

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

DOCKET NO. 2019-0302

BELLEVUE PROPERTIES, INC.

v.

TOWN OF CONWAY & a.

**RULE 7 MANDATORY APPEAL FROM A FINAL RULING OF
THE CARROLL COUNTY SUPERIOR COURT**

**OPENING BRIEF FOR BELLEVUE PROPERTIES, INC.,
PETITIONER-APPELLANT**

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**(Oral Argument)
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QUESTIONS PRESENTED

1. Whether the trial court erred as a matter of law by affirming the Town of Conway's discontinuance of McMillan Lane based on the application of an incorrect legal standard and balancing test that erroneously considered the Town's alleged interests in discontinuing McMillan Lane beyond the maintenance costs that it will save due to the discontinuance?

Petitioner's Am. Trial Memorandum (Jan. 16, 2019), Appellant's App. at 108; Petitioner's Motion for Reconsideration (Mar. 8, 2019), Appellant's App. at 137.

2. Whether the trial court erred in finding, as a matter of law and fact, that Bellevue's and the public's interest in the continuance of McMillan Lane did not outweigh the Town's interests in discontinuing McMillan Lane?

Petitioner's Am. Trial Memorandum (Jan. 16, 2019), Appellant's App. at 108; Petitioner's Motion for Reconsideration (Mar. 8, 2019), Appellant's App. at 137.

3. Whether the trial court erred in finding, as a matter of fact, that the potential harm to Bellevue was too uncertain to outweigh the Town's interests in discontinuing McMillan Lane?

Petitioner's Motion for Reconsideration (Mar. 8, 2019), Appellant's App. at 137.

4. Whether the trial court erred in finding, as a matter of fact and law, that the Barnes Road Extension will serve the same purpose as McMillan Lane, and by overlooking the critical legal distinction between a property owner accessing its property by a legally protected public way and

a property owner accessing its property over a private way owned by an abutter?

Petitioner's Am. Trial Memorandum (Jan. 16, 2019), Appellant's App. at 108; Petitioner's Motion for Reconsideration (Mar. 8, 2019), Appellant's App. at 137.

STATEMENT OF THE CASE

Pursuant to RSA 231:48, the Petitioner-Appellant, Bellevue Properties, Inc. ("Bellevue"), current owner of the North Conway Grand Hotel (the "Hotel"), a 200 room resort hotel in North Conway, New Hampshire, filed this case against the Town of Conway, a municipal corporation, and against 13 Green Street Properties, LLC, 1675 W.M.H., LLC, and Settlers' R2, Inc. (collectively "Settlers")¹ to appeal and seek the reversal of a town vote on April 11, 2017 to discontinue McMillan Lane, a public highway. *Petition for Appeal from Discontinuance and for Damages Pursuant to RSA 231:48* (Oct. 5, 2017), Appellant's App. at 100.

After a bench trial, the trial court affirmed the Town's vote to discontinue McMillan Lane, finding that under the balancing test, "the benefits to the Town of discontinuing McMillan Lane outweigh Bellevue's interests in continuing the road." *Order* (Feb. 27, 2019) at 13, Appellant's App. at 134. The trial court also found that "the conditional discontinuance of McMillan Lane was a valid exercise of the Town's statutory authority to discontinue public highways." *Id.* at 15, Appellant's App. at 136. Bellevue's Motion for Reconsideration was denied. *Order* (Apr. 29, 2019), Appellant's App. at 145. This appeal follows.

¹ These entities are abutters to McMillan Lane.

STATEMENT OF THE FACTS

Hotel guests, other invitees, and employees depend on McMillan Lane for public highway access to the Hotel from Route 16 and 302

Bellevue owns real estate situated at 72 Common Court in North Conway, New Hampshire, known as Tax Map/Lot # 255-98, on which it operates the North Conway Grand Hotel (“Hotel”). Trial Ex. 1, tab 27, Appellant’s App. at 390; Tr. at 36:4-7, Appellant’s App. at 041. The Hotel is located to the rear of the Settlers Green Outlet Village and the Settlers Green Streetside retail shops and restaurants (collectively “Settlers Green”). Trial Ex. 1, tabs 31 and 32, Appellant’s App. at 396-397. Settlers Green is located on Route 16 and 302, which is the primary commercial “strip” in North Conway. Id.; Tr. at 110:3-5, Appellant’s App. at 115. The Hotel has no frontage on Route 16 and 302. Id.; Tr. at 38:5-7, Appellant’s App. at 043; see also Tr. at 110:14, Appellant’s App. at 115 (Barsamian testifying that “frontage is important to any project.”). Historically, the only public highway access to the Hotel from Route 16 and 302 is through Barnes Road, McMillan Lane, and the eastern portion of Common Court. Id.; Tr. at 39:19-23; 40:3-8, Appellant’s App. at 044-045.

Prior to April 2017, McMillan Lane was dedicated to public use and accepted for maintenance by the Town of Conway. Trial Ex. 1, tab 32, Appellant’s App. at 397; Tr. at 166:4-9; 168:5-7, Appellant’s App. at 171, 173. There is also public highway access to the Hotel from the North - South Road through Fairway Lane and Common Court. Trial Ex. 1, tabs 31 and 32, Appellant’s App. at 396-397; Tr. at 42:1-2, Appellant’s App. at 047. There is also access to the Hotel from Route 16 and 302 through a private way, Settlers Green Drive. Trial Ex. 1, tabs 31 and 32, Appellant’s

App. at 396-397; Tr. at 37:21-38:4; 39:7; 111:1, Appellant's App. at 042-044, 116. This private way is owned and maintained by Settlers Green. Trial Ex. 1, tab 32, Appellant's App. at 397. The Hotel has deeded easement rights to use Settlers Green Drive. Tr. at 111:3-6, Appellant's App. at 116.

McMillan Lane is an 870-foot long public highway. Tr. at 166:12-167:2, Appellant's App. at 171-172. It became a public highway as a result of an eminent domain taking by the Town in 1992. Tr. at 13:2-4, Appellant's App. at 018. It provides access from Barnes Road to Common Court. Trial Ex. 1, tabs 31 and 32, Appellant's App. at 396-397. McMillan Lane is regularly used by the general public to travel between Route 16 and 302 and the North South Road. Tr. at 117:20-118:2, Appellant's App. at 122-123; see also Tr. at 113:7-9; 115:22-116:3, Appellant's App. at 118, 120-121 (Barsamian testifying in 2010 that McMillan Lane is one of the most heavily trafficked roads other than Route 16 and 302 and the North-South Road); Trial Ex. 1, tab 12, Appellant's App. at 326; Tr. at 139:23-140:1, Appellant's App. at 144-145.

Bellevue purchased the Hotel in 1999. Tr. at 43:20-21, Appellant's App. at 048. Since the Hotel does not have frontage directly on the busy Route 16 and 302 commercial corridor, the ability to provide unfettered public access from Route 16 and 302 to the Hotel over Barnes Road, McMillan Lane, and Common Court was an important factor in Bellevue's decision to purchase the hotel. See Tr. at 42:24-43:1, Appellant's App. at 047-048 (Cohen testifying that it is "critical" for there to be access to the Hotel from Route 16/302); see also Tr. at 44:4, 13-45:11; 46:10-18; 56:3-4, Appellant's App. at 049-051, 061. The status of these roads as public ways

in 1999 assured Bellevue that Hotel guests, invitees, and employees had such an unfettered legal right to travel to the Hotel from Route 16 and 302, as opposed to being subject to the good faith, cooperation, and financial viability of a private landowner allowing their land to be used as a private way. Id.

13 Green Street Properties, LLC, 1675 W.M.H., LLC, and Settlers R2, Inc. (collectively “Settlers”), own the real estate abutting both sides of McMillan Lane. Tr. at 121:25; 124:2-5, Appellant’s App. at 126, 129. These entities are part of the family of companies that owns and operates Settlers Green. Tr. at 103:12-104:5; 106:2-5, Appellant’s App. at 108-109, 111.

The potential discontinuance of McMillan Lane only arose to accommodate Settlers’ plans to maximize the development potential of their properties.

On or about October 25, 2016, Settlers filed a Subdivision and Boundary Line Adjustment Plan (“Plan”) with the Town of Conway Planning Board. Trial Ex. 1, tab 20, Appellant’s App. at 351. The primary purpose of the Plan was to provide for the elimination of McMillan Lane by extending Barnes Road to intersect with Common Court. Id. The proposed elimination of McMillan Lane would allow Settlers to use the current location of McMillan Lane for additional development of Settlers’ properties. Trial Ex. 1, tab 30, Appellant’s App. at 395; Tr. at 124:12-16; 126:20-25; 127:15-17; 161:6-11; 183:16-20, Appellant’s App. at 129, 131-132, 166, 188; Trial Ex. 1, tab 12, Appellant’s App. at 326; Tr. at 140:23-141:3, Appellant’s App. at 145-146. Since McMillan Lane was a public highway, any relocation of McMillan Lane would require that the existing

location of McMillan Lane be discontinued pursuant to RSA 231:43. Tr. at 129:17-131:3, Appellant's App. at 134-136.

In discussions between the Town and Settlers, a "chicken and the egg" type problem emerged, where Settlers did not want to incur the expense of obtaining Planning Board approval without some assurance that the voters would allow the discontinuance of McMillan Lane. Id.; Tr. at 153:13-21, Appellant's App. at 158; Trial Ex. 1, tab 13, Appellant's App. at 328. Yet it made little sense for Settlers to commit to relocating McMillan Lane without assurance that the Planning Board would approve their development plans. Id. As a result of these discussions, Settlers made the decision to withdraw the Plan from Planning Board consideration and instead asked the Town to pursue the discontinuance of McMillan Lane, as a first step. Id.; Trial Ex. 1, tab 15, Appellant's App. at 337. Prior to the Town's meeting with representatives from Settlers, the Town had never suggested to anyone that McMillan Lane should be discontinued. Tr. at 131:8-11; 186:13-17, Appellant's App. at 136, 191.

After meeting with Settlers at their December 20, 2016 meeting, the Town of Conway Board of Selectmen, with Settlers' counsel, began the process of preparing and placing a warrant article for the discontinuance of McMillan Lane on the 2017 Town Meeting ballot. Trial Ex. 1, tabs 7, 16, 17 and 21, Appellant's App. at 316, 339, 340, 366. The Town did not propose discontinuing McMillan Lane due to a lack of use. Tr. at 180:19-24, Appellant's App. at 185. In fact, the Town specifically required that McMillan Lane be kept open as a private way, pending approval of future development and replacement with an alternate road. Trial Ex. 1, tabs 9 and 11, Appellant's App. at 320, 325. The Board of Selectman approved

and placed Article 27 on the 2017 Town Meeting ballot proposing the discontinuance of McMillan Lane. Trial Ex.1, tab 1 (at BELLEVUE 029), and tabs 2, 4, 9, and 11, Appellant's App. at 254, 273, 300, 320, 325. At the deliberative session of the Town Meeting held on March 6, 2017, Article 27 was debated and amended by the voters. Trial Ex. 1, tab 6 (at BELLEVUE 106-108) and tab 35 (video), Appellant's App. at 313-315.

The final version of Article 27, as presented to the Town voters on the Town Meeting ballot was as follows:

ARTICLE 27: To see if the Town will vote to discontinue completely and absolutely an 870 foot long Town road known as McMillan Lane. The road to be discontinued is described as follows: The two-lane road beginning at the intersection of Barnes Road and ending at the Common Court intersection. Discontinuance is conditioned on the road being open, maintained, and unmodified by the owners of the abutting parcels to which the road would revert – 13 Green Street Properties, LLC, 1675 W.M.H., LLC, and Settlers' R2, Inc. and their successors (informally known as Settlers OVP) – until such time as Settlers OVP has obtained Site Plan Review and/or Subdivision approval from the Conway Planning Board to eliminate McMillan Lane and shall construct and complete an alternate road with no new egress to the North-South Road prior to closing McMillan Lane.

Trial Ex. 1, tab 4, Appellant's App. at 300. Article 27 discontinuing McMillan Lane as a public highway was approved by the Town voters, 834 - 250, at the Town Meeting dated April 11, 2017. Trial Ex. 1, tab 5, Appellant's App. at 301.

During the entire process of proposing, considering, and voting on Article 27, the Town voters were never presented with any specific information, nor was there any specific debate, about cost savings which

would accrue to the Town as the result of the discontinuance of McMillan Lane. Trial Ex. 1, tab 1, Appellant's App. at 226; Trial Ex. 1, tab 35, (video). The conditions contained within Article 27, which require Settlers to either keep McMillan Lane open or to construct a replacement right of way, do not require that any replacement right of way be accepted as a public highway. Trial Ex. 1, tab 4, Appellant's App. at 300.

The trial court ruled that Article 27 allowed the Town to conditionally discontinue a public highway, McMillan Lane. Id. Initially, McMillan Lane becomes discontinued as a public way when it is replaced with a new privately maintained, non-public, road. Id. Since the April 11, 2017 vote discontinuing McMillan Lane as a public highway, the Town has stopped maintaining McMillan Lane. Tr. at 117:11-19, Appellant's App. at 122. McMillan Lane is currently maintained by Settlers and/or related Settlers entities. Id.; Tr. at 132:24-133:2; 152:13-23, Appellant's App. at 137-138, 157. The Hotel does not have deeded easement rights to use McMillan Lane or any proposed replacement. Tr. at 141:10-19; 152:13-23, Appellant's App. at 146, 157.

Based on its overall highway maintenance budget, including its equipment replacement budget, its infrastructure budget, and employee costs and benefits, the Town has estimated that it spent \$6,984.00 in 2016 towards the maintenance of McMillan Lane. Tr. at 171:21-23, Appellant's App. at 176. McMillan Lane, at 0.164 miles, represented 0.2% of the road distance maintained by the Town and \$6,984.00 represents 0.2% of the actual road maintenance costs (\$3,449,445.00) for the Town in 2016. Trial Ex. 1, tab 29, Appellant's App. at 392; Tr. at 167:3-11, Appellant's App. at 172.

Based on its overall highway maintenance budget, including its equipment replacement budget, its infrastructure budget, and employee costs and benefits, the Town has estimated that it would have spent \$7,821.00 in 2018 to maintain McMillan Lane if McMillan Lane had been publicly maintained at that time. Tr. at 177:18-19, Appellant's App. at 182. McMillan Lane, at 0.164 miles, would represent 0.2% of the road distance maintained by the Town and \$7,821.00 represents 0.2% of the actual road maintenance costs (\$3,862,677.00) for the Town in 2018. Trial Ex. 29, Appellant's App. at 392. The \$7,821.00 is not a significant savings to the Town and has a negligible impact on the Town property tax rate moving forward. Trial Ex. 1, tab 1 (at BELLEVUE 039) and tab 28, Appellant's App. at 264, 391; Tr. at 177:20-24, Appellant's App. at 182; Town Ex. B.

STANDARDS OF REVIEW

This appeal requires the Court's application of several standards of review. The Court reviews *de novo* the trial court's rulings on questions of law, including, but not limited to, the interpretation of a statute and the interpretation of a property right. Tanguay v. Biathrow, 156 N.H. 313, 314 (2007) (as modified by denial of reconsideration on Dec. 4, 2007); Town of Hinsdale v. Town of Chesterfield, 153 N.H. 70, 72 (2005); Arcidi v. Town of Rye, 150 N.H. 694, 698 (2004). "We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature

might have said or add language that the legislature did not see fit to include.” Town of Hinsdale, 153 N.H. at 72.

Findings of fact are entitled to deference unless they are clearly erroneous or lack evidentiary support. N.H. Fish & Game Dep’t v. Bacon, 167 N.H. 591, 596 (2015). While the Court will “not overturn the trial court’s ruling on a mixed question unless it is clearly erroneous,” the misapplication of law to factual findings is reviewed under a plain error standard. Cadle Co. v. Bourgeois, 149 N.H. 410, 415 (2003).

This Court reviews challenges to a trial court’s evidentiary rulings under an unsustainable exercise of discretion standard. State v. Exxon Mobil Corp., No. 2013-0591, 2015 WL 5766678, at *19 (N.H. Sup. Ct. Oct. 2, 2015).

SUMMARY OF THE ARGUMENT

The trial court’s affirmance of the Town of Conway’s vote to discontinue McMillan Lane, a public highway that Bellevue depends on for public access to the North Conway Grand Hotel from heavily trafficked Route 16 and 302, is erroneous for several reasons and should be reversed. First, the trial court erred as a matter of law by applying an incorrect legal standard and considering the Town’s alleged interests in discontinuing McMillan Lane beyond the maintenance costs that it will save due to the discontinuance. Under the proper legal standard that applies in road discontinuance appeals under RSA 231:48, as articulated in Town of Hinsdale, 153 N.H. at 74, Bellevue’s and the public’s interest in the continuance of McMillan Lane is balanced against the burden that maintenance of McMillan Lane imposes on the Town.

Under this proper balancing test, the evidence in this case demonstrates that Bellevue's and the public's interest in the continuance of McMillan Lane to protect their unfettered legal right to access property by a legally protected public way outweighs the insignificant burden that maintenance of McMillan Lane imposes on the Town. Despite this evidence, however, the trial court improperly overlooked a critical legal distinction between public ways and private ways, and concluded that the Barnes Road Extension, a private way, will serve the same purpose as McMillan Lane, a public highway. The trial court also improperly concluded that the potential harm to Bellevue was too uncertain to outweigh the Town's interests in discontinuing McMillan Lane. The result of the trial court's affirmance of the discontinuance of McMillan Lane on these faulty grounds is that Bellevue has lost the absolute right to have its guests, other invitees, and employees access the Hotel from Route 16 and 302 over a dedicated public way because the Town wanted to benefit a private developer, Settlers. Such a meaningful reduction of Bellevue's right of access for the benefit of a private developer should not be permitted. Therefore, the trial court's affirmance of the discontinuance of McMillan Lane should be reversed based on errors of law and fact.

ARGUMENT

I. THE TRIAL COURT'S AFFIRMANCE OF THE TOWN OF CONWAY'S VOTE TO DISCONTINUE MCMILLAN LANE IS ERRONEOUS AND SHOULD BE REVERSED.

- A. The trial court erred as a matter of law by applying an incorrect legal standard and considering the Town's alleged interests in discontinuing McMillan Lane beyond**

the maintenance costs that it will save due to the discontinuance.

The trial court's affirmance of the Town's vote to discontinue McMillan Lane should be reversed because the trial court erred by applying an incorrect legal standard in this case. In its Order affirming the Town's vote to discontinue McMillan Lane, the trial court determined that "because a town's statutory authority to discontinue roads need not be premised solely upon reduced maintenance costs, see RSA 231:43, I, the court will also consider Conway's other interests in discontinuing McMillan Lane." *Order* (Feb. 27, 2019) at 10-11, Appellant's App. at 131-132. The trial court then considered the following alleged interests of the Town: 1. "a cost savings to the Town of approximately \$7,821 per year"; 2. consistency with the Town's plan; 3. "creat[ing] a new retail space, attract[ing] more visitors to North Conway, and promot[ing] the local economy"; 4. "creat[ing] more residential housing, which is currently in demand in North Conway"; and 5. "ensuring the success of a local business." *Id.* at 12, Appellant's App. at 133.

However, the substantive legal standard that applies in road discontinuance appeals under RSA 231:48 is articulated in Town of Hinsdale, 153 N.H. at 74, which provides a narrower balancing test to be applied. Under Town of Hinsdale, the aggrieved party's, and the public's, interest in the continuance of the road as a public highway is balanced against "the burden that maintenance of the road would impose on the town that voted to discontinue the road." *Id.* This substantive legal standard specifically restricts the trial court's consideration of a Town's interest to the burden that maintenance of the road would impose on the Town.

Accordingly, in this case, the legal standard that the trial court should have applied is one that balances Bellevue's and the public's interest in the continuance of McMillan Lane against the burden that maintenance of McMillan Lane imposes on the Town.

The trial court cites RSA 231:43, I in its Order as a basis for its conclusion that it may consider the Town's interests other than maintenance cost savings. But, the trial court erroneously interpreted this statute, which does not set forth the substantive legal standard to apply in road discontinuance appeals. RSA 231:43, I states the following:

[a]ny class IV, V or VI highway, or any portion thereof, in a town may be discontinued by vote of a town; provided, however, that:
(a) Any highway to public waters, or portion of such highway, laid out by a commission appointed by the governor and council, shall not be discontinued except with the consent of the governor and council.

(b) Any class V highway established to provide a property owner or property owners with highway access to their property because of a taking under RSA 230:14 shall not be discontinued except by written consent by such property owner or property owners.

By its plain, ordinary, and unambiguous language, RSA 231:43, I only addresses the Town's power to discontinue, and therefore, this statute is inapplicable to the issue of what balancing test applies in a road discontinuance appeal under RSA 231:48. See State Emps.' Ass'n of N.H. v. State, 161 N.H. 730, 738 (2011) (stating that "the interpretation of a statute is a matter of law" and that "[w]e interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include."); see also State Emps.' Ass'n of N.H., SEIU, Local 1984 (SEA) v. N.H. Div. of Pers.,

158 N.H. 338, 343 (2009) (stating that “[w]hen construing the meaning of a statute, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to words used.”).

The trial court’s application of an incorrect legal standard in this case is an error of law that warrants reversal of its affirmance of McMillan Lane’s discontinuance because the trial should have only considered the burden that maintenance of the road would impose on the Town of Conway, and not any other alleged interests of the Town.

B. Under the proper substantive legal standard and balancing test, Bellevue’s and the public’s interest in the continuance of McMillan Lane outweighs the minimal burden that maintenance of McMillan Lane imposes on the Town.

Under the balancing test in Town of Hinsdale, the evidence in this case demonstrates that Bellevue’s and the public’s interest in the continuance of McMillan Lane outweighs the burden that maintenance of McMillan Lane imposes on the Town, which is negligible. 153 N.H. at 74. Despite this evidence, however, the trial court improperly concluded that the potential harm to Bellevue, which the trial court characterized as “reduced access” and “impact on its business interests,” was too uncertain to outweigh the Town’s interests in discontinuing McMillan Lane. *Order* (Feb. 27, 2019) at 11, Appellant’s App. at 132. As a basis for this conclusion, the trial court relies on the following findings of fact: 1. there is no evidence to suggest that Settlers may one day cease to maintain its private roads around Settlers Green; 2. there is no evidence to establish a likelihood of Settlers Green failing or going out of business; 3. the discontinuance of McMillan Lane will not affect Hotel guests’ ability to

access the Hotel. *Id.* at 11-12, Appellant's App. at 132-133. The trial court then contrasted these points with several alleged interests of the Town, which, as stated *supra*, are improper considerations under the balancing test articulated in Town of Hinsdale. The trial court's erroneous findings of fact, and subsequent discounting of Bellevue's and the public's interest in the continuance of McMillan Lane, warrant reversal of its affirmance of the discontinuance.

- i. **As a threshold matter, the trial court erred as a matter of law by overlooking a critical legal distinction between public ways and private ways and erroneously equalizing them.**

In finding that the Barnes Road Extension, a private way, will serve the same purpose as McMillan Lane, a public highway, the trial court wrongly equalized public ways with private ways and erred as a matter of law. Prior to its conditional discontinuance, McMillan Lane was a public highway, over which the public, including Bellevue, had an absolute legal right to access and use. In contrast, the proposed Barnes Road Extension is a private way, over which the public, including Bellevue, has no legal right or easement to access and use. Contrary to the trial court's conclusion, the fact that the proposed Barnes Road Extension will allegedly be kept open and maintained for the public does not equate to the public having an absolute legal right to access and use it.

While the trial court reasoned that the Barnes Road Extension will be "dedicated to public use," and concluded that this was a reason why the Barnes Road Extension will serve the same purpose as McMillan Lane, this is a faulty finding of fact and of law. The approved Site Plan and Boundary

Line Adjustment proposing the replacement of McMillan Lane with Barnes Road Extension contradicts the trial court's conclusion that the Barnes Road Extension will be "dedicated to public use." Town Exs. C and D, Appellant's App. at 97, 99. Dedication is a term of art that is broadly defined as "the devotion of land to a public use by an unequivocal act of the owner of the fee manifesting an intention that it shall be accepted and used present or in the future for such public use." American Law of Property § 12.132 (Casner ed. 1952); see also RSA 231:51 (stating that "[a]ny street, lane or alley within this state which has been dedicated to public use by being drawn or shown upon a plan of lands platted by the owner, and the sale of lots in accordance with such plan, may be released and discharged from all public servitude by vote of the governing body of a city or town if such street, lane, or alley has not been opened, built, or used for public travel within 20 years from such dedication.")). In this case, it is clear from the approved Site Plan and Boundary Line Adjustment that Settlers is not dedicating the Barnes Road Extension to the Town for acceptance under RSA 231:51, as there is no such dedication mentioned or included in the Site Plan and Boundary Line Adjustment. According to the Plan, the Barnes Road Extension will remain a private way.

Even if the Barnes Road Extension will be open for the public to use, that does not grant Bellevue and the public the same legal right that they had in McMillan Lane, which is the unfettered legal right to access property by a legally protected public way. Private ways do not provide the public with the same level of access as public ways. In this case, Bellevue has lost the absolute right to have its guests, other invitees, and employees access the Hotel from Route 16 and 302 over a dedicated public way

because the Town wanted to benefit a private developer, Settlers, who wanted to discontinue McMillan Lane to better develop to parcel of land on which McMillan Lane sits. Such a meaningful reduction of Bellevue's right of access for the benefit of a private developer should not be permitted, as it contradicts long-standing principles of law that protect the public's rights to use a public way. See, e.g., Local Government Center, Inc., A Hard Road to Travel – New Hampshire Law Of Local Highways, Streets, and Trails, 63 (2004) (stating that “[a] well established principle of New Hampshire law is that public highways should be preserved; once public rights of way are established, the rights of the public should last indefinitely, unless a formal public decision is made to discontinue them.”); see also Davenhall v. Cameron, 116 N.H. 695, 697 (1976) (stating that “[i]t is well established that highway discontinuance is not favored by the law.”); Proctor v. Andover, 42 N.H. 348, 351 (1861); Metcalf v. Bingham, 3 N.H. 459 (1826); RSA 236:30 (the public's right to use a public highway cannot be lost by adverse possession or prescription); RSA 229:5, VII (abandonment or failure to maintain a public highway does not result in discontinuance of the public's right to use the highway).

The simple fact that Bellevue could legally access its property over McMillan Lane as a dedicated public way assured that Bellevue, and its customers, invitees, and employees, would have access to the Hotel from Route 16 and 302 without worrying about the success, failure, wherewithal, or goodwill of an abutting landowner, or about a foreclosing creditor. If Settlers, or subsequent owners of the abutting parcels, fail to act cooperatively and in good faith in the future, or if they do not remain financially viable, and access to or maintenance of the Barnes Road

Extension ends, Bellevue's and the public's options for a remedy are few because they have no legally enforceable rights to use Barnes Road Extension or to ensure maintenance of Barnes Road Extension.

While Bellevue and Settlers may currently have mutual reasons to assure access to all customers when they both have projects operating in this area, one does not need to look far to see failed retail shopping centers or empty grocery stores. A planning board's approval of a condition would have little effect on an owner who is not operating the retail shopping center. Bellevue's concerns regarding access to and maintenance of a private way should Settlers' project change or fail are not hypothetical. The obligations of a private landowner to provide access and maintain a private way, as a condition for continued operation of a specific project, fall far short of the obligations of a municipality to maintain a Class V road. The obligation of the Town to maintain a public way is greater and more effective than the ability of a town to seek enforcement of a condition of planning board approval, which is not a sufficient remedy for a party like Bellevue. The valuable rights of the public to access McMillan Lane should not be given up for a private landowner's benefit and a promise to provide private access. Bellevue should not have to rely on the good faith of Settlers, and their successors in interest, for public access to its property from the busy commercial corridor of Route 16 and 302. While Settlers and the Town have suggested to the trial court that such interference with the Hotel's access is farfetched or theoretical, testimony of Robert Barsamian, principal of Settlers, at trial established that in 2010, Settlers threatened to discontinue plowing and other maintenance on portions of Settlers Green Drive, the other private road providing access from Route 16

and 302 to the Hotel pursuant to an easement. Tr. at 141:23-25; 149:5-151:14, Appellant's App. at 146, 154-156.

In addition, the diminishment of Bellevue's and the public's valuable legal right exists independent from, and should not be discounted by, any supposed lack of evidence that Settlers may one day cease to maintain its private roads around Settlers Green and that Settlers Green may fail or go out of business in the future. Hoping for Settlers' continued viability as a condition of access from busy Route 16 and 302 falls far short of access on a dedicated public way. The trial court's reliance on these issues as a basis for its conclusion that the potential harm to Bellevue was too uncertain to outweigh the Town's interests in discontinuing McMillan Lane is clearly erroneous and should be reversed.

By converting Bellevue's access from Route 16 and 302 to the Hotel from a public way to a private way, the Town has exposed Bellevue to the risk that Settlers, their mortgage holders, or successors, may choose not to maintain or allow access to this private way in the future. Such risk does not exist with the previously existing public highway, McMillan Lane, which the Town was obligated to maintain as a dedicated and accepted public way. The obligation of the Town to maintain McMillan Lane and the absolute right of the public to use McMillan Lane without permission provides Bellevue with stronger and more secure access to its property than any private way ever could. The trial court's affirmance of the discontinuance of McMillan Lane wholly ignores the legal distinction between a property owner accessing its property by a legally protected public way and a property owner accessing its property over a private way owned by an abutter. Therefore, because the trial court erred in affirming

McMillan Lane's discontinuance based on its faulty conclusion that the Barnes Road Extension will serve the same purpose as McMillan Lane, the Court's affirmance should be reversed.

ii. Bellevue's and the public's interest in the continuance of McMillan Lane to protect their unfettered legal right to access property by a legally protected public way outweighs the insignificant burden that maintenance of McMillan Lane imposes on the Town.

Bellevue's and the public's interest in the continuance of McMillan Lane stems from their unfettered legal right to travel on McMillan Lane as a public highway. It is certain that due to the discontinuance of McMillan Lane, this valuable legal right of Bellevue and the public to access and use McMillan Lane as a public highway will be abolished. There is no dispute in this case that a dedicated public way, which Bellevue and the public depend on for access, is being replaced by a private way over which Bellevue and the public have no private easement or right of access. This replacement is not equal, as stated *supra*, and it is not just a matter of "reduced access," as the trial court states. Instead, due to the discontinuance of McMillan Lane, Bellevue and the public are being forced to give up an absolute right of access so that a private developer will benefit to their detriment, in the hope that Settlers will honor its unenforceable promise to maintain and leave open the new private way.

Accordingly, under the substantive legal standard articulated in Town of Hinsdale, Bellevue's and the public's unfettered and valuable legal right to travel on McMillan Lane as a public highway outweighs the negligible burden that maintenance of McMillan Lane imposes on the

Town, which is at most \$7,821.00 or 0.2% of the actual road maintenance costs for the Town. 153 N.H. at 74. As witness testimony established, this burden is insignificant to the point of having only a negligible impact on the Town's property tax rate moving forward. Tr. at 177:20-24, Appellant's App. at 182.

Further, even if it were appropriate for the trial court to consider factors in addition to the maintenance burden on the Town, the factors cited by the trial court still do not outweigh the serious reduction of Bellevue's absolute right of access. For example, the trial court in part based its finding that the discontinuance of McMillan Lane is proper because it found that the discontinuance serves the Town's interest in "creat[ing] more residential housing." However, this finding is without merit. At trial, Robert Barsamian, principal of Settlers, testified that residential development is not "on the drawing board" right now for Settlers Green. Tr. at 108:20-22, Appellant's App. at 113.

The discontinuance of McMillan Lane does not provide the Town with any significant benefit, but rather, was for the benefit of a private landowner who wished to develop his property more intensely. Accordingly, the trial court's affirmance of the Town Meeting vote to discontinue McMillan Lane should be set aside and McMillan Lane's status as a public highway should be restored.

CONCLUSION

For all of these reasons, the Petitioner-Appellant respectfully requests that the trial court's affirmance of the discontinuance of McMillan Lane be reversed.

STATEMENT CONCERNING ORAL ARGUMENT

To the extent that this Court finds it necessary to receive oral argument, the Petitioner-Appellant requests 15 minutes for oral argument. Attorney Tilsley will argue on the Petitioner-Appellant's behalf.

**CERTIFICATION CONCERNING THE ORDERS BEING
APPEALED**

Pursuant to N.H. Sup. Ct. R. 16(3)(i), the Petitioner-Appellant hereby certifies that the appealed Orders are in writing and are appended to its brief below.

Respectfully submitted,

Bellevue Properties, Inc., Petitioner-Appellant
By its attorneys,

BERNSTEIN, SHUR, SAWYER & NELSON,
P.A.

Date: December 9, 2019 By: /s/ Christina A. Ferrari
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CERTIFICATE OF SERVICE

I certify that on the 9th day of December, 2019, I have served by e-filing the foregoing Petitioner-Appellant's Opening Brief and the Petitioner-Appellant's Appendix to Peter J. Malia, Esquire, counsel for the Town of Conway Planning Board, and to Derek D. Lick, Esquire, counsel for Settlers.

_ /s/ Christina A. Ferrari _____
Christina A. Ferrari, Esquire

COPY OF THE DECISIONS BELOW