

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

DOCKET NO. 2019-0302

BELLEVUE PROPERTIES, INC.

v.

**TOWN OF CONWAY,
13 GREEN STREET PROPERTIES, LLC,
1675 W.M.H., LLC AND SETTLERS' R2, INC.**

Appeal Pursuant to Supreme Court Rule 7
From the Final Order of the Superior Court of Carroll County in
Docket No. 212-2017-CV-00134

**BRIEF OF THE APPELLEE/RESPONDENT,
TOWN OF CONWAY**

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***To Be Argued By:
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ISSUE PRESENTED

The citizens of the Town of Conway voted at their 2017 Town Meeting to discontinue McMillan Lane, a short secondary road located within the Settlers' Green outlet store development. After an evidentiary hearing and briefing, the trial court affirmed that vote. Did the court err in affirming the Town vote where: (a) the petition discontinuing the road was put before the electorate only after consideration by the Town Selectmen and at the suggestion of the Town Engineer/Public Works Director; (b) there was evidence of significant benefit to the Town in the discontinuance in fostering economic development in addition to a reduction of road maintenance expenses; (c) the Town Meeting deliberations were extensive and thoughtful, resulting in the Petition being amended and specific conditions being imposed on the discontinuance; and (d) the Town required that a replacement road be constructed and open to the public prior to McMillan Lane being closed and removed?

STATEMENT OF FACTS

The Petitioner-Appellant, Bellevue Properties, Inc. ("Bellevue"), owns property in North Conway, New Hampshire, on which it operates the North Conway Grand Hotel (the "Hotel"). Petitioner's Brief, p. 8. Bellevue appealed the discontinuance of a town road, McMillan Lane, pursuant to RSA 231:48. See Petitioner's "Petition for Appeal from Discontinuance and for Damages Pursuant to RSA 231:48," Appendix, Vol. II, pages 100-107 (hereinafter "App. Vol. II at ____"). Bellevue's property is not itself located on McMillan Lane, but rather on a second road, Common Court,

which connects to McMillan Lane and two other roadways. See Aerial Photograph and Plan, App. Vol. I at 396-97.

The Intervenor in this case, 13 Green Street Properties, LLC, 1675 W.M.H., LLC, and Settlers R2, Inc. (together referred to as “Settlers”), own and operate a retail shopping “outlet village” (“Settlers Green”), which is adjacent to and partially surrounds the Hotel. See *id.* Settlers owns all of the property on either side of the 870-foot McMillan Lane. See Tax Map, App. Vol. I at 390; see also Petitioner’s Brief, p. 9.

In 2016 Settlers filed a Subdivision and Boundary Line Adjustment Plan (the “2016 Plan”). Settlers was seeking to develop land on both sides of McMillan Lane. App. Vol. I at 316-317, 328-335. McMillan Lane is one of three “connector roads” extending out from Common Court, the road that basically encircles the Settlers Green development. McMillan Lane extends between Common Court and Barnes Road, another side road that itself connects to Route 16/302, a/k/a White Mountain Highway. These roads can all be seen in App. Vol. I at 395-397. Settlers proposed, in their 2016 Plan, to eliminate McMillan Lane, develop the land around it, and replace McMillan Lane with a new connector road. App. Vol. I at 352-356.

In the 2016 Plan, the new connector road was proposed to be located slightly to the east of McMillan Lane. App. Vol. I at 351-365 (2016 public hearing notice, see plans at 354 and 356 showing proposed location of new connector road). The new connector road would connect the same two roads (Common Court and Barnes Road), and it would connect with Common Court in front of the Hotel entrance very close to the spot where the to-be-discontinued McMillan Lane connects to Common Court. *Id.* at 354. The new connector road, which was eventually approved by the

Planning Board in 2018 as the “Barnes Road Extension,” is to be in the same location as was proposed in 2016. App. Vol. II at 99 and App. Vol. I at 395.

A series of meetings and discussions took place in November and December, 2016, between the Town and Settlers regarding the most efficient way to proceed with the 2016 Plan. App. Vol I. at 328-339. Conway’s Town Engineer and Public Works Director, Paul DegliAngeli, suggested that Settlers withdraw the 2016 Plan and first ascertain whether or not the Town of Conway’s legislative body would agree to discontinue McMillan Lane and replace it with a new connector road. If Settlers cleared that hurdle, then they could re-submit a revised version of the 2016 Plan to the Planning Board. Settlers agreed. *Id.* A warrant article (Article 27) was drafted to present to the voters at the 2017 Annual Town Meeting. App. Vol. I at 340-346.

The Town of Conway is an SB2 town. App. Vol. II at 12-13. The 2017 deliberative session took place on March 6, 2017. App. Vol. I at 273-284 (see Article 27 on p. 277). Article 27, as originally placed on the warrant for the deliberative session, read as follows:

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 to construct and complete, if found necessary by the Planning Board, an alternative road prior to closing McMillan Lane.
Recommended by the Board of Selectmen (5-0-0).
Not recommended by the Budget Committee (2-12-1).

At the deliberative session, two amendments were made to Article 27 by the Town's legislative body. App. Vol. I at 314-315 and 371. The final version of Article 27 that emerged from the deliberative session read as follows:

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.
Recommended by the Board of Selectmen (5-0-0).

The amendments made it clear that the residents of the Town of Conway wanted to make sure that (1) Barnes Road Extension (the new connector road) was built and open to the public before McMillan Lane was closed, and (2) Barnes Road Extension did not result in a new connection to the North-South Road. App. Vol. I at 371-374.

Article 27, as amended at the deliberative session, was overwhelmingly approved on Town Meeting voting day (April 11, 2017), by vote of 834-250. App. Vol I. at 306. Consistent with its earlier discussions with Town staff and the Board of Selectmen, Settlers resubmitted a revised version of its 2016 Plan in 2018 (the “2018 Plan”). The 2018 Plan was approved by the Conway Planning Board on November 8, 2018. App. Vol. II at 97-98.

The Conway Planning Board, in approving the 2018 Plan, carried out the instructions of the legislative body as set forth in Article 27, as amended. The Planning Board’s approval did not contain a new connection to the North-South Road, and the Planning Board’s written Notice of Decision contains the following condition subsequent:

2. Barnes Road improvements and the proposed extension of Barnes Road must be substantially complete and open to public use prior to closure of McMillan Lane. Id.

Furthermore, the approved 2018 Plan itself states that Barnes Road Extension shall be “Open to Public Use.” App. Vol. II at 99.

Following a trial on the Petitioner’s appeal of the Town’s discontinuance of McMillan Lane, the Superior Court, in a decision dated February 27, 2019, rejected Bellevue’s arguments that the Town’s decision to discontinue was unjustified. App. Vol. II at 122-136. The trial court noted that this case was similar to Town of New London v. Davis, 73 N.H. 72 (1904). The trial court concluded as follows:

... Conway’s interests in discontinuing McMillan Lane are greater than were the Town’s interests in Town of New London. In this case, the Town will benefit from the absolute discontinuance of McMillan Lane because it will no longer bear the burden of maintaining the road. Furthermore, the

continued development of Settlers' Green will serve to promote Conway's local economy. Although Barnes Road Extension will remain private, the discontinuance of McMillan Lane is conditioned upon Barnes Road Extension being dedicated to public use. Therefore, the residents of Conway will not be inconvenienced by the loss of McMillan Lane. The fact that Settlers will benefit from the discontinuance of McMillan Lane does not negate the benefits to Conway. Accordingly, the court holds that the conditional discontinuance of McMillan Lane was a valid exercise of the Town's statutory authority to discontinue public highways. App. Vol II at 136.

SUMMARY OF ARGUMENT

The trial court, in a well-reasoned 15-page decision issued after a trial in which six witnesses testified (one via video deposition), correctly affirmed the Town of Conway's vote to discontinue McMillan Lane – an 870 foot “connector road” essentially located within a commercial development, Settlers Green, for which the Town provided an adequate replacement be constructed to town road standards, and open to the public.

The trial court properly weighed the Town's interests against those of Bellevue. It correctly concluded that RSA 231:48 allows the courts to consider all town interests in the discontinuance and not just a reduction in road maintenance expenses, when balancing those benefits against the interests of Bellevue. The court noted that RSA 231:43, which governs a town's power to discontinue a public highway, “need not be premised solely upon reduced maintenance costs.” App. Vol. II at 131. Therefore, the court considered Conway's other interests in discontinuing McMillan Lane, not merely maintenance cost savings. With all the Town's interests in the

discontinuance properly considered, Bellevue could not meet its burden of proof in establishing that its interests in keeping McMillan Lane in place were greater than those of the Town in discontinuing it. Thus, there was more than sufficient evidence in the record to support the trial court's decision.

Furthermore, the court did not overlook the distinction between public and private ways in the discontinuance appeal, as alleged by Bellevue. To the contrary, the record reveals that the court heard a great deal of testimony and received numerous exhibits pertaining to the distinction between public and private ways. While it is true that McMillan Lane was a public road, and its replacement, Barnes Road Extension, would be a private road, there was evidence in the record showing that Bellevue was already located on a public road (Common Court) and that its primary access to and from the busy Route 16/302 corridor was not from McMillan Lane, but from Settlers' Green Drive, where its hotel's pylon signs are located. App. Vol. I at 396-397; App. Vol. II at 124. In short, the harm to Bellevue was not "uncertain," as Bellevue suggests. Rather, the evidence fully supports the trial court's conclusion that the discontinuance of McMillan Lane does not harm Bellevue at all. The Town's legislative body, in amending Article 27 at the deliberative session, and the Conway Planning Board, in approving the 2018 Plan, made sure that the traveling public (and, by extension, Bellevue) would not be adversely affected by the discontinuance of McMillan Lane.

Finally, Bellevue's suggestion that the Town discontinued McMillan Lane for the benefit of a private developer is unsupported by the evidence. As the court concluded, "the fact that Settlers will benefit from the

discontinuance of McMillan Lane does not negate the benefits to Conway.” App. Vol. II at 136. The record reveals that the Town, in the discussions with Settlers prior to the creation of Article 27, was not seeking to benefit Settlers. Town staff was not necessarily in favor of or opposed to the 2016 Plan that was filed by Settlers and pending before the Conway Planning Board. However, both sides realized that it was complicated due to the existence of an 870-foot town road that had been built in the middle of the Settlers Green development and that had bisected land owned by Settlers on either side of it. At the request of Settlers, the Town agreed to meet to discuss possible ways to deal with this issue. The Town’s Engineer/Public Works Director eventually proposed the plan that involved (1) withdrawal of the 2016 Plan, (2) presenting a warrant article to the legislative body to discontinue McMillan Lane and, if successful (3) re-submission of a new Planning Board application.

The actions of the legislative body at the deliberative session also do not provide evidence of a desire by the Town to benefit a private developer. Likewise for the Conway Planning Board’s proceedings on the resubmitted development plan in 2018. At every step of the way, Town staff, Town residents, and the Town’s Planning Board were solely interested in protecting the interests of the Town of Conway – including the interests of the driving public as balanced against the Town’s interests in fostering smart economic development by realigning a roadway that had bisected adjoining lots in the middle of the largest commercial development in the Town. In considering multiple types of Town interests, the Town also protected the interests of Bellevue, both with respect to traffic and fostering development that will bring visitors to the Town and Bellevue’s hotel.

Therefore, the trial court's affirmance of the discontinuance of McMillan Lane should be affirmed by this court.

STANDARD OF REVIEW

In Town of Hinsdale v. Town of Chesterfield, 153 N.H. 70 (2005), this Court specifically identified the standard of review applied to a trial court's decision relating to a road discontinuance:

We therefore find it clear that our standard in reviewing a trial court's decision in a discontinuance appeal should be the same as our standard in reviewing a trial court's decision in a layout appeal. We have previously determined that the superior court's conclusion that occasion exists for the layout of roads must be supported by *some* evidence, and we will not disturb its determination in the absence of gross mistake or fraud. Accordingly, we conclude that "some evidence" is the appropriate standard by which to review the trial court's *de novo* determination.

Id. at 74 (quoting Rodgers Dev. Co. v. Town of Tilton, 147 N.H. 57, 60 (2001)) (emphasis in original). In this case, there was more than "some evidence" in the record supporting the Town's discontinuance and, in turn, the trial court's affirmance of that decision. Additionally, there is absolutely nothing in the record to establish "gross mistake" or "fraud." Thus, the trial court's decision should be affirmed.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE TOWN'S VOTE TO DISCONTINUE McMILLAN LANE WAS LEGAL AND SHOULD BE AFFIRMED.

A. The Superior Court applied the correct legal standard and its decision should be affirmed.

In its decision, the trial court noted that the statute under which this appeal was brought, RSA 231:48, does not set forth the legal standard to be applied when the discontinuance of a public highway is challenged. Order at 9, App. Vol. II at 130. However, the parties to this case cited the same precedent, which the trial court relied upon for guidance. Specifically, the trial court stated as follows with respect to its task in reviewing the Town's discontinuance decision:

...the parties agree that Town of Hinsdale v. Town of Chesterfield, 153 N.H. 70, 73-74 (2005), sets forth the appropriate legal standard. (See Defs.' Post-Trial Mem. Law at 2-3; Pl.'s Am. Trial Mem. At 7.)... In Hinsdale... the Court held that "the substantive legal standard in this case balances the aggrieved town's interest in the road's continuance against the burden that maintenance of the road would impose on the town that voted to discontinue the road, with the burden of proof resting on the aggrieved town." Id. at 74. Order at 9-10, App. Vol. II at 130-131.

The trial court determined that "a similar balancing test is appropriate in this case," but also recognized 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." Id. See also RSA 231:43, I, App. Vol. I at 149. The trial court then went forward in

considering the Town's interests in discontinuing McMillan Lane as set forth in the record.

Bellevue challenges the trial court's decision to consider all of the Town's interests, and not just a reduction in road maintenance expenses, when balancing the parties' interests in this case. Bellevue cites to no authority other than the Hinsdale decision, and it reads the Hinsdale case in a particularly narrow fashion. Specifically, Bellevue asserts that because the Hinsdale Court focused only on reduced road expenses when it considered the discontinuance of a road in the neighboring Town of Chesterfield, then that is the only factor a court may consider in all road discontinuance cases. Bellevue misreads the Hinsdale case.

In Hinsdale, the New Hampshire Supreme Court was faced with a challenge by the Town of Hinsdale to the discontinuance by the Town of Chesterfield of a road that connected the two towns. See Hinsdale, 153 N.H. at 71-72. The trial court found that keeping the road open "was important not only for public convenience, but also for public safety. . ." and that "the cost to Chesterfield of maintaining the quarter-mile section [of the road] was minimal." Id. Thus, when this Court concluded in Hinsdale that "the substantive legal standard in this case balances the aggrieved town's interest in the road's continuance against the burden that maintenance of the road would impose on the town that voted to discontinue the road," it was balancing the interests that were in play *in that case*. It was not laying out a one-size-fits-all restrictive standard in which the *only* benefit to a Town that may *ever* be considered by the courts is the reduction in road maintenance expenses. In fact, in the Hinsdale case itself, this Court ultimately considered not only Chesterfield's interests in

minimally reducing its road maintenance expense, but also its interests in keeping its residents from being “bothered” by traffic on the road originating from Hinsdale. *Id.* at 75. The Hinsdale Court found that those interests did not outweigh the interests of the Town of Hinsdale in keeping the road open for safety purposes, *see id.*, but the important point is that the Hinsdale decision cannot reasonably be read to limit consideration of the Town’s interests in discontinuing a road to only the lesser maintenance costs that might result. All town interests in the discontinuance should be considered, and the trial court here was correct to reject Bellevue’s efforts to limit its consideration and force it to ignore important factors such as fostering economic development, and encouraging development consistent with the Town’s Master Plan, in addition to factors relating to the highway and road budget.

The trial court correctly concluded that there was no legal support for Bellevue’s contention that the balancing test should be limited to maintenance costs. The trial court further found that Bellevue carried the burden of proof to show that its interests in the road’s continuance outweighed the Town’s interests in discontinuance, and that Bellevue failed to meet this burden. Order at 11, App. Vol. II at 132.

B. The Superior Court correctly determined that the Town’s interests in discontinuing McMillan Lane outweighed Bellevue’s interests in the continuation of McMillan Lane.

Towns have the right to discontinue public ways without providing a replacement, as the discontinuance statute imposes no such requirement. See RSA 231:43. Here, however, Conway, acting through its Town Meeting, conditioned the discontinuance of McMillan Lane upon the

construction of an alternative road (that had been proposed by Settlers at the outset) that must be open and available to the public. Despite this effort by the Town to “go the extra mile” and protect the driving public in a way that it was not obligated to do, Bellevue still complains. Bellevue points to the fact that the replacement road, the Barnes Road Extension, will be a private road maintained by Settlers, whereas McMillan Lane was a town road, in support of its argument that its interests outweigh Conway’s in the road discontinuance balancing test. Petitioner’s Brief at 20-25. The evidence supports the trial court’s rejection of Bellevue’s “private road” argument.

First, it is important to note that Bellevue’s property is not located on McMillan Lane. Bellevue’s property is located on Common Court. Thus, even with the discontinuance of McMillan Lane and its replacement with Barnes Road Extension, Bellevue’s hotel is still accessed by public roads, including portions of Common Court on which the Hotel has frontage. App. Vol. I at 397.

Additionally, the primary access to the Hotel is from Route 16/302 via Settlers’ Green Drive, not McMillan Lane. App. Vol. I at 390, 396-397; see also App. Vol. I at 69. The Hotel’s primary signage is located on a pylon at the intersection of Route 16/302 and Settlers’ Green Drive. Id. The Hotel also has signage on Common Court near the Common Court Connector (a/k/a Fairway Lane), which provides additional access to the Hotel from the North-South Road. Id. At 69-70. The Hotel has no signage on McMillan Lane, or on Barnes Road (which connects McMillan Lane to Route 16/302). App. Vol. I at 69. Mr. Cohen, principal of Bellevue, agreed in his testimony at trial that “there’s nothing for the unfamiliar public to

identify that they could access (the Hotel) from Barnes Road down through McMillan Lane.” App. Vol. I at 71.

Bellevue has recorded easements over Settlers’ Green Drive and the private portion of Common Court, which as stated are private roads that provide the primary access to the Hotel. Id. Mr. Cohen testified that he could not recall a single instance in the roughly 20 years that Bellevue has owned the Hotel that Settlers had obstructed or limited access so as to preclude its guests from accessing the Hotel. App. Vol. I at 67, 71. The testimony also revealed that Bellevue has never lodged a complaint with Settlers or the Town for its failure to maintain or plow Settlers’ Green Drive or Common Court. App. Vol. I at 71-74 (testimony of Mr. Cohen); 193 (testimony of Mr. DegliAngeli).

Furthermore, pursuant to the terms of Article 27 and the Planning Board approval, Barnes Road Extension must be constructed to Town road specifications and remain open to the public, including Bellevue’s hotel guests. App. Vol. I at 207 (Testimony of Mr. Irving), App. Vol. II at 97-98 (Notice of Planning Board decision) and 99 (approved plan). Barnes Road Extension basically constitutes a minor relocation of McMillan Lane as it connects the same two roads (Barnes Road and Common Court). It merely moves the connection to Common Court slightly to the east. App. Vol. I at 395 and Vol. II at 99. Construction and maintenance of Barnes Road Extension will be the responsibility of Settlers, not Bellevue. Bellevue will not be charged anything for the road maintenance pertaining to Barnes Road Extension. App. Vol. I at 161.

Not only is public access to Barnes Road Extension required by Article 27 and the Planning Board approval, it is obviously in Settlers’ self-

interest to ensure that Barnes Road Extension remains properly maintained and fully open to the public because Settlers wants to ensure that its patrons have maximum access to the development to shop at its existing stores and the grocery store that was included in the development proposal. As Mr. Barsamian, the principal of Settlers, testified:

“...we’re talking about a road that accesses all of our developments, accesses the shops. It accesses the North-South Road. It’s paramount to us to have it...it’s a secondary access that people use to get around, back and forth to projects and from -- and it’s a cut-through road. It’s not, you know, Route 16...no matter what would happen to the site, we would still maintain that road just like we do Settlers Green Drive because our customers use it. It’s our lifeline to our success.” App. Vol. I at 140-141.

Mr. DegliAngeli, the Town’s Engineer and Public Works Director, testified that he suggested discontinuance of McMillan Lane for a number of reasons. First, it was consistent with his always-existing desire to reduce road maintenance expenses. App. Vol. I at 193. In addition, it would facilitate a more efficient Planning Board review of the development plan that had previously been submitted by Settlers (the 2016 Plan) by eliminating the uncertainty about whether or not it would be appropriate or advisable for the Planning Board to approve a plan conditioned upon the legislative body’s approval of a warrant article to discontinue a public road shown on the plan. By discontinuing the road first, this issue would be resolved for the Planning Board. As Mr. DegliAngeli testified, discontinuance would help to “navigate the logistics of the process.” App. Vol. I at 184. Mr. DegliAngeli agreed that Barnes Road Extension will provide just as good of an access road as McMillan Lane currently does. App. Vol. I at 198.

Former Town Manager Earl Sires testified (via video deposition) that he was involved in the discussions to discontinue McMillan Lane, and he took a favorable view of the discontinuance and recommended it to the Board of Selectmen for a number of reasons¹. Once again, it helped to simplify a complex process. App. Vol II at 16. It also allowed for additional, relatively intense, large scale commercial development in an area of town where the Town's Master Plan envisioned such development. Id. at 20. The development was also presented as a regional attraction and the Selectmen were interested in promoting the local economy. Id. The Town would save some money (cost savings from not having to maintain the new road). Id. Mr. Sires was further comforted by the knowledge that the Planning Board would review the project if Article 27 passed, and he has confidence in the Planning Board's ability to protect the Town's interests. Id. at 21. The Selectmen eventually voted unanimously (5-0) to place Article 27 on the warrant for the 2017 Annual Town Meeting. App. Vol. I at 321.

Conway Planning Director Tom Irving testified that Barnes Road Extension must be constructed and open to the public before McMillan Lane can be closed, pursuant to Article 27 and the Planning Board's conditions of approval. App. Vol I. at 206-207. Mr. Irving further testified that if Barnes Road Extension does not remain open to the public as required, the Town has the ability to withdraw any building permits and certificates of occupancy issued to Settlers in relation to the development conditionally approved by the Planning Board. Id. at 202. Mr. Irving also

¹ The 2017 Town Meeting would be the last one for Mr. Sires. He retired on July 31, 2017. App Vol. II at 10.

testified that in the unlikely event Barnes Road Extension is not kept open to the public as required, the Town has the ability to impose statutory fines of \$275.00 for the first offense and \$550.00 per day for each additional offense for failure to comply with a Planning Board condition. Id. at 210.

The trial court summarized the balancing test as follows:

The Court finds the potential harm asserted by Bellevue to be too uncertain to outweigh Conway's interest in discontinuing McMillan Lane. As a preliminary matter, there is no evidence before the court to suggest that Settlers may one day cease to maintain its private roads around Settlers' Green. Since Bellevue purchased the Hotel in 1999, Hotel guests primarily accessed the Hotel by traveling along Settlers' Green Drive and the private section of Common Court which is permitted by an easement of record. Settlers has consistently maintained and plowed its private roads, including Settlers' Green Drive and the private section of Common Court. There is no evidence that Hotel employees have ever had to contact Settlers to plow otherwise-unplowed roads. Since Conway adopted Article 27 on April 27, 2017 (sic), Settlers has likewise maintained and plowed McMillan Lane. There is no evidence before the court to suggest that Settlers or its successors will cease to maintain Settlers' Green Drive, Common Court, McMillan Lane, or Barnes Road Extension once it is built. There is also no evidence to establish a likelihood of Settlers' Green failing or going out of business in the future. Additionally, the discontinuance of McMillan Lane will not affect Hotel guests' ability to access the Hotel by traveling along North-South Road, Fairway Lane, and the public section of Common Court.

In contrast, Conway has a number of realistic, concrete interests in the discontinuance of McMillan Lane. First, the discontinuance of McMillan Lane and assumption of maintenance activities by Settlers has resulted in a cost savings to the Town of approximately \$7,821.00 per year. While this sum is small in comparison to Conway's overall budget for

highway maintenance, it nevertheless represents a yearly savings to the town. More importantly, the discontinuance of McMillan Lane is consistent with Conway's town plan and will allow Settlers to successfully develop a presently unused parcel of land. While this certainly benefits Settlers, it is also in the Town's interest because it will help to create new retail space, attract more visitors to North Conway, and promote the local economy. ...

Additionally, the discontinuance of McMillan Lane is conditioned upon Barnes Road Extension being constructed and dedicated to public use. Barnes Road Extension will therefore serve the same purpose as McMillan Lane has done for Conway residents to avoid traffic congestion along Route 302. Accordingly, the court finds that the benefits to Conway of discontinuing McMillan Lane outweigh Bellevue's interests in continuing the road. App. Vol. II at 132-134.

As this quoted section of the trial court's order makes apparent, there was more than the "some evidence" necessary in the record to support the trial court's affirmation of the Town's decision to discontinue McMillan Lane. In fact, the evidence was overwhelmingly in favor of discontinuance, which is why the Town Engineer/Public Works Director, the former Town Manager, the Selectmen, the Planning Board and the citizens of the Town at Town Meeting expressed their support for discontinuance in conjunction with the construction of a replacement road that would allow for ongoing, planned economic development precisely in the area of Town desired by the Town's Master Plan. The discontinuance of McMillan Lane was justified. The discontinuance was approved by Conway's legislative body not because it would benefit Settlers, but because it would benefit the Town. The many benefits to Conway clearly outweigh any alleged harm to Bellevue in discontinuing the road.

CONCLUSION

For all of the reasons set forth above, the Respondent Town of Conway respectfully requests that the trial court's affirmance of the discontinuance of McMillan Lane be affirmed.

STATEMENT CONCERNING ORAL ARGUMENT

To the extent that this Court finds it necessary to receive oral argument, the Respondent Town of Conway requests 15 minutes for oral argument, to be shared with Attorney Lick, Counsel for Settlers.

CERTIFICATION OF WORD COUNT

I hereby certify that this Brief is in compliance with Rule 16(11) and 26(7) and is within the 9,500 word limit. This brief contains 5,599 words.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2020, I have served, by e-filing, the foregoing Brief to Roy W. Tilsley, Jr., Esquire and Christina A. Ferrari, Esquire, counsel for Bellevue, and Derek D. Dick, Esquire, counsel for Settlers.

Respectfully submitted,
TOWN OF CONWAY
By Its Attorneys,
HASTINGS MALIA P.A.

Dated: January 23, 2020

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