

Issues Addressed in Forest Society Notice of Appeal to the NH Supreme Court

Whether:

1. The Superior Court erred by granting summary judgment without specifying which “material facts” NPT adduced to meet its burden of demonstrating that no genuine issue of fact exists with respect to the scope of the 1931 Route 3 highway easement through the Forest Society’s land. *Concord Group Ins. Co. v. Sleeper*, 135 N.H. 67 (1991).
2. The Superior Court erred in ruling that: “NPT’s *actual* use of the public right-of-way and whether such use exceeds the scope of the public highway easement is [...] speculative.” Order, p. 6. The Forest Society was seeking injunctive relief and a declaratory judgment in order to *prevent* a violation of its property rights; it was not seeking damages to compensate it for an existing use. Further, NPT submitted detailed plans for its transmission line. To the extent that evidence of the proposed use was “speculative” four months after the petition was filed, the Superior Court erred by granting summary judgment instead of allowing the parties to engage in the discovery needed to adduce the necessary evidence.
3. The Superior Court erroneously ruled that power transmission lines are a “proper” use of highways, without determining whether the specific use proposed in this case exceeds the scope of the public highway easement—a scope that is no greater than necessary to serve the public use for which the easement was taken. *Bigelow v. Whitcomb*, 72 N.H. 473 (1904). In particular, the Superior Court failed to assess the “surrounding circumstances” at the time the easement was created, *Arcidi v. Town of Rye*, 150 N.H. 694 (2004), by ignoring, without discussion: (a) the Forest Society’s expert affidavit explaining that the Route 3 highway easement was created at a time when all utility companies were fully regulated, and were required to demonstrate a public need for transmission projects, and (b) the Forest Society’s assertion that NPT is acting as a private utility in this elective project for which no public necessity has been established, and that its proposed use of public highways therefore does not comport with the underlying rationale of case law allowing such use in the context of fully-regulated utilities.
4. The Superior Court erred by failing to address RSA 231:167, which provides that utility structures in the highway easement may in fact exceed the scope of the easement, creating a *de facto* taking of private property rights and a corresponding right of eminent domain compensation for landowners. If the excavation of land, or the installation and operation of the transmission line, causes a single dollar’s worth of damage to a landowner, the State will have violated Pt. 1, Art. 12-a of the New Hampshire Constitution, which prohibits any direct or indirect taking of property rights from one person (the Forest Society) for the private benefit of another (NPT). *See also* RSA 371:1.
5. The Superior Court erred by treating the case as a licensing matter and deferring to the Department of Transportation, which lacks jurisdiction to adjudicate private property rights. DOT review of the “public good” for licensing purposes is limited to determining whether a proposed use will interfere with travel, which is not in dispute here. *Parker*

Young Co. v. State of New Hampshire, 83 N.H. 551 (1929); RSA 231:161, I(d) and IV. The administrative appeal of a licensing decision, which the Superior Court suggested, cannot resolve property rights. The Superior Court's order leaves affected landowners without a forum or a remedy.