The State of New Hampshire

Supreme Court

Case No. 2019-0460

State of New Hampshire

v.

Shane M. Beattie, et al.

Rule 7 Mandatory Appeal of a
Dismissal of the Appellants' Preliminary Objection
to a Taking under RSA chapter 498-A

Appellants' Brief

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Eminent Domain Procedure Act (N.H. RSA Chapter 498-A) supersede N.H. RSA 230:14 and :19 with regard to the procedure to be followed by a landowner challenging a Declaration of Condemnation by the N.H. Department of Transportation, which question of law was left unanswered by State v. Korean Methodist Church, 157 N.H. 254 (2008)? See, Respondents' Objection to State of New Hampshire's Motion to Dismiss at Paras. 10-41, Appellants' App. Vol. I, 82-86; Decision at pp. 4-7, Brief at pp. 38-41.

II. As a subsidiary issue to Question 1: Is the only way that a landowner can contest a taking by the State under N.H. RSA 230:14 and :19 is to prove (and therefore allege) "fraud or gross mistake", when that standard is not included in N.H. RSA Chapter 498-A? See, Respondents' Objection to State of New Hampshire's Motion to Dismiss at Paras. 10-41, Appellants' App. Vol. I, 82-86; Decision at pp. 4-7, Brief at pp. 38-41.

III. If Question 1 is answered in the Negative: Did the February 12, 2014, Notice of Public Hearing received by the Beatties from the N.H. Department of Transportation comport with constitutional procedural due process (under the N.H. Constitution), and sufficiently apprise them that their property rights as landowners would be adversely affected by failing to challenge the decision of the Governor's Commission (which heard and determined the issue of "Occasion" for the taking at

issue)? See, Respondents' Objection to State of New Hampshire's Motion to Dismiss at Paras. 42-56, Appellants' App. Vol. I, 86-89; Decision at pp. 7-9, Brief at pp. 41-43.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THIS CASE (TEXT WITH CITATION)

RSA 230:14 Layout by Commission.

I. The governor, with advice of the council, may appoint a commission of 3 persons who, upon hearing, shall determine whether there is occasion for the laying out or alteration of a class I or class II highway or a highway within the state included in the national system of interstate highways as proposed by the commissioner of transportation. If such a determination is made by the commission, the commissioner may purchase land or other property that is reasonably necessary for the construction, reconstruction, or alteration and shall lay out the remainder of such highway or alteration. Any such land or property which cannot be acquired by agreement with the owner or owners thereof may be acquired in accordance with RSA 498-A and all issues that are appealed relating to necessity, public use, and net public benefit shall be determined in accordance with RSA 230:19. Property rights acquired under the provisions of this section shall be in fee simple or in the form of easements, including property acquired by condemnation proceedings.

II. The commissioner may acquire such property as he or she determines necessary to:

(a) Lay out and establish, construct, improve, or maintain, provide a change of alignment of, or provide drainage for class I or class II highways.

(b) Construct, improve, and maintain transportation projects as directed by law and provide mitigation for existing or potential environmental effects of transportation projects.

(c) Provide rest areas, parking strips, and roadside and landscape development for the preservation and development of natural scenic beauty.

(d) Provide for the health, safety, and welfare of the public using a class I or class II highway.

(e) Secure materials, with necessary ways and access, for the construction, improvement, and maintenance of class I or class II highways.

(f) Erect administrative, storage, and operational buildings.

RSA 230:19 Hearing.

The governor and council, or the commission, at the time and place appointed for hearing shall make a personal examination of the proposed location, and of any highway for which the proposed highway is designed to be a substitute, shall hear all parties interested who may attend, and may adjourn as they see cause. They may admit or reject any evidence offered and there shall be no appeal from their findings on the matter of occasion for the laying out of the highway or alteration thereof in the absence of fraud or gross mistake.

RSA 498-A:1 Intent of Chapter.

I. It is the intent by the enactment of this chapter to provide a complete and exclusive

procedure to govern all condemnations of property for public uses including the review of necessity, public uses, and net-public benefit, and the assessment of damages therefor. It is not intended to enlarge or diminish the power of condemnation given by law to any condemnor and it is not intended to enlarge or diminish the rights given by law to any condemnee to challenge the necessity, public uses, and net-public benefit for any condemnation.

II. Notwithstanding any other provision of law to the contrary, no person's private real property shall be taken pursuant to this chapter unless that real property is to be put to public use, as defined in RSA 498-A:2, VII.

RSA 498-A:9-a Preliminary Objections.

I. Within 30 days after the return day, any condemnee may file a motion in the office of the board raising preliminary objections to the declaration of taking. The board upon cause shown may extend the time for filing preliminary objection. Preliminary objection shall be limited to and shall be the exclusive method of challenging:

(a) The sufficiency of the security;

(b) Any other procedure followed by the condemnor; or

(c) The necessity, public use, and net-public benefit of the taking.

II. Failure to raise any matters by preliminary objection shall constitute a waiver thereof.

III. Preliminary objection shall state specifically the grounds relied upon.

IV. All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.

V. The board shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require. If preliminary objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages, including costs and expenses, to be determined

by the board in the manner prescribed in RSA 498-A:24. The board may allow amendment or direct the filing of a more specific declaration of taking.

RSA 498-A:9-b Determination of Preliminary Objections Based on Necessity, Public Use, and Net-Public Benefit.

I. If a condemnee files a preliminary objection under RSA 498-A:9-a, I(c) concerning necessity, public use, or net-public benefit, the board shall transfer that preliminary objection to the superior court of the county in which the property is located. There shall be no filing fee for such transfer.

II. Upon receipt of the transfer from the board, the superior court shall require a response from the condemnor and may conduct an evidentiary hearing before it rules on the preliminary objection. Parties may appeal the superior court's decision to the supreme court. Once the decision is final and nonappealable, the superior court shall send to the board a copy of its decision.

III. If the superior court denies the condemnee's preliminary objection, the board shall then proceed under RSA 498-A:25 to determine the amount of just compensation.

IV. If the superior court grants the preliminary objection, the board shall determine the damages, if any, in accordance with RSA 498-A:9-a, V and then dismiss the declaration of taking and record such dismissal order in the registry of deeds.

RSA 498-A:29 Repeals.

All acts or portions of acts inconsistent herewith are hereby repealed.

STATEMENT OF THE CASE

On September 5, 2018, the State filed a Declaration of Taking under RSA 498-A:5 with the Board of Tax and Land Appeals ("BTLA"). On November 27, 2018, the Appellants filed a Preliminary Objection challenging necessity and net-public benefit under RSA 498-A:9-a. On December 6, 2018, as required by statute, the BTLA transferred

the question of necessity and net-public benefit to the Superior Court. The State filed a Motion to Dismiss, to which Appellants objected, and the Superior Court (MacLeod, J.) held a hearing on the State's dismissal motion on June 5, 2019. After the hearing, the Superior Court issued a decision granting the motion to dismiss, and this appeal followed.

STATEMENT OF THE FACTS

This case arises from a Department of Transportation ("DOT") highway project for which the State has taken a portion of the appellants' land in Lancaster, New Hampshire. The taking is part of the DOT's planned project to replace the Rogers' Rangers Bridge, which carries US Route 2 across the Connecticut River from Lancaster, New Hampshire to Guildhall, Vermont. The appellants live on a 24.25-acre parcel located on the North side of Route 2 in Lancaster, just before the bridge. The project, as proposed, requires the state to take 0.93 acres of the appellants' land in fee simple, a permanent slope easement of 9,506 square feet, and a temporary construction easement of 8,543 square feet. As explained in detail in the record, the appellants feel that this project, as proposed, will cause significant adverse effects beyond the taking itself, including increased flooding on their land.

On November 30, 2013, under RSA 230:8, the governor appointed a three-person panel to explore whether there was occasion to replace the Rogers' Rangers bridge. (Appellant App. Vol. I 50 ¶ 2.) This panel held preliminary hearings in both NH and VT to discuss this project. On February 12, 2014, the Department of Transportation sent a notice to the appellants that another public hearing would be held on March 25, 2014 regarding the replacement of this bridge. (Appellant App. Vol. I, 3) (See RSA 230:17 and RSA 230:18 regarding such notice and method of service). This notice does not state that the condemnor does not represent the rights of the condemnee, and it does not state that the condemnee may want to obtain independent advice or unbiased counsel. Id. See RSA 498-A:4. This notice also does not state that this public hearing is anything other than informational—in other words, it does not state that, unlike the prior hearings, which

were informational, that this is the hearing that will result in a vote taken pursuant to RSA 230:14 to take property by eminent domain (in fact the words eminent domain and condemnation do not appear anywhere on this notice).

The hearing, which was conducted pursuant to RSA 230:14, was held by the commission on March 25, 2014. At this hearing, the commission heard testimony from state officials regarding the environmental and historical impacts that might result from the proposed construction. Robert Landry, P.E. the project manager for the NH Department of Transportation, Bureau of Bridge Design, testified that "[f]ollowing extensive study and coordination, it was determined that there are no feasible and prudent alternatives to the removal of the U.S. Route 2 bridge." (Appellant App. Vol. I, 17). Then, Joseph C. Adams, Jr., P.E., Project Engineer of the NH Department of Transportation, Bureau of Bridge Design briefly spoke about how he determined that constructing a new bridge to the north of the existing bridge was preferable to repairing the existing bridge, because it was cheaper. Id, Vol. I, 28. He never once addressed or considered the option of constructing a new bridge to the south, but instead only considered the option of building a new one to the North, or in the existing place. He also did not factor the cost of land acquisition into the overall cost of the project. Id. at Vol. I, 38.

After the hearing, on April 7, 2014, the Commission issued a report making a finding of necessity for the laying out or alteration of the highway at issue. (Appellant App. Vol. I, 47.) The report was only two paragraphs long, as follows:

> This project will replace the bridge carrying US 2 (Bridge Street) over the Connecticut River, also known as the Rogers' Rangers Bridge (NH Bridge #111/129 and #42 on NH's 2013 Bridge Priority List) that connects the towns of Lancaster, NH and Guildhall, VT. The new bridge will be built immediately adjacent to the upstream (north) side of the existing bridge. The proposed improvements will also include the reconstruction of the US 2 extending 1400' east and 600' west of the bridge. At the conclusion of the construction the existing US 2 bridge will be removed.
>
> We, the commission appointed by Governor and Executive Council on November 20, 2013, to hold a hearing to determine the occasion for the replacement of the US 2 bridge, held our hearing on March 25, 2014, and find in the affirmative.

Id. In summary, the effect of this short two-paragraph letter is that, based on these findings, the State was allegedly entitled to, four years later, file a declaration of taking to condemn the appellants' land. This is so even though nothing on the face of this letter is addressed to the appellants, and the description of the location of this new bridge is not described with sufficient detail to determine where the bridge and new highway will be located on the appellants' land.

In the years following the commission's findings of occasion, representatives of NH DOT met several times with Mr. Beattie, to discuss the specifics of the project. During these meetings, N.H. D.O.T personnel made several statements that increased the appellants' concerns regarding flooding. One time, when an authorized DOT agent began explaining that "if the flow rate [of the Connecticut River] increases, then the computer animated model of the anticipated flooding will change." (Appellant App. Vol. I, 96-97, Beattie Aff. ¶ 27.) However, before this agent could finish, another "DOT employee abruptly interrupted the agent who was explaining this to [him]. The DOT employee told the agent to stop talking, and stop his explanation." (Id. at ¶ 28.) "Another representative of DOT followed up this comment by stating that, if he was in [Mr. Beattie's] position, [he] 'should ask for at least a foot' of clearance between the height of the new anticipated flood level and the low point of my home." (Id. at ¶ 32.)

In July 2018, the State sent a notice of offer to purchase the appellants' land under RSA 498-A:4. The appellants did not accept this offer; therefore, the State filed a declaration of taking under RSA 498-A:5 with the Board of Tax and Land Appeals ("BTLA") on September 5, 2018. The appellants filed a preliminary objection challenging necessity and net-public benefit under RSA 498-A:9-a on November 27, 2018. The appellants argued that there are other, less drastic means by which the State could complete the project; that the State has not adequately analyzed the net-public benefit of the condemnation; and that the procedure followed here violated the appellants' due process rights; among other arguments. The appellants did not allege that the Commission's finding of necessity was a result of fraud or gross mistake.

The BTLA transferred the question of necessity and net-public benefit to the Superior Court on December 6, 2018. The State filed a Motion to Dismiss, and the Superior Court held a hearing on this motion on June 5, 2019. After the hearing, the Superior Court issued a decision granting the motion to dismiss, and this appeal followed.

The Superior Court's Decision

The Superior Court dismissed the case because the appellants did not allege the State committed fraud or gross mistake when determining that taking their land was necessary for the DOT project. The statutory scheme giving the State the right to take private property for a highway project is RSA chapter 230. The statutory scheme setting forth the procedure to take private property for a highway project (or any other public use), and to appeal therefrom, is RSA chapter 498-A. RSA chapter 498-A does not require an individual to allege that a governmental body has committed fraud or gross mistake, but RSA 230:19, does. The question, then, is whether RSA chapter 498-A, as the complete and exclusive procedure for condemning private property, and for appealing any such condemnations, invalidates RSA 230:19's language providing for a scope of review that is different from that provided under RSA chapter 498-A.

Summary of the Argument

The Superior Court should have applied a de novo standard of review below, instead of the fraud and gross mistake standard set forth in RSA 230:19. This is because RSA chapter 498-A exclusively controls procedure for an appeal of necessity; a standard of review is procedural; and the standard of review set forth under RSA 498-A:9-b is that of de novo review. It is clear after this Court's decision in Armento, and the 1995 amendments to RSA chapter 498-A, that the legislature intended this chapter to set forth a complete and exclusive procedure to challenge necessity in an appeal at the Superior Court. RSA 498-A:1; City of Keene v. Armento, 139 N.H. 228 (1994). Exclusive control of procedure means that courts cannot look to an enabling statute (such as RSA 230:19)

to resolve any procedural questions that arise (as this would not result in an exclusive procedural statutory scheme under RSA chapter 498-A).

The proper standard of review to apply in any given case is a question of procedural law, not substantive law. See Freund v. Nycomed Amersham, 347 F.3d 752, 762 (9th Cir. 2003). This Court's decisions in V.S.H Realty and Merrill acknowledge that the de novo standard of review for condemnation proceedings is a "procedural" question, and that applying a different standard of review for a municipal taking versus a state taking would violate our Constitution. Merrill v. Manchester, 124 N.H. 8, 14 (1983)

Lastly, the DOT's 2014 notice of hearing and the BTLA's 2018 Order of Notice both violate due process by failing to include essential information—i.e. that RSA 230:19's standard of review applies, and that RSA 498-A:9-a &b's procedures do not control. Additionally, the 2014 notice clearly violated the express statutory notice requirements of RSA 498-A:4 by failing to advise the Beatties they should hire unbiased counsel. Even if this Court finds that the fraud and gross mistake standard applies, it should reverse the decision below because of these due process violations.

Argument

A. The Eminent Domain Procedure Act (N.H. RSA Chapter 498-A) supersedes N.H. RSA 230:14 and :19 with regard to the procedure to be followed, including the Standard of Review that applies when a landowner challenges a Declaration of Condemnation by the N.H. Department of Transportation

As is explained in greater detail below, the Superior Court should not have applied the fraud and gross mistake standard of review on an appeal under RSA 498-A:9-a & b. This is true for the following reasons:

i. RSA chapter 498-A exclusively controls procedure for condemning private property, and for appealing any such condemnations.

ii. Exclusive control of procedure means that courts cannot look to an enabling statute (such as RSA 230:19) to resolve any procedural questions that arise (as this

would not result in an exclusive procedural statutory scheme under RSA chapter 498-A)

iii. A standard of review is procedural; it is not substantive

iv. The applicable standard of review under RSA 498-A:9-a & b is de novo review.

i. RSA chapter 498-A exclusively controls procedure for condemning private property, and for appealing any such condemnations

The legislative history and the statutory language make it clear that RSA chapter 498-A "provide[s] a complete and exclusive procedure to govern . . . the review of necessity . . . ." RSA 498-A:1. Starting with the relevant history: "The power of eminent domain is the public power of buying what is necessary for public use. It is a power that predates the Constitution of the state of New Hampshire, since it was implied in the original social compact." 16 NH Prac. Series: Municipal Taxation & Road Law § 53.02.

Prior to 1971, there were approximately 54 different statutes giving governmental bodies the right to take property by eminent domain for various reasons (i.e. highways, municipal airports, courthouses, etc). (Appellant App. Vol. I, 123-124, RSA ch. 498-A, 1971 H.B. 770, Com. Files.) These statutes are referred to as "enabling statutes." This "patchwork" of statutes set forth "at least 10 different ways by which a condemnor may take property for different purposes." (Id.) Before 1971, the enabling statutes also set forth the procedure the condemnor must follow to take property. In other words, the enabling statutes were both procedural and substantive.

In 1971, after two years of study, the legislature passed RSA chapter 498-A, an act to improve eminent domain procedure. This chapter was passed to create "a simple uniform procedure for [all] condemnation[s]" instead of "a patchwork quilt." (Id.) The chapter as enacted contained a statement of intent, as follows:

> It is the intent by the enactment of this chapter to provide a complete and exclusive procedure to govern all condemnations of property for public uses, and the assessment of damages therefor. It is not intended to enlarge or diminish the power of condemnation given by law to any condemnor and it is not intended to enlarge or diminish the rights given by law to any condemnee to challenge the necessity**,** for any condemnation.

Appellant App. Vol. I, 119-124, RSA 498-A:1 (1971) (emphasis added). To the extent earlier enabling statutes contained any procedural provisions inconsistent with this act, such provisions were repealed by RSA 498-A:29.

Since then, "RSA chapter 498-A [has been interpreted to be a] comprehensive eminent domain procedure act, not a comprehensive eminent domain enabling statue." City of Keene v. Armento, 139 N.H. 228 at 231 (1994). This means it does not give any governmental body the power, or right, to condemn property. It merely sets forth the procedure that must be followed when any governmental body takes property.

It is important to note that the original version RSA 498-A:1, statement of intent, did not expressly contain any language regarding a "review" or "appeal" of necessity, public use, or net-public benefit. This led to some confusion on how appeals regarding necessity should be handled. In 1994, the State Supreme Court's decision in Armento held that after the county commissioners determined there was a necessity to take land for an extraterritorial airport under RSA 423:3, "the only issue for the board of tax and land appeals to determine on appeal is the appropriate amount of just compensation." Armento, 139 N.H. at 231-32. The Court held that, "[t]he jurisdiction of the county commissioners is limited to determin[ing] whether there is necessity for the proposed taking; the board of tax and land appeals must determine just compensation." Id. at 234.

After this decision the legislature promptly, the next year, passed an amendment to RSA chapter 498-A. The express purpose of the 1995 amendments was to clarify, in direct response to the Armento ruling, that "RSA 498-A was intended to simplify the procedure relative to all condemnations of property," including appeals for necessity under RSA 498-A:9-a & b. (Appellant App. Vol. I, 134, RSA ch. 498-A, 1995 H.B. 414, Com. Files.) If, as Armento ruled, the only issue to address on an appeal pursuant to a preliminary objection under RSA 498-A:9-a was just compensation (and not necessity), this would result in "a disjointed and inefficient" procedure. (Id.)

Because a citizen has "a right to object to necessity" under RSA chapter 498-A, the 1995 amendments were designed to provide "simplicity for the sake of citizens . . . without adversely affecting the citizen's rights." (Id. at 130, 132.) To accomplish this,

the 1995 amendments added language to the statute's statement of the intent (bolded and underlined language was added in 1995):

> RSA 498-A:1 (I). It is the intent by the enactment of this chapter to provide a complete and exclusive procedure to govern all condemnations of property for public uses **including the review of necessity, public uses, and net-public benefit,** and the assessment of damages therefor. It is not intended to enlarge or diminish the power of condemnation given by law to any condemnor and it is not intended to enlarge or diminish the rights given by law to any condemnee to challenge the necessity, **public uses, and net-public benefit** for any condemnation.

(Appellant App. Vol. I, 125-135.) The 1995 amendments also added a new section: RSA 498-A:9-b. This new section codified the procedure for the "determination of preliminary objections based on necessity, public purpose, and net-public benefit." RSA 498-A:9-b. Under this section, "If a condemnee files a preliminary objection under RSA 498-A:9-a, I(c) concerning necessity, public use, or net-public benefit, the board shall transfer that preliminary objection to the superior court of the county in which the property is located." Id. In sum, this clarified, after the Armento decision, that the BTLA has jurisdiction over appeals regarding necessity if raised as a preliminary objection. (Appellant App. Vol. I, 127, 130, 132, 134, RSA ch. 498-A, 1995 H.B. 414, Com. Files.) This was intended to create a simple streamlined process for a citizen to object to necessity—all objections shall be raised in one pleading (the preliminary objection); filed in one place (the BTLA); and if necessity is raised, it will be transferred to the Superior Court by the BTLA.

It is clear after Armento and the 1995 amendments: the legislature intended RSA chapter 498-A to set forth a complete and exclusive procedure to challenge necessity in an appeal at the Superior Court. RSA 498-A:1 (stating that this statute "provide[s] a complete and exclusive procedure to govern . . . the review of necessity").

ii. Exclusive control of procedure means that courts cannot look to an enabling statute (such as RSA 230:19) to resolve any procedural questions that arise

If RSA chapter 498-A exclusively controls procedure, what happens when its language does not expressly or clearly answer a procedural question that arises during an appeal? Should the Court look to an enabling statute to fill any "gaps" in procedure? For the reasons explained below, courts cannot look to enabling statutes to answer procedural questions that arise after a preliminary objection has been filed.

In its 1994 decision in Armento (before the 1995 amendments described above), this Court held that it "must look to [enabling statutes] for the proper procedures in situations where RSA chapter 498-A ***does not*** exclusively control procedure." Armento, 139 N.H. at 231. However, this language cannot control here, because after the 1995 amendments, it is now clear that RSA chapter 498 ***does*** exclusively control procedure, including the procedure to appeal a finding of necessity. (Appellant App. Vol. I, 127, 130, 132, 134, RSA ch. 498-A, 1995 H.B. 414, Com. Files.)

In fact, the word "exclusive" is expressly stated in the statute's statement of intent; and after the 1995 amendments, this section specifically includes "reviews of necessity" as part of this "complete and exclusive" procedure act. Therefore, after the 1995 amendments, courts cannot look to enabling statutes to resolve any procedural questions that arise, as doing so would not result in an exclusive procedural statutory scheme under RSA chapter 498-A.

The express purpose of the 1995 amendments was to clarify, in direct response to the Armento ruling, that "RSA 498-A was intended to simplify the procedure relative to all condemnations of property," including appeals for necessity under RSA 498-A:9-a & b. (Appellant App. Vol. I, 134, RSA ch. 498-A, 1995 H.B. 414, Com. Files.) If one must look to enabling statutes to answer procedural questions that arise for an appeal under RSA 498-A:9-a & b, citizens would again face a "patchwork" of statutes to determine the procedure for challenging a finding of necessity. This would not result in the simple, efficient process that was intended by the legislature, but instead would result in an "inefficient and disjointed" procedure. The idea that one must look to an enabling statute

to answer procedural questions about an appeal under RSA 498-A:9-a & b is manifestly inconsistent with the clear statutory language and legislative intent that RSA chapter 498-A sets forth a complete and exclusive procedure to challenge a finding of necessity in eminent domain proceedings, and to make things as simple as possible for citizens because they have "a right to object to necessity." (Appellant App. Vol. I, 130, 132, RSA ch. 498-A, 1995 H.B. 414, Com. Files.)

As applied here, the Beatties would have had to look to both RSA 230 and RSA 498-A to discern how to procedurally challenge the finding of necessity. This is true even though the BTLA's 2018 Order of Notice, notifying the Beatties of their right to file a preliminary objection only cites to RSA 498-A, and does not cite to RSA 230 at all. The Beatties would have somehow had to find RSA 230:19 before filing their preliminary objection in order to learn that unless they can prove fraud or gross mistake, they have no right to challenge necessity. This results in a complicated, inefficient, disjointed, and unequal procedure for citizens like the Beatties.

Therefore, to the extent that any question arises regarding what procedure is required under RSA chapter 498-A after a declaration of taking has been filed, the Court must examine RSA chapter 498-A's statutory language, caselaw, legislative history, and the constitution, as appropriate, to resolve any such questions—in order to ensure there is an exclusive and simplified procedure for condemnations. It cannot look to RSA 230:19, the enabling statute, to provide any procedural guidance at this stage in the process.

iii) A Standard of Review is Procedural

The next question is whether a standard of review is a procedural question that is exclusively controlled by RSA chapter 498-A, or whether it is a substantive question that is controlled by the enabling statute. As is explained below, the standard of review that applies here is a procedural question; is not substantive.

The relevant enabling statute, RSA 230:19, sets forth a standard of review of "fraud or gross mistake" for an appeal "on the matter of occasion for the laying out of [a] highway." However, it is important to note that RSA 230:19's scope-of-review language

predates the 1971 enactment of RSA chapter 498-A by several decades. In fact, this language has remained unchanged since at least 1945. (Appellant App. Vol. I, 136-138, RSA 188, Part 4, 10, Hearing (1945) ("there shall be no appeal from their findings on the matter of occasion for the laying out of the highway or alteration thereof in the absence of fraud or gross mistake"). As a threshold matter, this leaves open the possibility that RSA 230:19's scope-of-review language is in fact an old procedural provision from an enabling statute that was invalidated and repealed by RSA 498-A:29.

The standard of review is the amount of deference given by one court in reviewing a decision of a lower court or tribunal. The proper standard of review to apply in any given case is a question of procedural law, not substantive law. See Freund v. Nycomed Amersham, 347 F.3d 752, 762 (9th Cir. 2003) ("[I]t is well established that rules regarding the appropriate standard of review, or even the availability of review at all, to be applied by a federal court sitting in diversity, are questions of federal law") (citing Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278-79 (1989) ("Federal law, however, will control on those issues involving the *proper review* of the jury award by a federal district court and court of appeals.")); see also Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (holding that the *reviewability* of a remittitur order is a *question of procedure*, not substantive state law). (emphasis added).

In fact, this Court has previously acknowledged that the standard of review applied under RSA 498-A:9-a & b is a procedural matter. In V.S.H Realty and Merrill this Court held that the de novo standard of review was a "procedural" safeguard required by our State Constitution. Merrill v. Manchester, 124 N.H. 8, 15 (1983); Armento 139 N.H. at 233 (describing the standard of review as a "procedure[] which we have previously read into other condemnation statutes in order to cure constitutional defects").

As mentioned, under RSA 498-A:1, the legislature intended "to provide a complete and exclusive procedure to govern condemnations[,] including the review of necessity, public uses, and net-public benefit." However, it did not intend "to enlarge or diminish the power of condemnation [or] to enlarge or diminish the rights given by law to . . . challenge [] necessity, public uses, and net-public benefit." Id. To state that a rule

must not "enlarge or diminish" one's rights is another way of saying that the rule must be procedural, not substantive. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

The standard of review that applies under RSA 498-A:9-a & b is not substantive. The applicable standard of review (de novo vs fraud or gross mistake) does not in itself create any substantive right here. It does not add, subtract, or define any of the elements necessary to establish necessity, public use, or net-public benefit. See Freund, 347 F.3d at 762-65; see generally, Erie 304 U.S. 64. These elements are properly set forth under RSA 230:14, II. The applicable standard of review merely establishes how those pre-existing rights can be reviewed.

Therefore, in applying de novo review, the Court would not be enlarging the rights to challenge necessity, public uses, or net public benefit, and therefore would not be violating the legislature's intent in enacting RSA chapter 498-A as a complete and exclusive procedural act. Since RSA 230:19's standard of review is procedural, it must yield to RSA chapter 498-A.

iv) The Applicable Standard of Review under RSA 498-A:9-a & b is De Novo Review

If RSA chapter 498-A exclusively controls procedure, and the standard of review is a procedural matter, the final question, then, is what standard of review is set forth under this statute? This Court's decisions in V.S.H Realty and Merrill clearly hold that the standard of review required under RSA 498-A:9-a & b is that of a de novo review. In fact, this Court has held that a de novo review of questions of necessity is a "procedural" safeguard required by our State Constitution. Merrill v. Manchester, 124 N.H. 8, 15 (1983).

In V.S.H Realty, Inc. & a. v. City of Manchester, property owners appealed the Manchester Board of Mayor and Aldermen's decision to take their land to widen Granite Street in Manchester. 123 N.H. 505 (1983). Prior to 1981, RSA chapter 234 set forth a procedure to appeal such a decision that included the equivalent of a new trial before the commissioners on issues including a finding on the occasion or necessity for laying out a

highway. When the chapter was recodified in 1981 the section providing for an appeal to the commissioners was eliminated. All appeals would have to follow the procedures set forth in RSA 498-A:9-a & b.

On appeal, the City argued that when the legislature eliminated the de novo appeal to the commissioners under RSA chapter 234, leaving only an appeal to the Superior Court under RSA chapter 498-A, "this changed the appeal from a trial de novo to the limited appellate review of whether the decision of the board was based on fraud, gross mistake, or insufficient evidence." V.S.H Realty, 123 N.H. at 507. The Court disagreed, and held that "the 'scope of review' in the superior court 'entitled' the landowners 'to a trial de novo before the superior court on the issues of occasion and necessity.'" Merrill, 124 N.H. at 14.

In Merrill, property owners appealed the Manchester Housing Authority's decision that their land was blighted, and therefore subject to condemnation under RSA chapter 205 to construct an industrial park. 124 N.H. at 8. Property owners in this case did not have a chance to object and submit evidence at a public pre-taking hearing before the Board of Mayor and Aldermen voted to endorse the MHA's finding of blight. On appeal, the Court noted that if the plaintiff's property had been taken for a municipal highway, RSA chapter 231 would have provided such a pre-taking hearing.

The Court concluded that there was no "compelling governmental interest in providing fewer procedural safeguards to landowners merely because their property is sought for municipal redevelopment use by a housing authority to eliminate blight, rather than for municipal highway use by a city." Id. at 15. The "failure of RSA chapter 205 to provide procedural safeguards akin to those that exist under RSA chapter 231 violate[ed] the equal protection clause of our State Constitution." Id. The Court then read into RSA chapter 205 the "procedural safeguards" necessary to comply with constitutional protections of equal protection and due process, including the right to a pre-taking hearing, and that on appeal any party "aggrieved by the governing body's findings with respect to blight, necessity, and public purpose is entitled to a de novo trial before the superior court." Id.

Therefore, this Court's decisions in V.S.H Realty and Merrill both held that the standard of review for an appeal under RSA 498-A:9-b in the context of a municipal taking is that of a de novo review, and that such review is a "procedural" safeguard required by our State Constitution. Merrill v. Manchester, 124 N.H. at 15; see also, Armento, 139 N.H. at 233 ("[C]ertain procedures, which we have previously read into other condemnation statutes in order to cure constitutional defects . . . requires a de novo review of that hearing in superior court.").

While both V.S.H. Realty and Merrill related to municipal condemnations under RSA 231 and RSA 205 (not state highway condemnations under RSA 230), this difference should not change the outcome here. First, as explained above, RSA 498-A:9-b exclusively controls procedure, and the standard of review is procedural. If RSA 498-A:9-b requires a de novo review in the context of a municipal taking, then it must also require a de novo review in the context of a state taking. In order to provide an "exclusive" procedure for all condemnations, and to avoid a "patchwork" of different procedures for different takings, courts must read RSA 498-A:9-b to set forth the same standard of review for municipal condemnations as it does for state condemnations.

Secondly, as the decisions in V.S.H. Realty and in Merrill demonstrate, applying a different standard of review for a municipal taking versus a state taking would violate our Constitution. The current situation is analogous to that presented in Merrill. Here, as in Merrill, the State argues that RSA 498-A:9-b does not provide an aggrieved party with a right to a de novo review before the superior court. However, if the appellants' property had been taken for a municipal purpose, rather than a State highway, they would have been entitled to such a de novo review. But, as Merrill explained, there is no "compelling governmental interest[1] in providing fewer procedural safeguards to landowners merely because their property is sought for [a State highway] rather than for [a] municipal highway." Merrill, 124 N.H. at 15. The failure "to provide procedural safeguards akin to those that exist" for municipal takings violates due process and equal protection under

[1] The right at issue here is a fundamental right to property, and therefore "strict scrutiny" applies here, requiring a compelling governmental interest to treat two similarly situated parties differently.

our State Constitution. Id. For these reasons, the Court should read into RSA chapter 498-A:9-a & b the same "procedural safeguards" as are articulated in V.S.H. Realty and in Merrill, so that property owners are afforded the same procedural protections regardless of whether their property is sought for a State highway or a municipal one. Id.

In sum, the appellant in this case is entitled to de novo review in the Superior Court, both because (1) the standard of review under RSA chapter 498-A:9-b is de novo review; and also because (2) a standard of review is a procedural safeguard, and our State Constitution entitles similarly situated landowners to the same procedural safeguards to protect the fundamental right of private property ownership. See Id. at 14 (stating that such rights are fundamental rights under the constitution, and citing Gazzola v. Clements, 120 N.H. 25 (1980) on this issue).

v) The Supreme Court's Decisions in Korean Methodist Church and Greene are not Controlling Here

The Superior Court cites to State v. Korean Methodist Church of N.H. and State v. Greene in support of its holding that the fraud and gross mistake standard of review set forth in RSA 230:19 applies. 157 N.H. 254, 256-57 (2008); No. 2004-0185, 2004 WL 7318752 (N.H. Dec. 1, 2004). However, these cases do not control the outcome here, for the reasons that follow.

In Korean Methodist Church, the State took part of the Church's land under RSA chapter 230 for a new access road and bridge to access an airport. The Church filed a preliminary objection pursuant to RSA 498-A:9-a. Similar to the current case, the Church did not allege fraud or gross mistake when filing its preliminary objection. The Superior Court denied the Church's preliminary objection without holding a hearing. The Church then appealed this decision to the State Supreme Court. The Church's appeal focused on "the trial court's failure to hold an evidentiary hearing before ruling on the preliminary objection."

On appeal the Church also argued that "requiring it to prove fraud and gross mistake [under RSA 230:19] was error. 157 N.H. at 256-57. However, the Supreme

Court held that "the Church failed to preserve this argument." Id. "The record provided in [the] appeal, however, fail[ed] to show that the Church ever argued before the trial court that requiring it to prove fraud or gross mistake was error. Accordingly, the Church [had] failed to preserve this argument, and [the Court] decline[d] to address it." Id. Accordingly, Korean Methodist Church cannot be cited as authority on the issue of which standard of review applies in the present case, as the Supreme Court expressly stated that it was not ruling on this issue.

The Supreme Court's ruling in State v. Greene is not controlling here for the same reason. In Greene, the State filed a declaration of taking to acquire land for a highway project, and the respondents filed a preliminary objection under RSA 498-A:9-a. The Superior Court denied the preliminary objection, granting summary judgment in favor of the state. The Supreme Court, on appeal, stated "[w]hile 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. . . . 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." No. 2004-0185, 2004 WL 7318752 (N.H. Dec. 1, 2004).

Based on the Court's brief summary of the facts, it appears that the respondents did not allege fraud or gross mistake below, but it also appears that the Superior Court's decision did not rely on the failure to allege fraud or gross mistake, either. In other words, it appears that neither the parties, nor the trial court, raised or ruled on the question of what standard of review applies in such a case.

Therefore, the Supreme Court in Greene applied the standard of review set forth in RSA chapter 230 without deciding whether such standard of review is constitutional or applicable in light of RSA chapter 498-A's legislative intent. Regardless, it is important to note that this one-page decision was not published, and therefore does not provide precedential value. See Supreme Court Orders, N.H. BAR ASSOC. (Dec. 16, 2015), see also N.H. Sup. Ct. R. 12-D(3).

B) The DOT's 2014 Notice Violated Due Process

Even if this Court finds that the standard of review under RSA 230:19 applies here, this Court should still reverse and remand the Superior Court's decision on an alternative ground because the notice sent by the DOT in 2014 violated due process. (Appellant App. Vol. I, 3.) In other words, if the standard of review is an issue of substantive rights, then the appellants should have received greater notice that their substantive rights would be affected.

A notice dated February 12, 2014 sent from the DOT to the Beatties informs them that a public hearing was to be held on March 25, 2014. The notice is a one page letter that informs the Beatties of the time and place of the hearing; that it will be about the "replacement of the US 2 (Rogers Rangers bridge)"; that the notice is sent to the Beatties because "the proposed project will either require property acquisition from you or your property is in close proximity to the project"; how they can contact the project manager with questions or to see the plans; and how to submit written statements.

The notice does not:

1. Cite or refer to any statutes. In particular, it does not cite any section of RSA chapter 230 or RSA chapter 498-A.
2. It does not notify the Beatties that unless they are able to allege that fraud or gross mistake occurs at this hearing, they will be precluded from appealing any condemnations under RSA chapter 498-A.
3. It does not notify the Beatties that after this hearing the commission set up under RSA 230:14 will take a vote to essentially take their land by eminent domain. It does include the phrase "will either require property acquisition from you" but, it does not explain what is meant by "property acquisition". It does not give any further information or explanation, and it does not, anywhere, use the terms take or taking, involuntary, condemn, condemnation, or eminent domain.
4. It does not include a disclosure "conspicuously located, which states that the condemnor does not represent the rights of the condemnee and that the condemnee may want to obtain independent advice or unbiased counsel." RSA 498-A:4.

(Id.)

The Court in In re Kilton sets forth the law regarding when a notice complies with due process. "For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." 156 N.H. 632 (2007). "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" Id. "To satisfy due process, '[t]he notice must be of such nature as reasonably to convey the required information' and must be more than 'a mere gesture.'" Id. The Court's inquiry ultimately "focuses upon whether notice was fair and reasonable under the particular facts and circumstances of each case."

In applying the above-stated law, the Court in In re Kilton, found that the United States Supreme Court's decision in Mathews was instructive. 156 N.H. 632, 642 (2007). In that case, when analyzing whether a notice satisfied due process, the Court balanced three factors:

> (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Id. (citing Mathews v. Eldridge, 424 U.S. 319, 332 (1976)).

In the present case, the 2014 Notice does not comport with Due Process because it did not "reasonably [] convey the required information" to the Beatties. RSA 498-A:4 clearly requires this notice to include a disclosure "conspicuously located, which states that the condemnor does not represent the rights of the condemnee and that the condemnee may want to obtain independent advice or unbiased counsel." This information is required under RSA 498-A:4, yet it is completely absent from the notice, and therefore violates the statute, as well as the constitutional requirements for due process that are explained in greater detail below.

The 2014 Notice did not "apprise the [Beatties] of, and permit adequate preparation for, an impending hearing." In re Kilton 156 N. H. at 638-39. The statutory requirement notifying the condemnee of their right to obtain unbiased counsel is intended to allow for adequate preparation for the hearing. An unbiased attorney hired to represent the rights of the condemnee would significantly affect one's level of preparation for condemnation hearing.

Also, the failure to cite to RSA 230, anywhere, significantly hinders a condemnee's ability to prepare for the hearing. The average landowner has no ability to discern what legal authority the DOT is acting under, what standards apply, or what, procedurally, will happen as a result of this hearing. A citation to the proper enabling statute would have apprised the Beatties of the definition of "necessary" set forth under RSA 230:14, II. It would have apprised the Beatties that the meaning of this hearing was to allow the commission to consider all evidence offered to determine the necessity for this project as proposed; that after this hearing the commission would vote to take their property by eminent domain; and that they would be deprived of the right to appeal such decision unless they can prove fraud or gross mistake.

Lastly, the notice's language does not communicate that the State may take their land by eminent domain. The statement that "the proposed project will either require property acquisition from you" does not adequately apprise the Beatties that this means an involuntary acquisition via eminent domain. How can they adequately prepare for something if they do not know what will be happening? "Property acquisition" might be enough to notify a legal scholar of the possibility of eminent domain, but the average citizen has very little experience with or understanding of the power of eminent domain. If the notice had stated "condemnation" or "eminent domain" or even simply "taking", the Beatties would have been significantly better able to prepare for the hearing.

For the reasons discussed above, it is clear that under the circumstances of this case, the notice was not "fair and reasonable." Furthermore, in balancing the three factors from Mathews, (1) the private interest affected by the official action here is a fundamental right protected by the Federal and State Constitutions, as stated in Gazzola

v. Clements, 120 N.H. 25 (1980) (stating that property rights are fundamental rights under the constitution); (2) the risk of an erroneous deprivation of such rights here is significant, given the fact that the only avenue to challenge a decision would be under the extremely narrow "fraud or gross mistake" standard; and (3) the administrative burdens of providing a more complete written notice of this hearing are minimal to non-existent.

It would take very little time and expense to cite to RSA 230 in this notice; to more completely state that this hearing will present the evidence and basis for the commission's vote on the need for this project, as proposed; that this vote could result in the involuntary acquisition of the Beatties' land by condemnation and eminent domain proceedings; that there will be no appeals from such a decision in the absence of fraud or gross mistake; and that "the [DOT] does not represent the rights of the [Beatties] and that [they] may want to obtain independent advice or unbiased counsel." RSA 498-A:4.

Therefore, the balancing factors set forth under Mathews weigh heavily in favor of a finding that the 2014 Notice did not comport with the requirements of due process. And, at the least, the notice clearly violated the statutory notice requirements of RSA 498-A:4. This due process violation materially affected the Beatties' fundamental property rights, as their land was taken from them pursuant to a hearing for which they were not adequately prepared for due to deficiencies in the notice set forth above.

C) The 2018 BTLA Order of Notice Violated Due Process

Alternately, even if the standard of review under RSA 230:19 applies here, this Court should still reverse and remand the Superior Court's decision below because the Order of Notice sent by the BTLA dated September 7, 2018 also violated due process. (Appellant App. Vol. I, 48.) This order sent to the Beatties' enclosed a copy of a Declaration of Taking filed to begin an RSA chapter 498-A eminent domain proceeding; the return date; information regarding service of the order; information regarding how to file an appearance, answer, date of valuation, preliminary objection, and the withdrawal of deposit (and that withdrawing any deposit waives rights to object under RSA 498-A:11). However, importantly, the information regarding how to file a preliminary

objection only cites RSA 498-A:9-a. It does not include any citation to RSA 230:19 or the standard of review that allegedly applies here from that statute. It does not notify the Beatties that unless they allege that fraud or gross mistake they will not be entitled to an appeal under RSA 498-A:9-a. (Appellant App. Vol. I, 48.)

As cited above, the New Hampshire Supreme Court, in In re Kilton, held that "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" Id. 156 N.H. 632 (2007). Further, "'[t]he notice must . . . reasonably [] convey the required information.'" Id. The Court evaluates due process by balancing the three factors from Mathews set forth above.

The 2018 Order of Notice did not "apprise the [Beatties] of, and permit adequate preparation for" their right to file a preliminary objection and appeal. In re Kilton 156 N. H. at 638-39. The failure to cite to RSA 230, anywhere, significantly hindered their ability to prepare for the preliminary objection and appeal. The express citation to RSA 498-A:4, and not RSA 230:19, is extremely misleading. RSA 498-A:9-a & b, sets forth a standard of review that is different from that in RSA 230:19. It is misleading to cite to a statute that contains a standard of review that does not apply, without any further instruction. This directly impeded the Beatties' ability to adequately prepare for their preliminary objection and appeal.

When balancing the three factors from Mathews, (1) the private interest affected by the official action here is again the fundamental property rights protected by the Federal and State Constitutions; (2) the risk of an erroneous deprivation of such rights here is significant, as the failure to properly plead the standard of review set forth in RSA 230:19 deprives the Beatties of their right to appellate review, without any further procedural safeguards; and (3) the administrative burdens of providing a more complete written Order of Notice is again very minimal. All that is required is an additional paragraph setting forth requirements of RSA 230:19 and how they affect one's right to object under RSA 498-A:9-a & b.

Again, the balancing factors set forth under Mathews weigh heavily in favor of a finding that the 2018 Order of Notice did not comport with the requirements of due process.

CONCLUSION

This Court should reverse Superior Court decision granting the State's Motion to Dismiss, and remand this matter to the Superior Court for further proceedings to consider the Beatties' Preliminary Objection under N.H. RSA 498-A:9-b.

REQUEST FOR ORAL ARGUMENT

Appellants request that oral argument scheduled in this matter, to be presented to the entire Court. Oral argument will be presented on behalf of the Appellants by either Attorney Jonathan S. Frizzell or Attorney Sandra L. Cabrera. Appellants estimate oral argument to be 15 minutes or less.

RULE 16 (3) (i) CERTIFICATION

I hereby certify that the appealed decision is in writing and is appended to the brief as an addendum, directly hereafter.

Dated: December 2, 2019

Respectfully submitted,
Shane M. Beattie and Trina R. Beattie
By and through their attorneys,
Waystack Frizzell, Trial Lawyers

/s/ Jonathan S. Frizzell
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/s/ Sandra L. Cabrera
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Attorney for Appellants

RULE 16 (10) / RULE 26 (7) / SUPP. RULE 18 (c) CERTIFICATION

I, Jonathan S. Frizzell, certify that the foregoing Brief has this day been transmitted to opposing counsel via the Court's electronic filing system to counsel for Appellee, Allison B. Greenstein, Esquire.

/s/ Jonathan S. Frizzell
Jonathan S. Frizzell, NH Bar #12090
Attorney for Appellants

Rule 16 (3) (i) ADDENDUM

The decision appealed from is in writing, and is included directly hereafter.

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 18-CV-142

State of New Hampshire

v.

Shane M. Beattie, *et al.*

ORDER ON STATE'S MOTION TO DISMISS

On November 27, 2018, the defendants, Shane M. Beattie and Trina R. Beattie, filed with the New Hampshire Board of Tax and Land Appeals (the "Board") a preliminary objection challenging a declaration of taking issued by the plaintiff, the State of New Hampshire. (Index #1.) Pursuant to RSA 498-A:-9b, I, the preliminary objection was transferred to the Superior Court on December 6, 2018. (*See id.*) On January 14, 2019, the State filed a motion to dismiss the Beatties' preliminary objection, (index #8), and on February 13, 2019, the Beatties filed an objection thereto and requested a hearing on the matter. (Index #10.) On May 8, 2019, the parties requested an expedited ruling on the State's motion to dismiss. (Index ##21–22.) The court granted the Beatties' request for a hearing and on June 5, 2019, conducted a hearing on the State's motion.

Drawing all reasonable inferences in the Beatties' favor, the court finds that the record supports the following material facts.[1] On November 20, 2013, the Governor and Executive Council of the State of New Hampshire appointed a three-person Commission to hold a hearing to determine whether there was occasion for the laying out or alteration of New Hampshire Route 2/Bridge Street (the "project") in the Town of Lancaster. (Decl.

[1] Due to the particular procedural posture of this case, having been transferred from the Board of Tax and Land Appeals, the court draws the following facts from the State's declaration of taking, the Beatties' preliminary objection, and the exhibits submitted with the parties' pleadings. It is worth noting that in their preliminary objection, the Beatties admitted many of the facts asserted in the declaration of taking.

Taking ¶ 2.)[2] The project called for the replacement of an existing bridge spanning the Connecticut River from Lancaster to Guildhall, Vermont, and for the laying out or alteration of Route 2/Bridge Street in Lancaster. (*See* State's Mot. Dismiss at 2.)

By letter dated February 12, 2014, the New Hampshire Department of Transportation ("DOT") notified the Beatties that a public hearing on the project would be held on March 25, 2014. (Defs.' Obj. State's Mot. Dismiss, Ex. C.) The DOT's notice to the Beatties provided that they were being informed of the public hearing because the proposed project would either require the acquisition of their property, or because their property was in close proximity to the project. (*Id.*) The DOT's notice also invited all interested parties to comment at the public hearing. (*Id.*) The notice did not, however, set forth the applicable legal standards governing the Beatties' statutory right to appeal from the findings of the Commission. (*See id.*) Consistent with The DOT's notice, the Commission held a public hearing on March 25, 2014. (Decl. Taking ¶ 2.)

In a report dated April 7, 2014, the Commission made a finding of necessity for the project. (Decl. Taking ¶ 2.) Based on the Commission's finding of necessity, the State identified the Beatties as condemnees affected by the project by virtue of a deed recorded at the Coos County Registry of Deeds on September 21, 2006 at Book 1189, Page 424. (*Id.* ¶ 3.) The State specifically identified a tract of land owned by the Beatties, adjacent to New Hampshire Route 2/Bridge Street, for taking in fee simple. (*Id.* ¶ 4.) Accordingly, on or about September 5, 2018, the Board issued a declaration of taking in fee simple of a 0.93 acre tract of the Beatties' land, as well as a slope easement and a temporary construction easement over the Beatties' land. (*Id.* ¶¶ 4, 8.)

On or about November 27, 2018, the Beatties filed with the Board a preliminary

[2] The Declaration of Taking was attached as Exhibit A to the State's motion to dismiss.

objection to the declaration of taking. (*See generally* Prelim. Obj.) In their preliminary objection, the Beatties specifically challenged the necessity and net-public benefit of the taking, and requested that the preliminary objection be transferred to Superior Court pursuant to RSA 498-A:9-b, I. (*Id.*)

The Beatties first challenge the declaration of taking on the grounds that the condemnation of their land is not necessary. (*Id.* ¶ 9, a.) They assert that there are other, less drastic means by which the State could complete the project. (*Id.*) They contend that, rather than constructing a new bridge and laying out a new roadway on their land, the State could instead acquire a temporary construction easement over their land in order to construct a new bridge where the old bridge is presently located. (*Id.*)

The Beatties also challenge the declaration of taking on the grounds that the State has not adequately analyzed the net-public benefit of the condemnation of their land. (*Id.* ¶ 9, b.) They assert that the proposed project will alter the established flood pattern of the Connecticut River, diverting more water toward their homestead, residence, garages, equipment storage areas, and other outbuildings. (*Id.*) Further, they assert that the project will cause additional damage to adjacent properties. (*Id.*) However, at the hearing on the State's motion to dismiss, the Beatties conceded they do not assert that the Commission's findings were the result of fraud or gross mistake.

When ruling on a motion to dismiss, the trial court must ordinarily determine whether the plaintiffs' allegations stated in the complaint "are reasonably susceptible of a construction that would permit recovery." *Lamprey v. Britton Constr., Inc.*, 163 N.H. 252, 256 (2012). In doing so, the court must "assume the plaintiff's allegations to be true and construe all reasonable inferences in the light most favorable to [the plaintiff]." *Id.* The court "need not, however, accept allegations in the [complaint] that are merely

conclusions of law." *Id.* The court should test these facts against the applicable law and deny the motion to dismiss "[i]f the facts as alleged would constitute a basis for legal relief." *Starr v. Governor*, 148 N.H. 72, 73 (2002). Dismissal is appropriate if the facts as alleged in the complaint "do not constitute a basis for legal relief." *Lamprey*, 163 N.H. at 256.

The parties dispute the legal standard to be applied in reviewing the State's motion to dismiss. (*Compare* State's Mot. Dismiss at 3 *with* Defs.' Obj. State's Mot. Dismiss ¶¶ 5–20.) Despite the difference in procedural posture between this case and a typical motion to dismiss, the court finds that the ordinary standard of review for motions to dismiss is the best means of evaluating the sufficiency of the Beatties' claims. As such, the court construes the facts asserted in the declaration of taking and the preliminary objection in the light most favorable to the Beatties in order to determine if the facts as alleged constitute a basis for legal relief.

The statutory authority for the Beatties' present claims is found in RSA Chapter 498-A, New Hampshire's Eminent Domain Procedure Act. RSA 498-A:9-a, I provides that "[w]ithin 30 days after the return day, any condemnee may file a motion in the office of the board raising preliminary objections to the declaration of taking." A preliminary objection is limited to, and is the exclusive means of challenging the sufficiency of a surety, any procedure followed by the condemnor, or the necessity, public use, and net-public benefit of the taking. RSA 498-A:9-a, I. The provision at issue in this case, RSA 498-A:9-a, I(c), specifically relates to challenging the necessity, public use, and net-public benefit of a taking.

The State argues that in order to successfully state a claim under RSA 498-A:9-a, I(c), the Beatties were required to allege in their preliminary objection that the

Commission's finding was either fraudulent or grossly mistaken. (*See* State's Mot. Dismiss at 3.) In support of this argument, the State cites to RSA 230:19 and *State v. Korean Methodist Church of N.H.*, 157 N.H. 254, 256–57 (2008). (State's Mot. Dismiss at 3.) However, the Beatties contend that to state a claim, they were required only to challenge the necessity, public use, or net-public benefit of the taking here at issue. (Defs.' Obj. State's Mot. Dismiss ¶¶ 23–26.) Because RSA Chapter 498-A is intended to provide a complete and exclusive procedure to govern all condemnations, the Beatties argue that RSA 230:19 is inapplicable to the instant proceedings and that they were not required to allege fraud or gross mistake. (*Id.*) Accordingly, the dispositive question before the court is whether a condemnee must allege fraud or gross mistake in order to state a claim under RSA 498-A:9-a, I(c).

First, the court finds that the State's reliance on *Korean Methodist Church of N.H.*, 157 N.H. at 256–57, is misplaced. In that case, the defendant filed a preliminary objection challenging the necessity and net-public benefit of a taking. *Id.* at 255. The trial court ruled that the defendant was required to prove fraud or gross mistake in order to prevail on its preliminary objection. *Id.* at 257. Because the defendant never alleged fraud or gross mistake, the trial court denied the preliminary objection. *Id.* On appeal, the defendant argued that the trial court erred in requiring it to prove fraud or gross mistake. *Id.* However, because the defendant failed to preserve that argument for appeal, the New Hampshire Supreme Court explicitly declined to address it. *Id.* Therefore, the Supreme Court did not reach the issue before this court—whether a condemnee is required to allege fraud or gross mistake in a preliminary objection.

The Beatties correctly argue that RSA Chapter 498-A is intended to provide a complete and exclusive procedure to govern condemnations of property. However, the

New Hampshire Supreme Court has found that although RSA Chapter 498-A "is a comprehensive eminent domain *procedure* act," it is "not a comprehensive eminent domain enabling statute." *City of Keene v. Armento*, 139 N.H. 228, 231 (1994). As such, the court must look to statutes other than RSA Chapter 498-A to find the enabling authority for all takings, as well as "the proper procedures in situations where RSA chapter 498–A does not exclusively control procedure." *Id.*

The court finds instructive the unpublished opinion in *State v. Greene*, No. 2004–0185, 2004 WL 7318752, at *1 (N.H. Dec. 1, 2004). In that case, the defendants filed preliminary objections, pursuant to RSA 498-A:9-a, I, challenging the findings of a special committee that had been appointed under RSA 230:45. *Id.* On appeal before the New Hampshire Supreme Court, the parties argued that the controlling legal standard was found in RSA 498-A:9-b. *Id.* However, citing to *City of Keene*, the Court held that the controlling standard was instead found in the applicable enabling statute, RSA 230:45. *Id.* Relying upon both the enabling statute and RSA 230:19, the Court held that "[i]n the absence of fraud or gross mistake, the special committee's findings on the laying out of the highway are not subject to appeal." *Id.*

Applying the same principles to the instant case, this court holds that although RSA Chapter 498-A governs the procedures to be followed, the controlling legal standard is found in the applicable enabling statute, RSA 230:14. Under that statute, the Governor "may appoint a commission of 3 persons who, upon hearing, shall determine whether there is occasion for the laying out or alteration of a class I or class II highway or a highway within the state." *Id.* If the commission finds in the affirmative, the commissioner may purchase land or other property that is reasonably necessary for the laying out or alteration of the highway. *Id.* Importantly, the statute provides: "Any such

land or property which cannot be acquired by agreement with the owner or owners thereof may be acquired in accordance with RSA 498-A and all issues that are appealed relating to necessity, public use, and net public benefit shall be determined in accordance with RSA 230:19." *Id.* Accordingly, any appeal from the commission's findings brought under RSA 498-A:9-a, I(c) (which relates to necessity, public use, and net public benefit) must be determined in accordance with RSA 230:19.

RSA 230:19 provides that the Commission "may admit or reject any evidence offered and there shall be no appeal from their findings on the matter of occasion for the laying out of the highway or alteration thereof in the absence of fraud or gross mistake." Because a condemnee may not appeal from the commission's findings in the absence of fraud or gross mistake, the court concludes that in order to successfully state a claim under RSA 498-A:9-a, I(c), the condemnee must allege fraud or gross mistake.

In this case, however, the Beatties have made it clear that they do not allege the Commission's findings were based on fraud or gross mistake. Accordingly, the court holds that the Beatties have failed to state a claim upon which relief may be granted, and their preliminary objection must therefore be dismissed. Additionally, the court notes that although dismissal for failure to state a claim does not typically become a final judgment until the non-moving party has been given an opportunity to amend, *see ERG, Inc. v. Barnes*, 137 N.H. 186, 189 (1993), that rule is inapplicable to the instant case. The Beatties have conceded that they do not allege fraud or gross mistake on the part of the Commission. In the absence of such an allegation, any appeal from the findings of the Commission is barred by RSA 230:14 and 230:19.

Finally, the Beatties argue that even if the court finds they were required to allege fraud or gross mistake, the State's failure to notify them of their rights to appeal violated

their right to due process. (*See* Defs.' Obj. State's Mot. Dismiss ¶¶ 42–56.) The New Hampshire Supreme Court has noted "that while property interests are protected under the Federal, as well as the State, Constitutions, they are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *In re Town of Nottingham*, 153 N.H. 539, 549 (2006) (quotation omitted). "For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *In re Kilton*, 156 N.H. 632, 638 (2007) (quoting *Berube v. Belhumeur*, 139 N.H. 562, 567 (1995)). "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Id.* (quotation omitted). Thus, due process "does not require perfect notice, but only notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 638–39 (quotation omitted).

In this instance, the court concludes that the DOT's February 12, 2014 letter comported with due process because it notified the Beatties of the proposed project, it informed them of their potential interest in the project, and it invited public comment at the March 25, 2014 public hearing. Specifically, the notice provided that the project would require the acquisition of property from the Beatties, or that the project would be in close proximity to their property. From this, the Beatties could have reasonably concluded that their property interests might be adversely affected by the project. The notice also invited interested parties—such as the Beatties—to comment at a public hearing on March 25, 2014. Therefore, the court finds that the notice was reasonably calculated to apprise the

Beatties, as interested parties, of the pendency of the project, and that it afforded them an opportunity to present any objections they might have.

For the foregoing reasons, the Beatties' November 27, 2018 preliminary objection is dismissed *with prejudice*. The parties' requests for an expedited ruling are granted to the extent consistent with this order, and are otherwise denied. In the absence of an appeal to the Supreme Court, this case shall be remanded to the Board of Tax and Land Appeals consistent with RSA 498-A:9-b, III for further proceedings under RSA 498-A:25.

SO ORDERED, this 12th day of July 2019.

Lawrence A. MacLeod, Jr.
Presiding Justice