

## MASSACHUSETTS LAW GOVERNING EMINENT DOMAIN AND PIPELINE COMPANIES

Prepared By:  
James D. Masterman  
Russell P. Plato  
Greenberg Traurig, LLP  
One International Place  
Boston, Massachusetts 02110  
(617) 310-6284  
mastermanj@gtlaw.com  
www.gtlaw.com

### PIPELINE COMPANY AUTHORITY TO EXERCISE THE POWER OF EMINENT DOMAIN

In Massachusetts, a gas company can apply for permission to exercise the power of eminent domain in connection with its activities, including the construction of a gas pipeline.<sup>1</sup> Permission is sought as part of the petition a gas company must file when it wishes to construct a generating facility, gas manufacturing unit, or gas pipeline. Mass. Gen. Laws ch. 164, §§ 69J, 69R. Petitions are submitted to the Energy Facilities Siting Board, an agency within the Department of Public Utilities (“DPU”). *Id.* The petition must include a description of the proposed construction, an analysis of the need for the facility, a description of alternatives, and a description of environmental impacts. *Id.* § 69J.

When the petition includes a request to exercise the power of eminent domain, the company must include “(1) a statement of the use for which such land is to be taken; (2) a description of land to be taken sufficient for the identification thereof; (3) a statement of the estate or interest in the land to be taken for such use; (4) a plan showing the land to be taken; (5) a statement of the sum of money established by such utility to be just compensation for the land to be taken; and (6) such additional maps and information as the department requires.” Mass. Gen. Laws ch. 164, § 69R. The company must send a copy of the petition and these annexed materials to each city, town, and property owner that will be affected by the taking. *Id.*

Once DPU has received the petition, it holds a public hearing in the community where the land to be taken is located. Mass. Gen. Laws ch. 164, § 69R. During the Energy Facilities Siting Board’s review, third parties may petition to intervene as parties to the proceedings on the ground that they will be “substantially and specifically affected” by the proceeding. 980 Mass. Code Regs. 1.05(1); Mass. Gen. Laws ch. 30A, § 10. If the petition is granted, the third party may present and cross-examine witnesses, file a brief, file comments, and appeal any decision. 980 Mass. Code Regs. 1.05(1)(h). Third parties may also request leave to participate in the proceedings as limited participants. *Id.* at 1.05(2)(a). Limited participant status allows the third

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<sup>1</sup> This discussion focuses on construction efforts by gas companies, but Massachusetts law also permits a company to petition for the right to exercise the power of eminent domain for the purpose of an oil pipeline. *See* Mass. Gen. Laws ch. 164, § 69S. The considerations and procedure for an oil pipeline is generally similar to those that apply to gas pipelines. *Id.*

party to file a brief and file comments, but does not give the third party the status of a party to the proceeding. *Id.* at 1.05(2)(c)–(d).

After holding a hearing, DPU may grant the company the authority to exercise the power of eminent domain to the extent that doing so is “required in the public interest, convenience and necessity.” Mass. Gen. Laws ch. 164, § 69R. This authority cannot extend to any property located in a public way, public place, public park, or reservation. *Id.* If DPU denies the petition, no such authority is given, and the company must wait one year before filing a new petition. *Id.*

The company then makes the taking pursuant to the Massachusetts eminent domain statute, found in Chapter 79 of the General Laws and discussed further below. After the taking is made, the company must use the property for the purposes that DPU authorized. Mass. Gen. Laws ch. 164, § 69R. If the company stops using the property for those purposes, “its rights under such taking shall cease and terminate.” *Id.*

A gas company may also apply to DPU for permission to enter privately owned land for the purpose of conducting a survey in advance of eminent domain proceedings. Mass. Gen. Laws ch. 164, §§ 72A, 75D. DPU can grant this permission to the company even if it has not yet granted the company authority to take the property by eminent domain, and the company does not need to give the property owner notice of the application before submitting it to DPU. *Town of Carlisle v. Dep’t of Public Utilities*, 353 Mass. 722, 724 (1968). Once DPU gives the company permission to enter onto the land, the company must give the property owner notice at least five days prior to entering the property. Mass. Gen. Laws ch. 164, §§ 72A, 75D.

## **EMINENT DOMAIN PRACTICE AND PROCEDURE**

A gas company that is authorized to exercise the power of eminent domain must do so pursuant to the procedures laid out in Chapter 79 of the Massachusetts General Laws. Those procedures are described below.

### **A. Order of Taking**

A taking is effected through the adoption and recording of an order of taking. Mass. Gen. Laws ch. 79, § 1. An order of taking is a document that describes the property at issue, the interest being taken, and the purpose for which it is being taken. *Id.* With respect to trees or structures on the land, the order of taking must state whether those items are included in the taking. *Id.* If not, the order of taking includes a date by which the owner must remove those items. *Id.* If the taking is being made for an improvement that could be funded through betterments, the order of taking must state whether betterments will be assessed. *Id.*

The order of taking is adopted by the board of the authority that is making the taking. Mass. Gen. Laws ch. 79, § 1. At the state level, that board consists of the governor and the governor’s council. *Id.* § 2. At the county or municipal level, the board is the county commissioners, the aldermen, or the board of selectmen. *Id.* When the taking is being made by a private corporation, the board of directors is the taking body. *Id.*

The order of taking must be recorded within thirty days at the registry of deeds for every county in which any of the property being taken is located. Mass. Gen. Laws ch. 79, § 3. Upon that

recording, the taking is effective and title to the property vests in the taking authority. *Id.* At the same time, the right to compensation vests in the owner of the property taken. *Id.*

One additional requirement arises in some instances. When the taking is not made by the commonwealth, a county, a city, or a town, the taking authority must give the property owner notice of intent to take at least thirty days prior to the actual taking. Mass. Gen. Laws ch. 79, § 5C. However, this requirement does not apply to takings authorized by the Department of Public Utilities. *Id.* In those takings, notice is made pursuant to Chapter 164, as described above.

## **B. Compensation Award**

The taking authority—or, in some instances when the land is taken by a private corporation, the municipal governing body—is required to make an award of damages when it adopts the order of taking. Mass. Gen. Laws ch. 79, §§ 6, 7. (Note that the term “award” refers to the taking authority’s *decision* “as to what it determines is voluntarily to be paid to the property owner,” *Roberts v. Worcester Redevelopment Auth.*, 53 Mass. App. Ct. 454, 464 (2001), as opposed to the *payment* of that amount to the property owner.) However, the taking authority must first have an appraisal of the property being taken. Mass. Gen. Laws ch. 79, § 7A. The only exception to this requirement is waiver by the persons affected of the right to an immediate appraisal or of any right to an appraisal at all. *Id.*

The taking authority may revise that award at any time prior to paying the owner, so long as the right to compensation has not yet vested in the owner or the taking authority can otherwise show good cause for the revision. Mass. Gen. Laws ch. 79, §§ 6, 7.

## **C. Post-Recording**

Once the order of taking is recorded, the taking authority must give notice to every person entitled to damages as a result of the taking. Mass. Gen. Laws ch. 79, § 7C. Damages must be paid promptly. *Id.* § 7B. Prompt payment is made by offering each party affected by the taking “a reasonable amount which such board is willing to pay.” *Id.* § 8A. The party who receives payment from the taking authority may accept it without waiving his or her right to seek a larger sum “before an appropriate tribunal” (usually superior court). *Id.* § 7G; *see also id.* § 8A. An affected party may enforce compliance with this payment requirement by petitioning the court for a writ of mandamus. *Id.* § 10A.

In addition to these damages, the taking authority must pay the reasonable moving expenses of any person displaced from the property that was taken. Mass. Gen. Laws ch. 79, § 6A.

## **D. Challenging Condemnation or the Damages Award**

Any person entitled to damages for a taking may contest the lawfulness of the taking, or seek additional damages, by filing a complaint in superior court within three years of the recording of the taking. Mass. Gen. Laws ch. 79, §§ 14, 16, 18. This deadline may be extended if the affected party did not receive notice of the taking at least 60 days prior to the expiration of the three year period. *Id.* § 16. The case is decided by a jury unless the parties waive that right. *Id.* § 22.

Where multiple parties are affected by the taking, they may bring an action either together or separately. *Id.* § 23; *id.* § 27. When the taking affects a tenant and reversioner or landlord, the total amount of damages is first determined. *Id.* § 24. Those damages are then paid to a trustee, who is charged with apportioning the funds between the various interested parties. *Id.*

### **E. Compensation/Valuation Issues**

In addition to the U.S. Constitution's guarantee of "just compensation," U.S. Const. amend. V, owners of taken property are also entitled to "reasonable compensation" under the Massachusetts Constitution, Mass. Const. pt. 1, art. X, and state law.

In practice, courts look to determine the "fair market value" of the property that was taken. *Correia v. New Bedford Redevelopment Auth.*, 375 Mass. 360, 361 (1978). That value is determined by reference to the "highest and best use to which [the] property could reasonably be put," *Douglas Envtl. Assocs., Inc. v. Dep't of Envtl. Prot.*, 429 Mass. 71, 75 (1999), and it is fixed at the value of the property taken before the order of taking was recorded, Mass. Gen. Laws ch. 79, § 12. If the taking damaged or benefited any part of the owner's property that was not taken, the amount of that damage or benefit is added to or deducted from that fixed amount. *Id.* The property owner is also entitled to interest for the period between vesting of the right to damages and payment of those damages. *Id.* § 37.

Depending on the circumstances of the case, fair market value may be calculated using one of three methods. *Correia*, 375 Mass. at 362. First, the value may be calculated as the cost of reproducing the property, minus depreciation. *Id.* Second, the value may be calculated as a capitalization of projected net income. *Id.* Third, the value may be calculated based on comparable sales in the relevant market. *Id.*

Attorney's fees are not recoverable as part of the damages award. *Griefen v. Treasurer & Receiver-Gen.*, 390 Mass. 674, 676 (1983). Costs are awarded if the property owner receives an increase in damages by bringing suit. Mass. Gen. Laws ch. 79, § 38. If the award does not increase as a result of the suit, costs are taxed against the petitioner. *Id.*