

Mag Francis conversation with DES and DOJ re. Failure of DES to require landowner signatures on Eversource's line rebuild DES AOT applications.

From: Marguerite

Sent: Sunday, November 21, 2021 11:04 AM

To: Aslin, Christopher <Christopher.G.Aslin@doj.nh.>

Cc: Michael McDonald <mac.mcdonald@pwc.com>; Anne Norris <annemarshallnorris@gmail.com>; (redacted) Trowbridge, Philip <Philip.R.Trowbridge@des.nh.>; Mauck, Ridgely <Addison.R.Mauck@des.nh.gov>

Subject: Referral from Phillip Trowbridge

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As you are aware, property owners in New London have been investigating a number of permitting deficiencies associated with Eversource's rebuilding of the M-127 power corridor. These errors/omissions occurred with both state and municipal permits, and are traceable to process flaws within Eversource, within DES, and within the Town of New London. While we have painfully slogged through most issues, we have a couple of items left to resolve. Phillip Trowbridge gave us your name as the attorney who provided him with the legal opinion regarding who is the property owner of the land within Eversource's ROW as it pertains to DES AOT regulations.

The case law Phillip cited was from an adjudication completed in 2015, prior to DES significantly amending their AOT regulations, including defining key terms—Applicant, Agent, Owner, Person. Given the time line, the civil suit that surfaced the ambiguity with terms in the older Administrative Codes was a probable driver behind some of the changes that were adopted by Doc. #12342 effective 8-15-17. Additionally, in conjunction with the new rules/definitions, the AOT application form was

significantly revised, hopefully tightening up points of confusion inherent in the older document.

The codified definition of “applicant” clarifies that an easement holder with a legal right to complete the work proposed in an AOT permit can submit an application, which in this specific case would be Eversource. The regulations also spell out what property owner information/signatures must be on the AOT permit and associated documentation submitted to Municipalities and to DES (ENV-WQ 1503.10). “Owner” in the amended Administrative Code (ENV-WQ 1502.45) is defined as the “Record Title Holder”. Phillip has stated that based on your interpretation, Eversource is the singular “owner” of the underlying property. While we agree that Eversource has a title interest in this private property, and can apply for an AOT permit, we disagree that they are the exclusive “Record Title Holder” and can sign that application as the exclusive “owner”. The regulations provide for multiple “owners” if applicable.

Interestingly, Eversource is quite clear that they do not own the underlying property but rather have a limited use easement on this private property. I am going to attach some policy information published by Eversource regarding their view on who owns the property/land that the pole structures and lines reside on, and how they define and distinguish the rights of the two entities. The easement on our property is quite specific relative to what Eversource can construct to maintain and operate this portion of the power grid. That easement does not limit our use of that land outside of state, federal, and industry-specific safety rules that are codified in statutes and written policies. For example, we can plant and landscape the property within the easement boundaries. However, industry standards protecting the grid have specific rules relative to the maximum heights of trees within the power corridor, beginning with an 8-foot maximum directly under the power lines and ending with a 25-foot maximum at the outer perimeter of the easement boundary. Property owners cannot build a swimming pool within the easement boundary, but in New Hampshire, we can work with established snowmobile trail groups to allow those recreational activities to occur on our underlying property, even when it is within the easement boundary (although we have zero interest in snowmobile trails on our properties). Property owners with these easements attached to their land can and do include that underlying property within our Town Trail System. Some people

grow crops within the easement. And we could go on with specific examples.

Property owners and the easement holder (now Eversource) both retain their title interests. We cannot interfere with Eversource's easement rights and Eversource cannot unreasonably restrict our enjoyment of private property. Eversource sums it up better than I can:

“The majority of the rights-of-way used for the Eversource electric transmission system were established through the purchase of easement rights by Eversource from owners of the underlying property. While we have rights to operate and maintain the electric transmission system through these easements, the underlying property is still owned by private parties. Their rights to use the property continue, subject to our easement rights.”

I would add that Eversource is restricted by the specifics included in our easements and does not have a contractual right to “do whatever they want within the easement” which was apparently true in the cited case (Robert Michele). For example, our easement contracts state that Eversource can construct a “foundation suitable for the poles”. That is something that can be quantified by a civil engineer familiar with the pole technology being utilized. Eversource cannot construct a permanent foundation on our properties that is 2,000 square feet if their pole engineer indicates they only need 500 square feet to safely and securely house the footings. That would be going outside what is specifically included in our easement contracts, and infringing on our rights as owners of that land.

Hopefully I have outlined our understanding of record title holder status relative to the easement. We believe that Eversource's publicly available documentation supports our interpretation. We understand that Eversource has a title interest in the land covered by the easement contracts along the M-127 power corridor. We disagree with DES/DOJ that Eversource is the exclusive owner/record title holder of the underlying land. Given that “Record Title Holder” is a term not defined in the regulations, Merriam Webster apparently becomes the operative reference for clarifying what that term means. We have completed that analysis.

I believe we will need to meet, perhaps virtually, to better understand your point of view/legal opinion on the “owner” definition codified in the

relevant regulations. It is possible that other New London property owners may choose to adjust their work schedules to participate. If you could give us a couple of available meeting dates, I will coordinate property owner communication.

<https://www.eversource.com/>

Thank you,

Marguerite Francis

On Dec 9, 2021, at 1:50 PM, Aslin, Christopher
<Christopher.G.Aslin@doj.nh> wrote:

Dear Ms. Francis,

Thank you for reaching out in regard to NHDES's interpretation and application of its Alteration of Terrain (AOT) rules in relation to Eversource's transmission line maintenance on the M127 line through New London. NHDES's interpretation of its rules was reached in consultation with NHDOJ and was deemed a reasonable exercise of NHDES's administrative authority under RSA 485-A. I recognize that you have a different interpretation of the AoT rules and the meaning of "record title holder" and have already raised your concerns directly with NHDES staff. At this time there is no further role for NHDOJ in this matter.

Sincerely,

Chris Aslin

Christopher G. Aslin

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From: Marguerite

Date: December 9, 2021 at 2:28:56 PM EST

To: Philip Trowbridge <philip.r.trowbridge@des.nh.gov>

Cc: Ridgely Mauck <Addison.R.Mauck@des.nh.gov>, christopher.aslin@doj.nh.gov

Subject: Re: Referral from Phillip Trowbridge

This is quite circular. I asked that DES provide the legal basis for declaring Eversource the Record Title Holder as defined in the AOT regulations. You referred me to DOJ as the ones that provided you with that opinion. DOJ deflects back to DES' interpretation of its own rules, and indicates that you have the authority to make that legal interpretation.

So, my question to you is—what is the legal basis for your interpretation that Eversource is the singular Record Title Holder for AOT permitting purposes. If the answer is “Because I say So”, then just tell me that and I will proceed accordingly.

Marguerite Francis