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Court Update

NORTHERN PASS USE OF STATE HIGHWAY EASEMENT IS PERMITTED

Society for the Protection of NH Forests v. Northern Pass Transmission Line, LLC
New Hampshire Supreme Court No. 2016-0322, 1/30/2017

The Society for the Protection of NH Forests (SPNHF) sued to have the proposed placement of the Northern Pass Transmission in the Route 3 right-of-way in Clarksville declared to be beyond the scope of the permissible use of a highway easement. The Superior Court ruled the use of right-of-way for the transmission line would be permitted.

The NH Supreme Court affirmed that decision agreeing with the trial court that use of the public highway easement falls within the scope of the highway easement. Citing to prior case law, the court observed that public highway easements may be used for the placement of public utilities, including the proposed Northern Pass transmission line. Furthermore, the installation of utility facilities does not constitute an additional servitude which require the payment of damages to abutting landowners, such as SPNHF.

Even though, as if often the case with local roads, the fee of the street is in the municipality in trust for public use, or in the adjoining landowner, the regulation of the use of the state right-of-way remains under the paramount control of the legislature. Through RSA 231:160 and RSA 231:161 the legislature had granted authority to erect utilities in any public highway. Specifically, these legislative acts demonstrated the use of the right-of-way for the installation of an underground direct current electrical transmission line, with associated facilities, falls squarely within the scope of the public highway easement as a matter of law.

The Court also rejected the argument of SPNHF that a public highway easement is limited solely to viatic uses involving passage over land. Instead, the court concluded that the placement of an electrical transmission line is a permitted public highway use.

[Click Here to View Court Decision!](http://www.nhmunicipal.org/Resources/ViewDocument/792) (<http://www.nhmunicipal.org/Resources/ViewDocument/792>)

Practice Pointer: This ruling broadens the understanding of what is considered a permitted use within a public right-of-way. Although viatic uses are generally understood to be limited to use of a public road for public travel, this ruling makes clear that where the legislature has adopted statutes permitted other uses of a public right-of-way, such as public utilities, those uses will be deemed to be within the scope of a highway easement.

DISCLAIMER: This is an unpublished opinion. Readers should be aware that Supreme Court Rule 20(2) states that an order disposing of any case that has been briefed but in which no opinion is issued, shall have no precedential value. However, it may be used for persuasive purposes.

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Court Update

DENIAL OF ELECTRONIC SIGN TO CHURCH DID NOT INFRINGE ON RELIGIOUS LIBERTY

*Signs for Jesus v. Town of Pembroke**

U.S. District Court, New Hampshire, Opinion No. 2017 DNH 016, 1/27/2017

Hillside Baptist Church and Signs for Jesus were denied a permit to install an electronic sign on the Church's property in Pembroke and they brought an action against the Town alleging violations of the United States Constitution, the New Hampshire Constitution, and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

The US District Court in Concord concluded that (1) the Town's decision to deny the Church's request for an electronic sign had nothing to do with either religion or the content of the Church's speech, (2) the decision served the Town's important governmental interests in aesthetics and traffic safety in a manner that was narrowly tailored to serve those interests, (3) the decision does not unreasonably burden the Church's right to practice its religious beliefs, to practice free speech, or to use its property and finally, that the Town has not treated the Church differently from any other similarly situated landowner.

In reaching these legal conclusions the Court said the Town's regulation of electronic signs did not substantially burden more speech than necessary, especially because the Church could communicate its religious messages using a manually changeable sign.

Considering these conclusions, the court found that the Church's contention that it should be free from the effect of the Town's electronic sign ordinance amounts to a demand, not for a level playing field, but instead for a right to be treated differently from all other private landowners. Neither the state and federal constitutions nor RLUIPA requires this result.

[Click Here to View Court Opinion!](http://www.nhmunicipal.org/Resources/ViewDocument/790) (<http://www.nhmunicipal.org/Resources/ViewDocument/790>)

*This case summary was mostly written by Christopher L. Northrup, Principal Planner, New Hampshire Office of Energy and Planning

Practice Pointer: When faced with a claim that a land use regulation violates RLUIPA, the courts will examine whether the regulation imposes a substantial burden on the affected religious organization in a manner that is not justified by a compelling governmental interest done in the least restrictive manner. When determining whether a land use regulation imposes a substantial burden the Court will examine whether the regulation: 1) targets religious entities because of hostility to that religion, or, 2) although appearing neutral on the surface the land use regulation was designed to reach a predetermined outcome contrary to the interests of the religious organization, or, 3) the land use regulation was imposed in an arbitrary and capricious manner.

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