THE STATE OF NEW HAMPSHIRE
SUPREME COURT

DOCKET NO. 2016-0322

SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

PETITIONER – APPELLANT

V.

NORTHERN PASS TRANSMISSION, LLC

RESPONDENT – APPELLEE

APPEAL FROM MAY 26, 2016 ORDER OF SUPERIOR COURT –
(COOS COUNTY)

BRIEF OF APPELLANT
SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution

Cases

Cases (continued)

Statutes and Court Rules

Treatise and Other Authorities

QUESTIONS PRESENTED

1. Whether the Superior Court erred by ruling that it would be speculative to decide whether Northern Pass Transmission LLC's use of the Route 3 right-of-way over the Appellant's land will exceed the scope of the public highway easement. [No reference to the record is included, as neither party argued below that a decision would be speculative.]

2. Whether the Superior Court erred by issuing summary judgment without addressing the pertinent facts presented by the Society for the Protection of New Hampshire Forests, or indicating which facts presented by Northern Pass Transmission LLC met its burden of showing that no genuine issue of material fact existed with respect to the scope of the Route 3 highway easement, rather than allowing the parties to engage in the discovery needed to adduce the necessary evidence. Petitioner's Mem. of Law, pp. 3-5, 11.

3. Whether the Superior Court erred by ruling as a matter of law that all power transmission lines are by definition a "proper use" of highways, without determining whether the specific proposed use exceeds the scope of the Route 3 highway easement, without considering the surrounding regulatory circumstances when the easement was created—and their bearing on the parties' expectations—and without explaining why changes in regulatory circumstances justify the uncompensated use of private land by companies that have not demonstrated a public need to use that land. Petitioner's Mem. of Law, pp. 7-11.

4. Whether the Superior Court erred by failing to address RSA 231:167, which provides that it is possible for utility structures in the highway easement to exceed the scope of the easement, creating a *de facto* taking of property rights and a corresponding right of eminent domain compensation for landowners, and whether permitting such a taking violates RSA 371:1, which prohibits the exercise of eminent domain powers for a utility project of this nature, and Pt.

1, Art. 12-a of the New Hampshire Constitution, which prohibits any direct or indirect taking of property rights from one person for the private benefit of another. Petitioner's Mem. of Law, pp. 11-13.

5. Whether the Superior Court erred by deferring to the Department of Transportation, which lacks jurisdiction to adjudicate private property rights, and thereby leaving affected landowners without a forum or a remedy. Petitioner's Mem. of Law, pp. 11-14.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

RSA 231:160 Authority to Erect. Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

RSA 231:161, I(c) State Maintained Highways. Petitions for such permits or licenses concerning all class I and class III highways and state maintained portions of class II highways shall be addressed to the commissioner of transportation who shall have exclusive jurisdiction of the disposition of such petitions to the same effect as is provided for selectmen in other cases, and shall also have like jurisdiction for changing the terms of any such license or for assessing damages as provided herein. [...]

RSA 231:167 Damages. If any person shall be damaged in his estate by the erection of any such poles or other structures, or by the installation of any such underground conduits or cables or by installing or placing any wire, cable, guy, cross-arm, fixtures, transformers, manhole, drain, or other apparatus in or under the highway by authority of any such license, he may apply to the selectmen to assess his damages. Such proceedings shall thereupon be had as are provided in the case of assessment of damages in laying out highways by the selectmen, and such damages, if any, may be awarded as shall be legally and justly due.

RSA 371:1 Petition. Whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility should construct a line, branch line, extension, pipeline, conduit, line of poles, towers, or wires across the land of another, or should acquire land, land for an electric substation, or flowage, drainage, or other rights for the necessary construction, extension, or improvement of any water power or other works owned or operated by such public utility, and it cannot agree with the owners of such land or rights as to the necessity or the price to be paid therefor, such public utility may petition the public utilities commission for such rights and easements or for permission to take such lands or rights as may be needed for said purposes. No public utility may petition for permission to take private land or property rights for the construction or operation of an electric generating plant or an electric transmission project not eligible for regional cost allocation, for either local or regional transmission tariffs, by ISO New England or its successor regional system operator.

N.H. Constitution, Pt. 1, Art. 12-a Power to Take Property Limited. No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.

STATEMENT OF THE CASE

On November 19, 2015 the Society for the Protection of New Hampshire Forests (the "Forest Society") filed a Petition for Declaratory Judgment and Injunctive Relief against Northern Pass Transmission LLC ("NPT") in Coos County Superior Court, asking the court to rule on NPT's purported right to excavate and permanently occupy a parcel of land owned by the Forest Society along Route 3, as part of its $1.6 billion scheme to build a 192-mile high-voltage power transmission line from the Canadian border to Deerfield, New Hampshire.

On January 4, 2016 NPT moved for summary judgment, before a structuring conference had been held—no such conference ever took place—and before the Forest Society could engage in any discovery beyond propounding requests for admissions. On February 25, 2016 the Forest Society moved to join the New Hampshire Department of Transportation (the "DOT"), and to amend its Petition accordingly.

Apart from agreeing that the Forest Society owns the land in question, and that NPT plans to use that land without permission or compensation, NPT denied or effectively denied virtually every substantive factual allegation in the Petition and in the Forest Society's requests for admissions. *See* Answer; *see* App. 35-48. Nevertheless, NPT contended that there were no genuine disputes of material fact requiring trial, and that the matter should be decided on summary judgment. The Superior Court (MacLeod, J.) conducted a hearing on the outstanding motions on March 31, 2016, and on May 26 issued an order granting NPT's motion for summary judgment. Add. 22.

The Superior Court held that: (a) finding whether NPT's "actual" use will exceed the scope of the public highway easement would be "speculative"; (b) nevertheless, NPT's proposed use is within the scope of the highway easement as a matter of law; and (c) RSA 231:160 grants

the DOT exclusive authority to approve utility use of state highways, regardless of any effect on private property rights. Add. 28-31. The Superior Court declined to address RSA 231:167, which establishes that utility structures in the highway easement can in some cases exceed the scope of that easement and work a taking of private property. The Superior Court did not reach the Forest Society's motion to amend the Petition and add the DOT as a respondent.

STATEMENT OF FACTS

The Northern Pass Project

On October 19, 2015 NPT submitted an application to the New Hampshire Site Evaluation Committee ("SEC"), the administrative body charged with reviewing and approving the planning and construction of energy facilities. The proposed Northern Pass Project would consist of a direct current ("DC") power transmission line running from the Canadian border through New Hampshire to a converter station to be built in Franklin. Alternating current ("AC") power from that station would be transported to an existing substation in Deerfield. From there, the electricity would be made available to wholesale buyers in southern New England. Due to the nature of DC power, NPT's use of the Route 3 highway right-of-way will be dedicated and exclusive; no power can be added to or taken from the line, and no competitor of NPT can use the same space. App. 4-5, ¶¶ 7-8.

The Forest Society owns the fee interest in land in Clarksville (the "Washburn Family Forest") located on both sides of Route 3 just south of the Connecticut River at the Pittsburg/Clarksville town line. Add. 24; App. 37-38. The selectmen of Clarksville, Stewartstown and Pittsburg laid out the road in 1931, stating simply that "for the accommodation of the public there is occasion for a new highway." Add. 24; App. 18. They paid landowner Lyman Lombard, the Forest Society's predecessor-in-interest, one thousand dollars to establish the highway right-of-way through what is now the Washburn Family Forest. App. 22. The State took over maintenance of that segment of the highway sometime between 1937 and 1945, and currently maintains it as a Class I state highway. Add. 24-25.

In October 2015 NPT submitted an application to the DOT seeking an excavation permit and a license to extend its transmission line through the Washburn Family Forest. Add. 23-24.

The line would be encased in a housing of as-yet undetermined dimensions, buried approximately fifty to seventy feet beneath the surface of Route 3, and underneath the bed of the Connecticut River. Add. 24; App. 12-16. On November 13, 2015, without discussing the matter with landowners, the DOT stated in a letter to the SEC that it anticipated entering into a Use and Occupancy Agreement with NPT allowing the requested use. App. 33.

Changes in the Regulatory Environment, Relevant to Scope of the Easement

The following facts, set forth in an affidavit prepared by the Forest Society's expert Dr. Richard Tabors, are relevant to the scope of the public highway easement.

Historically, electric transmission projects were undertaken by public utility companies, which had to convince state and/or federal authorities of a public need for their projects. Recent changes in the regulatory environment have opened the door to "elective" merchant transmission projects driven solely by a perceived opportunity for profit. Developers such as NPT are not required to demonstrate that the additional power will address energy shortages or improve system reliability, and are not required to justify their rates. App. 3-5, ¶¶ 4-6, 8.

In the old environment of full regulation, New Hampshire legislators and courts approved public utility companies' use of public highways for projects shown to meet specific public needs. The societal importance of extending electric and telephone service throughout the state was deemed to outweigh the rights of private property owners—even though people like Lyman Lombard could not have imagined all the non-highway uses to which their property would be subjected when they accepted small sums in exchange for the creation of highway rights-of-way over their land. App. 3-4, ¶¶ 3-6; App. 22. Elective utility projects such as the Northern Pass Project offer an opportunity for profit, but unlike traditional power lines—and unlike the roads themselves—they are not designed to meet a demonstrated public need.

SUMMARY OF THE ARGUMENT

The Forest Society does not seek a broad ruling on the merits of the Northern Pass Project. The issues on appeal are: (a) whether there are limits on a largely unregulated company's entitlement to excavate and permanently occupy privately-owned land along and underneath public roads for its own non-highway, non-public purposes; and (b) whether affected landowners may obtain a judicial determination of whether such a use violates their property rights by exceeding the scope of the public highway easement. The Superior Court answered "no" to both questions, granting summary judgment before the Forest Society had an opportunity to conduct meaningful discovery and otherwise develop its case.

The Superior Court approached this matter as if it were a mere licensing issue. In essence, it held that the DOT has exclusive authority to rule on the scope of a state highway easement, even when doing so is effectively an adjudication of private property rights. The Superior Court did not address—or even mention—factual support and key statutory language presented by the Forest Society. It failed to hold NPT to its burden on summary judgment, to accept responsibility for deciding difficult issues of property rights, and to provide individual landowners a fair opportunity to be heard when a company like NPT demands to use their land for profit.

ARGUMENT

Before allowing rights-of-way obtained for a public purpose to be expropriated for a private one, the Superior Court should have addressed disputed material facts that precluded summary judgment.

In reviewing a grant of summary judgment, this Court considers the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. If its review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the Court will affirm the grant of summary judgment. It reviews the trial court's application of the law to the facts *de novo*. *Bennett v. ITT Hartford Group*, 150 N.H. 753, 756 (2004). An issue of fact is material for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law. *Dent v. Exeter Hospital*, 155 N.H. 787, 792 (2007).

I. The Superior Court Erred in Ruling NPT's Use of the Public Highway Easement Too Speculative for Declaratory or Injunctive Relief.

In support of its motion for summary judgment, NPT provided a copy of its DOT license application and a link to its entire submission to the SEC—thousands of pages of summaries, analysis, charts, maps, and engineering designs. NPT Mem. of Law, p. 3. This evidence, and NPT's own representations, made perfectly clear NPT's intention to excavate land in the Washburn Family Forest and install a permanent transmission line. Nevertheless, the Superior Court ruled that because the DOT had not yet acted on the license application, and because construction had not begun, it was "purely speculative" whether the proposed use would exceed the scope of the highway easement, and whether there would be a taking of private property. Add. 27-28.

"Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties [...]." RSA 491:22. Declaratory judgment is a broad remedy that makes a controversy justiciable at an earlier stage than an action at law, and should be liberally construed to prevent not only threatened wrongs, but also uncertainty and misunderstandings in the assertion of rights. *Beaudoin v. State*, 113 N.H. 559, 562 (1973). NPT is already making test borings in the Washburn Family Forest. There can be no doubt that the parties presented current, adverse claims of legal right to the Superior Court. Even NPT agreed that the case was ripe for declaratory judgment. Answer, ¶¶ 5, 18.

NPT's explicit and detailed plan to excavate and permanently occupy the Forest Society's land—one topic on which there was no dispute of fact—also made injunctive relief appropriate. The Forest Society cannot reasonably be expected to wait until the SEC, the Public Utilities Commission, the DOT, the Department of Environmental Services and other agencies have made their determinations before asserting its property rights with the courts, which have the exclusive jurisdiction to rule on them. *See Gordon v. Town of Rye*, 162 N.H. 144, 152 (2011).

II. The Superior Court Erred by Ruling on the Scope of the Highway Easement as a Matter of Law, Without Considering the Facts Presented.

After noting that the matter was not ripe for adjudication, the Superior Court nevertheless ruled as a matter of law that no utility facility can ever exceed the scope of a highway easement. Add. 28-29. That legal ruling is facially inconsistent with RSA 231:167, which allows eminent domain damages for overburdening of a highway easement by the installation of underground cables, and is also inconsistent with decisions of this Court. *See* Sections IV, V below. Whether a proposed use of an easement is reasonable is a question of fact. *Boston & Maine Corp. v. Sprague Energy Corp.*, 151 N.H. 513, 519 (2004). Determining the scope of the Route 3 public

highway easement required more evidence and analysis than could be adduced on summary judgment.

As discussed in Section V below, the regulatory environment affecting utility projects is a critical part of the "surrounding circumstances" at the time the easement was created and at the time of its proposed use. Those surrounding circumstances reflect the parties' expectations, and are an essential element of establishing the scope of the easement. *See Arcidi v. Town of Rye*, 150 N.H. 694, 701-02 (2004). Whether the proposed transmission line will create an additional burden on the land can only be determined when both sides have had a full opportunity to develop and present pertinent evidence. The Forest Society expects to show that the disruption caused by the excavation and installation, the need for ongoing monitoring and maintenance, and the permanent existence of underground high-voltage lines will adversely affect the value of its property.

Genuine issues of material fact therefore exist as to the scope of the highway easement, and whether NPT's proposed use of the Washburn Family Forest will exceed that scope. The determination is not about the use of new technology. Fundamentally, it is a question of whether this private transmission project is the kind of public travel benefit that the parties intended in 1931. The Forest Society believes that when the facts are understood, it will be clear that there is no justification for extending the requested private benefit to NPT at the expense of landowners.

III. The Washburn Family Forest is Subject to a Public Highway Easement for Viatic Use Only.

As a rule, a landowner holds a fee interest extending to the center line of a road that borders his or her property, subject to a public easement allowing members of the public to travel on the road. *Duschesnaye v. Silva*, 118 N.H. 728, 732 (1978); *see also* 16 Loughlin, New Hampshire Practice: Municipal Taxation and Road Law, § 45.05; Local Government Center, S.

Slack, Ed., "A Hard Road to Travel," 21 (2004 ed.); *Concord Manufacturing Co. v. Robertson*, 66 N.H. 1, 15-17 (1889). Where the Forest Society owns the fee on both sides of Route 3 in the Washburn Family Forest, it therefore owns all the land under the road.

Towns and the State of New Hampshire acquired some of their highway easements through the exercise of eminent domain powers, others through negotiation with landowners under an implicit or explicit threat of eminent domain. A highway easement is a right-of-way for "viatic" use only—in essence, for passage over the land. "The land being taken for a highway, and for no other public use, the easement acquired by the public is limited to the right to travel over the same." *Winchester v. Capron*, 63 N.H. 605 (1886) (citation omitted.) Any other use exceeds the scope of the easement. "[N]o new servitude, not in the nature of public travel, can be imposed upon the land, against the consent of the land-owner, without a further condemnation of his land under the right of eminent domain, and the award of adequate compensation therefor." *Id.*; *see also Hartford v. Gilmanton*, 101 N.H. 424, 426 (1958); 39 Am.Jur.2d Highways, Streets, and Bridges § 183 (1998) ("The general rule is that the law will not by construction effect a grant of a greater interest than is essential for the public use").

> [T]he public has only an easement, a right of passage; the soil and freehold remain in the individual, whose lands have been taken for that purpose [...]. Everything growing or standing upon the land, the trees, timber, etc., belongs to the owner; and everything that goes to form the land itself also belongs to him, except what is necessary to be actually used in the making or repairing of the highway. [...] The owner of the land, therefore, retains his title in trees, grass, growing crops, buildings, and fences [...], as well as in any mines or quarries beneath, which are not part of the surface of the earth upon which the highway is made.

Bigelow v. Whitcomb, 72 N.H. 473, 476 (1904) (citations omitted); *see also Lyford v. City of Laconia*, 75 N.H. 220, 227 (1909); *Duxbury-Fox v. Shakhnovich*, 159 N.H. 275, 284 (2009).

The Superior Court misunderstood this principle. It ruled, contrary to the precedent cited above, that "under New Hampshire law a public highway easement is not limited solely to 'viatic' use." Add. 29. The parties, however, seemed to agree that the question was not whether a highway easement is limited by law to viatic use—which it plainly is—but whether NPT's proposed use can be considered viatic. *See* discussion in Section V below. The Forest Society has never suggested that the roads may only be used for vehicular traffic.

IV. Ambiguous Easements Are Interpreted According to a Rule of Reason.

"For the accommodation of the public there is occasion for a new highway." App. 18. Where, as here, the scope of an easement is unclear, it is interpreted according to a "rule of reason." The affected parties are deemed to have contemplated the easement holder's right to do whatever is reasonably convenient or necessary to fully enjoy the purposes for which it was granted. *See* Bruce & Ely, The Law of Easements and Licenses in Land, § 8:3 (2011); *Sakansky v. Wein*, 86 N.H. 337 (1933); *Thurston Enterprises v. Baldi*, 128 N.H. 760 (1986).

What is reasonable is primarily a question of fact. It hinges on a determination of the specific facts of each case, taking into account surrounding circumstances at the time the easement was created and at the time of its use, such as the location and use of the parties' properties, and the advantages and disadvantages to each party. *Arcidi v. Town of Rye*, 150 N.H. 694, 702 (2004); *see also* Szypszak, 17 New Hampshire Practice, Real Estate, § 8.03.

The holder of an easement may not "materially increase the burden" of the easement on the property, or impose a new or additional burden that results in "the creation and substitution of a different servitude from that which previously existed." *Crocker v. Canaan College*, 110 N.H. 384, 387 (1970), citing 25 Am.Jur.2d Easements and Licenses, § 87. *See also Arcidi*, 150 N.H. at 703 (where easement was intended for "ingress and egress," installation of water line

exceeded scope of easement); *Boston & Maine Corp. v. Sprague Energy Corp.*, 151 N.H. 513, 519-20 (2004) (installation of underground pipes carrying commercial gasoline would unreasonably burden easement for "grade crossing" over railroad line).

V. NPT's Proposed Use Exceeds the Scope of the Public Highway Easement.

NPT's proposed use of Route 3 is unquestionably beyond what was contemplated by landowners in 1931 when they negotiated a price for granting highway easements over their property. That fact does not end the inquiry, however. If the proposed use is a "normal development from conditions existing at the time of the grant," it is not considered unreasonably burdensome. *See Downing House Realty v. Hampe*, 127 N.H. 92, 96 (1985); *Heartz v. City of Concord*, 148 N.H. 325, 332 (2002). Many courts have found that advances in the science of transportation—for example, from horse-drawn conveyances to motorized vehicles—fall within the category of "normal development." That principle is not in dispute here.

Some courts have also indulged a useful fiction that the transportation of electricity is a form of "public travel." In the substantive part of its order, the Superior Court cites only two cases. The first is *Opinion of the Justices*, 101 N.H. 527, 530 (1957), in which this Court opined that the public easement includes all reasonable modes of travel and transportation that are not incompatible with the use of the highway by others, and "is not restricted to the transportation of persons or property in moveable vehicles, but extends to every new method of conveyance which is within the general purpose for which highways are designed."

An opinion of the justices does not constitute binding precedent, *State v. Ploof*, 162 N.H. 609, 625 (2011), and the view expressed in this one is by no means universal. *See Minot v. United States*, 546 F.2d 378, 381 (Ct.Cl. 1976) (power agency that installed higher and wider transmission towers in place of existing line could be held to account for inverse condemnation

for overburdening property); *Grimes v. Va. Elec. & Power Co.*, 96 S.E.2d 713, 714 (N.C. 1957) (placement of additional lines and cross-arms on existing power poles imposed additional burden on easement, entitling landowner to compensation).

Moreover, the present dispute does not arise from the introduction of new technology or a "new method of conveyance." It arises from changes in the regulatory environment. When this *Opinion of the Justices* was written in 1957, electric power was provided by monopoly public utility companies whose operations, expenditures and rates were regulated by the Public Utilities Commission, and in some instances by federal agencies. App. 3-5, ¶¶ 3, 6, 8. NPT's proposed use is more akin to a *private* utility use, as if Anheuser-Busch sought to excavate and lay pipes under a southern portion of Route 3, to bring water from the Merrimack River to its plant for its exclusive use in making beer. For the treatment of private underground installations in an easement, *see Arcidi v. Town of Rye*, 150 N.H. 694 (2004), *Boston & Maine Corp. v. Sprague Energy Corp.*, 151 N.H. 513 (2004).[1]

The other case cited by the Superior Court is *King v. Town of Lyme*, 126 N.H. 279 (1985). A landowner sought a license for electric lines to be extended to his home across an abutter's property, either over a discontinued roadway or over a private easement negotiated with the abutter, even though the private easement stated that it was solely intended for "access" to his land. The Court held that the petitioner was entitled to receive electric service over the private easement. It added in *dicta* that the use of a highway for utilities does not constitute an additional servitude, and that utilities are a proper highway use. *Id.* at 284-85.

King represents a commonsense judicial presumption that a landowner should be allowed to receive retail electric service for his home. It has no real application to issues of DC

[1] The Superior Court did not address the fact that DOT's Utility Accommodation Manual, § VIII(D)(2), which governs the State's licensure of public rights-of-way for utility installations, provides that: "Private utilities are not permitted within the [right-of-way]." App. 26.

transmission, or to an installation that would operate as a sort of private extension cord from the Canadian border to Franklin. The *King* Court did not mention RSA 231:167, which provides for payment of damages in cases where utilities in a highway cause damage to a landowner—a provision entirely at odds with a blanket statement that utilities can never exceed the scope of a highway easement.

Courts in a number of states have held—consistent with the principle underlying RSA 231:167—that power lines may exceed the scope of a highway easement, and may constitute an additional servitude on the land. *See Cathey v. Arkansas Power & Light Co.*, 97 S.W.2d 624, 626 (Ark. 1936) (utility company's construction of poles on highway easement created additional burden entitling owner to compensation); *Louisiana Power & Light Co. v. Dileo*, 79 So.2d 150 (La.Ct.App. 1955) (utility company could not set poles and lines in public easement without obtaining consent of landowners or exercising powers of eminent domain). "Although the strips of land in question are subject to a servitude for public highway purposes, this servitude does not extend to the use for *private* power line purposes." *Id.* at 155 (emphasis added).

See also Heyert v. Orange & Rockland Utils., 262 N.Y.S.2d 123, 126 (N.Y. 1965) (installation of underground gas main was not lawful highway use); *Brown v. Asheville Elec. Light Co.*, 51 S.E. 62, 65 (N.C. 1905) (municipality had no right to grant away landowners' rights; every principle of justice demands that a corporation seeking a benefit from the use of another person's land must pay for it).

> We conclude that power lines and utility poles are *not included* within the scope of the general public highway easement. Specifically, if the [governmental acquiring entity] had wanted its easement to include utilities, it could have stated as much. Allowing a utility company that operates for a profit to place its poles on the servient land without having to pay for this right is

> manifestly unfair to the servient landowner whose easement did not include utilities within its purview. To hold otherwise would allow the utility company to get something for nothing. The sole existence of a public easement should not enable a company for profit to obtain free use.

Keokuk Junction Railway Co. v. IES Industries, 618 N.W.2d 352, 362 (Iowa 2000) (emphasis in original).

The regulatory environment is one of the "surrounding circumstances" that must be taken into account in considering the scope of the public easement. In 1931, landowners signing over easements knew that public utility companies could install facilities along the roads if they could convince regulators of a public need. It is not a "natural evolution" of technology that allows a largely unregulated company such as NPT to build facilities without demonstrating a public need. The Forest Society takes no position on deregulation in the electric industry. However, no company should be allowed to impose its costs of doing business on individuals who never agreed to have their land used for that purpose, and who will have no share in the profits.[2]

VI. The Superior Court Erred by Treating this Dispute as a Licensing Matter.

As part of its SEC application, NPT applied to the DOT for a license to install its transmission line in state highway rights-of-way. After "numerous meetings" between DOT and NPT personnel, the DOT announced its intention to enter into a Use and Occupancy Agreement with NPT, which would allow the project to go forward through the Washburn Family Forest. App. 33.

The Forest Society argued below that the proposed use exceeds the scope of the highway easement and violates private property rights; the easement was created in a regulatory environment in which only fully-regulated public utility companies could build transmission

[2] To be clear, the Forest Society is not seeking monetary damages. As discussed in Section VIII below, neither NPT nor the State acting on NPT's behalf may take private property rights for this project, even if they pay compensation.

lines, and only after convincing regulatory authorities of a public need for the lines. Instead of addressing that argument, the Superior Court treated the dispute as a simple licensing matter, and focused on a single word in the licensing statute. RSA 231:160 states that "any" person may lay electric wires under a roadway. Consequently, the Superior Court reasoned, NPT's largely unregulated status was irrelevant. Add. 30.

In pertinent part, RSA 231:160 provides that: "[E]lectric light and electric power poles and structures and underground conduits and cables [...] may be erected, installed and maintained in any public highways and [...] carried across or placed under any such highway by **any** person, copartnership or corporation **as provided in this subdivision and not otherwise.**" (Emphasis added.) This language is restrictive, not permissive. Its point is not that "any person" may install high-voltage wires under roads, but that *no person* may do so *except* as set forth in the statutory subsection, RSA 231:159 *et seq.* That subsection includes RSA 231:167, which provides for the payment of damages when such an installation harms a landowner—with the clear implication that power lines can exceed the scope of the highway easement.[3]

VII. The Superior Court Denied Landowners a Forum and a Remedy.

The Superior Court cited language from RSA 231:161, II and IV to the effect that the DOT shall issue a license if the "public good" requires. "In effect, [the Forest Society] is arguing that the proposed Northern Pass Project will not serve the public good." Add. 30. This is something of a red herring; the Forest Society did not ask the Superior Court to rule on the public good. Rather, it asked the Superior Court to decide the scope of an easement, based on the reasonable expectations of the parties to the easement.

[3] Read in conjunction with N.H. Constitution, Pt. 1, Art. 12-a and RSA 371:1, RSA 231:167 prohibits the State from allowing NPT to make private use of the Route 3 right-of-way through the Washburn Family Forest. *See* Section VIII below.

"Thus, the DOT, not this court must decide, in the first instance, whether a proposed project meets the 'public good' requirement of RSA 231:161." Add. 30-31. While this statement is technically correct, it misses the point. Even if the DOT duly considered the public good before announcing its intent to enter into a Use and Occupancy Agreement with NPT—a rather dubious assumption—the definition of "public good" in the licensing context is extremely narrow. *Parker Young Co. v. State of New Hampshire*, 83 N.H. 551, 557-8 (1929). It has nothing to do with private property rights, which is what the Forest Society asked the Superior Court to adjudicate.

The *Parker Young* Court reviewed a board of selectmen's licensing decision favoring one utility company over another.[4] Licensing authorities act in what is essentially a judicial capacity; they "may not prejudicate any issue." *Id.* at 558 (citation omitted). Without consulting other interested parties, the licensing authority signaled its intended course of action. Its predetermination of the public good under a general procedural rule violated its duty and foreclosed the rights of one party. "The public, as well as the parties, is entitled to a finding of the public good on a hearing without error of law." *Id.* at 560.

Similarly, the DOT in the present case announced its intention to execute a Use and Occupancy Agreement with NPT without consulting other interested parties, despite being put on notice of a property rights dispute. App. 29-31, 33. The back-room agreement between DOT and NPT, coupled with the Superior Court's refusal to exercise its jurisdiction over property rights disputes, highlight the apparent futility of landowners seeking a forum, let alone a remedy.

The *Parker Young* Court noted that the predecessor statute to RSA 231:161 was "designed to regulate and control the use made of highways for utility purposes so that such use

[4] The DOT's licensing authority over state roads is the same as a board of selectmen's authority over town roads. RSA 231:161, I(d).

may not unduly interfere with the other public uses to which the highways are dedicated. It confers no express power upon the [licensing authority] to determine who may and who may not occupy the highway with poles and wires [...]." *Id.* at 555-6 (citation omitted; emphasis added). In sum, the DOT's licensing decision is limited to determining whether a proposed use will interfere with public travel. That decision—in which landowners have no meaningful voice—is not an adequate substitute for a judicial determination of whether a proposed use exceeds the scope of the highway easement and violates property rights. The availability of an administrative appeal, Add. 31, fn. 2, is of little use when the question decided by the DOT will not be the question raised by the landowner.[5]

VIII. Approving NPT's Requested Use Will Result in Inverse Condemnation.[6]

NPT lacks eminent domain authority. App. 47. Even public utilities that do have such authority may not take private property—or use state lands—absent an administrative showing that their proposed facilities "will provide a substantial benefit to the public **in this state**." RSA 374-A:8 (emphasis added). As recently as 2012, the legislature amended RSA 371:1 to provide that no public utility may seek "to take private land or property rights for the construction or operation of [...] an electric transmission project not eligible for regional cost allocation, for either local or regional transmission tariffs, by ISO-New England or its successor regional system operator." NPT has not claimed that it is eligible for regional cost allocation. App. 41-42.

These statutes make clear the legislative goal of restricting the appropriation of private property rights absent an express showing of a public need. In 2006 the legislature took the extraordinary additional step of amending the State Constitution. **"No part of a person's**

[5] RSA 21-L expressly excludes the review of condemnation of property from the DOT Appeals Board's powers.
[6] The Superior Court did not rule on the Forest Society's Motion for Joinder and an Amended Petition adding the New Hampshire Department of Transportation as a respondent.

property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property." N.H. Constitution, Pt. 1, Art. 12-a. This provision applies even if the desired private use would provide a demonstrated benefit to the public.

To the extent that placing the Northern Pass Project through the Washburn Family Forest exceeds the scope of the highway easement, it will amount to a taking of private property. If the excavation, installation and maintenance of underground cables cause the Forest Society even a single dollar in damages, the State will have violated statutory and constitutional provisions by effectuating a taking of property from one person for the private benefit of another.

In enacting RSA 231:167, the legislature expressly recognized that underground cables in the public way may cause damage to landowners:

> If any person shall be damaged in his estate by the [...] installation of any such underground conduits or cables [...] in or under the highway by authority of any such license, he may apply to the [licensing authority] to assess his damages. Such proceedings shall thereupon be had as are proved in the case of assessment of damages in laying out highways by the [licensing authority], and such damages, if any, may be awarded as shall be legally and justly due.

The procedures for assessing damages in laying out highways are set forth in RSA 231:15-20, which in turn references RSA 498-A:1, the Eminent Domain Procedures Act. In short, by granting a license to install the requested transmission line through the Washburn Family Forest, the DOT would effect a *de facto* taking of a property interest in the freehold underlying the highway. The Superior Court erred by declining to address the application of these statutes and constitutional provisions. It erred by denying a landowner the opportunity to present evidence showing that the proposed installation and permanent occupation of land will cause it harm.

CONCLUSION

The Forest Society's petition raised questions of property rights that should have been carefully considered and addressed, rather than dismissed out-of-hand as a mere licensing issue. The Northern Pass Project cannot go forward without the use of property owned by others, and neither the SEC nor the DOT has jurisdiction to determine property rights.

It fell upon the Superior Court to decide whether the scope of the 1931 right-of-way, created for the public benefit, can be construed to encompass an elective private project of this nature. If the Superior Court could not answer that question with certainty based on the summary judgment filings, it should have denied NPT's motion and allowed the parties to proceed with discovery and develop the facts needed to fully understand and fairly resolve the dispute.

This Court should therefore reverse the decision below, and remand the matter to the Superior Court with instructions ensuring that landowners will receive a fair hearing to determine whether their property rights are being improperly expropriated by Northern Pass Transmission LLC.

The appealed decision is attached as an addendum to this brief.

Respectfully submitted,

SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

By Its Attorneys,
RANSMEIER & SPELLMAN
PROFESSIONAL CORPORATION

Dated: September 28, 2016

By: 

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ORAL ARGUMENT STATEMENT

The Appellant requests fifteen minutes of oral argument before the full Court, to be presented by Attorney John T. Alexander.

CERTIFICATION

I hereby certify that two copies of the foregoing were sent by email and by first class mail, this 28th day of September, 2016 to Bruce W. Felmly, Esq. and Adam M. Hamel, Esq., counsel for Northern Pass Transmission LLC.

John T. Alexander, Esq.

ADDENDUM

A. Order on Defendant's Motion for Summary Judgment, May 26, 2016

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Coos Superior Court
55 School St., Suite 301
Lancaster NH 03584

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

Thomas N. Masland, ESQ
Ransmeier & Spellman PC
One Capitol Street
PO Box 600
Concord NH 03302-0600

Case Name: **Society for the Protection of New Hampshire Forests v Northern Pass Transmission LLC**
Case Number: **214-2015-CV-00114**

Enclosed please find a copy of the court's order of May 25, 2016 relative to:

Order on Defendant's Motion for Summary Judgment

May 26, 2016

David P. Carlson
Clerk of Court

(285)

C: Bruce W. Felmly, ESQ; Adam M. Hamel, ESQ; Frank Kenison, ESQ

22

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS.

Docket No. 15-CV-114

Society for the Protection of New Hampshire Forests

v.

Northern Pass Transmission, LLC

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, the Society for the Protection of New Hampshire Forests ("SPNHF"), brought suit against the defendant, Northern Pass Transmission, LLC ("NPT"), seeking a declaratory judgment and injunctive relief pertaining to NPT's plan, known as the Northern Pass Project, to build an electric power transmission line extending from the Canadian province of Quebec through New Hampshire to southern New England. NPT now moves for summary judgment as to all of SPNHF's claims. SPNHF objects. The court held a hearing on the matter on March 31, 2016. Based on the pleadings, the parties' arguments, and the applicable law, the court GRANTS NPT's Motion for Summary Judgment.

I. Factual Background

The record supports the following relevant and undisputed facts. In October 2015, NPT and its co-applicant, Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH"), submitted their Joint Application for a Certificate of Site and Facility to Construct a New High Voltage Transmission Line and Related Facilities in New Hampshire (the "Application") to the New Hampshire Site Evaluation Committee. (Bellis Aff. ¶ 5, Jan. 4, 2016; NPT's Mem. Law, Ex. A.) The proposed

CLERK'S NOTICE DATED
5/26/16
CC: Felmly / Hemel
Kenison / Mosland

Northern Pass Project consists of a high voltage electric transmission line extending approximately 192 miles from the Canadian border through New Hampshire to southern New England. (*See* NPT's Mem. Law, Ex. A.) The proposed transmission line is comprised of a single circuit 320 kV high voltage direct current ("HVDC") transmission line linked to a 345 kV alternating current ("AC") transmission line via an HVDC/AC converter terminal located in Franklin, New Hampshire. (*See id.*) In conjunction with the filing of the Application, NPT and PSNH also submitted a petition to the New Hampshire Department of Transportation ("DOT") seeking permission, pursuant to RSA 231:160 (2009), to install the electric transmission line, and related facilities, across, over and under certain state highways. (Bellis Aff. ¶ 6; NPT's Mem. Law, Ex. B.)

SPNHF owns land (the "Washburn Family Forest") on both sides of a section of Route 3 in Clarksville, New Hampshire. (Bellis Aff. ¶ 9; SPNHF's Mem. Law 2.) As part of the Northern Pass Project, NPT is seeking the necessary permission, licenses, and permits from the DOT to bury a portion of the transmission line approximately fifty to seventy feet below the section of Route 3 that runs through SPNHF's property. (Bellis Aff. ¶ 9; NPT's Mem. Law, Ex. B; SPNHF's Mem. Law, Ex. C.)

The stretch of Route 3 that passes through the Washburn Family Forest is a four-rod road currently maintained as a "Class I" state highway.[1] The selectmen of Clarksville, Stewartstown and Pittsburgh laid out this section of road in 1931, after determining that there was "occasion for a new highway" for the "accommodation of the public. (*See* SPNHF's Mem. Law, Ex. D.) The selectmen paid SPNHF's predecessor-in-

[1] In its Complaint, SPNHF mistakenly identified Route 3 as a "Class II" state highway. In its memorandum of law in support of its Objection to Motion for Summary Judgment, however, SPNHF clarified that this segment of Route 3 is currently a "Class I" state highway. (*See* SPNHF's Mem. Law 3 n.1.)

interest, Lyman Lombard, $1000 to establish the public highway right-of-way through the Washburn Family Forest. (*See id.*; SPNHF's Mem. Law, Ex. E.)

NPT has not asked SPNHF for, and SPNHF has not granted NPT, permission to install, use, or maintain the proposed transmission line through the Washburn Family Forest, contending that SPNHF's permission is not required because the DOT has exclusive power to authorize NTP's proposed use of the public right-of-way. (*See* NPT's Mem. Law 5.) As of the date of this order, the DOT has not granted the necessary permits, licenses, and permissions authorizing NPT to install the proposed transmission line underneath Route 3. (*See* NPT's Mem. Law, Ex. C.)

On November 19, 2015, SPNHF brought the present suit against NPT. SPNHF seeks a declaratory judgment that NPT's proposed use of Route 3 through the Washburn Family Forest, "whether it involves a buried line or above-ground towers, exceeds the scope of the public right-of-way and cannot be undertaken without [SPNHF's] permission." (Compl. 6.) Moreover, SPNHF seeks a permanent injunction "preventing NPT from conducting any activities on the [Washburn Family Forest property] to advance or implement the [Northern Pass Project], without first obtaining [SPNHF's] permission." (*Id.*) NPT now moves for summary judgment as to all claims asserted by SPNHF.

II. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (2010 & Supp. 2013). The moving party has the burden of proving both elements. *Concord Grp. Ins. Co. v. Sleeper*, 135 N.H. 67,

69 (1991). A "material" issue of fact is one that "affects the outcome of the litigation." *Weeks v. Co-Operative Ins. Co.*, 149 N.H. 174, 176 (2003) (citation omitted). To demonstrate a genuine dispute regarding a material fact, the non-moving party "may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV.

When considering the evidence, the court must draw all inferences "in the light most favorable to the non-moving party." *Sintros v. Hamon*, 148 N.H. 478, 480 (2002). The court may not "weigh the contents of the parties' affidavits and resolve factual issues," but must simply determine "whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavit at trial." *Iannelli v. Burger King Corp.*, 145 N.H. 190, 193 (2000) (citations omitted); *Sabinson v. Tr. of Dartmouth Coll.*, 160 N.H. 452, 460 (2010).

III. Discussion

NPT moves for summary judgment on the grounds that there is no genuine issue as to any material fact and NPT is entitled to judgment as a matter of law because (1) its proposed use of the segment of Route 3 at issue is "squarely within the scope of the right of way easement," (NPT's Mem. Law 6–9), and (2) because the DOT has the sole power to authorize the proposed use and therefore NPT is not required to obtain SPNHF's permission prior to installing its transmission line. (*Id.* 9–11.) Specifically, NPT contends that New Hampshire has long recognized that utilities are a proper use of public highway easements and that the General Court, pursuant to RSA 231:160, has given "express statutory authorization for the installation and maintenance of underground conduits and cables underneath public highways." (*Id.* 6–8.) NPT

maintains that RSA 231:160 does not limit permits for the installation of utilities in public highways to only public entities or to specific public purposes, and thus NPT's proposed use of the stretch of Route 3 at issue is expressly authorized by statute. NPT also asserts that the DOT has the "exclusive power to authorize installation of utilities in state-maintained highways" under RSA 231:160 and 161, and thus NPT is not required to obtain SPNHF's permission before installing its transmission line underneath the segment of Route 3 at issue. (*Id.* 9–11.)

SPNHF counters that a public highway easement is "a right-of-way for 'viatic' use only—in essence, for passage over the land" and that "[a]ny other use exceeds the scope of the easement." (SPNHF's Mem. Law 6.) SPNHF contends that the question of whether NPT's proposed use exceeds the scope of the highway easement over the Washburn Family Forest must be decided by applying the "rule of reason" and only after both parties have had "a full opportunity to develop and present pertinent evidence" as to whether this proposed use was beyond what was contemplated by the landowners in 1931 when they created the public highway easement at issue. (SPNHF's Mem. Law 7–8, 10.) SPNHF's also asserts that there are important private property rights at issue in this case that must be decided by this court; not the DOT. That is, SPNHF argues that the DOT does not have jurisdiction to decide this private property dispute. Additionally, SPNHF maintains that, to the extent the proposed use of the right-of-way exceeds the scope of the highway easement, the DOT would effect a taking of SPNHF's "property interest in the freehold underlying the highway" if it granted NPT the licenses to install its electric transmission line under the stretch of Route 3 at issue. (*Id.* 13.)

At the outset, the court notes that NPT has not yet received any permits from the DOT, nor has any construction actually commenced. Thus, whether the DOT would

effect a taking of SPNHF's property *if* it granted NPT a license to install the transmission line underneath the stretch of Route 3 at issue is purely speculative and the court declines to address this issue. The extent of NPT's *actual* use of the public right-of-way and whether such use exceeds the scope of the public highway easement is similarly speculative. Nonetheless, the court finds that under the plain language of RSA 231:160 NPT's proposed use is a proper use of the public highway easement. Moreover, pursuant to RSA 230:161, the DOT has exclusive jurisdiction over whether to grant NPT a permit to install the proposed transmission line below the stretch of Route 3 at issue.

Pursuant to RSA 231:160:

> Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

RSA 231:161 provides: "any person, copartnership or corporation desiring to erect or install any such poles, structure, conduits, cables or wires in, under or across any such highway, shall secure a permit or license therefore in accordance with the following procedure." The statute grants the DOT "exclusive jurisdiction of the disposition" of "petitions for such permits or licenses concerning all class I and class III highways."

In *King v. Town of Lyme*, the New Hampshire Supreme Court interpreted RSA 231:160 and 161, explaining "RSA 231:160 grants the *authority* to erect utilities and specifies that utility facilities may be installed or erected 'in any public highway.' RSA 231:161 sets out the *procedure* by which a person, natural or legal, makes application for a permit or license to erect such facilities in 'any such highway.'"126 N.H. 279, 282 (1985). The Court concluded that "[t]hese two provisions, read together, *clearly*

authorize persons to be permitted to install utility facilities in any public highways." *Id.* (emphasis added). The Court noted that that in *Opinion of the Justices* it had opined: "In this state we have never considered a highway purpose to be limited solely to the transportation of persons and property on the highways." *Id.* at 284 (quoting *Opinion of the Justices*, 101 N.H. 527, 530 (1957)). The Court also acknowledged that "because both the legislature and this court have determined that the installation of utility facilities is a proper highway use, the use of a highway for such facilities does not constitute an additional servitude which would require the payment of damages to abutting landowners." *Id.* at 284–85 (citing *United States v. Certain Land in City of Portsmouth*, 247 F. Supp. 932, 934–35 (D.N.H. 1965)).

This court finds that under New Hampshire law a public highway easement is not limited solely to "viatic" use. Rather, as the Court stated in *King,* in enacting 231:160 and 161, the legislature "determined that the erection of utility facilities is a proper highway use." *Id.* at 284; *see also id.* at 284–85. Here, it is undisputed that the stretch of Route 3 at issue is a "class I" state highway. It is also undisputed that NPT seeks to install an electric transmission line underneath this stretch of Route 3. The court finds that RSA 231:160 "clearly authorize[s NPT] to be permitted to install [its] utility [line and/or] facilities in [this] public highway[]." *See King*, 126 N.H. at 284–85. The court further finds that RSA 231:161 plainly grants to the DOT exclusive authority over whether to permit NPT to install its proposed transmission line beneath the stretch of Route 3 at issue. *See* RSA 231: 161 (stating that the DOT "shall have exclusive jurisdiction of the disposition" of petitions for permits or licenses to install utilities in class I state highways).

SPNHF contends that the Northern Pass Project is not a traditional public utilities project and is beyond the scope of the public highway easement because NPT is a private, for-profit company. The court finds this argument unavailing. RSA 231:160 does not limit authorization for the installation of utilities to only public entities. Rather, as NPT asserts, the statute authorizes "*any* person, copartnership or corporation" to install utilities in public highways, provided they have the necessary permits and/or licenses. RSA 231:160.

SPNHF also argues that the Northern Pass Project is different and beyond the scope of the public highway easement because the proposed transmission line would be direct current ("DC") from Quebec, Canada to Franklin, New Hampshire. SPNHF analogizes the proposed DC transmission line to an extension cord running from Quebec to southern New England, with no flow of electric current branching off to benefit New Hampshire communities along the way. SPNHF contends that because there is no immediate benefit to New Hampshire communities, the proposed transmission line exceeds the scope of the public highway easement. In effect, SPNHF is arguing that the proposed Northern Pass Project will not serve the public good.

The court finds that, under RSA 231:161, the determination as to whether this project will serve the public good must be made, in the first instance, by the DOT. Under RSA 231:161, the General Court gave the DOT "exclusive jurisdiction" over the disposition of permits and licenses for utility projects in public highways. The legislature further provided that the DOT "shall grant" a requested permit or license "[i]f the public good requires." RSA 231:161. Thus, the DOT, not this court must decide, in the first instance, whether a proposed project meets the "public good" requirement of RSA

231:161.[2] As the court noted above, the DOT has not yet decided whether to grant NPT the necessary licenses and permits for the Northern Pass Project. As such, the court declines to address whether the proposed project serves the public good.

Accordingly, the court finds that there is no genuine issue as to any material fact and NPT is entitled to judgment as a matter of law because NPT's proposed use is within the scope of the highway easement and because the DOT has exclusive jurisdiction over whether to grant NPT the necessary permits and licenses for the Northern Pass Project.

IV. Conclusion

For the foregoing reasons, the court GRANTS NPT's Motion for Summary Judgment. Consequently, SPNHF's February 25, 2016 Motion for Joinder of the State of New Hampshire Department of Transportation as Party and to Amend Petition is MOOT and will not be addressed.

SO ORDERED, this 25th day of May 2016.

Lawrence A. MacLeod, Jr.
Presiding Justice

[2] To the extent SPNHF asserts that granting the DOT exclusive authority to decide this issue constitutes a "rubber stamp" the court does not agree. In the event DOT makes a determination with respect to this project that either party believes to be erroneous, that party may then appeal the DOT's decision to the DOT Appeals Board, *see* RSA 21-L:14–15, 18. Thereafter, the party may appeal the Appeals Board's decision to the Supreme Court. *See* RSA 21-L:18; RSA541:6.