STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

Docket No. _____

Town of Lempster

v.

Kevin Onnela
and
Debra Onnela
and
Avangrid Renewables, LLC
and
Lempster Wind, LLC,

TOWN OF LEMPSTER'S MEMORANDUM OF LAW IN SUPPORT OF ITS PETITION FOR DECLARATORY RULING

I. INTRODUCTION

The Town of Lempster ("Town") sought an order from the Superior Court requiring the Respondents to remove locked gates that exclude the taxpayers and public from Bean Mountain Road, a public, Class VI highway. Construction of the two gates at issue is contrary to the express, mandatory provisions of RSA 231:21-a, I, which require that the gates must be "capable of being opened and reclosed by highway users." In addition, "the selectmen may regulate such structures to assure such public use and may cause to be removed any gates or bars which fall in disrepair or otherwise interfere with public use of the highway." *Town of Goshen v Casagrande*, 170 N.H. 548 (2018) (Summary judgment granted to town under RSA 231:21-a, enjoining defendant from maintaining locked gate, blocking Class VI highway.).

As a result of the court proceedings, a considerable record was developed, including the facts and arguments relied upon by the parties. The court concluded the matter should be

considered by the Site Evaluation Committee ("SEC"), hence the reason for this Petition for Declaratory Judgment.

The Respondents may limit access to the Project Site in a manner consistent with the express language of the SEC record, and in particular the Town Agreement ("Agreement"), see *Exhibit 19*, by installing locked gates on the "access roads," running north and south from Bean Mountain Road. That is also consistent with a plan created by Respondent Lempster Wind, LLC that shows the location of the "access road," identified as "Project Access Road & Towers." *Exhibit 10.* Bean Mountain Road is not an "access road" as that term is employed in the SEC record.

Respondents argue they may exclude the public from Bean Mountain Road, claiming the Town "agreement expressly requires the subject gates." *Exhibit 23 at 3.* Yet there is no provision in the Agreement that "expressly requires the subject gates" on Bean Mountain Road. Nor do the Respondents cite any such provision. Rather, as the sign below (see, *Exhibits 5 and 8, paragraph 13)* erected on Bean Mountain Road makes clear, Respondents Onnela seek to exclude the public from their property by barring a Town Highway for their own purposes:

Now they suggest they do not know where that sign came from. *Exhibit 24,* ¶ 48. The argument strains credulity.

Nor could the Board of Selectmen authorize an encroachment on a public highway, the effect of which would be the exclusion of the public. Rather, the record is replete with references to the "Access Road" being gated to bar access to the Project Site, and all of the SEC documents distinguish the "Access Road" from public highways.

Respondents Onnela know Bean Mountain Road is a public, Class VI highway because of the process they were required to follow in 1981 to secure a building permit. *Exhibit 4.* Respondents Wind Park and Avangrid are on notice that Bean Mountain Road is a public, Class VI highway, by virtue of the Tax Maps that so state this fact. *Exhibit 14.* Indeed, in a report filed by the Wind Park for the period January 1 – December 31, 2020, Bean Mountain Road is

identified as a public highway on the plan, with the same convention used for School and Coach Roads. *Exhibit 13.*

Based on the foregoing, Respondents may erect locked gates on the Access Road, but are obliged to remove the locked gates from Bean Mountain Road, a public highway.

II. THE PARTIES HAVE AGREED THAT THE TOWN MAY ACT ON ANY COMPLAINT CONCERNING THE OPERATION OF THE WIND PARK

The Agreement provides:

> **Complaint Resolution.** The owner shall develop and submit to the Town a process to resolve complaints from Town residents concerning the construction or operation of the Wind Park. The process shall not preclude the local government from acting on a complaint.

Exhibit 20 at §5.2. Having received a complaint from the Lempster Trail Blazers ATV Club, *Exhibit 12*, that it could not secure access to Bean Mountain Road due to the installation of locks on the two gates, the Board of Selectmen sought the cooperation of the Respondents to remove those locks, without success. *Exhibit 1*; *see also Exhibit 20 at* §6.1.2 (all complaints from Town residents should be submitted to the Town). The Town has properly pursued this action consistent with the provisions of §5.2 of the Agreement (*Exhibit 20*).

III. THE TOWN AGREEMENT REGULATES THE RELATIONSHIP BETWEEN THE PARTIES AND DISTINGUISHES THE RIGHTS OF THE PARTIES RELATIVE TO "TOWN ROADS" AND "ACCESS ROADS."

The Respondents state the Agreement is the "foundational document," establishing the relationship between the parties. *Exhibit 23 (Onnela Memorandum of Law in Support of their Motion for Summary Judgment) at 3.* They claim the Agreement "expressly requires the subject gates" on Bean Mountain Road. Thus, the SEC must examine the Agreement to resolve the present conflict. The SEC will find "Bean Mountain Road" is not even mentioned in the

Agreement as the "access road." Rather, the SEC observed the Agreement "required the applicant to: 1) gate and lock entrances to the project site." *Exhibit 15, at 51.*

A. By the Terms of the Agreement, the "Access Road" "To the Project Site," Not Bean Mountain Road, is Subject to Gates.

"Access Road" is not a defined term in the Agreement. Yet its import was tolerably clear to the Respondents and the SEC. The SEC decision observed:

> In order to restrict public access to the turbines, structure and supporting equipment, the Applicant, Public Counsel and the Town of Lempster have entered into agreements, which, in part, contain conditions governing access and warning signs. . .. The condition set forth in the agreements required the Applicant:
>
> 1. Gate and lock entrances to the Project Site.

Exhibit 15 at 51. "Project Access Road" is identified as such on a plan created by the Respondents, running north and south from Bean Mountain Road. *Exhibit 10.* As Lempster Wind, LLC observed in its SEC Application, it would be seeking "permits for access to public roads and access road construction." *Exhibit 21, pp. 69-70.* In the summer of 2007, "access road construction" would begin. *Id.* A site survey would be "performed to mark the location of the wind turbines [and] access roads." *Id.* "Construction of Project access roads on private, leased site areas will, wherever possible, use existing logging roads and trails..." *Id at 71.* By the terms of Lempster Wind's Application, Bean Mountain Road is not an "access road."

> "Project Site" includes access roads:
>
> "Project Site"– property with rights as conveyed to Owner by lease, easement or other agreement with a Participating Landowner that includes all Wind Turbines, access roads, and other facilities required for construction and operation of the Wind Park.

Exhibit 20 at §1.9. Respondents Onnela contend "the wind farm operator...leases ...the Respondent's portion of Bean Mountain Road from the Respondents." *Exhibit 22,* ¶5. The

Onnelas do not and cannot own a public highway, and therefore, cannot convey a lease to Bean Mountain Road to anyone. Second, the Town is not a "Participating Landowner," as that term is defined in §1.8. *Exhibit 8, Second Affidavit of J. Mary Grenier, ¶¶ 8-10.* Therefore, Bean Mountain Road cannot be considered "rights as conveyed to Owner by lease, easement or other agreement." In contrast, the Respondents' survey indicates the "access road" is subject to a "Wind Farm Project Easement," whereas Bean Mountain Road is noted as "Not Town Maintained." *Exhibit 11.*

Warning signs are to be "placed no less than 300 feet from each Wind Turbine tower base on access roads." *Exhibit 20 at §2.7.3.* Under §2.8, the Town is to have a keyed access "to all gated entrances to the Project Site for the purpose of emergency response." *Id.* at 3. "Project Site" includes "access roads," and this is where signs are to be erected. No lease or easement to Bean Mountain Road has been conveyed, and the Town is not a "Participating Landowner." *Id. at* §1.10 (defining "Town" as "Town of Lempster, New Hampshire").

Section 8 of the Agreement clearly distinguishes "public roads" from "access roads." *Id. at 6.* Section 8.1 addresses **"Public Roads"** (emphasis in original). "Any road damage caused by the Owner or its contractors at any time shall be promptly repaired at the Owner's expense." *Id at* §8.1.3.

In contrast, §8.2 specifically addresses **"Wind Park Access Roads"** (emphasis in original). "The Owner shall construct and maintain roads at the Wind Park." *Id. at* §8.2.1. "Any use of the access roads that is beyond what is necessary to service the Wind Park" must conform to land use regulations. *Id. at* §8.2.2.

This understanding of the parties continues in §9.7, where staging or idling of vehicles is prohibited on "public roads" and weight limits are imposed with respect to "a Town road,"

§9.7.1; hours of operation are limited on "Town roads," §9.72; and waivers for over-sized vehicles can be secured with respect to "Town roads." Similarly, §12.3 provides for "**Setbacks from Public Roads**" (emphasis in original), not "access roads." *See also id. at* §13.2 ("Town may waive the setback requirement for public roads").

Clearly, the parties understood the distinction between "public roads" and "Wind Park Access Roads."

It was equally clear to the SEC. For example, the SEC Order states:

> Whereas, the proposed facility includes access roads, a metering station and interconnection point with the Public Service Company of New Hampshire 34.5 kV distribution line at the intersection of Bean Mountain Road and Nichols Road in Lempster.

Exhibit 16, at p.1. Note the access road is an integral part of the Project Site, whereas reference to Bean Mountain Road is for locational purposes only.

Had the parties (or the SEC) intended to identify Bean Mountain Road as an "access road," they knew how to do so by using those words. *Cf. Appeal of Beyer*, 122 N.H. 934, 939 (1982) ("legislature knew how to limit the involvement of board members" by so stating); *Cannata v. Town of Deerfield*, 132 N.H. 235, 243 (1989) ("legislature knew how to include real property in the definition when it intended to do so"). That the parties did not identify Bean Mountain Road as an "access road" is a strong indication that the parties did not intend this same result. *Barry v. Town of Amherst*, 121 N.H. 335, 338 (1981) ("absence of provision in statute is strong indication the legislature did not intend same result").

As it is, Bean Mountain Road is not even mentioned in the Agreement for other than locational purposes; the Respondents' contention to the contrary notwithstanding. There was no need to engage in a dispute regarding the status of Bean Mountain Road, as the Agreement clearly distinguishes access roads from public highways.

B. The Motive for Erecting Gate 2 Was Respondents' Onnela Desire to Exclude Public Access to Bean Mountain Road.

In a letter from Wesley Ash, President of the Lempster Trailblazers ATV Club, he advised the Board of Selectmen:

> One trail, Bean Mountain Road, now has been gated off with not one, but two gates.
>
> The first gate we ran across was on the side of Coach Road. This gate requires a code to open. When one of our members talked to Ryan Haley from Advanced Renewables about working around this, he explained that Kevin Onnela had requested that it be installed.
>
> We then approached Mr. Onnela about the gate. He informed us that Bean Mountain Road was never a Town road and therefore not a Class 6 road, and that he has the right to gate it. Since then, he has also locked the gate that he has on the Mountain Road side. By doing this, he has cut off our access to a long stretch of our trails plus our access to Coach Road.

Exhibit 12. This letter is confirmed, in part, by *Exhibit 9, at* ¶ 13, Affidavit of Ryan Haley:

> In June, 2010, defendant Kevin Onnela, with Lempster Wind's permission and approval, installed a gate (gate 2 shown on Exhibit A-1) at the border of the Lempster Wind facility site at the east end of Bean Mountain Road which restricts the public from using Bean Mountain Road to access the Lempster Wind facility.

The Wind Park does not even maintain Bean Mountain Road in the wintertime as a public road to the access roads of the Project Site. *Exhibit 8, Second Affidavit of Mary Grenier* at ¶12. Rather, the Respondents employ Ridge Road. *Id at* ¶13.

Thus, the facts are: (1) the gating of Bean Mountain Road is not the subject of any order of the SEC; (2) Kevin Onnela requested that the gate erected by the Wind Park be permanently locked; (3) Kevin Onnela erected and locked the second gate on Bean Mountain Road; and (4) Respondents Onnela acknowledged Bean Mountain Road to be a Class VI highway. The foundation set by the Respondents fails, and their case collapses.

The motive for erecting gate 2 was Respondents' Onnelas desire to bar public access to Bean Mountain Road; not to prevent access to the Wind Park. *See Exhibit5*. And gate 1 was locked at the behest of Respondents Onella to exclude the public from the road. If any question remains as to the motive for erecting the locked gate, SEC members need only return to page 3 of this memorandum and re-read the sign.

IV. BEAN MOUNTAIN ROAD IS A PUBLIC, CLASS VI HIGHWAY, SUBJECT TO THE EXCLUSIVE OWNERSHIP, REGULATION AND CONTROL OF THE TOWN OF LEMPSTER AND ITS BOARD OF SELECTMEN.

Respondents Onnela concede, "If [Bean Mountain Road] was a public road, neither the SEC nor the Plaintiff Town would have the authority or jurisdiction to order it gated and the public kept out." *Exhibit 22, Answer*, at ¶3 *of Onellas Statement of Affirmative Defenses.* According to the Respondents Onnela, the status of Bean Mountain Road is dispositive in this case. The Respondents "bear [] the burden of rebutting the 'strong presumption against discontinuance, and, in order to prevail, [they] must prove by 'clear and satisfactory evidence' that [Bean Mountain] Road has been discontinued." *Town of Goshen v Casagrande*, 170 N.H. at 551.

A. Bean Mountain Road is a Public Highway, Laid Out by The Board of Selectmen of the Town of Lempster in 1819.

Bean Mountain Road is a public, Class VI highway. *See* RSA 229:5,V. The layout (see, RSA 229:1 and RSA 231:8) of Bean Mountain Road is contained in the Town records. *Exhibits*3 *and* 4; *Exhibit* 7, *Second Affidavit of Mary Grenier* at ¶4. The Town record is confirmed by a certified copy of the exact same layout of Bean Mountain Road, as contained in the records of the Department of State, Division of Archives & Records Management. *Exhibit2*; *Webster v. Town of Boscawen*, 67 N.H. 111 (1892) ("reputation, such as recitals in ancient records and grants, is competent evidence of the laying out of ancient highways"). Former Selectman and

Fire Chief Phillip Tirrelll confirmed the layout. *Exhibit 6* at ¶5. The highway was laid out in 1819 by the Board of Selectmen of the Town of Lempster.

B. Bean Mountain Road Has Not Been Discontinued by a Vote of the Town Meeting.

"Once a highway is established, it is presumed to exist until discontinued and discontinuance is not favored in the law." *Davenhall v. Cameron,* 116 N.H. 695, 696-97 (1976). The Respondents' assertion that the selectmen or building inspector may discontinue a highway, *Exhibit* 24, *Joint Reply* at p. 3, is incorrect as a matter of law. The Board of Selectmen's power under RSA 41:8 "does not include the power to discontinue a public highway.... The discontinuance of an established town highway... may be accomplished only by vote of the town." *Marrone v Town of Hampton*, 123 N.H. 729, 734(1983). The records of the Town have been examined, and no vote of the Town Meeting to discontinue Bean Mountain Road has been identified. *Exhibit* 7, *Affidavit of Mary Grenier*, at ¶6. "Because public roads are discontinued by Town vote and such actions are recorded in the town report, the best evidence of discontinuance is the official record." *Davenhall v. Cameron*, 116 N.H. at 695, 697 (1976). "Discontinuance is a fact that must be proved and the burden is upon the party who asserts discontinuance to prove it by clear and satisfactory evidence." *Id.* at 696-97. Respondents Onnela acknowledged the Class VI status of Bean Mountain Road in 1981, when they sought a building permit under RSA 36:26 (now recodified at RSA 674:41). The procedures in that statute were required because Bean Mountain Road was a Class VI highway, and those procedures were a predicate to the building permit. *Exhibit 4.* The building permit granted to Respondents Onnela documented the status: "The Town of Lempster reserves all right to subject road and connectors as Class VI roadway." *See Town of Goshen v Casagrande, supra.* Nothing could be clearer, notwithstanding the Respondents' efforts to obfuscate by suggesting the

building inspector discontinued the highway. *Exhibit 24, Joint Reply* at 3. Reading half of the documents (or a sentence) is neither evidence nor persuasive.

V. LOCKED GATES ON BEAN MOUNTAIN ROAD ARE A VIOLATION OF RSA 231:21-a, AND ARE THEREFORE SUBJECT TO ABATEMENT.

RSA 231:21-a provides, in part:

> Any gates or bars maintained by private land owners shall be erected so as not to prevent or interfere with public use of the highway, and shall be capable of being opened and reclosed by highway users. The selectmen may cause to be removed any gates or bars which fall into disrepair or otherwise interfere with the public use of the highway.

New Hampshire-Vermont Health Services v. Comm. of Ins., 122 N.H. 268, 272 (1982) ("the word 'shall,' generally regarded as a command, indicates that a statute was intended to be mandatory."). Respondents' Avangrid and Lempster Wind suggestion that a locked gate on Bean Mountain Road is essential to public safety is in considerable doubt as it was Respondents Onnela who erected the second gate, for their own purposes, in 2010. *Exhibit 9, Affidavit of Ryan Haley* at ¶ 13. The Onnelas make clear their interest in the locked gate, complaining its removal would allow "unrestricted access to Bean Mountain Road and thus access to Onnela's private residence." *Exhibit 23,* at p. 2. This argument is not an expedient for violating the law. Nor does it suggest the gate was erected for any purpose associated with the wind park.

Neither the gate erected by Respondents Onnela for their personal purposes, nor the gate erected by the Respondents Avangrid or Lempster Wind, and subsequently locked at the behest of Respondents Onnela, satisfy the mandate of RSA 231:21-a, and are therefore subject to abatement.

A. The Board of Selectmen has no Authority to Authorize a Permanent Encroachment on a Public Highway.

Respondents claim the Board of Selectmen entered into an agreement which authorized the Respondents to encroach on Bean Mountain Road by erecting permanent locked gates and barring public use. As already has been demonstrated, the SEC will examine the Agreement in vain, seeking any reference to erecting a permanent, locked gate on Bean Mountain Road.

Moreover, Respondents' argument may be disposed of as a matter of law:

> A municipality cannot authorize a permanent encroachment, i.e., cannot confer power on abutters or others to occupy permanently a part of the street for a private use, unless such power has been delegated by the legislature, and even then, the property rights of abutters and nearby owners of adjoining property must not be infringed upon. If the municipality has no power to permit a particular use of the streets, such use is unlawful and constitutes a nuisance.

Marrone v. Town of Hampton, 123 N.H. 729, 734 (1983) (quoting *10E McQuillan Municipal Corporations*, §30.73, at 765 (3d rev. ed. 1981)). In *Marrone*, the selectmen permitted an abutter to construct a sea wall, stairs and landscaping on an unpaved extension of a public street, "the effect of the improvements was the discontinuance of the highway." *Id.* at 734. "[S]uch an abrogation of vehicular use could have been accomplished only by vote of the Town." *Id.* "Where a municipal governing body enters into a contract which is beyond the scope of the municipality's powers, such an attempt to contract is termed *ultra vires*, and the contract is wholly void," *id.*, not voidable.

Bean Mountain Road is a public highway, subject to the mandatory provisions of RSA 231:21-a, and the SEC may enforce the Town's request that the gates be removed because they "interfere with the public use of the highway." The Agreement recognizes the Town's authority to act on a complaint and hence the Town brings this matter to this SEC.

V. THE DOCTRINE OF PREEMPTION DOES NOT APPLY, AS THE SEC DID NOT REQUIRE THE ERECTION OF PERMANENTLY LOCKED GATES ON BEAN MOUNTAIN ROAD, A PUBLIC HIGHWAY, NOR MAY PREEMPTION BE RELIED UPON TO DISPOSSESS THE PUBLIC FROM ITS PROPERTY

> *"If [Bean Mountain Road] was a public road, neither the SEC nor the Plaintiff Town would have the authority or jurisdiction to order it gated and the public kept out."*

Exhibit 22, Answer at ¶3 *of Onellas Statement of Affirmative Defenses.*

It is anticipated that the Respondents will argue the preemptive authority of the SEC extends to taking property without compensation; in this case barring the public from its road. In the face of the foregoing concession, it is absurd for the Respondents to now attempt to persuade the SEC that the ownership and right to use a public highway has been preempted by the SEC. There is no law in New Hampshire that vests such sweeping authority in a State agency. Nor is there anything to suggest this was the intention of the SEC when it noted the Agreement "required the applicant to: 1) gate and lock entrances to the project site."

"Local legislation is repugnant to state law when an ordinance or bylaw either expressly contradicts a statute or else runs counter to the legislative intent of the statutory scheme." *State v. Driscoll*, 118 N.H. 222, 225 (1978) (regulation of use of emergency vehicles sirens pre-empted). In *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091 (1982) the Court ruled that state regulation preempted the field of regulating and siting hazardous waste facilities. Nevertheless, it refined the concept of preemption, noting "[a]ny regulations relating to such matters as traffic and roads, landscaping and building specifications, snow, garbage and sewage removal, signs, and other related subjects, to which any industrial facility would be subjected and which are administered in good faith and without exclusionary fact, may validly be applied to a facility approved by the State bureau." *Id.* at 1104. In other words, local regulations that are not repugnant to the statutory scheme may be applied in a preempted field.

That the SEC believed this field was not preempted and the Town retained its authority over placing gates on its roads is demonstrated by the fact that the SEC left this issue to the Town and Public Counsel to enter into agreements with the Wind Park. "[T]he agreements require the [Wind Park] to: (1) gate and lock entrances to the Project Site; (pc)." *Exhibit 15,* at 51. Section 4.3 of the Agreement, *Exhibit 20*, requires "[e]ntrances to the Project Site shall be gated," and Section 2.8 requires the "Town shall have keyed access to all gated entrances to the Project Site." The access to the Project Site is shown on the plan compiled by the Respondents, the location of which is identified as "Project Access Road & Towers." *Exhibit 10.* The Town continues to support this requirement.

The doctrine of preemption has never been extended to include the power of a state agency to take control of municipal property. The Respondents' argument does not simply involve regulation under RSA 231:21-a. Rather, Respondents argue for the exclusion of the public from the public's property. *Wasserman v. City of Lebanon*, 124 N.H. 538 (1984), relied upon by the Respondents, provides no support for this proposition. In *Wasserman*, the city attempted to bar the construction of a dam on the Mascoma River. The Court ruled the regulation of the construction and maintenance of hydroelectric dams was preempted by RSA 481 and 482. It did not involve the taking of town property. Nor did *Public Service Company v. Town of Hampton*, 120 N.H. 68 (1980), also relied upon by the Respondents, involve seizing town property. Rather, the Court held that a regulation requiring use of underground transmission lines was a matter left to the PUC. It did not involve commandeering town property and excluding the public.

VI. LACHES, ESTOPPEL AND WAIVER

The defendants' estoppel, laches and waiver claims may be disposed of summarily. As the Supreme Court observed in *Town of Moultonborough v. Crumb*, 114 N.H. 26, 128 (1974):

> Since the State's rights in land and waters are not always enforced and protected with the same alacrity as private rights. . . the legislature provided that no person can acquire title to state lands by adverse possession. For the same reason it has been decided that the state does not forfeit or lose its rights to public lands and waters by laches, estoppel or waiver.

(Citations omitted); *see also* RSA 236:30 (no adverse right against municipal highway).

Similarly, in *State v. Tallman*, 139 N.H. 223, 225-26 (1994), the Court applied the same rule:

> Because the State's rights in land are not always enforced and protected with the same vigilance as private rights, the legislature has determined that no person can acquire title to State lands by adverse possession. These same policy considerations are implicated when a defendant tries to invoke the doctrine of laches to bar a State's claim to land. Thus this court has held that the State does not forfeit or lose its rights to public lands by laches.

VII. CONCLUSION

The Town of Lempster is entitled to judgment as a matter of law as the Respondents, who bear the burden of proof, have failed to introduce any evidence that Bean Mountain Road has been discontinued. They have blocked access to the public's road in violation of RSA 231:21-a, knowing full well that it is a Class VI public highway. Respondents must remove the gates and, consistent with the SEC proceedings and Agreement, place gates at the access road.

Respectfully submitted,
TOWN OF LEMPSTER
By Its Attorneys
UPTON & HATFIELD, LLP

Dated: February 16, 2022 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Law in Support of its Petition for Declaratory Ruling was this day forwarded to Susan Geiger, Esquire (sgeiger@orr-reno.com), Robert S. Carey, Esquire (rcarey@orr-reno.com), Meredith R. Farrell, Esquire (mfarrell@orr-reno.com), and Thomas Quarles, Jr., Esquire (tquarles@devinemillimet.com), counsel of record, via electronic mail.

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Michael P. Courtney