

**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

PETITION FOR DECLARATORY RULING

NOW COMES the Town of Lempster, by and through its attorneys, Upton & Hatfield, LLP, complaining against Kevin Onnela, Debra Onnela, Avangrid Renewables, LLC and Lempster Wind, LLC, and in accordance with Site 203.01, seeking a declaratory ruling requiring the Respondents to remove locked gates on Bean Mountain Road, and place gates on the access roads of the Project Site pursuant to an approved Agreement, and as grounds therefor states as follows:

INTRODUCTION

The Town of Lempster (“Town”) seeks an order, requiring the defendants to remove locked gates from Bean Mountain Road, a public, Class VI highway. Construction of the two gates at issue is contrary to the provisions of RSA 231:21-a, I, which requires 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 into 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 a locked gate, blocking Class VI highway).

On June 28, 2007, the Site Evaluation Committee (“SEC”) approved a Certificate of Site and Facility for a wind-powered electric generating facility, proposed by Respondent, Lempster Wind, under RSA 162-H:4. See, *Exhibit 16* (Docket #2006-01). The facility, located adjacent to Bean Mountain Road, consists of twelve wind turbines and “the project access road, which is estimated to be five miles long.” *Exhibit 15* (Decision Issuing Certificate of Site Facility with Conditions) at p.3.

As part of the approval process, the Town and Lempster Wind entered into an agreement that required Lempster Wind to erect locked gates at the entrance of the Project Site. *Exhibit 20* (“Agreement”). “Project Site” includes “access roads,” and is defined as:

property 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 section 1.9. The Agreement clearly distinguishes “access roads” from “public roads.” E.g., Contrast Section 8.1, “**Public Roads**” (emphasis in original) and section 8.2, “**Wind Park Access Roads**” (emphasis in original). Installation of permanently locked gates on Bean Mountain Road is inconsistent with the terms of the Agreement.

The defendants may limit access to the Project Site by installing locked gates at the “access roads,” running north and south from Bean Mountain Road, as contemplated by the Agreement.

PARTIES

1. The Town of Lempster is a municipal corporation located in the County of Sullivan, with a mailing address of P.O. Box 33, Lempster, New Hampshire 03605.

2. Kevin Onnela and Debra Onnela own properties located within the Town of Lempster on Bean Mountain Road, identified in the Town's tax records as Map 221, Lots 22 and 23; Map 228, Lot 27; and Map 218, Lot 34 (collectively the "Property"). Their mailing address is 1182 NH Route 10, Lempster, New Hampshire 03605.

3. Avangrid Renewables, LLC, is a foreign limited liability company with a principal mailing address of 1125 NW Couch Street, Suite 700, Portland Oregon, 97209, and a registered agent office address of 10 Ferry Street, Suite 313, Concord, NH 03301.

4. Lempster Wind, LLC, is a foreign limited liability company with a principal mailing address of 1125 NW Couch Street, Suite 700, Portland Oregon, 97209, and a registered agent office address of 10 Ferry Street Suite 313, Concord, NH 03301.

FACTS

5. On June 28, 2007, the SEC approved a Certificate of Site and Facility for a wind-powered electric generating facility, proposed by Respondent Lempster Wind under RSA 162-H:4. *See, Exhibit 16* (Docket #2006-01).

6. The Project Site is located adjacent to Bean Mountain Road.

7. There are two gates that currently block access to Bean Mountain Road. One gate, erected by Kevin and Debra Onnela in 2010, is located on the east end of Bean Mountain Road. The other gate, erected by Lempster Wind in 2008, is on the west side, closest to Nichols Road.

8. In addition, the Respondents have installed a sign prohibiting public travel on Bean Mountain Road. *Exhibit 5.*

9. This prevents the passing of the traveling public, including ATV use, on Bean Mountain Road.

10. Kevin and Debra Onnela know that Bean Mountain Road is a Class VI public highway. On January 28, 1981, Building Inspector Rudolf Adler informed Mr. Onnela that a building permit could not be issued for the Onnela Property because “Bean Mountain Road is a Class VI road and is officially discontinued.” *Exhibit 4.*

11. On March 14, 1981, a Building Permit was issued with the condition that Mr. Onnela be responsible for maintaining Bean Mountain Road as a Class VI road and that “the Town of Lempster reserves all rights to subject road and connectors as a Class VI roadway.” *Id.*

12. On February 18, 2020, pursuant to RSA 215-A:6, IX, the Town of Lempster Selectboard designated Bean Mountain Road as an ATV trail.

13. The Town has notified the Respondents, advising them of the violations, but the gates remain. *Exhibit 1.*

14. Representatives of the Town have viewed Bean Mountain Road and have confirmed the current use of the locked gates to block the traveling public, including ATV use. *Exhibit 8 at paragraph 6. Respondents do not dispute the gates block traveling public travel on Bean Mountain Road but claim the SEC Order allows such impediments.*

15. RSA 231:21-a grants to the Board of Selectmen express authority to “regulate such structures to assure such public use, and may cause to be removed any gates or bars which fall into disrepair *or otherwise interfere with public use of the highway.*” RSA 231:21-a (emphasis added).

**BEAN MOUNTAIN ROAD IS A PUBLIC HIGHWAY THAT
MAY BE CLOSED ONLY BY A VOTE OF THE TOWN MEETING**

16. Bean Mountain Road is a Class VI, public highway, laid out in 1819. See, *Exhibits 2 & 3* (layout); *Exhibit 7*, Affidavit of Mary Grenier; and RSA 229:5,VII.
17. “Once a highway is established, it is presumed to exist until discontinued and discontinuance is not favored by the law.” *Davenhall v. Cameron*, 116 N.H. 695, 696-97(1976).
18. “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).
19. 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 paragraph 6.
20. “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)).

**THE AGREEMENT DOES NOT PERMIT THE RESPONDENTS
TO PERMANENTLY EXCLUDE THE PUBLIC FROM A PUBLIC HIGHWAY**

21. The Board of Selectmen of the Town entered into an Agreement with Lempster Wind, LLC. *Exhibit 20*.
22. The Respondents incorrectly claim the Agreement authorizes them to encroach on Bean Mountain Road by erecting permanent locked gates.

23. The power of the Board of Selectmen to enter into contracts under RSA 41:8 “does not include the power to discontinue a public way because such authority is reserved to the inhabitants to be exercised by vote of the town. RSA 231:43.” *Marrone v. Town of Hampton*, 123 N.H. at 735.

24. The Agreement (*Exhibit 20*) clearly distinguishes “Public Roads” from “Access Roads” constructed by Respondents Avangrid Renewables, LLC and Lempster Wind, LLC. Compare Section 8.1 (“**Public Roads**” (emphasis in original) *with* Section 8.2 “**Wind Park Access Roads**” (emphasis in original); *see also Exhibit 10* (plan created by Respondents, showing “project access road,” running north and south from Bean Mountain Road).

25. Bean Mountain Road is not the “access road,” as that term is employed in the Agreement.

26. The Respondents are currently violating RSA 231:21-a, I by installing locked gates on Bean Mountain Road, a Town of Lempster Class VI Road.

WHEREFORE, the Town of Lempster respectfully prays that the Site Evaluation Committee:

A. Find and rule the Respondents are interfering with the use of Bean Mountain Road in a manner violative of RSA 231:21-a, II and in a manner inconsistent with the terms of the Agreement;

B. Issue an Order, requiring the Respondents to remove all locked gates and signs on Bean Mountain Road that restrict public travel, prohibit the further installation of locked gates and signs that restrict the public’s right to travel on Bean Mountain Road, and order that gates be installed on access roads;

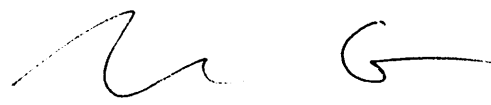
C. If the Respondents fail to remove said gates within fifteen (15) days from the SEC Order, permit the Town to remove the gates and signs by any means necessary, at the cost of the Respondents; and

D. Grant such other and further relief as may be just and equitable.

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

Dated: February 16, 2022

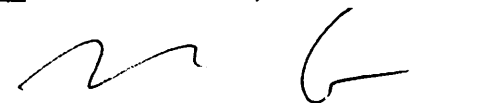
By:



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing 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.



Michael P. Courtney