

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

Joint Application of Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility for the Construction of a New High Voltage Transmission Line in New Hampshire

Docket No. 2015-06

**MUNICIPAL GROUPS 1 SOUTH, 2, 3 NORTH AND 3 SOUTH'S
OBJECTION TO APPLICANTS' MOTION TO AUTHORIZE
PHASE 1-B ARCHEOLOGICAL SURVEY**

Municipal Intervenor Groups 1 South, 2, 3 South and 3 North (collectively “the Referenced Municipal Groups”)¹ hereby submit the following objection to the Applicants’ Motion to Authorize Phase 1-B Archeological Survey, stating as follows:

1. On January 19, 2018, the Applicants filed a Motion to Authorize Phase 1-B Archeological Survey seeking to obtain an order from the Subcommittee to authorize survey work on municipal roadways in Clarksville and Stewartstown. As set forth in more detail herein, that Motion should be denied. The Applicants should also not be allowed to supplement the record with the minutes from the Selectboard meetings for those towns, which were attached to the Motion as Attachment 3.

2. As an initial matter, the Applicants’ request for authority from the Subcommittee to perform work within municipal roadways should be denied because only municipalities have authority to grant such permission. *See* RSA 236:9 (permission required from municipalities); RSA 236:10 (allowing municipalities to enforce rules and regulations governing excavation). The only exception to this statute is set forth in RSA 236:12, which applies to railroads.

¹ As of the time of filing this objection, the spokesperson for Municipal Group 3 (South) is still in the process of determining whether the Town of Canterbury seeks to participate in this objection. All other municipalities in the groups participate.

3. There is also no basis for the Applicants' argument that RSA chapter 162-H overrides the requirement under RSA 236:9 for municipalities to provide permission to excavate municipal roadways. The rules of statutory construction are well established. "Where reasonably possible, statutes should be construed as consistent with each other." *EnergyNorth Natural Gas v. City of Concord*, 164 N.H. 14, 16 (2012) (quotation omitted). "It is a well-recognized rule of statutory construction that where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the latter will be regarded as an exception to the general enactment where the two conflict." *Appeal of Johnson*, 161 N.H. 419, 424 (2011) (quotation omitted); see *EnergyNorth Natural Gas*, 164 N.H. at 16 ("When interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute. To the extent two statutes conflict, the *more specific* statute controls over the general statute.") (quotation and citation omitted).

4. Here, the heart of this statutory construction issue is the relationship between RSA chapter 162-H and RSA 236:9. With respect to the purported conflict between RSA chapter 162-H and RSA 236:9, there is no specific language in RSA chapter 162-H to support a determination that it was intended to supplant municipal oversight over the excavation of municipal roadways. RSA chapter 162-H authorizes the Site Evaluation Committee to issue a certificate relative to the siting of an energy facility, and to monitor the construction and operation of an energy facility to ensure compliance with the certificate. RSA 164-H:4, I (powers and duties); RSA 162-H:16 (findings and certificate issuance). However, there is no language in RSA chapter 162-H that evidences an intent to override a municipality's authority to regulate its municipal roadways. To the contrary, the Site Evaluation Committee's rules

specifically require an applicant to provide evidence that it has the current right to construct the facility on, over, or under the site, which includes “*a license, permit, easement or other permission* from a federal, state, or *local government agency*. . . .” N.H. Admin. Rules, Site 301.03(c)(6). The plain language of this administrative rule shows that an applicant must receive permission in accordance with RSA 236:9 to excavate a municipal roadway.

5. Moreover, no state agency or state department has regulatory control over the excavation of municipal roadways. The applicable statutes demonstrate that New Hampshire municipalities have sole regulatory authority to make rules and regulations pertaining to municipal roadway excavation. *See* RSA 236:9; RSA 236:10 (authorizing municipalities to make rules and regulations to govern the excavation of roadways). Further, the authority conferred upon municipalities under RSA 41:11 and 47:17 authorizes the regulation of municipal roadways. *See* RSA 41:11 (stating that unless regulated by the Department of Transportation, the selectmen of a town are authorized to “regulate the use of all public highways, sidewalks, and commons in their respective towns”); RSA 47:17 (stating that cities have authority to “regulate all streets and public ways . . . the digging up the ground by traffic thereon or in any other manner, or any other act by which the public travel may be incommoded or the city subjected to expense thereby. . . .”) (emphasis added).

6. The record also makes it abundantly clear that only municipalities have the power to authorize excavation and construction within their roadways. As the Department of Transportation acknowledged in its correspondence dated December 22, 2017, the Department of Transportation declined to oversee any construction on municipal roadways because it has no long-term maintenance responsibilities or authority for locally-maintained sections, and it did not want to set the precedent that would “usurp local authority with regards to usage for their

roadways.” The Department of Transportation also explained that the monitoring of municipally-maintained roadways requires knowledge of municipal ordinances and municipal operations, which it does not have.

7. The importance of maintaining control over municipal roads was also discussed by Edward Roberge, the City of Concord’s Engineer. Mr. Roberge explained he was not comfortable with having a state agency, such as the Department of Transportation, oversee construction on municipal roadways. Tr. 11/17/2017 (Day 61AM) at 62-63. As Mr. Roberge further stated:

[The Department of Transportation doesn’t] have detailed information about our City streets. It would be like asking me to issue a permit on Mountain Road where I don’t know how Mountain Road was constructed. I can understand how Mountain Road might have been constructed back in the day. I don’t have physical records of Mountain Road. But we know everything about our City streets, and that’s why I’ve always taken the position that permitting authority within the City is pretty unique. We understand the characteristics of the street. We know its use. We know its traffic volumes. We know what neighborhood concerns are. We know that it was built -- if it’s Bog Road, we know that it’s built on a wooden corduroy. . . . [Y]ou don’t have the detail of how those individual City streets exist and how they’re used today.

So the point that I make here in stressing the importance of City involvement and issuing permits is for that. Is to protect the City’s investment in its infrastructure with the knowledge that we know. . . .

Tr. 11/17/2017 (Day 61AM) at 62-63. Similar to the issues addressed by Mr. Roberge, the Towns of Clarksville and Stewartstown have the most knowledge about their local roads. This issue is particularly pertinent to any proposed excavation on historical dirt roads that may currently have several feet of ground frozen underneath.

8. There is also no basis for an argument that the regulation of local municipal roadways is preempted. “The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, State law.” *Casico v. City of*

Manchester, 142 N.H. 312, 315 (1997). “Thus, preemption will occur when local legislation either expressly contradicts a statute or otherwise runs counter to the legislative intent underlying a statutory scheme.” *Town of Hooksett v. Baines*, 148 N.H. 625, 627 (2002).

9. The interplay between RSA chapter 162-H and RSA 236:9 involves two state statutes, and therefore, the request to excavate does not involve a situation in which a local ordinance potentially conflicts with a state statute. Moreover, as also previously discussed, the need to obtain municipal permission to excavate does not run counter to RSA chapter 162-H and/or the Site Evaluation Committee’s administrative rules. It is the applicant’s obligation to show that it has legal right to construct and operate a facility, which includes licenses, permits and other permissions from *local* government agencies. N.H. Admin. Rules, Site 301.03(c)(6).

10. In the end, only a municipality has authority to grant permission to excavate in a municipal roadway. The Subcommittee does not have jurisdiction to grant permission to conduct the excavation that the Applicants are seeking. In the event that the Applicants believe that they are being illegally denied the opportunity to conduct the excavation, the appropriate recourse is to address the issue by filing a legal action in superior court. This proceeding is not the place or the time to review the decision by the Towns of Clarksville and Stewartstown to deny permission to conduct the Phase I-B archeological study.

11. Finally, the Applicants should not be allowed to supplement the record by introducing the minutes from the Selectboard meetings for those towns, which were attached to the Motion as Attachment 3. Those minutes have been available for several months, and the Applicants have long been aware that the Towns of Clarksville and Stewartstown were unwilling to grant permission to conduct the archeological survey. It is unfair to the parties to have minutes untimely submitted into the record that were available many months ago.

WHEREFORE, it is respectfully requested that the Site Evaluation Committee:

- A. Deny the Applicants' Motion to Authorize Phase 1-B Archeological Survey;
- B. Strike Attachment 3 from the Applicants' Motion to Authorize Phase 1-B Archeological Survey; and
- C. Grant such other and further relief as may be just.

Respectfully submitted,

By and through its attorneys,

CITY OF CONCORD

Dated: January 29, 2018

By: /s/ Danielle L. Pacik
Danielle L. Pacik, Esq., Bar #14924
Deputy City Solicitor
41 Green Street
Concord, New Hampshire 03301
Telephone: (603) 225-8505
dpacik@concordnh.gov

TOWNS OF NEW HAMPTON, LITTLETON,
DEERFIELD, PEMBROKE, and ASHLAND
WATER & SEWER DEPARTMENT

MITCHELL MUNICIPAL GROUP, P.A.

Dated: January 29, 2018

By: /s/ Steven Whitley
Steven M. Whitley, Esq., Bar #17833
25 Beacon Street East
Laconia, New Hampshire 03246
Telephone: (603) 524-3885
steven@mitchellmunigroup.com

TOWNS OF BRISTOL, EASTON, FRANCONIA,
NORTHUMBERLAND, PLYMOUTH, SUGAR
HILL and WHITEFIELD

By and through their attorneys,

GARDNER, FULTON & WAUGH, PLLC

Dated: January 29, 2018

By: /s/ C. Christine Fillmore
C. Christine Fillmore, Esq., Bar #13851
Gardner, Fulton & Waugh, PLLC
78 Bank Street
Lebanon, NH 03766-1727
Tel. (603) 448-2221
Fax (603) 448-5949
cfillmore@townandcitylaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the foregoing was sent by electronic mail to persons named on the Service List of this docket.

Dated: January 29, 2018

By: /s/ Danielle Pacik
Danielle L. Pacik, Esq., Bar #14924