

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2004-0185, State of NH v. L. Hamlin Greene & a.; State of NH v. Irving Oil Corporation & a.; State of NH v. Fandangle's Limited & a.; State of NH v. Joan Brassill Living Trust & a.; State of NH v. Richard Marshall Luciano & a., the court on December 1, 2004, issued the following order:**

The respondents appeal a decision of the trial court granting summary judgment to the State of New Hampshire. They contend that the trial court erred in denying them a hearing pursuant to RSA 498-A:9-b (1997) and granting summary judgment where material issues of fact existed. We affirm.

The State filed a declaration of taking and deposit of damages for the respondents' properties with the board of tax and land appeals (BTLA). The properties were to be acquired for Phase 5A of a nine-phase highway project in accordance with the findings of a special committee established pursuant to RSA 230:45 (1993). The respondents then filed preliminary objections. See RSA 498-A:9-a, I (1997).

The respondents first contend that RSA 498-A:9-b entitles them to a hearing on necessity, public benefit and public purpose because they offered credible evidence to demonstrate that the State could not meet its burden on those issues. Because RSA 498-A:9-b, II, provides that the superior court "may conduct an evidentiary hearing before it rules on [a] preliminary objection [concerning necessity, public purpose and net-public benefit]," the decision to hold a hearing is discretionary, see Duffy v. City of Dover, 149 N.H. 178, 181 (2003) (as general rule of statutory construction "may" is permissive).

In this case, as we review the trial court's grant of summary judgment, "we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." Godbout v. Lloyd's Ins. Syndicates, 150 N.H. 103, 105 (2003). "Summary judgment is proper only if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Cricklewood on the Bellamy Condo. Assoc. v. Cricklewood on the Bellamy Trust, 147 N.H. 733, 736 (2002).

The respondents argue that the State's admission that the widening and curb cut consolidations of Phase 5A will not work constitutes a judicial admission they are unnecessary, do not provide a net-public benefit and therefore do not serve a public purpose. While the respondents cite a standard of review set forth

in RSA 498-A:9-b, the correct standard is that set forth in RSA 230:45 (1993).

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See RSA 498-A:1 (1997); City of Keene v. Armento, 139 N.H. 228, 231-35 (1994) (RSA chapter 498-A is comprehensive eminent domain procedure act that must be read in conjunction with previously enacted eminent domain statutes). In the absence of fraud or gross mistake, the special committee's findings on the laying out of the highway are not subject to appeal. See RSA 230:45; RSA 230:19 (1993). Even if we assume without deciding that the respondents are entitled to seek review of the committee's findings almost ten years after submission of its report, the January 2003 report submitted by their expert and the alleged admissions by the State do not raise an issue of material fact under the applicable standard. See RSA 230:19.

In light of our conclusion that the trial court properly granted the State's motion for summary judgment, we need not address the respondents' argument that they were denied due process and equal protection when the trial court declined to hold an evidentiary hearing on their preliminary objections. See Verizon New England v. City of Rochester, 151 N.H. \_\_\_\_, \_\_\_\_, 855 A.2d 497, 503 (2004) (setting forth discussion of equal protection analysis).

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox  
Clerk**

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