

**STATE OF NEW HAMPSHIRE**  
**SITE EVALUATION COMMITTEE**

**Docket No. 2022-01**

**Petition for Declaratory Ruling Regarding Avangrid Renewables, LLC  
and Lempster Wind, LLC**

**Town of Lempster’s Supplemental Brief**

**Introduction**

The Town of Lempster (“Town”) sought an order from the Superior Court requiring the Intervenor to remove locked gates that exclude the public from Bean Mountain Road, a public, Class VI Town highway. Intervenor argued the Site Evaluation Committee (SEC) expressly required the public barred from Bean Mountain Road, claiming the SEC Order and Town Agreement expressly requires the erection of the subject gates. The Court refrained from ruling to permit the SEC to address whether it mandated the closure of a public highway, contrary to law. *See* RSA 231:21-a, I (gates must be “capable of being opened and reclosed by highway users...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.”); see also, *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.).

The Onnelas do not genuinely believe Bean Mountain Road is an SEC mandated access road to the Wind Farm as the sign posted at gate 2 states there is “NO ACCESS TO WIND FARM”:

“PRIVATE DRIVEWAY. NO ACCESS TO WIND FARM. VIOLATORS WILL BE PROSECUTED.”



The sole issue presented in this matter is whether the 2007 SEC Certificate requires the installation of locked gates at their current locations on Bean Mountain Road. *See SEC Order* dated April 28, 2022 at 7. It does not.

### Analysis

#### I. THE TOWN AGREEMENT REGULATES THE RELATIONSHIP BETWEEN THE PARTIES AND DISTINGUISHES THE RIGHTS OF THE PARTIES RELATIVE TO “TOWN ROADS” AND “ACCESS ROADS.”

The Court found the SEC adopted the terms of two agreements to implement the requirement that Lempster Wind “[g]ate and lock entrances to the project site”. 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

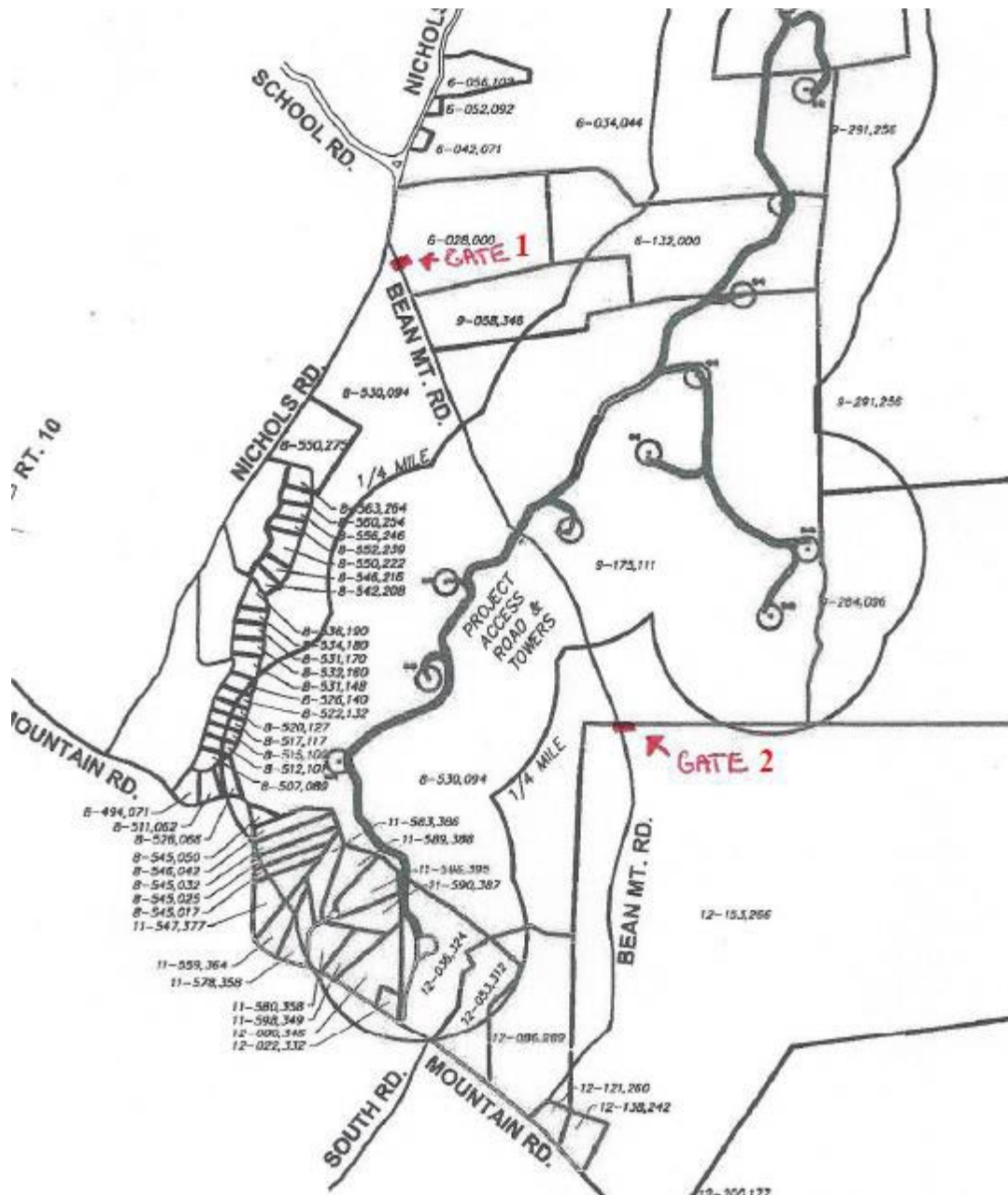
gated access points.” See *Joint Statement of Material Facts* ¶4. Section 4.1.3 of the Town Agreement uses identical language. Additionally, the Town Agreement defined “project site” as:

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.

*Joint Statement of Material Facts* ¶5.

- **By the Terms of the Agreement, the “Access Road” “To the Project Site” is gated, and Bean Mountain Road is not an Access Road.**

“Access Road” is not a defined term in the Agreement. However, “Project Access Road” is identified as such on a plan created by the Intervenors, running north and south from Bean Mountain Road:



Joint Statement of Material Facts at page 3.

Similarly, Intervenor's survey plan indicates the "access road" is subject to a "Wind Farm Project Easement," whereas Bean Mountain Road is noted as "Not Town Maintained."<sup>1</sup> *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. The definition of "Project Site" includes access roads.

As pointed out by the Court, the term "Project Site" is specifically defined by the parties in the Town Agreement to include "access roads":

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*. Intervenor Onnela contend the wind farm operator leases the Intervenor's portion of Bean Mountain Road from the Intervenor. The Onnelas do not and cannot own a public highway, and therefore, cannot convey a lease of Bean Mountain Road to anyone. Nor is the Town a "Participating Landowner," as that term is defined in §1.8.

- **Access Roads Were to be Constructed.**

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 access roads were to be

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<sup>1</sup> Class VI roads are town roads open to the public, but they are roads that the Town has no duty to maintain. *See Gill v. Gerrato*, 154 N.H. 36, 42 (2006) ("If the lane is a class VI highway, pursuant to RSA 229:5, the town would have no duty to maintain it.").

constructed. Bean Mountain Road is not an “access road” to be constructed. It already existed since 1819.

- **Sections 8 and 9 of the Agreement Clearly Distinguish “Public Roads” from “Access Roads.”**

Section 8.1 is entitled “**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 is entitled and 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.” Weight limits are imposed with respect to “a Town road.” §9.7.1. Hours of operation are limited on “Town roads,” §9.7.2. 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,” and incorporated that understanding in the Agreement by using very clear language.

- **The SEC Order distinguished between Access Roads and Bean Mountain Road**

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.

Note the access road is an integral part of the Project Site, whereas reference to Bean Mountain Road is for locational purposes only. This is the only reference to Bean Mountain Road in the entire Agreement and hardly represents a SEC mandate to gate the road.

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. 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.

- **The Motive for Erecting Gate 2 Was Intervenors’ Onnela Desire to Exclude Public Access to Bean Mountain Road, Not Public Safety**

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.



As the sign (see, *Exhibits 5 and 8, paragraph 13*) erected on Bean Mountain Road makes clear, Intervenor Onnela seek to exclude the public from their property by barring a Town Highway for their own purposes:



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. The motive for erecting gate 2 was Intervenor’s Onnelas desire to bar public access to Bean Mountain Road; not to prevent access to the Wind Park. And gate 1 was locked at the behest of Intervenor Onnela to exclude the public from the road.

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*. 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.* The Onellas understood the Town has a right to use Bean Mountain Road when they were seeking a building permit.

**II. 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.**

According to the Intervenors Onnela, the status of Bean Mountain Road is dispositive in this case.

*“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 Intervenors Onella Statement of Affirmative Defenses.*

The Intervenors “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.

- **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 1819 layout (*see*, RSA 229:1 and RSA 231:8) of the road is contained in the Town records. *Exhibits 3 and 4; Exhibit 7, Second Affidavit of Mary Grenier at ¶4* and the Department of State, Division of Archives & Records Management. *Exhibit 2*. Former Selectman and Fire Chief Phillip Tirrell confirmed the layout. *Exhibit 6 at ¶5*.

Intervenors' claim that the Board of Selectmen authorized them to terminate public access to Bean Mountain Road must fail as the Board's power under RSA 41:8 "does not include the power to discontinue a public highway." *Marrone v Town of Hampton*, 123 N.H. 729, 734(1983). 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.*

### **Conclusion**

The Intervenors may limit access to the Project Site in a manner consistent with the language of the Town Agreement, by installing locked gates on the "access roads," running north and south from Bean Mountain Road. However, the Intervenor's cannot use the SEC Order and Agreements to limit the public's access to Bean Mountain Road, a town road.

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

Dated: July 29, 2022

By: /s/ Michael P. Courtney  
Michael P. Courtney (NH Bar #21150)  
10 Centre St., P. O. Box 1090  
Concord, NH 03302-1090  
(603) 224-7791  
[mcourtney@uptonhatfield.com](mailto:mcourtney@uptonhatfield.com)

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Supplemental Brief was this day forwarded to Susan Geiger, Esquire ([sgeiger@orr-reno.com](mailto:sgeiger@orr-reno.com)), Robert S. Carey, Esquire ([rcarey@orr-reno.com](mailto:rcarey@orr-reno.com)), Meredith R. Farrell, Esquire ([mfarrell@orr-reno.com](mailto:mfarrell@orr-reno.com)), and Thomas Quarles, Jr., Esquire ([tquarles@devinemillimet.com](mailto:tquarles@devinemillimet.com)), counsel of record, via electronic mail.

/s/ Michael P. Courtney  
Michael P. Courtney