

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Coos Superior Court
55 School St., Suite 301
Lancaster NH 03584

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**Bruce W. Felmly, ESQ
McLane Middleton Professional Association
900 Elm Street
PO Box 326
Manchester NH 03105-0326**

Society for the Protection of New Hampshire Forests v Northern Pass

Case Name: **Transmission LLC**
Case Number: **214-2015-CV-00114**

Enclosed please find a copy of the court's order of May 25, 2016 relative to:

Order on Defendant's Motion for Summary Judgment

May 26, 2016

David P. Carlson
Clerk of Court

(285)

C: Thomas N. Masland, ESQ; Adam M. Hamel, ESQ; Frank Kenison, ESQ

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS.

Docket No. 15-CV-114

Society for the Protection of New Hampshire Forests

v.

Northern Pass Transmission, LLC

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, the Society for the Protection of New Hampshire Forests (“SPNHF”), brought suit against the defendant, Northern Pass Transmission, LLC (“NPT”), seeking a declaratory judgment and injunctive relief pertaining to NPT’s plan, known as the Northern Pass Project, to build an electric power transmission line extending from the Canadian province of Quebec through New Hampshire to southern New England. NPT now moves for summary judgment as to all of SPNHF’s claims. SPNHF objects. The court held a hearing on the matter on March 31, 2016. Based on the pleadings, the parties’ arguments, and the applicable law, the court GRANTS NPT’s Motion for Summary Judgment.

I. Factual Background

The record supports the following relevant and undisputed facts. In October 2015, NPT and its co-applicant, Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”), submitted their Joint Application for a Certificate of Site and Facility to Construct a New High Voltage Transmission Line and Related Facilities in New Hampshire (the “Application”) to the New Hampshire Site Evaluation Committee. (Bellis Aff. ¶ 5, Jan. 4, 2016; NPT’s Mem. Law, Ex. A.) The proposed

CLERK'S NOTICE DATED

5/26/16

CC: Felmy / Hemen
Kensan / Mastland

Northern Pass Project consists of a high voltage electric transmission line extending approximately 192 miles from the Canadian border through New Hampshire to southern New England. (*See* NPT’s Mem. Law, Ex. A.) The proposed transmission line is comprised of a single circuit 320 kV high voltage direct current (“HVDC”) transmission line linked to a 345 kV alternating current (“AC”) transmission line via an HVDC/AC converter terminal located in Franklin, New Hampshire. (*See id.*) In conjunction with the filing of the Application, NPT and PSNH also submitted a petition to the New Hampshire Department of Transportation (“DOT”) seeking permission, pursuant to RSA 231:160 (2009), to install the electric transmission line, and related facilities, across, over and under certain state highways. (Bellis Aff. ¶ 6; NPT’s Mem. Law, Ex. B.)

SPNHF owns land (the “Washburn Family Forest”) on both sides of a section of Route 3 in Clarksville, New Hampshire. (Bellis Aff. ¶ 9; SPNHF’s Mem. Law 2.) As part of the Northern Pass Project, NPT is seeking the necessary permission, licenses, and permits from the DOT to bury a portion of the transmission line approximately fifty to seventy feet below the section of Route 3 that runs through SPNHF’s property. (Bellis Aff. ¶ 9; NPT’s Mem. Law, Ex. B; SPNHF’s Mem. Law, Ex. C.)

The stretch of Route 3 that passes through the Washburn Family Forest is a four-rod road currently maintained as a “Class I” state highway.¹ The selectmen of Clarksville, Stewartstown and Pittsburgh laid out this section of road in 1931, after determining that there was “occasion for a new highway” for the “accommodation of the public. (*See* SPNHF’s Mem. Law, Ex. D.) The selectmen paid SPNHF’s predecessor-in-

¹ In its Complaint, SPNHF mistakenly identified Route 3 as a “Class II” state highway. In its memorandum of law in support of its Objection to Motion for Summary Judgment, however, SPNHF clarified that this segment of Route 3 is currently a “Class I” state highway. (*See* SPNHF’s Mem. Law 3 n.1.)

interest, Lyman Lombard, \$1000 to establish the public highway right-of-way through the Washburn Family Forest. (*See id.*; SPNHF’s Mem. Law, Ex. E.)

NPT has not asked SPNHF for, and SPNHF has not granted NPT, permission to install, use, or maintain the proposed transmission line through the Washburn Family Forest, contending that SPNHF’s permission is not required because the DOT has exclusive power to authorize NPT’s proposed use of the public right-of-way. (*See* NPT’s Mem. Law 5.) As of the date of this order, the DOT has not granted the necessary permits, licenses, and permissions authorizing NPT to install the proposed transmission line underneath Route 3. (*See* NPT’s Mem. Law, Ex. C.)

On November 19, 2015, SPNHF brought the present suit against NPT. SPNHF seeks a declaratory judgment that NPT’s proposed use of Route 3 through the Washburn Family Forest, “whether it involves a buried line or above-ground towers, exceeds the scope of the public right-of-way and cannot be undertaken without [SPNHF’s] permission.” (Compl. 6.) Moreover, SPNHF seeks a permanent injunction “preventing NPT from conducting any activities on the [Washburn Family Forest property] to advance or implement the [Northern Pass Project], without first obtaining [SPNHF’s] permission.” (*Id.*) NPT now moves for summary judgment as to all claims asserted by SPNHF.

II. Standard of Review

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III (2010 & Supp. 2013). The moving party has the burden of proving both elements. *Concord Grp. Ins. Co. v. Sleeper*, 135 N.H. 67,

69 (1991). A “material” issue of fact is one that “affects the outcome of the litigation.” *Weeks v. Co-Operative Ins. Co.*, 149 N.H. 174, 176 (2003) (citation omitted). To demonstrate a genuine dispute regarding a material fact, the non-moving party “may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial.” RSA 491:8-a, IV.

When considering the evidence, the court must draw all inferences “in the light most favorable to the non-moving party.” *Sintros v. Hamon*, 148 N.H. 478, 480 (2002). The court may not “weigh the contents of the parties’ affidavits and resolve factual issues,” but must simply determine “whether a reasonable basis exists to dispute the facts claimed in the moving party’s affidavit at trial.” *Iannelli v. Burger King Corp.*, 145 N.H. 190, 193 (2000) (citations omitted); *Sabinson v. Tr. of Dartmouth Coll.*, 160 N.H. 452, 460 (2010).

III. Discussion

NPT moves for summary judgment on the grounds that there is no genuine issue as to any material fact and NPT is entitled to judgment as a matter of law because (1) its proposed use of the segment of Route 3 at issue is “squarely within the scope of the right of way easement,” (NPT’s Mem. Law 6–9), and (2) because the DOT has the sole power to authorize the proposed use and therefore NPT is not required to obtain SPNHF’s permission prior to installing its transmission line. (*Id.* 9–11.) Specifically, NPT contends that New Hampshire has long recognized that utilities are a proper use of public highway easements and that the General Court, pursuant to RSA 231:160, has given “express statutory authorization for the installation and maintenance of underground conduits and cables underneath public highways.” (*Id.* 6–8.) NPT

maintains that RSA 231:160 does not limit permits for the installation of utilities in public highways to only public entities or to specific public purposes, and thus NPT's proposed use of the stretch of Route 3 at issue is expressly authorized by statute. NPT also asserts that the DOT has the "exclusive power to authorize installation of utilities in state-maintained highways" under RSA 231:160 and 161, and thus NPT is not required to obtain SPNHF's permission before installing its transmission line underneath the segment of Route 3 at issue. (*Id.* 9–11.)

SPNHF counters that a public highway easement is "a right-of-way for 'viatic' use only—in essence, for passage over the land" and that "[a]ny other use exceeds the scope of the easement." (SPNHF's Mem. Law 6.) SPNHF contends that the question of whether NPT's proposed use exceeds the scope of the highway easement over the Washburn Family Forest must be decided by applying the "rule of reason" and only after both parties have had "a full opportunity to develop and present pertinent evidence" as to whether this proposed use was beyond what was contemplated by the landowners in 1931 when they created the public highway easement at issue. (SPNHF's Mem. Law 7–8, 10.) SPNHF also asserts that there are important private property rights at issue in this case that must be decided by this court; not the DOT. That is, SPNHF argues that the DOT does not have jurisdiction to decide this private property dispute. Additionally, SPNHF maintains that, to the extent the proposed use of the right-of-way exceeds the scope of the highway easement, the DOT would effect a taking of SPNHF's "property interest in the freehold underlying the highway" if it granted NPT the licenses to install its electric transmission line under the stretch of Route 3 at issue. (*Id.* 13.)

At the outset, the court notes that NPT has not yet received any permits from the DOT, nor has any construction actually commenced. Thus, whether the DOT would

effect a taking of SPNHF's property *if* it granted NPT a license to install the transmission line underneath the stretch of Route 3 at issue is purely speculative and the court declines to address this issue. The extent of NPT's *actual* use of the public right-of-way and whether such use exceeds the scope of the public highway easement is similarly speculative. Nonetheless, the court finds that under the plain language of RSA 231:160 NPT's proposed use is a proper use of the public highway easement. Moreover, pursuant to RSA 230:161, the DOT has exclusive jurisdiction over whether to grant NPT a permit to install the proposed transmission line below the stretch of Route 3 at issue.

Pursuant to RSA 231:160:

Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

RSA 231:161 provides: "any person, copartnership or corporation desiring to erect or install any such poles, structure, conduits, cables or wires in, under or across any such highway, shall secure a permit or license therefore in accordance with the following procedure." The statute grants the DOT "exclusive jurisdiction of the disposition" of "petitions for such permits or licenses concerning all class I and class III highways."

In *King v. Town of Lyme*, the New Hampshire Supreme Court interpreted RSA 231:160 and 161, explaining "RSA 231:160 grants the *authority* to erect utilities and specifies that utility facilities may be installed or erected 'in any public highway.' RSA 231:161 sets out the *procedure* by which a person, natural or legal, makes application for a permit or license to erect such facilities in 'any such highway.'" 126 N.H. 279, 282 (1985). The Court concluded that "[t]hese two provisions, read together, *clearly*

authorize persons to be permitted to install utility facilities in any public highways.” *Id.* (emphasis added). The Court noted that that in *Opinion of the Justices* it had opined: “In this state we have never considered a highway purpose to be limited solely to the transportation of persons and property on the highways.” *Id.* at 284 (quoting *Opinion of the Justices*, 101 N.H. 527, 530 (1957)). The Court also acknowledged that “because both the legislature and this court have determined that the installation of utility facilities is a proper highway use, the use of a highway for such facilities does not constitute an additional servitude which would require the payment of damages to abutting landowners.” *Id.* at 284–85 (citing *United States v. Certain Land in City of Portsmouth*, 247 F. Supp. 932, 934–35 (D.N.H. 1965)).

This court finds that under New Hampshire law a public highway easement is not limited solely to “viatic” use. Rather, as the Court stated in *King*, in enacting 231:160 and 161, the legislature “determined that the erection of utility facilities is a proper highway use.” *Id.* at 284; *see also id.* at 284–85. Here, it is undisputed that the stretch of Route 3 at issue is a “class I” state highway. It is also undisputed that NPT seeks to install an electric transmission line underneath this stretch of Route 3. The court finds that RSA 231:160 “clearly authorize[s NPT] to be permitted to install [its] utility [line and/or] facilities in [this] public highway[.]” *See King*, 126 N.H. at 284–85. The court further finds that RSA 231:161 plainly grants to the DOT exclusive authority over whether to permit NPT to install its proposed transmission line beneath the stretch of Route 3 at issue. *See RSA 231: 161* (stating that the DOT “shall have exclusive jurisdiction of the disposition” of petitions for permits or licenses to install utilities in class I state highways).

SPNHF contends that the Northern Pass Project is not a traditional public utilities project and is beyond the scope of the public highway easement because NPT is a private, for-profit company. The court finds this argument unavailing. RSA 231:160 does not limit authorization for the installation of utilities to only public entities. Rather, as NPT asserts, the statute authorizes “*any* person, copartnership or corporation” to install utilities in public highways, provided they have the necessary permits and/or licenses. RSA 231:160.

SPNHF also argues that the Northern Pass Project is different and beyond the scope of the public highway easement because the proposed transmission line would be direct current (“DC”) from Quebec, Canada to Franklin, New Hampshire. SPNHF analogizes the proposed DC transmission line to an extension cord running from Quebec to southern New England, with no flow of electric current branching off to benefit New Hampshire communities along the way. SPNHF contends that because there is no immediate benefit to New Hampshire communities, the proposed transmission line exceeds the scope of the public highway easement. In effect, SPNHF is arguing that the proposed Northern Pass Project will not serve the public good.

The court finds that, under RSA 231:161, the determination as to whether this project will serve the public good must be made, in the first instance, by the DOT. Under RSA 231:161, the General Court gave the DOT “exclusive jurisdiction” over the disposition of permits and licenses for utility projects in public highways. The legislature further provided that the DOT “shall grant” a requested permit or license “[i]f the public good requires.” RSA 231:161. Thus, the DOT, not this court must decide, in the first instance, whether a proposed project meets the “public good” requirement of RSA

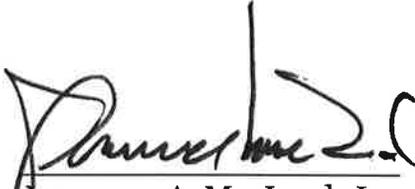
231:161.² As the court noted above, the DOT has not yet decided whether to grant NPT the necessary licenses and permits for the Northern Pass Project. As such, the court declines to address whether the proposed project serves the public good.

Accordingly, the court finds that there is no genuine issue as to any material fact and NPT is entitled to judgment as a matter of law because NPT's proposed use is within the scope of the highway easement and because the DOT has exclusive jurisdiction over whether to grant NPT the necessary permits and licenses for the Northern Pass Project.

IV. Conclusion

For the foregoing reasons, the court GRANTS NPT's Motion for Summary Judgment. Consequently, SPNHF's February 25, 2016 Motion for Joinder of the State of New Hampshire Department of Transportation as Party and to Amend Petition is MOOT and will not be addressed.

SO ORDERED, this 25th day of May 2016.



Lawrence A. MacLeod, Jr.
Presiding Justice

² To the extent SPNHF asserts that granting the DOT exclusive authority to decide this issue constitutes a "rubber stamp" the court does not agree. In the event DOT makes a determination with respect to this project that either party believes to be erroneous, that party may then appeal the DOT's decision to the DOT Appeals Board, *see* RSA 21-L:14-15, 18. Thereafter, the party may appeal the Appeals Board's decision to the Supreme Court. *See* RSA 21-L:18; RSA541:6.