposed Amendments Fail to Reflect the Realities of Natural Gas Pipeline Permitting.
5. The Board Should Consider Whether Proposed Amendments Must be Reviewed Under SEQR Before The Town Board May Vote on Them.
6. The Proposed Amendments May Not Be Consistent With The Town's Comprehensive Plan.

III. Factual Background Regarding the Zoning Law and Proposed Pipeline.

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1. Lack of Federal Regulation
2. Lack of State Regulation
3. Considerations by the Town Board Relevant to the Lack of Federal/State Regulation

V. The Existing Franchise Agreement Between the Town of Dryden and NYSEG Provides Guidance On How the Zoning Law Should Be Clarified:

1. Factual Background Regarding the Franchise Agreement.

2. The Franchise Agreement Contains Provisions that Protect the Rights of the Town Board, Residents and Businesses in the Town of Dryden:
 - a. **Gas Conducted Under the Agreement Must Only Benefit Town Residents and Businesses.**
 - b. **Siting of Infrastructure Must be Determined by the Town Board.**
 - c. **Indemnification of the Town by NYSEG.**
 - d. **NYSEG Must Secure Permits.**
 - e. **Preservation of Character and Desirable Aesthetic Features of the Community**

VI. Conclusions.

1. In the event that the Board attempts to effect any amendments to the Zoning Law that will remove the Special Use Permit requirement with regard to public utility development, it would be well advised to ensure that the amendments make clear that allowed public utility development must only be for the benefit of Town residences and businesses, that the amendments reflect the realities of public utility regulation, a full SEQR review is conducted and the amendments' consistency with the Town's Comprehensive Plan is considered.
2. In the event that the Board determines the proposed pipeline to be an allowable use, the Board would be well advised to conduct a searching and thorough Special Use Permit review and impose conditions that will ensure the safety of residents, and preserve the character, desirable aesthetic features and unique natural assets of the Town.

I. INTRODUCTION

This Memorandum of Law ("Memorandum") is submitted on behalf of a group of Dryden Town residents (the Concerned Citizens of Dryden, or "Concerned Citizens"), including individuals who would be potentially affected by the above-captioned amendments and who are concerned about energy development, land use and the assurance of public participation in decision-making.

New York State Electric and Gas Corporation ("NYSEG") and its parent corporation, Iberdrola USA ("Iberdrola") have proposed "the Lansing/Freeville reinforcement project along West Dryden Road."¹ This Memorandum highlights some of the powerful protections afforded to the citizens of Dryden by the Town of Dryden Zoning Law ("Zoning Law") and the Franchise Agreement that NYSEG and the Dryden Town Board ("Board") entered into on August 20, 1951 ("Franchise Agreement").² The Concerned Citizens urge the Board to preserve and enforce these protections with regard to any proposed public utility development, and to ensure that identical protections are included in any amendments or laws enacted or future agreements entered into by the Board.

This Memorandum presents first the Concerned Citizens' position regarding the proposed amendments to the Zoning Law, in an effort to prioritize information that is immediately relevant to the Board. However, the Memorandum goes on to explain background that the Board would be well advised to consider before deciding to take further action in this case.

II. Amendments to the Zoning Law Have Been Proposed in Response to the Proposed Lansing/Freeville Reinforcement Project.

On March 19, 2015, the Dryden Town Board adopted a resolution to introduce an amendment to Local Law #1 of 2015, and set a public hearing on the matter for April 16, 2015.³ Upon information and belief, the amendments were subsequently revised at the Town Board's April 9, 2015 Agenda Meeting.

The amendments initially introduced would remove the definition of "Public Utility" from the Zoning Law, and add two new definitions for "Public Utility Delivery Facilities" and "Public Utility Structures." The proposed amendments would also make Public Utility Delivery Facilities a permitted use in all Use Zones in the Town of Dryden and Hamlet of Varna.⁴ Furthermore, the amendments proposed to repeal Subsection E of Section 900, and to enact in its place:

(1) Nothing contained in this Zoning Law shall be construed to require a Special Use Permit for repairs or replacements in kind of Public Utility Delivery Facilities or for individual lot service connections by a public utility corporation.

(2) Facilities or activities of a public utility corporation regulated by FERC (the Federal Energy Regulatory Commission), the PSC (the New York Public Service Commission), or which involve the extension of a Public Utility Structure for a distance of less than 1,000 feet are not subject to regulation by this Law.⁵

The Concerned Citizens of Dryden urge the Town Board to either vote down or revise the amendment to preserve protections currently available under the Zoning Law, conduct any review required under NY SEQRA before proceeding to a public hearing and consider whether the proposed natural gas pipeline is consistent with the Town's Comprehensive Plan.

1. The Proposed Amendments Are Unnecessary, As The Proposed Pipeline Would Clearly Require a Special Use Permit Under the Current Zoning Law.

Upon information and belief, the Board has introduced the proposed amendments primarily to clarify that NYSEG must obtain a Special Use Permit before they could construct the Lansing/Freeville Reinforcement Project. There is no confusion under the Zoning Law that the West Dryden Road portion of the Lansing/Freeville Reinforcement Project would either: 1. require a Special Use Permit⁶ or 2. be prohibited as a use not specifically authorized.⁷

According to the Town of Dryden Zoning Map, the portion of West Dryden Road where NYSEG proposes to install the natural gas pipeline is located in Rural Residential and Rural Agricultural Use Zones.⁸ According to Section 500 of the Zoning Law:

- A. structures and land in the Town may only be used in accordance with the Allowable Use Groups Chart (Section 501), and
- B. the Planning Department shall deny any application for a use of land that does not fall into one of the allowable uses.⁹

Assuming that the proposed natural gas pipeline were to be located on West Dryden Road and classified as public utility development, a Special Use Permit would be required according to the Allowable Use Groups Chart.¹⁰ In the Zoning Law, "Public Utility" is defined as:

Infrastructure and services that supply an everyday necessity to the public at large, such as Public Water and/or Public Sewer facilities, electricity, natural gas, and telecommunications. A Public Utility may be owned by a municipality or a private entity, or a combination thereof.¹¹

As explained further below, in absence of a Special Use Permit Review by the Board, the proposed pipeline would likely be constructed without any regulation or oversight by Federal and State agencies. Thus, the Board would be well advised to place tight restrictions on the proposed natural gas pipeline. Furthermore, the easements that have been proffered to the West Dryden Road residents state that NYSEG would have “the right to assign this easement and right of way, or any part thereof, or interest therein.”¹² Thus, having special conditions¹³ that would “run with the land”¹⁴ until such time that the pipeline falls under state or Federal regulation could ensure that standards the Board believes to be necessary for the pipeline’s safe construction, operation and maintenance would be followed not only by NYSEG, but any of NYSEG’s successors in interest.

The details of the proposed project are considered to be “confidential.”¹⁵ The easements¹⁶ proffered by NYSEG to West Dryden Road residents do little to allow them or the Town to anticipate the pipeline’s potential impacts; or to plan for its construction, operation and maintenance. NYSEG does not even seem clear on the details of the project they intend to pursue.¹⁷ NYSEG has stated that not all property owners have agreed to sign the proffered easements, and the issue of public utility permitting seems yet to be discussed before the Board.¹⁸ Due to the potential impacts, public interest in the matter and the consequences that could result from faulty planning, execution and operation of a potentially unregulated natural gas pipeline; the Board would be well advised to ensure that the review process for development like the proposed Lansing/Freeville Reinforcement Project requires a Special Use Permit.

2. Late Changes in the Proposed Amendment Constrain the Public’s Ability to Provide Effective and Relevant Comment

The Town has ostensibly complied with relevant public notice provisions in this matter.¹⁹ However, on April 16, 2015 the Board may not vote on changes reportedly made to the proposed amendment on and after the Town Board Agenda Meeting on April 9, 2015.²⁰ As of the evening of April 14, 2015, the revisions have not been published on the Board’s website. The public will not be able to adequately research and prepare their comments until they have an opportunity to see the wording of the revised amendment proposals. Thus, the Board would be well advised to postpone not only the vote on the proposed amendments, but also the public hearing.

3. The Proposed Amendments Fail to Specify that Public Utility Development Exempt From Special Use Permits Requirements Must Deliver Utilities Only to Residents and Businesses in the Town of Dryden.

The intent of the drafters is not clear from the text of the proposed amendments to the Zoning Law. From the nature of the amendments, it appears that the intent of the drafters was to remove the Special Use Permit application requirement for public utility construction to residences and businesses in the Town of Dryden that may be better addressed by building permits. If so, the Concerned Citizens urge the Board to reintroduce amendments clarifying that any public utility development not requiring a Special Use Permit must run for 1000 feet or less and also deliver utilities only for the benefit of Town residences and businesses.

Due to the pipeline's proposed engineering, it could conceivably fall within the proposed definition of "Public Utility Delivery Facilities." The pipeline NYSEG proposes to construct on West Dryden Road would arguably be "local infrastructure," in that a portion would be located within the Town of Dryden. Further, the letter of Iberdrola USA's Mark Marini speaks of inability to provide incremental natural gas service and to accept additional applications for gas service, suggesting the necessity of the project.

However, the "public at large" language contained in the proposed definition of "Public Utility Delivery Facilities" in the Zoning Law may create confusion about the public to whom the infrastructure must deliver the "everyday necessity." Here, the public served would be located largely outside the town. The proposed natural gas pipeline would be used to transport commercial quantities of fracked gas through the town, for the benefit of individuals in Lansing and Ithaca. Any distribution of natural gas to Dryden Residents was an afterthought.

At least one New York court has observed that situations occur where the interests of the "public at large" may be pitted against the interests of "local inhabitants."²¹ The Board would be well advised to ensure that any amendment to the Zoning Law clarify that only residents and businesses in the Town of Dryden may be served by public utilities not subject to Special Use Permit requirements.

4. The Proposed Amendments Fail to Reflect the Realities of Natural Gas Pipeline Permitting.

In Anschutz Exploration Corp. v. Town of Dryden, Hon. Philip R. Rumsey of Tompkins County Supreme Court ruled invalid, severed and struck a portion of the 2011 Zoning Ordinance amendments that sought to invalidate permits "issued by any local, state or federal agency, commission or board" that allowed for any of the prohibited fracking activities in the Town.²² In light of Hon. Rumsey's action, it may not have been unreasonable for the Board to have proposed the most recent amendments to remedy aspects of the Zoning Law that they believed would run afoul of other permitting processes.

The amendments may also have been proposed with the assumption that adequate oversight and public participation mechanisms exist in permitting processes for public utilities. The amendments could thus have been introduced as an effort to avoid the duplication of efforts by the Town Board where alternate permitting mechanisms exist. Furthermore, one could expect that part of the motivation for the amendment included a desire to avoid the time, effort and expense that the Board would expend in reviewing Special Use Permit applications and defending challenges to the Zoning Law by potential applicants.

As discussed in greater detail below, despite the fact that NYSEG is regulated by the PSC, the construction of the proposed natural gas pipeline does not appear to require regulation under Federal or state laws and regulations. Accordingly, the wording of the proposed amendment to Zoning Law Section 900(E)(2) would appear to allow unregulated development of public utility facilities in the town, as long as the entities themselves are otherwise regulated by the PSC or FERC.

Convenience to the Board and public utility companies may be part of the motivation for the proposed amendments. However by adopting the proposed amendments to the Zoning Law, the Town Board could effectively, if inadvertently, authorize the type of natural gas development that requires a Special Use Permit as a result of the 2011 amendments to the Zoning Ordinance, without any effective permitting or oversight. Most importantly, the engineering and scale of a project like the proposed pipeline is likely beyond Dryden Code Enforcement's inspection capabilities.

5. The Town Board Should Consider Whether Proposed Amendments Must be Reviewed Under SEQR Before A Vote May be Called.

Under New York's State Environmental Quality Review ("SEQR") regulations, "the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district" creates a presumption that the Town must conduct a SEQR review as a lead agency.²³ And, the Town Board may not "approve" any amendment to the Zoning Law until it has "complied with" the SEQR process.²⁴

A "determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in section 617.7(c)"²⁵ of the SEQR regulations. Some of the criteria that may be relevant to the proposed pipeline include:

- (iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;
- (v) the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;
- (vi) a major change in the use of either the quantity or type of energy;
- (vii) the creation of a hazard to human health;
- (viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses.²⁶

Upon determining significance of the amendment for SEQR purposes, the Town Board must open the matter of the amendment for public comment and should determine whether to conduct a public hearing.²⁷

The proposed amendments could conceivably affect any land or structures in the Town of Dryden, let alone an area exceeding 25 acres. And, the types of considerations required under SEQR are eminently relevant to the construction, operation, maintenance and impact of the proposed natural gas pipeline. Further, the public is clearly raising its collective voice to make the Board aware that significant public interest necessitates a full public hearing in this matter.

The Board invested a tremendous amount of time and effort in deciding upon and effecting the prohibitions against natural gas development in the Town of Dryden. Accordingly, the Board would be well advised to be as cautious and informed in proposing and effecting any amendments to the Zoning Law.

6. The Proposed Amendments May Not Be Consistent With The Town's Comprehensive Plan.

The Town of Dryden Comprehensive Plan states various Goals and Objectives that may be frustrated by the proposed amendment's position toward public utility infrastructure. The Board would be well advised to consider whether the proposed amendments would be consistent with the following:

1. The overall goal of this comprehensive plan is to promote the health, safety and welfare of the people of the Town of Dryden;
2. . . . this goal would be pursued. . . through. . . the following objectives:
 - a. protect the unique natural assets of the town,

- b. make optimum use of existing and future investments in public services and infrastructure,
 - c. encourage intermunicipal cooperation and communication in land use policies and the provision of public services;
3. Promote the long-term viability of the agricultural community in the town, and preserve agricultural land resources, without unduly infringing on property rights;
4. Adopt land use regulations which grant agriculture primacy as a land use in areas zoned for agriculture;
5. Channel residential development toward areas where public infrastructure. . . exist or are planned;
6. Minimize conflicts between established and future residential areas and established and future commercial or industrial areas;
7. Preserve the natural open space resources, environmentally sensitive areas and unique flora and fauna of the town;
8. Evaluate future expansions of public. . . infrastructure based on cost and the need to protect environmental resources;
9. Ensure a continuous and systematic program of monitoring, maintenance and upgrading of existing. . . facilities to maximize their efficiency and lifespan;
10. Ensure the provision of a comprehensive system of fire, police and emergency services and communications to protect life and property throughout the town and
11. Channel future growth and development toward areas of the town where fire, police and emergency services are available or easily accessible.²⁸

Just because NYSEG or Lansing or Ithaca says that there is a need for natural gas, even if the Town of Dryden wishes to cooperate with them, the Board should not ignore its well-considered and effective Comprehensive Plan. The Board should consider the potential impact that spraying pesticides, allowed under the proposed easements, could have in agricultural zones.²⁹ As further discussed below, it would not be clear whether local emergency responders have the ability to deal with natural gas pipeline emergencies. And, several of the enumerated factors bear upon preservation of the Town's unique assets. The Town of Dryden has set rational and esteemable goals and restrictions for its development. These principles should be a part of any considerations regarding land use in Dryden.

III. Factual Background Regarding the Lansing/Freeville Reinforcement Project

Jennifer Negus, NYSEG Real Estate Representative, stated that the details of the Easements that have been entered into with residents of West Dryden Road have not been recorded, and that until they are recorded the details would be treated as confidential and not discussed by NYSEG.³⁰

In his letter to the NYS Department of Public Service, Iberdrola USA Director-Regulatory, Mark O. Marini stated that:

1. The proposed pipeline will be part of the Lansing/Freeville Reinforcement Project;
2. The proposed pipeline would affect approximately seven miles along the South side of West Dryden Road, including approximately 100 different properties in the Town of Dryden;
3. The pipeline is designed to provide "incremental service" in the Town of Lansing;
4. The pipe to be installed will be 10 inches in diameter and
5. The pipeline will connect Dominion Transmission's Freeville Gate Station to a regulator station on Warren Road.³¹

Please note, the engineering overview provided with Mr. Marini's letter does not show that any portion of West Dryden Road that is proposed to be affected will be included in the distribution area.³²

According to the statements of NYSEG Project Manager David Bovee at the Dryden Town Board meeting on January 15, 2015:

1. Although the pipeline will be constructed of 10 inch diameter pipe, the distribution main to which the pipeline will be connected at the Warren Road regulator station is 8 inches in diameter;
2. NYSEG proposes to operate the pipeline at 124 psi, which would represent 6-7% of specified minimum yield strength ("SMYS") and classify the pipeline as a "distribution line;"
3. Once the maximum allowable operating pressure ("MAOP") is set at 124 psi, it cannot be increased;
4. At 124 psi, the pipeline would deliver gas at the rate of approximately 700,000 cubic feet per hour ("cfh");
5. NYSEG proposes to use approximately 328,000 cfh of the pipeline's capacity to "bring the existing systems up to over 70% and be able to provide gas for future projects;"
6. If operated at 125 psi, the pipeline would then classify as a "transmission line;"
7. Generally NYSEG wants to stay below 30% of SMYS;
8. Installation of an 8 inch pipeline on West Dryden Road would not be sufficient for the additional capacity required for future growth;
9. 10 inch pipe is more readily available and cost effective than 8 inch pipe;
10. The rights for the pipeline can be sold to any third party;
11. The pipeline is required to increase the Ithaca Area distribution system from 50%-70% maximum allowable pressure;
12. NYSEG would be able to provide the residents of West Dryden Road with gas from the pipeline, although there would be an "additional charge" for residences more than 100 feet from the pipeline;
13. The connection fees and regulations on NYSEG's website were referenced;
14. No Federal Energy Regulatory Commission ("FERC") permit would be required for the scope of work contemplated for the Freeville gate station and
15. NYSEG states that the pipeline cannot be used to repower Cayuga Power Plant.³³

In response, Tony Ingraffea, Professor of Civil and Environmental Engineering at Cornell University, pointed out:

1. It appears that this pipeline is being "overdesigned by a factor of 20;"
2. At 700,000 cubic feet per hour, assuming an average resident's annual use is approximately 7 cubic feet per hour, the pipeline could supply 100,000 households and
3. There is a question why NYSEG would propose to operate the pipeline at such a low capacity, suggesting a high degree of inefficiency.³⁴

Dominion, the owner of the pipeline to which NYSEG proposes to connect the Lansing/Freeville Reinforcement Project at the Freeville Gate Station, has a publicly stated Corporate Strategy that includes:

1. "Transporting natural gas from the Marcellus and Utica shale formations. . . to help producers transport their gas to market" and

2. Installing “new transmission pipes serving natural gas markets in the Northeast and mid-Atlantic regions.”³⁵

As discussed later in this memorandum, the natural gas pipeline would not be regulated by the Federal government, as the design has been proposed. Despite comments by NYSEG’s Bovee, however, Federal regulations include a means of increasing a pipeline’s MAOP. Effective October 1, 2015, the regulations of the Federal Department of Transportation will allow operators of “pipelines already in service” to increase the MAOP of a pipeline to the “alternative maximum allowable operating pressure” in all but “Class 4” locations.³⁶ The procedure for increasing the pressure in the line requires the pipeline operator only to: 1. Perform a strength test on the pipeline, 2. Notify Federal and State agencies of the proposed increase in pressure at least 180 days before operation at the higher pressure and 3. Agree to comply with operation and maintenance requirements under the Federal regulations.³⁷

Class 4 locations are ones “where buildings with four or more stories above ground are prevalent.” West Dryden Road would most likely classify as a Class 2 location. In a Class 2 location, operators will be able to increase the MAOP of a pipeline from approximately 60% up to 67% of SMYS.³⁸ It would thus seem that, as of October 1, 2015, the Lansing/Freeville Reinforcement Project could potentially operate at more than 7,000,000 cfh.

The amount of gas that could potentially be delivered to the affected residents of West Dryden Road would be approximately 0.10% of the pipeline’s capacity, according to NYSEG. In light of the Federal regulations cited above, the amount of gas delivered to West Dryden Road would likely be closer to 0.01% of the pipeline’s potential capacity.

In his comments to the Board, Stephen Merwin points out that he was offered the sum of \$1.00 for his consent to the easement offered by NYSEG.³⁹ This \$1.00 payment would compensate Merwin for the inconvenience to which he will be subjected for the installation, inspection, repair, replacement and removal of the pipeline, and for the burden of an “underground gas pipeline, including hand/man holes, pipes, ducts and conduits, with the necessary and appurtenances thereto and NYSEG’s “right now and from time to time to trim, cut, burn, treat and/or remove by manual mechanical and chemical means trees, roots, brush, structures and other obstructions within said easement and right of way.”⁴⁰

The same \$1.00 would compensate Mr. Merwin for the volume of gas that NYSEG plans to transfer across his property on a daily basis. In January 2015, the average residential price of natural gas in New York State was a rock-bottom \$10.51/MCF.⁴¹ The value of gas passing Mr. Merwin’s property on an hourly basis at that rate would be at least \$73.57 and as much as \$735.70. On a daily basis the value would be at least \$1,765.00 and as much as \$17,656. And, on a yearly basis, the value of the gas at that rate would be at least \$92,067.60 and as much as \$920,676.00.

However, in August 2008, the residential price of natural gas hit a high of \$24.96. Thus, the value of the gas being transferred by the proposed natural gas pipeline could conceivably be as much as \$15,305,472.00 per year or higher. Mr. Merwin would effectively be giving away rights to transfer a fortune across his property for next to nothing. And for the privilege of connecting to the pipeline, the affected residents of Dryden would have to pay NYSEG or its successors hundreds of times the amount they received for use of their property.

IV. The Proposed Pipeline Would Not be Regulated Under Federal or State Law.

Despite the fact that NYSEG is regulated by the PSC in some respects, it appears that the proposed gas pipeline would not fall under state or federal regulatory authority.

1. Lack of Federal Regulation.

The Federal Department of Transportation regulations prescribe Minimum Federal Safety Standards relating to natural gas pipelines.⁴² However, the regulations do not apply to “a pipeline that is not a regulated onshore gathering line.”⁴³ Federal regulations would not apply where the proposed pipeline would operate:

1. Beyond the furthest downstream point in a production operation;
2. Beyond the first downstream natural gas processing plant;
3. After the comingling of gas from separate production fields and
4. Beyond the furthest downstream compressor used to increase gathering line pressure for delivery to another pipeline.⁴⁴

New York state banned hydraulic fracturing for gas on December 17, 2014, so the proposed pipeline cannot lie before a natural gas processing plant or within a production operation. When looking at a diagram of the Atlantic Coast Pipeline, it is apparent also that the nearest storage facilities are located on the NY/PA border.⁴⁵ Thus, all of the gas that reaches the proposed pipeline would likely be comingled from separate production fields. And, if for no other reason, the fact that Dominion plans to decrease the pressure of the of the gas from 1440 pounds to 60 pounds at the Freeville gate station alone seems to establish that the Federal regulations do not apply here.

2. Lack of State Regulation

In order for a pipeline to be regulated pursuant to the NYS Public Service Law (“PSL”), it would have to classify as a “major transmission facility.”⁴⁶ The proposed natural gas pipeline would not likely classify as a “major transmission facility” because:

1. NYSEG proposes to operate the pipeline at a pressure of 124 PSI or less and
2. The proposed pipeline will be located entirely underground, wholly within the right of way of a state, county or town highway.⁴⁷

The County Right-of Way extends twenty five feet from the centerline of West Dryden Road. The South lane of West Dryden Road is approximately 12 feet wide. NYSEG’s Negus stated that the easement will run approximately 7.5 feet in either direction from the edge of the road. Thus, the easement will fall entirely within the right of way. Accordingly, by virtue of the fact of its proposed pressurization and location, the construction of the pipeline would not appear to fall under PSC regulation.

However, were NYSEG to propose construction of 10 inch pipeline outside the right-of-way and to be operated at 125 PSI or higher, under the NYS Public Service Law the PSC would require filing of an application, including specifically:

1. Description of the ecosystem, land use, visual and cultural resources which would be affected by the line;
2. An indication of the approved environmental management and construction standards and practices that will be followed in an effort to minimize or avoid adverse environmental impacts to the maximum extent practicable and
3. Notice to the NYS Department of Environmental Conservation, NYS Department of Agriculture and Markets and each municipality in which any portion of such line is to be located.⁴⁸

Furthermore, were the project to fall under PSL § 121-a, the applicant would be required to serve notice “on each municipality in which any portion of such line is to be located,”⁴⁹ “any person may file comments on an application with the commission”⁵⁰ and the commission may extend the time required to render a decision where it conducts a public hearing.⁵¹ Thus, some public participation is guaranteed in the PSC review process.

Also, when a pipeline is regulated as a major transmission facility under the PSL, “notwithstanding any other provision of law, no . . . municipality or any agency thereof may require any approval, consent, permit, certificate or other condition for the construction or operation of a major facility with respect to which an application for a certificate” has been issued by the PSC.⁵² Thus, it appears that under the PSL, permitting by the PSC would properly and completely supersede the Town of Dryden’s ability to regulate the any aspect of the proposed pipeline’s construction and operation; perhaps with the exception of completely prohibiting construction of similar types of pipelines.

The PSC issues a decision on a major transmission facility within 60-days from receipt of the application. The decision will state whether review has determined the project to be in the public interest. However, in the decision the PSC may only make the following determinations:

- (a) the basis of the need for the facility;
- (b) the nature of the probable environmental impact;
- (e) in the case of a gas transmission line, that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line;
- (f) that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder, all of which shall be binding upon the commission, except that the commission may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of the needs of consumers whether located inside or outside of such municipality.
- (g) that the facility will serve the public interest, convenience, and necessity, provided, however, that a determination of necessity made by the power authority of the state of New York pursuant to section ten hundred five of the public authorities law for a major utility transmission facility for which an application

has been filed prior to July first, nineteen hundred seventy-eight pursuant to section one hundred twenty-two of this chapter, shall be conclusive on the commission.⁵³

To be regulated by the PSC would be a trade-off for NYSEG. On one hand, the PSC could arguably supersede the land use authority of the Town of Dryden, the definition of “public necessity” need not relate directly to the residents of the Town and claims of the project’s unreasonability could be overcome by NYSEG’s arguments regarding cost or other economic factors. However, to gain these advantages, NYSEG would have to disclose the details of their project, allow public comment and subject themselves to an inquiry regarding the safety and environmental impact of the pipeline.

3. Considerations by the Town Board Relevant to the Lack of Federal/State Regulation

In the event that the pipeline does not fall under superseding sections of the PSL⁵⁴ or any relevant Federal or state laws, home rule would dictate that the Town Board shall have discretion regarding the permitting and siting of the proposed natural gas pipeline. The Town Board should carefully consider why NYSEG would choose secrecy and to use only a fraction of the pipeline’s potential capacity, over presumptions that seem so strongly in their favor in the PSC permitting process.

Use of the terms “distribution line” and “gas main” by NYSEG suggests the gas that will be transported in the pipeline will be used as a “public utility” for the “benefit of the residents or businesses of the town,” much as was required under the Franchise Agreement, as explained below. The details that have been provided by NYSEG and Iberdrola make clear that the benefit from the proposed project to residents in the Town of Dryden will be marginal at best, in comparison to those of NYSEG.

It would appear that the need for pipeline regulation is very real. Assistant Supervisor Jason Leifer astutely observed at the January 15, 2015 Town Board meeting: “We have tighter controls over cell towers which don’t hurt anybody, than these gas mains which can level a neighborhood, as they have elsewhere.⁵⁵ In fact, in January 2015 five “explosions” of natural gas and petroleum pipelines were reported in the United States.⁵⁶ The natural gas pipeline that exploded in a rural portion of West Virginia on January 26, 2015 reportedly spewed flames into the air for approximately 24 hours before the local authorities could get the blaze under control.⁵⁷

V. THE EXISTING FRANCHISE AGREEMENT BETWEEN THE TOWN OF DRYDEN AND NYSEG

1. Factual Background Regarding the Franchise Agreement

NYSEG and the Town Board of Dryden entered into the Franchise Agreement effective August 20, 1951. The purpose of the Franchise Agreement was to allow NYSEG to “lay, place and maintain conduits, pipes, mains, services and other appliances through, along and under the public highways, lanes, streets and other public places in said Town for the purpose of conducting gas for the supply of public and private buildings in said Town.”⁵⁸ Provisions of the agreement make clear that the gas supplied would be for use by people in the town, that the Town would maintain control over siting of the infrastructure and that NYSEG would be subject to all Town laws, ordinances and permitting processes when installing or repairing the infrastructure.

In discussions before the Board, several individuals have questioned the Franchise Agreement's applicability in this matter. Accordingly, this memorandum discusses in brief important protections from the Franchise Agreement that the Town should maintain in any Zoning Law amendments, future contracts, permit review processes or actions relating to the proposed public utility development.

2. Gas Conducted Under the Agreement Must Only Benefit Town Residents and Businesses

The Franchise Agreement allows only for the development of gas infrastructure "for the purpose of conducting gas for the supply of public and private buildings and places *in said Town.*" (*Emphasis added.*)⁵⁹ This clear intent is echoed when the Franchise Agreement states that the infrastructure contemplated under the agreement is meant "to distribute such gas for lighting, heat or power in the public and private buildings and places *within the said Town.*" (*Emphasis added.*)⁶⁰ These two paragraphs make clear that the parties intended the Franchise Agreement to allow only development of gas distribution infrastructure for the purpose of delivering gas within the Town. At no point does the Franchise Agreement discuss the possibility of gas development for the purpose of transferring, transmitting or otherwise conducting gas through the town for the benefit of individuals outside of the Town.

3. The Franchise Agreement Contains Provisions that Protect the Rights of the Town Board, Residents and Businesses in the Town of Dryden

a. Siting of Infrastructure Must be Determined by the Town Board

The Franchise Agreement stated specifically that the gas infrastructure would be "located under the direction of said Town Board or its duly authorized agent."⁶¹ This reflects the municipal authority to regulate land use discussed at length in the New York State Court of Appeal's decision regarding the Town of Dryden's zoning ordinance amendments that prohibited all oil and gas exploration, extraction and storage activities.⁶² The Court emphasized that "the local regulation of land use is '[a]mong the most significant powers and duties granted. . . to a town government.'"⁶³ Thus, in the agreement NYSEG acknowledges the Board's sole discretion to site public utility infrastructure within the Town's limits.

b. Indemnification of the Town by NYSEG

In the Franchise Agreement, NYSEG explicitly and "shall at all times indemnify and save harmless said Town and the members of the Town Board,"⁶⁴ from any liability "by reason of the location and maintenance"⁶⁵ of the gas infrastructure placed pursuant to the agreement or "by reason of any action done or omitted to be done in the premises by said Company."⁶⁶ As the Town dictates only where the gas distribution infrastructure may be located under the agreement, it is only right that NYSEG should bear all liability for any faulty installation, operation and maintenance of the infrastructure.

c. NYSEG Must Secure Permits

The Franchise Agreement states that "whenever" NYSEG "shall have occasion to make an opening in the surface of *any street or other public place* for the purpose of laying or repairing" (*Emphasis added.*)⁶⁷ the gas distribution infrastructure, "it will first procure any permits necessary under the law or ordinances of said Town."⁶⁸ The definition of "public place" as it relates to the proposed gas transmission pipeline is addressed in later sections of this memorandum. The agreement also states that the

permission to construct the gas infrastructure in the Town “is made upon condition that permission be secured from such public officers and commissions as is required by law.”⁶⁹

The types of permits that NYSEG must obtain were not limited to those that may have been required at the time the parties entered into the Franchise Agreement. At the time the parties entered into the Franchise Agreement, NYSEG could have reasonably foreseen, and thus accepted, that the Town may have exercised the authority to expand upon or amend their laws and ordinances.

d. Preservation of Character and Desirable Aesthetic Features of the Community

The Franchise Agreement states that NYSEG “will restore the surface of such street or other public place *as nearly as possible to its former condition.*” This duty is consistent with another right of municipalities that the Court of Appeals considered to be “without question:” the ability to “enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of [the community].”⁷⁰ Under the agreement, it was contemplated that the gas distribution infrastructure would be installed in such a manner that it did not negatively impact the character and desirable aesthetic features of the Town.

The Board would be well-advised to include all of the protections provided by the Franchise Agreement in any future Zoning Law amendments it enacts or contracts it enters into regarding public utilities.

VI. Conclusions.

All of the foregoing suggests two primary conclusions:

1. In the event that the Board attempts to effect any amendments to the Zoning Law that will remove the Special Use Permit requirement with regard to public utility development, it would be well advised to ensure that the amendments make clear that allowed public utility development must only be for the benefit of Town residences and businesses, that the amendments reflect the realities of public utility regulation, a full SEQR review is conducted and the amendments’ consistency with the Town’s Comprehensive Plan is considered.
2. In the event that the Board determines the proposed pipeline to be an allowable use, the Board would be well advised to conduct a searching and thorough Special Use Permit review and impose conditions that will ensure the safety of residents, and preserve the character, desirable aesthetic features and unique natural assets of the Town.

Dated: April 16, 2015

Respectfully submitted,

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¹ Letter from Mark O. Marini of Iberdrola USA to Hon. Kathleen H. Burgess, Secretary, NYS Department of Public Service, February 9, 2015 (“Marini Letter,” attached with engineering

² Franchise Agreement between NYSEG and the Dryden Town Board (“Franchise Agreement”), Tompkins County Clerk, Miscellaneous, Liber 11, Page 72, Entered August 28, 1951.

³ See., Dryden Town Board Meeting Minutes, March 19, 2015 (“3/19/2015 Minutes”), <http://dryden.ny.us/wp-content/uploads/2015/04/TB-3-19-15.pdf>, p. 8.

⁴ Id., p. 8-14.

⁵ Id., p. 14.

⁶ Town of Dryden, Zoning Law § 501.

⁷ Id., § 500(b).

⁸ See Id., § 401 (Zoning Map) and the Town of Dryden Zoning Map, <http://dryden.ny.us/zoningresourcespage>.

⁹ Id., § 500.

¹⁰ Id., §501.

¹¹ Id., Article III: Definitions.

¹² See Sample Easement to Linda Parks (“Parks Easement”)(Attached for the Board’s convenience.)

¹³ Zoning Law § 1202(E).

¹⁴ Id., § 1203(E).

¹⁵ See., Dryden Town Board Meeting Minutes, January 15, 2015, (“1/15/15 Minutes”), p. 4.

¹⁶ See, Parks Easement.

¹⁷ See., 1/15/15 Minutes, p. 4-7.

¹⁸ Id.

¹⁹ See, Zoning Law § 1701 and Town Law § 265(2).

²⁰ See, Municipal Home Rule Law § 20(4).

²¹ See, [Gewirtz v. City of Long Beach, 1972, 69 Misc.2d 763, 777.](#)

²² [Anschutz Exploration Corp. v. Town of Dryden, 35 Misc.3d 450, 470 \(Tompkins County Supreme Court, 2/21/2012\).](#)

²³ 6 NYCRR 617.4(b).

²⁴ Id., 617.3(a).

²⁵ Id., 617(a)(1).

²⁶ Id. 617.7(iv)-(viii).

²⁷ Id., 617.9(a)(3) and (4).

²⁸ See, Dryden Comprehensive Plan, <http://dryden.ny.us/Downloads/CompPlanFull.pdf>.

²⁹ See Parks Easement.

³⁰ See 1/15/15 Minutes, p. 4.

³¹ See Marini Letter.

³² See Id., engineering overviews.

³³ 1/15/15 Minutes, pp. 3-9.

³⁴ Id., p. 7.

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- ³⁵ See Dominion Corporate Strategy 2013-2014 (Dominion Corporate Strategy), http://www.dominioncsr.com/business/corporate_strategy.php and Atlantic Coast Pipeline Overview (“Copy attached for the Board’s convenience.”)
- ³⁶ See 49 CFR § 192.620(c)(1).
- ³⁷ See *Id.*, 192.620(1), (4) and (7).
- ³⁸ See “Standards for Increasing the Maximum Allowable Operating Pressure (MAOP) for Gas Transmission Pipelines, 73 FR 13167 (March 12, 2008) (Copy attached for the Board’s convenience.).
- ³⁹ 1/15/15 Minutes, p. 1.
- ⁴⁰ See Parks Easement.
- ⁴¹ See Natural Gas Prices, http://www.eia.gov/dnav/ng/ng_pri_sum_dcu_sny_m.htm (Attached, for the Board’s convenience.)
- ⁴² See 49 CFR 192.1.
- ⁴³ *Id.*, 192.1(b)(4)(ii).
- ⁴⁴ *Id.*, 192.8(a)(1)-(4).
- ⁴⁵ See Dominion Atlantic Coast Pipeline Overview.
- ⁴⁶ NY Pub Serv § 120(2).
- ⁴⁷ *Id.*
- ⁴⁸ *Id.*, 121-a(3).
- ⁴⁹ *Id.*, 121-a(2).
- ⁵⁰ *Id.*, 121-a(5).
- ⁵¹ *Id.*, 121-a(7).
- ⁵² *Id.*, 130.
- ⁵³ *Id.*, 126(1)(a)-(b) and (e)-(g).
- ⁵⁴ *Id.*, 126(1)(f) and (g).
- ⁵⁵ 1/15/15 Minutes, p. 12.
- ⁵⁶ See: <http://www.msnbc.com/rachel-maddow-show/watch/another-day-another-pipeline-explosion-389955139564>.
- ⁵⁷ See: <http://thinkprogress.org/climate/2015/01/27/3615805/west-virginia-gas-pipeline-explosion/>, <http://www.wtrf.com/story/27940731/authorities-responding-to-gas-line-explosion> (Attached for the Board’s convenience.)
- ⁵⁸ 1/15/15 Minutes, p. 1, lines 4-7.
- ⁵⁹ *Id.*, lines 6-7.
- ⁶⁰ *Id.*, lines 20-21.
- ⁶¹ *Id.*, lines 7-8.
- ⁶² See, *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 742 (2014).
- ⁶³ *Id.*, (*quoting* New York State Town Law (“Town Law”) § 272-a[1][b]).
- ⁶⁴ Franchise Agreement, p. 2., line 12.
- ⁶⁵ *Id.*, lines 14-15.
- ⁶⁶ *Id.*, lines 17-18.
- ⁶⁷ *Id.*, line 20.
- ⁶⁸ *Id.*, lines 22-23.
- ⁶⁹ *Id.*, p. 3., lines 1-3.
- ⁷⁰ *Wallach*, 742 (*quoting* *Trustees of Union Coll. In Town of Schenectady in State of N.Y. v. Members of Schenectady City Council*, 91 NY2d 161, 165 [1997].).