

TREES OR TOWERS?: THE BATTLE OVER NORTHERN PASS

By Israel Piedra

| | |
|--|-----|
| Introduction..... | 716 |
| I. The Road to Northern Pass..... | 718 |
| A. Project Details and Interested Parties | 718 |
| B. Legal and Political Maneuvering: The Road to Approval | 721 |
| II. Right-of-Way Easements | 724 |
| A. An Overview of Rights-of-Way | 724 |
| B. The Common Law: Restatement of the Law—Property..... | 725 |
| C. Case Law Relevant to the Overburdening of Easements | 727 |
| 1. Non-Binding Precedent | 727 |
| 2. Binding Precedent | 728 |
| III. Stopping Northern Pass Using Legal Action | 732 |
| A. The Overburdening of Existing PSNH Rights-of-Way | 732 |
| 1. Scope of the Easement | 733 |
| 2. Unreasonable Burden | 735 |
| B. The Effect of Transmission Lines on Property Value..... | 740 |
| Conclusion | 744 |

INTRODUCTION

New Hampshire is known for its scenic beauty, and many of the state's residents are fiercely protective of its land.¹ When a large Canadian hydroelectric company approached residents of New Hampshire's rural north, hoping to purchase tracts of land on which to construct electrical

1. See Annmarie Timmins, *Northern Pass Hits Roadblocks*, CONCORD MONITOR (Mar. 11, 2012), <http://www.concordmonitor.com/news/4416631-95/northern-pass-hits-roadblocks> [<http://perma.cc/M7F3-DKBQ>] (discussing local inhabitants refusal to sell their land to Northern Pass because of their love of the North Country). *see also* Howard Mansfield, *My Roots Are Deeper Than Your Pockets*, YANKEE MAG. (Mar. 2013), <http://www.yankeemagazine.com/article/features/northern-pass-land-owners/> [<http://perma.cc/AB5B-H6WZ>] (explaining how one woman refused to sell her land because of her love for the North Country despite being offered significant money).

transmission infrastructure for a project known as “the Northern Pass.” many landowners rejected these overtures out of a “devotion to New Hampshire’s beauty.”² If completed, the proposed project would originate at a hydropower facility in Quebec and run its transmission lines down into northern New Hampshire and through the White Mountains, utilizing mostly existing right-of-way easements.³ New Hampshire residents object to the project’s proposed transmission towers, claiming that the structures would rise far above the tree line and tarnish the state’s scenic beauty.⁴ The transmission towers proposed by Northern Pass would be much larger than the wooden power poles currently occupying the existing rights-of-way.⁵ Furthermore, environmental groups allege that the project would have a dire effect on the environment.⁶

This Article argues that under New Hampshire law, the Northern Pass project may overburden the existing right-of-way easements it will employ.⁷ In New Hampshire, even if a particular use is seemingly allowed by the easement’s language, it still may not unreasonably burden the servient estate.⁸ New Hampshire courts apply a “rule of reason” to determine whether an easement’s use is reasonable or if it represents an unreasonable burden.⁹ In order to prove this claim, landowners would likely need to provide concrete evidence that their property value was or would be substantially harmed by the construction of new transmission towers.¹⁰

Part I begins by exploring Northern Pass itself, including the legal and political maneuvering that has occurred during the project’s short-yet-convoluted history.¹¹ Part II presents an overview of the common law of

2. Mansfield, *supra* note 1.

3. Barbara Tetreault & Martha Creegan, *The Battle Over the Northern Pass*, BUS. N.H. MAG. (Apr. 24, 2012), <http://millyardcommunications.com/index.php?src=news&refno=3011&category=News&prid=3011> [<http://perma.cc/S6WM-BHHC>].

4. Rik Stevens, *2014 an Important Year for Northern Pass Plan*, CONCORD MONITOR (Jan. 4, 2014), <http://www.concordmonitor.com/home/10071769-95/2014-an-important-year-for-northern-pass-plan> [<http://perma.cc/CN4W-MB3R>].

5. See Chris Jensen, *Northern Pass May Face Right of Way Legal Battle*, N.H. PUB. RADIO (Apr. 3, 2012, 5 07 PM), <http://nhpr.org/post/northern-pass-may-face-right-way-legal-battle> [<http://perma.cc/3YHQ-YFJ7>] (discussing the current height of wooden telephone poles of 80 to 95 feet high with metal grid towers that would be higher than many trees).

6. See *Potential Impacts: How Will This Project Affect You?*, CONSERVATION L. FOUND., <http://www.clf.org/northern-pass/potential-impacts/> [<http://perma.cc/L98G-Y6UE>] (last visited Mar. 7, 2014) (considering the threat the Northern Pass project would have on endangered species and impact on vegetation, forests, wetlands, and the animals that live there).

7. *Id.*

8. *Heartz v. City of Concord*, 808 A.2d 76, 81 (N.H. 2002).

9. *Id.*

10. Jensen, *supra* note 5.

11. See *infra* notes 14–73 and accompanying text.

easements, specifically as it relates to overburdening.¹² It also explores the relevant case law in and outside New Hampshire.¹³ Finally, Part III argues that a lawsuit against Northern Pass alleging unreasonable use of easements is feasible, but would depend on strong evidence showing that the new transmission towers substantially burden the servient property owners.¹⁴

I. THE ROAD TO NORTHERN PASS

A. *Project Details and Interested Parties*

Northern Pass is a proposed project which would run 180 miles of new power lines through New Hampshire from Canada.¹⁵ The project—a corporate partnership between Northeast Utilities, which is the parent corporation of the Public Service Company of New Hampshire (“PSNH”), and Hydro-Quebec—would construct over one thousand high-voltage transmission towers throughout the state.¹⁶ Completing the Northern Pass project would cost 1.1 billion dollars and would transport 1,200 megawatts of hydropower from Canada to New England’s power grid.¹⁷ Much of the project route would feature large transmission towers, ranging from 80 feet to 135 feet tall, to transport electricity.¹⁸ This would make the towers dwarf trees in the area.¹⁹

The Northern Pass project was announced in late 2010.²⁰ Since that time, Northern Pass has elicited vigorous opposition from both

12. See *infra* notes 73–97 and accompanying text.

13. See *infra* notes 98–157 and accompanying text.

14. See *infra* notes 158–278 and accompanying text.

15. *Why the Northern Pass Project Matters*, NPR STATE IMPACT, <http://stateimpact.npr.org/new-hampshire/tag/northern-pass/> [<http://perma.cc/XK8A-ET9G>] (last visited Apr. 15, 2014).

16. See *id.* (describing how the Northern Pass project would send “up to 1,200 megawatts of hydropower from Canada to the New England power grid”). *The Northern Pass*, SOCIETY FOR PROTECTION N.H. FORESTS, <https://www.forestsociety.org/advocacy-issue/northern-pass> [<http://perma.cc/4H2N-VKQ9>] (last visited Mar. 20, 2015).

17. *Why the Northern Pass Project Matters*, *supra* note 15 (explaining how 1,200 megawatts would power one million homes). *Project Overview*, N. PASS, <http://northernpass.us/project-overview.htm> [<http://perma.cc/7P2W-HU75>] (last visited Mar. 22, 2014).

18. NORTHERN PASS TRANSMISSION LLC, APPLICATION FOR PRESIDENTIAL PERMIT FROM DEPARTMENT OF ENERGY 9 (2010), available at http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/Northern_Pass_Presidential_Permit_Application.pdf [<http://perma.cc/K23Q-77D2>].

19. Trees in Northern New Hampshire average between 40 and 80 feet in height. ALFRED KNIGHT CHITTENDEN, FOREST CONDITIONS OF NORTHERN NEW HAMPSHIRE 61 (1905). see also Tetreault & Creegan, *supra* note 3 (“The towers for the line would be 85 to 135 feet high—much higher than the average tree.”).

20. *Route Info/Route Map*, N. PASS, <http://northernpass.us/route-info.htm> [<http://perma.cc/D6K2-K85B>] (last visited Mar. 4, 2014).

environmental groups and New Hampshire residents.²¹ Opponents believe that the transmission towers and power lines would ruin the state's natural beauty and lead to a loss of tourism revenue.²² Tourism is New Hampshire's second largest industry, and many fear that the proposed transmission towers would irreparably harm that industry, especially in the White Mountain region.²³

Major tourist spots in the region have come out against the project because of its potential impact on tourism.²⁴ Additionally, of the 31 communities through which the project would pass, 30 have voted to oppose Northern Pass.²⁵ However, most of these votes are symbolic protests against the project; the ordinances would likely not be enforceable against Northern Pass if it achieves state approval.²⁶ Other approaches

21. *Why the Northern Pass Project Matters*, *supra* note 15.

22. *Id.*

23. See Maggie Hassan, Op-Ed., *Pursuing Energy Alternatives Does Not Require Accepting Northern Pass*, BOSTON GLOBE (Sep. 20, 2013), <http://www.bostonglobe.com/opinion/2013/09/20/pursuing-energy-alternatives-does-not-require-accepting-northern-pass/o5E02sdgLquzYhhH5cfQZM/story.html> [<http://perma.cc/6AGQ-DMQS>] (describing the value of New Hampshire's natural resources for tourism and attracting businesses).

24. Kathleen Callahan, *Area Businesses Charged Up Over Northern Pass Transmission Proposal*, N.H. BUS. REV. (Oct. 21, 2011), <http://www.nhbr.com/October-21-2011/Area-businesses-charged-up-over-Northern-Pass-transmission-proposal/> [<http://perma.cc/6CM8-LLSR>].

25. *Why Does AMC Oppose Northern Pass?*, APPALACHIAN MOUNTAIN CLUB, <http://www.outdoors.org/conservation/wherewework/wmncf/why-does-amc-oppose-northern-pass.cfm> [<http://perma.cc/4ANZ-K7XS>] (last visited Mar. 24, 2014). The community votes have come in the form of town ordinances and warrant articles. Paula Tracy & Bob Hookway, *Northern Pass Shows Up on a Dozen Ballots*, N.H. UNION LEADER (Mar. 11, 2012), <http://www.unionleader.com/article/20120312/NEWS05/703129954&template=mobileart> [<http://perma.cc/FEZ5-7ML6>]. For example, in the town of Bath, a proposed warrant article would forbid "overhead development of alternating current or direct current high-voltage transmission lines lying within the borders of the Town of BathAll such future electrical transmission lines must be placed underground." *Id.*

26. See Derek Patterson, *Rights-Based Ordinance Crushed at Lancaster Town Meeting*, COOS COUNTY DEMOCRAT (Mar. 21, 2012), <http://www.newhampshirelakesandmountains.com/Articles-c-2012-03-21-155918.113119-RightsBased-Ordinance-crushed-at-Lancaster-Town-Meeting.html> [<http://perma.cc/4K9K-S5LY>]. The ordinances passed by many New Hampshire towns are so-called "rights-based ordinances" drafted by the Pennsylvania-based Community Environmental Defense Fund. These ordinances declare that citizens' rights to make autonomous decisions should prevail over federal or state laws or permits. See also *Two Of Three North Country Towns Okay Ordinances To Fight Corporate Power - and Northern Pass*, N.H. PUB. RADIO (Mar. 14, 2012), <http://nhpr.org/post/two-three-north-country-towns-okay-ordinances-fight-corporate-power-and-northern-pass> [<http://perma.cc/NL5Z-S7Q4>]. The ordinances also assert the towns' "Right to a Sustainable Energy Future", the "Right to Scenic Preservation", and the "Right to Self-Government" among other things. See, e.g., *Sugar Hill, New Hampshire's Right to a Sustainable Future and Local Self-Governance Ordinance*, COMMUNITY ENVTL. LEGAL DEF. FUND, http://www.celdf.org/downloads/Sugar_Hill_NH_Community_Self_Government_Ordinance.pdf [<http://perma.cc/X3L2-8D89>] (last visited Apr. 16, 2014).

include the creation of taxpayer-sponsored legal funds specifically designated to combat the Northern Pass project.²⁷

Environmental groups such as the Society for the Protection of New Hampshire Forests (“Forest Society”) oppose Northern Pass because it would “directly impact more than two dozen tracts of conserved land in 17 communities.”²⁸ The Conservation Law Foundation has additional concerns with the project, from the increase of greenhouse gas emissions to the degradation of wilderness habitats.²⁹ The project’s most devastating environmental impact would be in Quebec, where Northern Pass will require the use of massive reservoir systems.³⁰ The reservoirs are created by dams, through which the flow of water from the reservoirs is steered into power-making turbines.³¹ These hydro impoundments would divert multiple large rivers, creating “devastating impacts on hundreds of miles of river ecosystems.”³²

Proponents for Northern Pass, conversely, argue that despite any drawbacks, the project is necessary and would benefit the region.³³ It is estimated that about 1,200 construction jobs would be created by the project.³⁴ Supporters also claim that the completed project would generate \$300 million a year in revenue for the state.³⁵ Additionally, Northern Pass argues that the project would reduce New England’s dependence on fossil fuels and thus reduce carbon emissions.³⁶

27. See *Sugar Hill Eyes Money to Fight Northern Pass*, N.H. UNION LEADER (Mar. 3, 2014), <http://www.umonleader.com/apps/pbcs.dll/article?AID=/20140304/NEWS05/140309733> [<http://perma.cc/P5TR-XNJB>] (discussing an approach for the creation of town-funded trust that would be called The Northern Pass Defense Fund).

28. *Why the Forest Society Opposes Northern Pass*, SOC’Y FOR PROTECTION N.H. FORESTS, <https://www.forestsociety.org/resource/why-forest-society-opposes-northern-pass> [<http://perma.cc/2D5K-SDDR>] (last visited Mar. 20, 2015).

29. *Potential Impacts: How Will This Project Affect You?*, *supra* note 6.

30. *Environmental Impacts of Water Impoundments*, APPALACHIAN MOUNTAIN CLUB, <http://www.outdoors.org/conservation/wherewework/wmnf/northern-pass-impoundments.cfm> [<http://perma.cc/25TB-CCV4>] (last visited Mar. 6, 2014).

31. *Hydroelectric Power: How it Works*, U.S. GEOLOGICAL SURVEY, <http://water.usgs.gov/edu/hyhowworks.html> [<http://perma.cc/EWW8-FJVF>] (last modified Mar. 17, 2014).

32. *Why Does AMC Oppose Northern Pass?*, *supra* note 25. The impoundments and resulting “flooding of boreal forests” would cause “the emission of significant amounts of greenhouse gasses.”

33. *Gains Outweigh the Costs for Hydropower from Quebec*, BOSTON GLOBE (Sep. 15, 2013), <http://www.bostonglobe.com/opinion/editorials/2013/09/15/hydropowe...spite-concerns-about-power-lines/oPe8tp1ZLCH9kqM9eEqH6O/story.html> [<http://perma.cc/PTG3-3U96>].

34. Stevens, *supra* note 4. This is important especially in New Hampshire’s North Country, where the closure of paper mills has sent unemployment skyrocketing.

35. *Id.*

36. Tetreault & Creegan, *supra* note 3.

It is true that there are some legitimate long-term concerns about New England's energy security.³⁷ For example, the region's energy demand has increased more than 20% in the last decade.³⁸ Additionally, the region has become very reliant on natural gas for electricity production—in 2000, just 15% of the region's electricity was produced from natural gas, whereas in 2012 that number inflated to 52%.³⁹ The Northern Pass project is meant to provide “renewable, low-cost power” to help secure the region's long-term energy needs.⁴⁰

B. Legal and Political Maneuvering: The Road to Approval

In 2011, Northern Pass publicly announced its proposed route for the project.⁴¹ The proposed route was subjected to a hailstorm of criticism, especially in New Hampshire's North Country, which is known for its scenic vistas.⁴² The project requires approvals from multiple state-level bodies, including the New Hampshire Public Utilities Commission and from the New Hampshire Energy Facility Site Evaluation Committee.⁴³

Additionally, because Northern Pass would cross the international border from Canada to the United States, the corporation is required to obtain a Presidential Permit from the United States Department of Energy.⁴⁴ The Department of Energy (“DOE”) must determine that a project is “consistent with the public interest” in order for a Presidential Permit to be issued.⁴⁵ The major component of the DOE's analysis is an Environmental Impact Statement (“EIS”) as required by the National Environmental Policy Act (“NEPA”).⁴⁶ Preparation of the EIS began in March 2011 when the DOE held a series of scoping meetings throughout the state and solicited

37. See Dave Solomon, *Gas Pipeline Not Enough to Avert New England Energy Crisis*, N.H. UNION LEADER (Feb. 17, 2014), <http://www.unionleader.com/article/20140218/NEWS05/140219222> [http://perma.cc/DPU6-A7KA] (discussing the future energy costs that New Hampshire may be hit with).

38. *Need for Energy*, N. PASS, <http://northernpass.us/need-for-energy.htm> [http://perma.cc/9MVK-GUXP] (last visited Mar. 7, 2014).

39. *Id.*

40. Callahan, *supra* note 24.

41. *Why the Northern Pass Project Matters*, *supra* note 15.

42. See *id.* (commenting on how Northern Pass “will deface New Hampshire's famous forests, hurting tourism”).

43. *Permitting Process and Timeline*, CONSERVATION L. FOUND., <http://www.clf.org/northern-pass/permitting-process-and-timeline/> [http://perma.cc/WBJ2-WV44] (last visited Mar. 7, 2014).

44. *Id.*

45. *Id.*

46. *Id.*, see 42 U.S.C. § 4332 (2006) (requiring a detailed statement on the environmental impact of major Federal actions significantly affecting the quality of the human environment).

written public comments.⁴⁷ To prepare an EIS, the DOE considers the proposed project's significant environmental impacts and reasonable alternatives.⁴⁸ A draft EIS is expected to be released in 2015.⁴⁹

Much of the Northern Pass project's planned route was contingent on acquiring 40 miles of new rights-of-way in northern New Hampshire.⁵⁰ To that end, Northern Pass spent millions of dollars attempting to purchase enough contiguous land parcels to build their transmission corridor through the North Country.⁵¹ However, they were met with staunch community resistance as well as coordinated efforts from the New Hampshire Forest Society, which fundraised aggressively in order to purchase several conservation easements on parcels of land desired by Northern Pass.⁵² The efforts of the Forest Society seriously complicated Northern Pass's originally proposed route.⁵³

Wary despite their successes, opponents of Northern Pass feared that the project would seek to invoke eminent domain to bypass their obstacles.⁵⁴ Northern Pass claimed it did not intend to use eminent domain, and opponents took solace in a state constitutional amendment, passed in 2006, which prohibits the taking of a person's property for the purpose of private development or other private use.⁵⁵ Despite the company's

47. *Permitting Process and Timeline*, *supra* note 43.

48. *See Environmental Assessments & Environmental Impact Statements*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/reg3esd1/nepa/eis.htm> [<http://perma.cc/2SZK-V7SY>] (last updated Jan. 28, 2014).

49. Staff Report, *30-Day Extension Sought for Review of Northern Pass*, N.H. UNION LEADER (Apr. 11, 2015), <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20150412/NEWS05/150419850/0/SEARCH>.

50. *Why the Northern Pass Project Matters*, *supra* note 15.

51. Chris Jensen, *Northern Pass' New Route Hangs On Eight Miles of Country Roads*, N.H. PUB. RADIO (June 27, 2013, 5:07 PM), <http://nhpr.org/post/northern-pass-new-route-hangs-eight-miles-country-roads> [<http://perma.cc/84FW-T8DR>]. Annmarie Timmins, *Northern Pass Buys Up Land*, CONCORD MONITOR (Oct. 16, 2011), <http://www.concordmonitor.com/news/4484431-95/northernpass> [<http://perma.cc/XHW3-BA9X>].

52. Amanda Loder, *Why Eminent Domain Bills are Center Stage in Northern Pass Controversy*, NPR STATE IMPACT (Jan. 18, 2012), [<http://perma.cc/ZR26-TXLG>]. In one case, a property owner accepted \$850,000 from the Forest Society for the land instead of \$3 million from Northern Pass. In another instance, a couple approached by Northern Pass instead granted the Forest Society a conservation easement on the land for nothing. Annmarie Timmins, *Northern Pass Official Project Not Harmed by Recent Conservation Easements*, CONCORD MONITOR (Feb. 20, 2013), <http://www.concordmonitor.com/home/4587904-95/northern-pass-official-project-not-harmed-by-recent-conservation-easements> [<http://perma.cc/336C-9S8X>].

53. Loder, *supra* note 52.

54. *Senate Blocks Eminent Domain for Northern Pass*, WMUR N.H. (Jan. 25, 2012), <http://www.wmur.com/Senate-Blocks-Eminent-Domain-For-Northern-Pass/11836368> [<http://perma.cc/JG47-L5XE>].

55. N.H. CONST. art. 12-a. *See Re The Debate Over Eminent Domain*, N. PASS (Jan. 25, 2012), <http://blog.northernpass.us/2012/01/25/re-the-debate-over-eminent-domain/> [<http://perma.cc/MAD9-2PAV>]. *see, e.g., N.H. Voters Opt to Curb Eminent Domain: Smaller House Districts Also at Stake*, USA TODAY (Nov. 11, 2006),

assurances and the protections offered by the 2006 amendment, public outcry demanded even stronger legislative safeguards.⁵⁶ Activists feared that Northern Pass could receive an exemption from the constitutional amendment because of the project's public benefits.⁵⁷ Therefore, in 2012, the New Hampshire legislature passed a law restricting the use of eminent domain even further.⁵⁸ This legislation was aimed directly at Northern Pass, and its sponsors believe that it completely blocks any possibility of eminent domain use for the project.⁵⁹

The maneuvering by the Forest Society and others forced Northern Pass to scrap much of their original proposed route in the North Country.⁶⁰ This led to the development of a new route, which was revealed in summer 2013 after months of delay.⁶¹ The new proposed route revealed that much of the land purchased in the North Country by Northern Pass was now of no use to the project as a result of the Forest Society's actions.⁶² The new proposal also responded to concerns about the project's visual impact by offering to bury eight miles of power lines.⁶³ Instead of using private property for the northern part of the project route as originally planned, Northern Pass changed its plan to use rights-of-way along state and local roads.⁶⁴

http://usatoday30.usatoday.com/news/politics/elections/vote2006/NH/2006-11-08-initiatives_x.htm [<http://perma.cc/GZ4P-KC2J>] (describing N.H. legislation restricting the use of eminent domain). The 2006 amendment was passed in response to the United States Supreme Court case of *Kelo v. City of New London*, in which the Court held that the state's eminent domain power could be used for private development in certain circumstances. 545 U.S. 469 (2005).

56. Garry Rayno, *Northern Pass Opponents and Supporters Pack Hearing*, N.H. UNION LEADER (May 19, 2011), <http://www.unionleader.com/article/20110519/NEWS06/705209990&template=mobileart> [<http://perma.cc/3LHP-YTAM>].

57. Loder, *supra* note 52.

58. H.R. 648, 2012 Gen. Court., Reg. Sess. (N.H. 2012). Matthew Spolar, *Eminent Domain is Restricted*, CONCORD MONITOR (Mar. 6, 2012), <http://www.concordmonitor.com/news/4415789-95/eminent-domain-is-restricted> [<http://perma.cc/ZSQ9-SCZ5>].

59. Kevin Landrigan, *Senate Rules Out Eminent Domain for Northern Pass Project*, NASHUA TELEGRAPH (Jan. 26, 2012), <http://www.nashuatelegraph.com/news/statenewengland/947724-227/senate-rules-out-eminent-domain-for-northern.html> [<http://perma.cc/3K6X-98Z3>].

60. See *Why the Northern Pass Project Matters*, *supra* note 15 (outlining how groups narrowed Northern Pass's options).

61. Annmarie Timmins, *New Northern Pass Route Includes 8 Miles Underground*, CONCORD MONITOR (Jun. 27, 2013), <http://www.concordmonitor.com/home/7196521-95/new-northern-pass-route-includes-8-miles-underground> [<http://perma.cc/7KGP-KVA6>].

62. See *id.* (explaining how the new route avoids some \$40 million in recent land purchases by Northern Pass officials).

63. *Id.* Northern Pass officials claim that burying additional miles of power lines is prohibitively expensive. By their estimate, burying eight miles of lines will add more than \$100 million in costs to the project.

64. *Id.*

These amended plans will require approval by the state's Department of Transportation.⁶⁵ A second public comment period for scoping was conducted by the United States DOE in late 2013 and a draft EIS, which precedes the final EIS, is expected to be released in 2015.⁶⁶ After an EIS is issued, the DOE will decide whether to approve the proposed project and issue a Presidential Permit.⁶⁷ If a federal permit is issued, New Hampshire's Site Evaluation Committee will begin a nine-month review of the project, which will include public hearings.⁶⁸ If this state approval is received by Northern Pass, the project will essentially have cleared its final regulatory hurdle.⁶⁹ Although Northern Pass initially hoped to begin operation by 2015, final approvals are now not expected until late 2016 and will be followed by two years of construction.⁷⁰

II. RIGHT-OF-WAY EASEMENTS

A. *An Overview of Rights-of-Way*

Northern Pass' transmission towers will be built on a combination of new and existing rights-of-way ("ROWS").⁷¹ ROWs are the physical land which a person or corporation may acquire the right to use.⁷² While an easement is the *right* to use the land,⁷³ the ROW is the land itself—in the case of electric utilities, the land on which transmission towers will be built and over which power lines will run.⁷⁴ Practically, the terms are often used

65. *Id.*

66. *Permitting Process and Timeline*, *supra* note 43. Staff Report, *supra* note 49. See U.S. DEP'T OF ENERGY, THE NORTHERN PASS TRANSMISSION LINE ENVIRONMENTAL IMPACT STATEMENT SCOPING REPORT 2, 4-5 (2014) (detailing DOE's EIS procedure for the Northern Pass plan).

67. See U.S. DEP'T OF ENERGY, *supra* note 66 (discussing the necessary steps before DOE considers issuing a Presidential Permit).

68. Stevens, *supra* note 4.

69. See *id.* (explaining how an approval from the Site Evaluation Committee will result in a construction permit to begin work).

70. Chris Jensen, *Another Delay for Northern Pass*, N.H. PUB. RADIO (May 1, 2015), <http://nhpr.org/post/another-delay-northern-pass>. William Opalka, *Eversource: Northern Pass Delayed Until 2019; Earnings Up*, RTO INSIDER (May 1, 2015), <http://www.rtoinsider.com/eversource-1st-qtr-2015-14826/>.

71. *Why the Northern Pass Project Matters*, *supra* note 15.

72. See BLACK'S LAW DICTIONARY 1440 (9th ed. 2009) (describing a right-of-way as a "strip of land subject to a nonowner's right to pass through").

73. Will Saxe, *When "Comprehensive" Prescriptive Easements Overlap Adverse Possession: Shifting Theories of "Use" and "Possession"*, 33 B.C. ENVTL. AFF. L. REV. 175, 176, 192 (2006).

74. See BLACK'S LAW DICTIONARY, *supra* note 72, at 1440 (using the third definition of right-of-way).

interchangeably, though “right-of-way” is often used in the context of utility transportation and public roads.⁷⁵

Easements are often granted in perpetuity and are not usually subject to termination or expiration.⁷⁶ The grantor of the easement, or the original landowner, owns what is known as the servient estate, which is the land burdened by the easement.⁷⁷ The person or corporation who is benefited by the easement holds what is known as the dominant estate.⁷⁸ Typically, the servient landowner is given a one-time payment for the ROW.⁷⁹ The servient estate owner may still use the land burdened by the ROW for any purpose which does not conflict with the “paramount rights of the power company.”⁸⁰

B. The Common Law: Restatement of the Law—Property

A description of the common law on easements is set out in Restatement (Third) of Property section 4.10, which addresses “Use Rights Conferred by a Servitude.”⁸¹ The Restatement reads:

[T]he holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the [easement]. The manner, frequency, and intensity of the use may change over time to take advantages of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude.⁸²

The Restatement goes on to say, “[T]he holder [of the easement] is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.”⁸³

75. See *Understanding Easements and Rights-of-Way*, XCEL ENERGY, http://www.xcelenergy.com/staticfiles/xcel/Corporate/Corporate%20PDFs/SLK_ROWBrochure_FS.pdf [<http://perma.cc/4ZCE-UECN>] (last visited Mar. 22, 2014) (noting that an “easement” and a “right-of-way” are distinct concepts).

76. *Id.*

77. BLACK’S LAW DICTIONARY, *supra* note 72, at 586.

78. *Id.*

79. *Understanding Easements and Rights-of-Way*, *supra* note 75.

80. W.M., Annotation, *Extent of Rights in Right-of-Way Acquired for Power or Light Line*, 46 A.L.R. 1463 (1927).

81. RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.10 (2000). Easements (and ROWs) are a type of servitude. *Id.*

82. *Id.*

83. *Id.*

The Restatement's comments for section 4.10 help to resolve the tensions found in the definition.⁸⁴ Comment *c.* states that the “[s]ervitude holder is entitled to make any use reasonably necessary for convenient enjoyment” of the easement.⁸⁵ The comment acknowledges that uses within the scope of the easement will change over time as technology and other factors change.⁸⁶ The intent of both parties and whether a use should have been contemplated is relevant.⁸⁷ Comment *f.* specifically deals with “[c]hanges in the manner, frequency, and intensity of use” of the easement, again noting that use of the easement may change to take advantages of developments in technology and other normal evolutions.⁸⁸ As an illustration, comment *f.* uses the hypothetical of a power company that holds an easement to run its power lines on wooden poles through a property.⁸⁹ The illustration concludes that the power company would be justified to replace the wooden power poles with taller, steel structures.⁹⁰ However, the illustration qualifies that determination by stating that the power company could not replace the original poles if “the increased size of the structures would unreasonably interfere with the enjoyment of the servient estate.”⁹¹

Comment *g.* explores what the Restatement means by “unreasonable damage to [the] servient estate.”⁹² Although the comment acknowledges that a certain amount of inconvenience is to be expected on the part of the servient estate, varying degrees of damage may not be unreasonable.⁹³ Comment *g.* specifically names the “aesthetics and the character of the property” as important concerns in determining whether a use or improvement will cause unreasonable damage to the servient estate.⁹⁴

Similarly, comment *h.* deals with “unreasonable interference with enjoyment of servient estate.”⁹⁵ The comment notes that what constitutes “unreasonable” is largely circumstance-specific, and again specifically notes aesthetic considerations as relevant.⁹⁶ As an illustration, the comment

84. *See id.* (explaining the application and public policy behind easements, and providing illustrations of application).

85. RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.10 cmt. c. (2000).

86. *Id.*

87. *Id.*

88. RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.10 cmt. f. (2000).

89. *Id.*

90. *Id.*

91. *Id.*

92. RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.10 cmt. g. (2000).

93. *See id.* (explaining how a certain amount of damage is acceptable so long as it is not more than contemplated by the parties or what is unreasonable).

94. *Id.*

95. RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.10 cmt. h. (2000).

96. *Id.*

poses a hypothetical in which A, the owner of Whiteacre, is granted an easement “for ingress and egress” over Blackacre.⁹⁷ Blackacre is a residential, suburban area.⁹⁸ The illustration concludes that A is not entitled to use the easement for rail, heavy trucks, or other loud vehicles because “the noise, vibrations, and appearances will interfere unreasonably with enjoyment of Blackacre,” the quiet suburban property.⁹⁹ The Restatement indicates that although an easement’s use is expected to evolve over time, that use may not unreasonably burden the servient property.¹⁰⁰

C. Case Law Relevant to the Overburdening of Easements

1. Non-Binding Precedent

Legal action attempting to halt Northern Pass would take place in New Hampshire.¹⁰¹ However, because New Hampshire courts have not considered any cases directly analogous to a theoretical overburdening complaint against Northern Pass, it is useful to consider precedent from other jurisdictions.¹⁰²

In *Burkhart v. Jacob*, the Oklahoma Supreme Court addressed the issue of easement overburdening.¹⁰³ In *Burkhart*, the dominant estate holders wanted to use a right-of-way in order to transport sand and gravel using heavy trucks.¹⁰⁴ In reversing the trial court’s order of summary judgment for the servient estate owners, the Court stated that “[w]hether or not a use is reasonable is a question of fact,” with the burden on dominant estate owners to show that the proposed use was allowable.¹⁰⁵ If the servient estate suffers “(1) decreased property value, (2) increased noise and traffic or interference with the servient owner’s peace and enjoyment of the land, and (3) physical damage to the servient estate,” this may indicate that a

97. *Id.*

98. *Id.*

99. *Id.*

100. *See infra* notes 81–98 and accompanying text (explaining that advances in development are expected but not to the extent that there will be interference with the use or enjoyment of a servient estate holder’s property).

101. Jensen, *supra* note 5.

102. *See id.* (explaining two pertinent New Hampshire Supreme Court Cases).

103. *Burkhart v. Jacob*, 976 P.2d 1046, 1049 (Okla. 1999).

104. *Id.* at 1048.

105. *Id.* at 1050.

proposed use could be unreasonably burdensome.¹⁰⁶ The Supreme Court of Alabama has also followed this definition of an unreasonable burden.¹⁰⁷

In *Farrell v. Vermont Electric Power Company*, the Vermont Supreme Court considered a utility company's installation of additional transmission lines on a ROW within the plaintiff's servient estate.¹⁰⁸ The ROW originally contained wooden power poles, and the utility company replaced these with newer, taller metal towers.¹⁰⁹ Plaintiff asserted that there was a genuine issue of material fact as to whether the power company had overburdened their easement.¹¹⁰ The Court affirmed the trial court's grant of summary judgment for the power company.¹¹¹ The Court found that the plaintiff "produced no evidence that the [new power] line imposes an additional burden on the Property."¹¹² Although the plaintiff argued that the new towers, if they fell, might damage his property, the Court deemed this mere speculation.¹¹³ Additionally, the Court determined that the plaintiff lacked any support for his claim that the difference in appearance created by the taller towers would impose a burden on the property.¹¹⁴

2. Binding Precedent

In one of the first New Hampshire state court decisions regarding the proper extent of an easement, the Superior Court stated: "[T]he grantee of a [right of] way is limited to use his way for the purposes and in the manner specified in his grant."¹¹⁵ The interpretation of the easement deed language itself is a question of law.¹¹⁶ The intention of the parties at the time of the easement's conveyance determines the interpretation of the easement.¹¹⁷ However, a court need not consider extrinsic evidence to determine a

106. See *id.* (listing burdens on the servient estate that affect the reasonableness of the change in use).

107. *Weeks v. Wolf Creek Indus.*, 941 So.2d 263, 272 (Ala. 2006). The Alabama Court quotes the *Burkhart* language exactly.

108. *Farrell v. Vt. Elec. Power Co.*, 68 A.3d 1111, 1117 (Vt. 2012).

109. *Id.* at 1113.

110. *Id.* at 1114.

111. *Id.* at 1113–14.

112. *Id.* at 1117.

113. *Id.*

114. *Id.*

115. *French v. Marstin*, 24 N.H. 440, 449 (N.H. 1852).

116. *Galloway v. Brox*, No. 11-CV-272-PB, 2012 WL 2994737, at *3 (D. N.H. July 23, 2012).

117. See *Heartz*, 808 A.2d at 81 (explaining that language in deeds controls, not the parties' intentions).

deed's meaning if the language of the easement is clear and unambiguous.¹¹⁸

If the easement language is ambiguous, the court must apply a reasonableness test, or "rule of reason," to interpret the deed.¹¹⁹ The rule of reason requires a court to "give a meaning to words which the parties or their ancestors in title have actually used . . . or else to give a detailed definition to rights created by general words either actually used, or whose existence is implied by law."¹²⁰ Therefore, the rule of reason is used by the court to define ambiguous terms or meanings in the easement language itself.¹²¹ By engaging in this inquiry, the court may determine whether or not a particular use is included under the easement's language.¹²²

However, even if use of an easement may be included under its terms, it may still be found to unreasonably burden, or overburden, the servient estate.¹²³ The rule of reason is again employed by New Hampshire courts to evaluate whether a use is an unreasonable burden.¹²⁴ In using an easement, both parties "must still act reasonably under the terms of the grant so as not to interfere with the use and enjoyment of each others' estates."¹²⁵ When the rule of reason is applied in this manner, it is "treated as a question of fact that is determined by considering the surrounding circumstances, such as location and the use of the parties' properties, and the advantages and disadvantages to each party."¹²⁶ An unreasonable burden will be found when there is an alteration in use "so substantial as to result in the creation and substitution of a different servitude from that which previously existed."¹²⁷ A complaining party must make "sufficient factual allegations of unreasonable use or burden" to succeed in a claim.¹²⁸

If a change of use is "a normal development from conditions existing at the time of the grant, such as an increased volume of traffic, the enlargement of a use is not considered to unreasonably burden the servient estate."¹²⁹ The New Hampshire Supreme Court determined in *Downing House* that an easement, originally used as a passageway to access a

118. *Id.*

119. *Id.*

120. *Sakansky v. Wein*, 169 A. 1, 2 (N.H. 1933).

121. *Heartz*, 808 A.2d at 81.

122. *See id.* (explaining how the rule of reason is used to interpret the parties' intentions concerning easements).

123. *Galloway*, 2012 WL 2994737, at *4.

124. *Heartz*, 808 A.2d at 81.

125. *Id.* (quoting *Lussier v. New England Power Co.*, 584 A.2d 179, 182 (N.H. 1990)).

126. *Galloway*, 2012 WL 2994737, at *4.

127. *Bos. & Me. Corp. v. Sprague Energy Corp.*, 861 A.2d 781, 787 (N.H. 2004).

128. *Heartz*, 808 A.2d at 82.

129. *Downing House Realty v. Hampe*, 497 A.2d 862, 865 (N.H. 1985).

residential home, could reasonably be used to access a commercial parking lot without overburdening the easement.¹³⁰ The Court found that this use was a reasonable evolution considering that “both properties as well as the surrounding area have been converted to commercial use.”¹³¹

In *Crocker v. College of Advanced Science*, an easement to convey sewage by an eight-inch pipe to the servient estate had been granted 60 years earlier to the owner of a summer inn.¹³² At the time, the summer inn operated only two or three months a year and had a capacity of just 35 guests.¹³³ Many years later, the defendant purchased the property and opened a school, which operated around nine months out of the year.¹³⁴ Eventually about 200 people were making use of the buildings and the sewage easement which served them.¹³⁵ The plaintiff observed that the flow of sewage onto his servient property had greatly increased and begun to accumulate on the surface of his land.¹³⁶ The servient owner petitioned for a permanent injunction, alleging an unreasonable burden caused by use of the easement.¹³⁷ The Court affirmed the trial court’s finding that the easement’s use had changed so dramatically that it “impose[d] an unwarranted additional and new burden on the servient property of the plaintiff.”¹³⁸

In *Nadeau v. Town of Durham*, a ROW ran over plaintiff’s property.¹³⁹ A single family residence and a ROW used as the driveway was the classic use of the dominant estate.¹⁴⁰ However, the dominant owner planned to build an elderly housing community on the parcel, featuring 14 condominium units and a parking lot.¹⁴¹ The ROW would be used as part of the housing development’s driveway and parking lot.¹⁴² The trial court found that the proposed use of the easement was impermissible for two reasons.¹⁴³ First, the trial court “considered the proposed use, the rights and burdens of the parties at the time of the creation of the right-of-way, the reasonable expectations of the parties relative to its future use, [and] changed circumstances of the parties...” and concluded that the plaintiff

130. *Id.* at 864–65.

131. *Id.* at 865.

132. *Crocker v. Coll. of Advanced Sci.*, 268 A.2d 844, 846 (N.H. 1970).

133. *Id.*

134. *Id.* at 846–47.

135. *Id.* at 847.

136. *Id.* at 846.

137. *Id.* at 845.

138. *Id.* at 847.

139. *Nadeau v. Town of Durham*, 531 A.2d 335, 335–36 (N.H. 1987).

140. *Id.*

141. *Id.* at 336.

142. *Id.*

143. *See id.* at 338 (outlining the Court’s justification).

could not have contemplated the proposed use of the easement.¹⁴⁴ Second, the trial court found that the new use of the ROW would substantially burden the servient property.¹⁴⁵ Specifically, “there would be increased noise, traffic, and lighting which would diminish the plaintiff’s use and quiet enjoyment of her property.”¹⁴⁶ The Supreme Court affirmed the trial court’s determinations.¹⁴⁷

The New Hampshire Supreme Court again addressed the issue of easement interpretation in the 1990 case of *Lussier v. New England Power Company*.¹⁴⁸ This case dealt with a power company’s ROW over plaintiffs’ servient estate, on which transmission lines and towers had been built in 1930.¹⁴⁹ In the 1980s, the power company moved to construct a third transmission line on the easement, and the plaintiffs initiated a suit to enjoin.¹⁵⁰ The language of the original deed was extremely broad and granted the power company: “[T]he perpetual right and easement to construct, reconstruct, repair, maintain, operate and patrol . . . lines of towers or poles . . . the perpetual right and easement to construct, operate, and maintain transmission lines.”¹⁵¹

The Court made clear that although the “rule of reason” should be used in instances where easement language is ambiguous, no such case existed here.¹⁵² The easement language was sufficiently explicit for the Court to determine, as a matter of law, that the power company’s addition would not exceed the easement’s language.¹⁵³ However, even if an easement may be used for a certain purpose, that use must be reasonable “under the terms of the grant so as not to interfere with the use and enjoyment of [the] estate[.]”¹⁵⁴ In *Lussier*, the plaintiffs “made no allegations of unreasonable interference or encroachment”; however, the Court noted as an example, if the plaintiffs had been “able to prove that the addition of the third line would cause adverse health effects from the increased voltage, then the addition might well have been determined to be an unreasonable use of the easement.”¹⁵⁵

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Lussier v. New England Power Co.*, 584 A.2d 179, 181 (N.H. 1990).
149. *Id.* at 180.
150. *Id.* at 180–81.
151. *Id.* at 181.
152. *Id.*
153. *Id.*
154. *Id.* at 182.
155. *Id.*

III. STOPPING NORTHERN PASS USING LEGAL ACTION

Environmental groups and local citizens in New Hampshire continue to oppose Northern Pass despite the company's efforts to ease concerns.¹⁵⁶ In addition, the political establishment of New Hampshire has strongly pressured Northern Pass to consider alternative route options and increase transparency in the process.¹⁵⁷ New Hampshire's governor, as well as its entire congressional delegation, has expressed concern about the possible negative impacts on the state.¹⁵⁸ Opponents of the project are hopeful to succeed in stopping the project—or in pushing it completely underground—through a combination of political and regulatory pressure.¹⁵⁹ Since Northern Pass still has several hurdles to pass on the regulatory front, including awaiting the results of the DOE EIS, most direct legal action is on hold until if and when the project actually begins.¹⁶⁰

A. *The Overburdening of Existing PSNH Rights-of-Way*

If Northern Pass gains approval, one of the remaining legal options for opponents of the project will be to object to the company's use of existing PSNH ROWs, over which the bulk of the project's transmission lines will run.¹⁶¹ Of the proposed 180 mile project, Northern Pass plans to use existing ROWs for 140 miles.¹⁶² These ROWs, owned by New Hampshire's largest electric utility, PSNH, are available to Northern Pass because

156. See Stevens, *supra* note 4 (explaining that Northeast Utilities implemented outreach programs for the community).

157. See Press Release, Office of the Governor, Governor Hassan Statement on Northern Pass Announcement (June 27, 2013), <http://governor.nh.gov/media/news/2013/pr-2013-06-27-northern-pass.htm> [<http://perma.cc/29B2-N9TH>] (informing constituents on the progress of the Northern Pass plan).

158. See Hassan, *supra* note 23; Jeanne Shaheen, et al., *In Their Own Words: Northern Pass Requires Thorough, Additional Federal Review*, CONCORD MONITOR (Aug. 22, 2013), <http://www.concordmonitor.com/home/8143871-95/in-their-own-words-northern-pass-requires-thorough-additional-federal-review> [<http://perma.cc/3QFN-Q2AN>] (noting New Hampshire's Congressional Delegation's continued concerns about the Northern Pass hydroelectric transmission project).

159. Stevens, *supra* note 4.

160. However, one New Hampshire White Mountain resort filed suit against Northern Pass, alleging that numerous violations by the transmission company have caused a significant decrease in property value. Bob Sanders, *Facing Foreclosure, White Mts. Resort Sues Northern Pass*, N.H. BUS. REV. (Oct. 3, 2013), <http://www.nhbr.com/October-4-2013/Facing-foreclosure-White-Mts-resort-sues-Northern-Pass/> [<http://perma.cc/P3ZG-LVX3>]. That lawsuit was dismissed in late 2014. John Koziol, *Judge Rejects Reconsideration of Lawsuit Against Northern Pass*, N.H. UNION LEADER (Nov. 23, 2014), <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20141124/NEWS05/141129568/1029> [<http://perma.cc/4F67-9GM7>].

161. Jensen, *supra* note 5.

162. *Id.*

PSNH's parent company is Northeast Utilities—the main corporation behind the Northern Pass project.¹⁶³ Some servient estate owners, along whose land PSNH holds easements, claim that Northern Pass's proposed use of those easements would be impermissible.¹⁶⁴ They argue that the new, much larger, transmission towers proposed by Northern Pass would unreasonably burden their property compared to the wooden transmission poles currently in use.¹⁶⁵ The original PSNH ROWs were largely standard format easements granting the utility the perpetual right to do almost anything within the eased area related to delivering electricity.¹⁶⁶ Despite this permissive language, landowners in New Hampshire argue that the Northern Pass project would overburden these existing easements.¹⁶⁷

1. Scope of the Easement

In evaluating the use of an easement, New Hampshire courts have a multistep process.¹⁶⁸ The first step is to determine the *meaning* of the easement itself.¹⁶⁹ This is a question of law.¹⁷⁰ The PSNH easements to be used by Northern Pass contain broad language.¹⁷¹ The following language is from a 1952 easement grant in Grafton County, which deeded a right-of-way to PSNH:

“[The grantors] do hereby give, grant, bargain, sell and convey unto the Grantee and its successors and assigns forever, the RIGHT and EASEMENT to erect, repair, maintain, rebuild, operate, patrol and remove electrical transmission and distribution lines, consisting of suitable and sufficient poles and towers, with suitable foundations, together with wires strung upon and extending between the same, for the transmission of electric current, together with all necessary cross-arms, braces, anchors, wires, guys and other equipment over and across [the property].”¹⁷²

163. *Why the Northern Pass Project Matters*, *supra* note 15.

164. Jensen, *supra* note 5.

165. *See id.* (explaining that “the new towers will poke up above the trees destroying the view and . . . the property value”).

166. *See* Frances Glassner Lee, Easement Deed recorded in Grafton County Registry of Deeds, Book 822, Page 244 (June 17, 1952) [hereinafter *Lee Easement Deed*] (on file with author).

167. Jensen, *supra* note 5.

168. *See Heartz*, 808 A.2d at 81 (outlining the two-step rule of reason analysis in easement interpretation).

169. *Id.*

170. *Galloway*, 2012 WL 2994737, at *3.

171. *See Lee Easement Deed*, *supra* note 166 (granting broad discretion to the grantee in the easement).

172. *Id.*

If the meaning of an easement is unclear, the New Hampshire courts will apply a “rule of reason” to give meaning to the easement deed’s language.¹⁷³ The original intent of the grantor and grantee of the deed is particularly relevant.¹⁷⁴ Although the PSNH deed seems clear, there may be room to argue that Northern Pass’ proposed use is unreasonable under the easement language.¹⁷⁵ For example, in *Nadeau*, the Supreme Court affirmed a trial court’s finding that a ROW, originally used as a driveway for a single-family home, could not be reasonably interpreted to serve as a driveway for a condominium complex parking lot.¹⁷⁶ Factors in reaching that determination included the reasonable expectations of the parties and burdens on them *at the time of the easement’s granting*.¹⁷⁷ When the PSNH easements were granted, a landowner would not likely have foreseen a 130-foot metal transmission tower, since the original towers were 55 feet tall and made of wood.¹⁷⁸ It is possible that, if a court were to determine that the language of a PSNH easement was ambiguous, evidence about the servient owner’s expectations would lead to a finding of unreasonableness similar to *Nadeau*.¹⁷⁹

However, the PSNH easements seem to leave little doubt about the meaning of the original deed.¹⁸⁰ If the language of an easement deed is clear and unambiguous, the court’s inquiry ends there, without needing to consider any extrinsic evidence.¹⁸¹ Based on New Hampshire Supreme Court precedent, a court would likely find the original PSNH easement language to be unambiguous.¹⁸² In *Lussier*, the Court considered a power company’s ROW with language very similar to the PSNH easements.¹⁸³ The Court found that the deed’s language explicitly authorized the construction of new transmission towers on the easement.¹⁸⁴ It is likely that

173. *Heartz*, 808 A.2d at 81.

174. *See Flanagan v. Prudhomme*, 644 A.2d 51, 56 (N.H. 1994) (stating how evidence of the parties’ intentions “may be used to clarify the terms of an ambiguous deed”).

175. *See Nadeau*, 531 A.2d at 337–38 (illustrating how New Hampshire courts use the “rule of reason”).

176. *Id.* at 336–37. The easement language only specified the width of the ROW, not its intended use.

177. *Id.* at 338.

178. *Jensen*, *supra* note 5.

179. *See Nadeau*, 531 A.2d at 338 (setting aside a proposed use of a right-of-way after considering the reasonable expectations of the parties relative to the right-of-way’s future use).

180. *See Lussier*, 584 A.2d at 182 (noting that the deed’s language is clear and controlling). *Lee Easement Deed*, *supra* note 166.

181. *Lussier*, 584 A.2d at 182.

182. *See id.* at 181–82 (explaining that New Hampshire precedent gives substantial deference to easement holders).

183. *See id.* at 181 (explaining that the easement language in both deeds allows improvements to be implemented). *Lee Easement Deed*, *supra* note 166.

184. *Lussier*, 584 A.2d at 182.

a New Hampshire court would follow this precedent and determine that adding towers and lines to the PSNH ROWs is a use within the scope of the easement's language.¹⁸⁵

2. Unreasonable Burden

Even if the New Hampshire courts determine that a proposed use is reasonable under the easement's language, servient owners may still have recourse.¹⁸⁶ No matter how clearly an easement may authorize a new use, that use may not create an unreasonable burden on the servient estate.¹⁸⁷ The Restatement of Property acknowledges that although a certain amount of damage or harm may be expected on the part of the servient estate, damage may not rise to the level of unreasonableness.¹⁸⁸ Again, the New Hampshire courts use the "rule of reason" to determine when a use becomes an unreasonable burden.¹⁸⁹ It is a question of fact.¹⁹⁰

Northern Pass opponents could claim two logical unreasonable burdens.¹⁹¹ The first, and more tenuous, is that the oversized Northern Pass transmission towers could create unreasonable health risks.¹⁹² The stronger argument claims that the new transmission towers will cause an unreasonable burden by impermissibly lowering the property value of the servient estates.¹⁹³

Unreasonable burdens have been found in New Hampshire when the easement's usage multiplies in scope, as is the case with the new, larger towers proposed by Northern Pass.¹⁹⁴ In *Crocker*, an easement over the servient estate was originally used to convey sewage for a small summer inn.¹⁹⁵ When the dominant estate began using the easement to serve a large

185. See *id.* at 181–82 (holding that additions to the transmission lines and electrical switching station were permitted under the terms of the deed due to the clearly expressed intent of the parties). See *Easement Deed*, *supra* note 166.

186. See *Galloway*, 2012 WL 2994737, at *4 (noting that an unfavorable outcome from New Hampshire courts does not mean all means of success for opposition to Northern Pass have been excluded).

187. See *Heartz*, 808 A.2d at 81 (noting that irrespective of the deed language, the rule is used to determine whether a particular use of the easement would be unreasonably burdensome).

188. RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.10 cmt. g. (2000).

189. *Heartz*, 808 A.2d at 81.

190. *Id.*

191. Jensen, *supra* note 5.

192. See *id.* (noting the court could rule in favor of the landowner if some downside were proven, for example, "adverse health effects from the increased voltage").

193. See *id.* (explaining the potential for new transmission towers to leave significant impacts on property values as a possible argument for Northern Pass opponents).

194. See *Nadeau*, 531 A.2d at 336–38 (citing previous New Hampshire cases where unreasonable burdens have been found when the scope of the easement multiplies).

195. *Crocker*, 268 A.2d at 846.

school with a much greater sewage flow, however, the Court determined that this was “an unwarranted additional and new burden” on the servient estate.¹⁹⁶ Similarly, in *Nadeau*, the Court found that “increased noise, traffic, and lighting . . . would diminish the [servient owner]’s use and quiet enjoyment of her property.”¹⁹⁷ It stands to reason that if an increase in the volume of annoyances such as noise and light pollution is sufficient to create an unreasonable burden, perhaps a decrease in property value or increase in health hazards would also be sufficient.¹⁹⁸

Other jurisdictions lend support to that proposition.¹⁹⁹ An Oklahoma Supreme Court case explicitly lists “decreased property value” as being a burden on the servient estate.²⁰⁰ Likewise, the Alabama Supreme Court has recognized property value decrease as a possible burden.²⁰¹

The Oklahoma Court also listed “increased noise and traffic or interference with the servient owner’s peace and enjoyment of the land,” the burden recognized by the New Hampshire Court in *Nadeau*.²⁰² Research shows that 300kV transmission lines such as the ones proposed by Northern Pass may create electrical noise or buzz as loud as 33 decibels in dry weather, with an increase of 15 to 30 decibels in humid weather.²⁰³ While this electrical noise could be characterized as “increased noise,” at its peak the additional noise would be only as loud as a normal conversation.²⁰⁴

The two cases most factually similar to a theoretical Northern Pass lawsuit buttress the utility company’s position.²⁰⁵ In Vermont, a landowner sued an electric company after it replaced the wooden power poles on its ROW with newer, taller towers.²⁰⁶ The Vermont Supreme Court rejected the servient owner’s allegations of overburdening as conclusory and mere

196. *Id.* at 847.

197. *Nadeau*, 531 A.2d at 338.

198. *See id.* at 337 (describing how the Court can use all “surrounding circumstances” to determine reasonableness).

199. *See Weeks*, 941 So.2d at 272. *Burkhart*, 976 P.2d at 1050 (providing cases that associate a decrease in property value or increase in health hazards with an unreasonable burden).

200. *Burkhart*, 976 P.2d at 1050.

201. *Weeks*, 941 So.2d at 272.

202. *Burkhart*, 976 P.2d at 1050. *see Nadeau*, 531 A.2d at 338 (explaining the Court’s recognition of “increased noise, traffic, and lighting” as burdens).

203. EIGIL REIMERS ET AL., *High Voltage Transmission Lines and Their Effect on Reindeer—A Research Programme in Progress*, 19 POLAR RES. 75, 76–77 (2000). This measurement comes from a transmission line in Norway.

204. *See Noise Sources and Their Effects*, PURDUE UNIV. – DEPT. OF CHEMISTRY, <https://www.chem.purdue.edu/chemsafety/Tramng/PPETram/dblevels.htm> [http://perma.cc/8Y7U-NEA6] (last visited Mar. 30, 2014) (describing noise levels at specific decibels). *see also* REIMERS ET AL., *supra* note 203 (noting that the increased noise is not likely to amount to an unreasonable burden).

205. *See Lussier*, 584 A.2d at 182 (referencing a case factually similar to Northern Pass). *Farrell*, 68 A.3d at 1117.

206. *Farrell*, 68 A.3d at 1112–14.

speculation.²⁰⁷ Similarly, in the New Hampshire case of *Lussier*, the servient estate owners “made no allegations” of an unreasonable burden.²⁰⁸ Therefore, in both cases regarding an electric company’s alleged overburdening of an easement, the “complaining party fail[ed] to make sufficient factual allegations of unreasonable use or burden.”²⁰⁹ Theoretically, if a Northern Pass servient landowner were able to name specific burdens, supported by fact and not merely conclusory, an unreasonable burden might be found.²¹⁰

A single sentence in the New Hampshire Supreme Court case of *Downing House* does significant damage to opponents of Northern Pass.²¹¹ Citing a Washington state appeals court, the New Hampshire Supreme Court determined that if a new use of an easement is a “normal development from conditions existing at the time of the grant . . . the enlargement of a use is not considered to burden unreasonably the servient estate.”²¹² This sentence seems to pertain more to the interpretation of the easement’s language than it does to overburdening.²¹³ Although the *Downing House* Court described the inquiry as a “question of fact,” indicating an overburdening analysis, the Court dwelled on the parties’ original intent, a factor relevant to interpretation of an easement but not an unreasonable burden inquiry.²¹⁴

Additionally, the Washington appellate court decision, the only authority cited by the Court in *Downing House*, also seems to be referring to interpretation rather than a separate overburdening inquiry.²¹⁵ The Washington court’s analysis refers to the “intentions of the parties connected with the original creation of the easement,” a factor in

207. *Id.* at 1117.

208. *Lussier*, 584 A.2d at 182.

209. *Heartz*, 808 A.2d at 82. *see Lussier*, 584 A.2d at 182 (emphasizing conclusory statements that lack adequate factual allegations that a property will be damaged will not satisfy the reasonable burden standard). *Farrell*, 68 A.3d at 1117.

210. *See Galloway*, 2012 WL 2994737, at *4 (reinforcing that allegations of an unreasonable burden must be supported by fact and not merely conclusory).

211. *Downing House*, 531 A.2d at 865.

212. *Id.* (citing *Logan v. Brodnck*, 631 P.2d 429, 432 (Wash. Ct. App. 1981)).

213. *See id.* *see also* RESTATEMENT (THIRD) OF PROPERTY SERVITUDES § 4.10 (2000) (noting that, although the reasonable use of an easement is expected to change over time, even a reasonable use may not create unreasonable burdens to a servient estate).

214. *See Downing House*, 497 A.2d at 865 (explaining the change of a use resulting from its normal development out of conditions in existence at the time of the grant, such as an increased volume of traffic, the enlargement of a use is not considered to unreasonably burden the servient estate). *see also Heartz*, 808 A.2d at 81 (stating that “[T]he parties’ intentions concerning the easement” are relevant to “interpret and give reasonable meaning to general or unclear terms in the” easement).

215. *Logan*, 631 P.2d at 431–32.

interpreting the easement's scope.²¹⁶ Furthermore, the Washington court's main authority for its holding is a now-outdated section of the Restatement (First) of Property, which is properly applied only to interpretation, not overburdening analysis.²¹⁷ In short, the damaging language in *Downing House* cited a case, which actually supported a separate principle: that in interpreting whether a proposed use is within an easement's scope, a court should accommodate normal developments from conditions at the time of the granting.²¹⁸ This is in line with the current Restatement.²¹⁹ However, the *Downing House* language came to stand for a different proposition: that if a particular use was a "normal development" from the time of the easement's creation, it was incontrovertibly permissible and could not be an unreasonable burden.²²⁰ Despite the incongruities in the *Downing House* decision, New Hampshire courts have relied upon it in their unreasonable burden analysis.²²¹

Even assuming a court would find the Northern Pass towers a "normal development from conditions existing at the time of the" original PSNH easement grants, the *Downing House* case is not necessarily the final word

216. *Id.*, see *Arcidi v. Town of Rye*, 846 A.2d 535, 543 (N.H. 2004) (citing *Lusser*, 584 A.2d at 181) (stating that to determine the "scope of the easement. . . [the Court's] task is to determine the parties' intent").

217. *Logan*, 631 P.2d at 432 ("The law assumes parties to an easement contemplated a normal development under conditions which may be different from those existing at the time of the grant. Restatement, Property § 484 (1944). see also *Cameron v. Barton*, 272 S.W.2d 40, 41 (Ky. 1954)."). The cited Restatement section states that if an easement's use is changed, an analysis of whether that use is reasonable should assume "that the parties to the conveyance contemplated a normal development of the [easement's] use." RESTATEMENT (FIRST) OF PROP. § 484 (1944) (emphasis added). Inquiries about intent are relevant only to the easement's interpretation, not in determining whether a use unreasonably burdens the servient estate. See *Hertz*, 808 A.2d at 81. The current Restatement makes clear that although an easement's "use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude . . . the [dominant estate] holder is not entitled to cause unreasonable damage to the servient estate." RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.10 (2000) (emphasis added). In addition to the Restatement, *Logan* also cites a state appellate decision from Kentucky, which clearly deals with the interpretation of an easement's scope, not an unreasonable burden analysis. See *Cameron v. Barton*, 272 S.W.2d 40, 41 (Ky. 1954) (holding that "[A] normal change in the manner of using a passway does not constitute a deviation from the original grant. . . . Such is the practical interpretation of the scope of the easement.").

218. See *Downing House*, 531 A.2d at 865 (referencing cases that take into account accommodation of normal developments and conditions since the time easement was granted), *Logan*, 631 P.2d at 432, *supra* note 217 and accompanying text.

219. See RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.10 (2000) ("The manner, frequency, and intensity of the use may change over time. . . to accommodate normal development[s].").

220. See *Bos. & Me. Corp.*, 861 A.2d at 787 (N.H. 2004) (citing *Downing House*, 497 A.2d 862) (finding an enlargement of use to be permissible). see also *Downing House*, 531 A.2d at 865 (distinguishing the Restatement and the court's interpretation of "normal development").

221. See, e.g., *Bos. & Me. Corp.*, 861 A.2d at 787–88; *Arcidi*, 846 A.2d at 543; *Hertz*, 808 A.2d at 82 (citing examples in which New Hampshire courts have relied upon the reasoning of the *Downing House* decision).

for servient landowners.²²² Although the language seems definitive, it has not always been applied that way by the New Hampshire courts, further devaluing the case as precedent.²²³ For example, the New Hampshire Supreme Court in *Lussier*, decided six years after *Downing House* in an opinion written by the same Justice, noted that “if the plaintiffs were able to prove that the addition of the third line would cause adverse health effects from the increased voltage, then the addition might well have been determined to be an unreasonable use of the easement.”²²⁴ This possibility indicates that either: under the *Downing House* language, additions to transmission lines are not “normal developments” under the easement; or, that even if a certain use is a normal evolution, a factual showing of negative effects on the servient property can still prove an unreasonable burden.²²⁵ Either way, the Court in *Lussier* clearly speculated, in spite of *Downing House*, that a modification to transmission lines could indeed be an unreasonable burden.²²⁶

In 2009, the New Hampshire Supreme Court further eroded the plain language of *Downing House*.²²⁷ The case uses the “normal development” language from *Downing House* several times but comes to a different conclusion:

“An enlargement of use is permissible if the change of a use is a normal development from conditions existing at the time of the grant, such as an increased volume of traffic. *The easement holder cannot, however, materially increase the burden of it upon the servient estate, nor impose a new or additional burden thereon.*”²²⁸

Therefore, the Court again recognized that even if a project (such as Northern Pass) is a “normal development” from the original easement, it *still* may not impose unreasonable burdens on the servient estate.²²⁹ The *Duxbury-Fox* Court correctly interpreted *Downing House*’s “normal development” language to apply only to easement interpretation: a separate inquiry from unreasonable burden analysis.²³⁰

222. See *Duxbury-Fox v. Shakhnovich*, 989 A.2d 246, 253 (N.H. 2009) (noting servient owners are not controlled by the *Downing House* decision), *Lussier*, 584 A.2d at 182.

223. See *Duxbury-Fox*, 989 A.2d at 253 (pointing out the *Downing* interpretation of “normal development” has not been applied consistently).

224. *Lussier*, 584 A.2d at 182.

225. *Id.*, *Downing House*, 531 A.2d at 865.

226. See *Lussier*, 584 A.2d at 182.

227. *Duxbury-Fox*, 989 A.2d at 253.

228. *Id.* (emphasis added) (citations omitted) (internal quotation marks omitted).

229. *Id.*

230. See *supra* notes 211–229 and accompanying text.

B. The Effect of Transmission Lines on Property Value

If the New Hampshire courts were to correctly interpret *Downing House* in a hypothetical lawsuit against Northern Pass, the plaintiffs would still need to prove that the proposed transmission towers would unreasonably burden their servient estates.²³¹ A bare assertion or conclusory statement that a particular use will overburden is insufficient.²³² The complaining party must make “sufficient factual allegations of unreasonable use or burden,” otherwise, the court will not engage in an unreasonable burden analysis.²³³

Ultimately, the New Hampshire courts will only find an unreasonable burden when the change in use is “so substantial as to result in the creation” of an essentially different easement.²³⁴ To determine whether a use is an unreasonable burden, the courts consider “the surrounding circumstances, such as location and the use of the parties’ properties,” as well as the “advantages and disadvantages to each party.”²³⁵

Common sense indicates that the presence of large 100-foot high-voltage transmission towers on a property would decrease its value, especially a property prized for its scenic beauty.²³⁶ However, harder evidence is necessary to prove an unreasonable burden.²³⁷ Anecdotal testimony is a start: many realtors in New Hampshire’s North Country attest that real estate value along Northern Pass’s proposed route has already fallen.²³⁸ Some claim that the proposed project has decreased some properties’ value by 25–50%.²³⁹

231. See *Galloway*, 2012 WL 2994737, at *4 (explaining the other obstacles that stand in the way, even if *Downing* were interpreted properly).

232. *Id.*

233. *Heartz*, 808 A.2d at 82.

234. *Bos. & Me. Corp.*, 861 A.2d at 787 (quoting *Crocker*, 268 A.2d at 847).

235. *Heartz*, 808 A.2d at 81.

236. See Chris Jensen, *Appraisal Triggers Latest Dispute Over Northern Pass*, N.H. PUB. RADIO (Nov. 1, 2012), <http://nhpr.org/post/appraisal-triggers-latest-dispute-over-northern-pass> [<http://perma.cc/HTA5-UJK6>] (describing how scenic properties are losing value due to the Northern Pass project).

237. See *Heartz*, 808 A.2d at 82 (holding that conclusory statements, which lack factual support that a property will be damaged does not satisfy the reasonable burden standard).

238. Paula Tracy, *Realtors: Northern Pass Scares Buyers, Lowers Values*, N.H. UNION LEADER (Nov. 4, 2012), <http://www.unionleader.com/article/20121105/NEWS05/121109620> [<http://perma.cc/E8SG-4NUK>].

239. *Id.* In one example, a property estimated to be worth \$400,000 received an offer of just \$190,000. The prospective buyer wrote that his offer was low because of uncertainty regarding Northern Pass. *Id.* The two realtors quoted in this newspaper article are opponents of the project, but have extensive real estate experience. *Id.*

Northern Pass, of course, is quick to dismiss these accounts.²⁴⁰ The corporation's literature states that "research suggest[s] that there are often no effects on property values [from transmission towers], or when there are effects, they are most often small."²⁴¹ To support their conclusion, Northern Pass cites several published reports on the impact of high-voltage transmission lines ("HVTL") on property values.²⁴² It should be noted that three of the reports cited by Northern Pass were themselves commissioned by the corporation.²⁴³

A recent literature review, from a neutral source, of studies concerning HVTLs is somewhat inconclusive.²⁴⁴ The literature review synthesizes studies from the United Kingdom, New Zealand, and North America.²⁴⁵ In the United Kingdom, the authors found that "physical proximity and the visual presence of a pylon [tower] can have a significant and negative impact on value."²⁴⁶

The literature revealed 20% average decrease in property value when transmission towers were within 100 meters of a property.²⁴⁷ Specifically, the review found that houses with a view of the countryside had their property value "more negatively affected."²⁴⁸ Property values in New Zealand were similarly negatively affected by 20% when 10–15 meters from a transmission tower.²⁴⁹

In the United States, the impact of HVTLs is not as clear from the literature.²⁵⁰ A review of existing studies commissioned by Northern Pass found that "[t]he majority of the literature review . . . finds that High Voltage Transmission Lines ("HVTLs") have a modest or no measurable impact on property values."²⁵¹ However, the 2013 book published by

240. *Id.*

241. *Property Value Impact, N. PASS*, http://northernpass.us/assets/pdf/np_property%20value%208-28-13.pdf [http://perma.cc/86HQ-HQXP] (last visited Mar. 9, 2014).

242. *Id.*

243. *Id.*, see also Callahan, *supra* note 24 (noting three of the reports Northern Pass relies on were commissioned by the corporation itself).

244. See SANDY BOND ET AL., *TOWERS, TURBINES AND TRANSMISSION LINES IMPACTS ON PROPERTY VALUE* 116 (2013) (explaining that there seems to be no clear correlation between price and distance of the variables that may lead to price impacts from HVTL proximity).

245. See *id.* at 115–16 (describing research findings from various locations around the world).

246. *Id.* at 68.

247. *Id.*

248. *Id.* at 68–69.

249. *Id.* at 95.

250. See *id.* at 116 (describing how half a century of research on HVTLs on property values has produced mixed results in North America).

251. RUSSELL THIBEAULT, *THE EFFECT OF HIGH VOLTAGE TRANSMISSION LINES ON REAL ESTATE VALUES: A REVIEW OF THE APPRAISAL LITERATURE* 2 (2011). Specifically, Thibeault

neutral authors was less conclusive, stating that there are “serious questions relating to the statistical quality of many of the earlier hedonic studies . . . [and] also the overriding issue that many of these ‘independent’ studies were not actually independent and have been financed by power line companies.”²⁵² The authors go on to note that many of the studies are incompatible because variables such as location, population density, and sizes of towers are so diffuse.²⁵³ For example, although property value “diminution would be expected to vary according to the size of the power line and/or the height of the pylon towers,” the studies do not investigate a correlation.²⁵⁴

These studies may have limited applicability to the properties affected by Northern Pass.²⁵⁵ Most obviously, every study on property value investigates the mere presence of transmission towers: they do not correlate the impact with height.²⁵⁶ This is an issue because the landowners would need to show that the new, much larger towers would create a decrease in property value *in comparison* to the transmission installments already in place.²⁵⁷

Even Northern Pass literature points out that each property must be evaluated on a case-by-case basis to determine how it will be affected by transmission lines.²⁵⁸ In a hypothetical case against Northern Pass, the strongest way for servient landowners to demonstrate an unreasonable burden might be appraisals of the specific property in question, before and after the addition of the new HVTLs.²⁵⁹ In this vein, a homeowner in northern New Hampshire, whose property is located on one of Northern Pass’s proposed alternative routes, commissioned an independent

concludes that “[m]ost of the studies find that the measurable impact of an HVTL on value is generally less than 10 percent.” *Id.* at 3.

252. BOND, *supra* note 244, at 110.

253. *See id.* (explaining the lack of standard methodology for calculating the monetary impact of residential properties’ proximity to HVTLs is due in part to the fact that comparisons between studies are difficult to make because of the variety and complexity of each individual lot sale).

254. *Id.* at 111.

255. THIBEAULT, *supra* note 251. Jensen, *supra* note 236.

256. *See* BOND, *supra* note 244, at 111 (citing the lack of correlation between the impact of HVTL height in every study regarding property value).

257. *See* Jensen, *supra* note 5 (discussing the issues that arise because of studies’ failure to correlate HVTL height and property value).

258. *See Property Value Impact*, *supra* note 241 (discussing how property devaluation cannot be evaluated in the aggregate in regards to the effect of transmission lines).

259. *See* Jensen, *supra* note 236 (“Peter Powell, a Lancaster realtor, said it is hard in the North Country to prove the impact of something like Northern Pass because ‘you can’t find comparables for something that hasn’t happened yet.’ Other studies of the impact of high-voltage power lines are in areas that are not as pristine as the North Country, said Powell.”).

appraisal.²⁶⁰ The study assumed that the HVTLs running over the property would be 90 to 135 feet high, “well above tree level.”²⁶¹ The appraisal concluded that the property would lose between 52 and 91% of its value after the construction of HVTLs.²⁶² The report also discounts the relevancy of existing literature on the subject, noting that in those studies, “most data was collected in areas of higher density residential development where a desirable view did not exist prior to the HVTL. This contrasts significantly with this assignment in that desirable views of mountains and other landscape features already exist and are valued.”²⁶³ However, while this appraisal does indicate a negative impact from Northern Pass, the property in question did not contain any prior transmission lines and again has limited applicability to an overburdening claim.²⁶⁴

In any case, Northern Pass was quick to discredit the appraisal.²⁶⁵ The corporation again cited the existing literature on the subject, saying that it contradicted the appraisal.²⁶⁶ They also pointed to a previous report, commissioned by Northern Pass, which concluded that HVTLs “do not adversely impact property values.”²⁶⁷ The report, which examined just eight properties, has been criticized as flawed by academics and appraisers.²⁶⁸

Ultimately, showing sufficient evidence of an unreasonable burden will be a tough task for landowners.²⁶⁹ The existing literature is either inconclusive or only marginally applicable.²⁷⁰ However, this does not necessarily indicate that legal action against Northern Pass would be futile.²⁷¹ If landowners could produce appraisals showing a substantial

260. Paula Tracy, *Couple: Northern Pass Kills Land Value*, N.H. UNION LEADER (Apr. 25, 2011), <https://retasite.files.wordpress.com/2009/01/reta-union-leader-apr-25-2011.pdf> [http://perma.cc/9W4N-3H3X]. The certified appraisal was conducted by James Walker, president of White Mountain Appraisals. *Id.* The homeowners paid more than \$10,000 for the appraisals. *Id.*

261. JAMES C. WALKER, APPRAISAL FOR BLAKSLEE RD. DALTON, N.H., WHITE MOUNTAIN APPRAISALS INC. 5 (2011).

262. *Id.* at 61.

263. *Id.* at 47.

264. *Id.* at 61. Tracy, *supra* note 260, *supra* note 257 and accompanying text.

265. Paula Tracy, *Northern Pass: PSNH Disputes Drop in Value*, N.H. UNION LEADER (May 29, 2011), <http://www.unionleader.com/article/20110530/NEWS05/705309971&template=mobileart> [http://perma.cc/4SG8-2UWE].

266. See Jensen, *supra* note 236.

267. *Id.* see BRIAN C. UNDERWOOD, IMPACT ON VALUE OF HIGH VOLTAGE TRANSMISSION LINES TOWNS OF DEERFIELD & LITTLETON 13 (2011) (evaluating HVTL's effects on property values in Deerfield and Littleton).

268. See *Property Value Impact*, *supra* note 241 (detailing the effect on property value). W. Tod McGrath, a real estate lecturer at MIT, noted that comparing “equalized tax assessment of some properties with sale prices of others” to reach conclusions was a serious defect. Jensen, *supra* note 236.

269. See *supra* notes 236–268 and accompanying text.

270. See *supra* notes 236–268 and accompanying text.

271. *Lusser*, 584 A.2d at 182. *Farrell*, 68 A.3d at 1117.

decrease in property value because of the new, taller transmission towers, that may be sufficient to show an overburdening of the easement.²⁷²

CONCLUSION

Many of New Hampshire's residents oppose the Northern Pass project for economic, aesthetic, and environmental reasons. Northern Pass plans to construct their proposed power lines on existing rights-of-way throughout the state. One legal option for landowners with properties burdened by the rights-of-way is to allege that the project's proposed transmission towers would be an unreasonable burden compared to existing wooden power poles. Based on New Hampshire Supreme Court precedent, the success of such a claim would depend on several factors. For one, the courts would need to correctly interpret the meaning of the *Downing House* case and avoid summarily dismissing the overburdening claim simply because the new transmission towers are a "normal development" of technology. Second, the landowners would need to show concrete evidence that the project would create an unreasonable burden on their property, likely through convincing evidence of a major decrease in property value. Ultimately, this legal argument may be just one item in the tool belt used to halt Northern Pass along with other litigation, political and regulatory roadblocks, and pressure from public opinion.

272. See *Lussier*, 584 A.2d at 182. *Farrell*, 68 A.3d at 1117 (showing a substantial decrease in property value attributable to new transmission towers is an effective way to prove unreasonable burden).