

THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS.

SUPERIOR COURT

Town of Lempster

v.

Kevin Onnela, et al.

Docket No. 220-2020-CV-00112

Order on Motion for Summary Judgment

Plaintiff brought this action seeking injunctive relief and a declaratory judgment arising out of the defendants' installation of a gate allegedly on a public highway without Plaintiff's permission. Defendants move for summary judgment arguing, among other things, the Court should dismiss the case under the doctrine of primary jurisdiction because the New Hampshire Site Evaluation Committee ("SEC") has concurrent jurisdiction over this dispute. Plaintiff objects. For the following reasons, the case is STAYED.

Facts

The following facts are taken from the parties' joint statement of material facts and are undisputed unless otherwise noted. In 2006, Lempster Wind, LLC filed an application with the New Hampshire Site Evaluation Committee ("SEC") to build a wind energy facility in Lempster, New Hampshire ("the Town"). The proposed project would be leased on private property owned by Kevin and Debra Onnela. Prior to the SEC's decision, both the Town and Lempster Wind proposed two draft agreements governing the project: an agreement between Lempster Wind and the public counsel ("the Public

Agreement”) and an agreement between Lempster Wind and the Town (“the Town Agreement”).

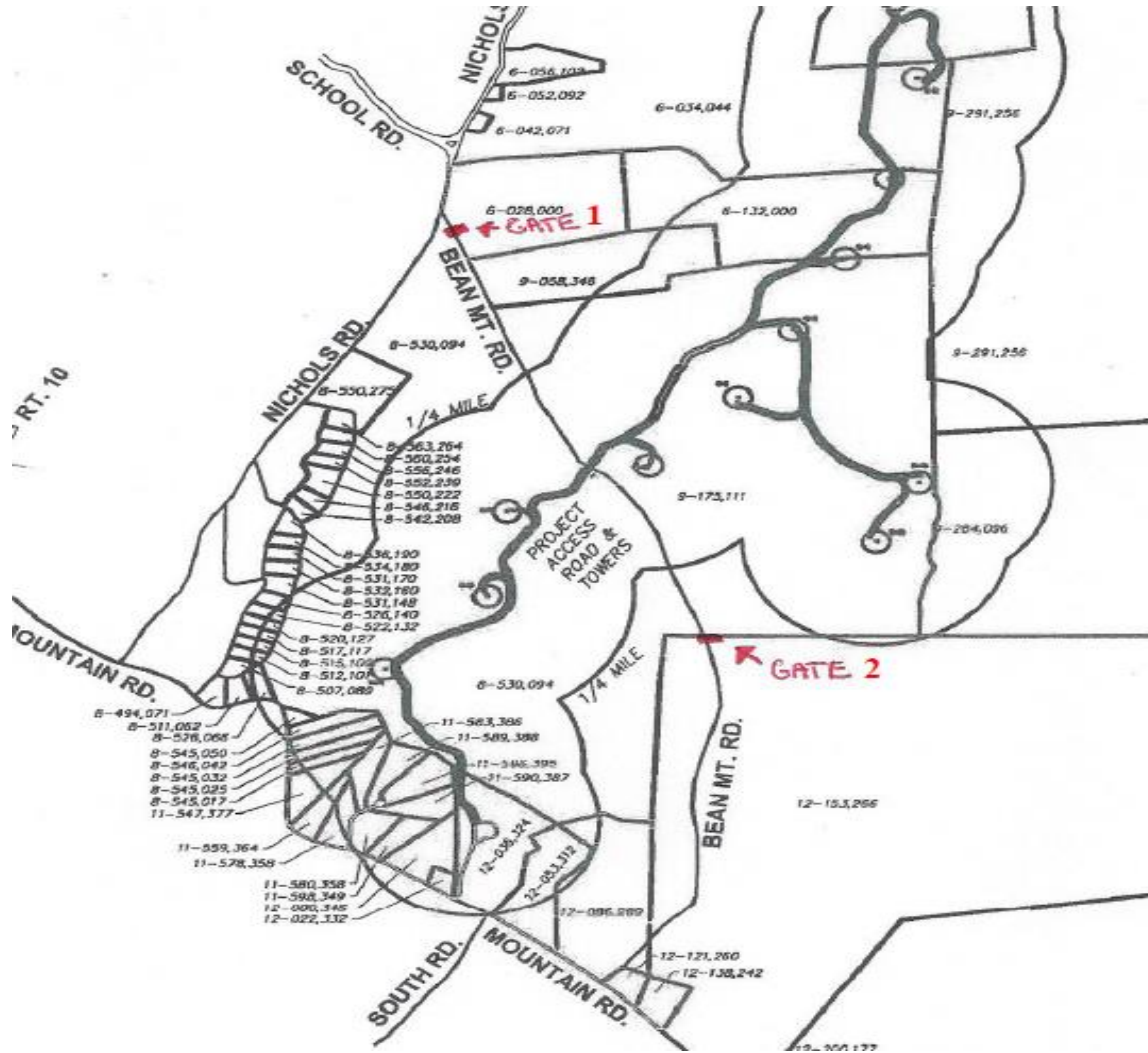
Both agreements refer to the use of locked gates to bar entrance to the project site. Section 4.a of the Public Agreement specifies that “[e]ntrances to the Project site shall be gated, and locked during non-working hours. If problems with unauthorized access are identified, the Project shall work to install additional gated access points.” (Defs.’ Statement of Material Facts Ex. D at 81.) Section 4.1.3 of the Town Agreement uses identical language. (*Id.* at 89.) Additionally, the Town Agreement defined “project site” as

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.

Id. at 85.

The SEC granted the application on June 28, 2006. (*See id.* Ex. D.) In relation to public access, the SEC adopted the conditions established in both agreements. (*Id.* at 51.) Specifically, the SEC decision required Lempster Wind to “[g]ate and lock entrances to the project site.” (*Id.*)

Once the SEC granted the application, Lempster Wind completed construction of the project. The layout of the area includes several access roads running between the windmills as well as another road, Bean Mountain Road, running through the site:



(Id. Ex. A-1.) This dispute originated from a gate installed on Bean Mountain Road. In 2008, Lempster Wind installed a gate and a warning sign at the intersection of Nichols Road and Bean Mountain Road, northwest of the facility (identified as Gate 1 above). Two years later, in 2010, the Onnelas obtained Lempster Wind's permission to install a gate (marked as Gate 2 above) at the east end of Bean Mountain Road.

This lawsuit arose from Gate 2. On July 16, 2020, the Town filed suit seeking declaratory judgment that the Onnelas had violated RSA 231:21-a by installing Gate 2 on a public highway without Town approval. The Town argues that, because Bean Mountain Road is a public highway, the public has the right to use the road for travelling

or other activities such as off-roading. Further, it contends that the SEC's requirement that the parties "gate and lock entrances" only applied to the project site's access roads, not Bean Mountain Road. As such, the Town seeks injunctive relief ordering the Onnelas remove Gate 2 and any nearby signs on Bean Mountain Road.

Legal Standard

A motion for summary judgment should be granted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III; *N.H. Ass'n of Counties v. State*, 158 N.H. 285, 287–88 (2009). To defeat summary judgment, the non-moving party "must set forth specific facts showing that there is a genuine issue [of material fact] for trial." *Panciocco v. Lawyers Title Ins. Corp.*, 147 N.H. 610, 613 (2002). A fact is material if it affects the outcome of the litigation. See *Bond v. Martineu*, 164 N.H. 210, 213 (2012). Ultimately, the Court must consider the evidence in "the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Concord Group Ins. Cos. v. Sleeper*, 135 N.H. 67, 69 (1991).

Analysis

The issue in this case turns on whether the language in the SEC's decision "gate and lock all entrances to the project site" allows the Onellas (and Lempster Wind) to maintain a gate on the east side Bean Mountain Road. The defendants move for summary judgment on several bases that relate to that ultimate issue: (1) violation of RSA 541:22; (2) the doctrine of primary jurisdiction; (3) preemption; (4) res judicata and collateral estoppel; (5) estoppel; (6) waiver; and (7) laches. The Town objects, arguing that the defendants' arguments fail because not only is Bean Mountain Road a public

highway, but the SEC decision did not require locked gates where the Onellas installed Gate 2.

As will be discussed below, the Court is persuaded that the doctrine of primary jurisdiction is applicable. Therefore, the Court need not analyze the other arguments.

Relating to their primary jurisdiction argument, Defendants contend that the Town's claims should be addressed by the SEC because the requested relief would ignore and seek to invalidate the SEC decision. The Town disagrees. It argues that the SEC does not have jurisdiction because the order did not require locked gates on the entirety of Bean Mountain Road.

The doctrine of primary jurisdiction provides that "a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by the specialized administrative agency that also has jurisdiction to decide it." *Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 371 (2012). The purpose of the doctrine is to maintain proper balance between the courts and administrative agencies:

The doctrine is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It applies to claims that contain some issue within the special competence of an administrative agency. Thus, under the primary jurisdiction doctrine, courts, even though they could decide, will in fact not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision.

Id. Ultimately, the doctrine comes into play when conduct that is the subject of court litigation is "at least arguably protected or prohibited by a regulatory statute" and when agency resolution of an issue would aid the court. *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 299–300, 302 (1973).

The Court finds the doctrine of primary jurisdiction should be applied to this case. RSA 162-H:4 gives the SEC the power to: (1) “monitor the construction and operation of any energy facility granted a certificate” and (2) “enforce the terms and conditions of any certificate.” If the SEC has the power to enforce the terms and conditions of its certificates, it most certainly has the power to interpret them. Indeed, the agency’s own regulations allow for declaratory rulings. See SITE Admin. Reg. 203.01 (“Any person may submit a petition for declaratory ruling from the committee on matters within its jurisdiction by filing an original written petition and 10 copies with the committee.”) The Court understands the Town’s argument that it is not moving to enforce the SEC decision because it believes the decision does not even apply. Despite that distinction, the Court still finds that interpretation of the SEC’s decision is a matter best left for the special competence of the SEC. *Frost*, 163 N.H. at 371. Not only did the SEC write the order at issue, it also routinely authors similar decisions that involve questions relating to the public’s access (or lack thereof) to a power facility.

SEC resolution could also be of material aid to judicial resolution of the dispute. *Ricci*, 409 U.S. at 302. This dispute could be entirely resolved by an SEC declaratory ruling interpreting its own decision. See *Colonial Green Prod. Distrib., LLC v. Cincinnati Insurance Company*, No. 213-2019-CV-00277, at *7 (June 15, 2021) (Ruoff, J.) (staying case under the doctrine of primary jurisdiction).

In sum, the Court finds that under the doctrine of primary jurisdiction it should stay the case. Both the Court and the SEC have jurisdiction over the dispute and the SEC’s decision will likely materially aid judicial resolution of the case.


Conclusion

For the reasons noted above, the Court STAYS this matter pending SEC review.¹

See *id.* (staying matter pending agency review).

SO ORDERED.

October 25, 2021
Date



Judge David A. Anderson

Clerk's Notice of Decision
Document Sent to Parties
on 10/25/2021

¹ The Court notes that per RSA 162-H:11 and RSA 541:6, parties must appeal SEC decisions to the Supreme Court. As such, the case is stayed pending Supreme Court review should either party appeal the SEC's decision.