THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2020-0437

BELLEVUE PROPERTIES, INC.

v.

13 GREEN STREET PROPERTIES, LLC
and
1675 W.M.H., LLC

Appeal from the Carroll County Superior Court

BRIEF OF DEFENDANTS - APPELLEES 13 GREEN STREET PROPERTIES, LLC AND 1675 W.M.H., LLC

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QUESTIONS PRESENTED FOR REVIEW

1. Bellevue's property does not abut or touch the discontinued road at issue in this case, McMillan Lane. Did the trial court err in ruling that Bellevue, as a non-abutter, lacked standing to assert access rights under RSA 231:43, III over the discontinued McMillan Lane?

(*Raised in Motion to Dismiss and Request for Attorneys' Fees, App. at 107-121.*)

2. Bellevue brought a prior suit claiming that the Town of Conway's discontinuance of McMillan Lane was improper because it unreasonably interfered with the public's access to Bellevue's property. The trial court and this Court disagreed and rejected Bellevue's claims in that case. Did the trial court err here when it determined that Bellevue's claims of access rights over McMillan Lane are barred by *res judicata* because such claims arose from the discontinuance and should have been asserted in the prior case?

(*Raised in Motion to Dismiss and Request for Attorneys' Fees, App. at 107-121.*)

STATEMENT OF THE CASE AND THE FACTS

Nature of the Case

This is an appeal of a decision of the Carroll County Superior Court (Ignatius, J.) granting a motion to dismiss based on undisputed facts. In its order granting dismissal, the trial court that concluded that the plaintiff/appellant, Bellevue Properties, Inc. ("Bellevue"), as the owner of real estate that does not abut or touch McMillan Lane, had no standing to assert private access rights over the now-discontinued McMillan Lane under RSA 231:43, III. The trial court also concluded that Bellevue's request for access rights was barred by the doctrine of *res judicata* because Bellevue failed to claim access rights when it previously litigated the

discontinuance of McMillan Lane two years prior and argued that the discontinuance curtailed access to its property.

Location of the Properties Owned by the Parties Relative to McMillan Lane

Bellevue owns real estate located at 72 Common Court in North Conway, identified as Tax Map/Lot No. 235/98. (Petition for Declaratory Judgment and to Quiet Title at ¶ 6, Bellevue Appendix., hereinafter "App.,"at 92; Trial Exhibits 4 and 6, App. at 83 and 86.) 13 Green Street Properties, LLC and 1675 W.M.H., LLC (collectively "Settlers") own real estate in the Settlers Green development in North Conway identified as Tax Map/Lot No. 235/92 and Tax Map/Lot No. 235/85. (Petition at ¶¶ 8-9, App.at 92; Trial Exhibits 4 and 6, App. at 83 and 86.) McMillan Lane bisects the two parcels of land owned by Settlers, and Settlers owns all of the land on either side of McMillan Lane. (Petition, at ¶ 14, App. at 93; Trial Exhibits 4 and 6, App. at 83 and 86.) McMillan Lane connects with the road known as Common Court, which itself abuts Bellevue's lot. (Trial Exhibits 4 and 6, App.at 83 and 86.) While the property owned by Bellevue abuts Common Court, Bellevue's property does not abut or touch McMillan Lane, the discontinued road at issue in this case. (*Id*.)

Impact of Discontinuance of McMillan Lane Already Litigated

On April 11, 2017, residents of the Town of Conway voted to adopt Warranty Article 27 to discontinue McMillan Lane as a public road. (Petition at ¶ 15, App. at 93.) The discontinuance of McMillan Lane was conditioned upon the road being open, maintained, and unmodified by Settlers until an alternative road was constructed. (*Id*.)

Bellevue appealed the Town's vote to discontinue McMillan Lane to the Carroll County Superior Court. (Trial Exhibit 2, February 27, 2017 Order on the Merits, *Bellevue Properties, Inc. v. Town of Conway, et. al*., Docket No. 212-2017-CV-00134, App. at 59-73) (the "Road

Discontinuance Case"). Bellevue argued that discontinuance of McMillan Lane would deprive it of the most direct and reliable access to its property and requested the trial court to reverse the Town's vote. (*Id*., App. at 66 and 69.) At the time and during the one-day trial in the Road Discontinuance Case, Bellevue was well aware of the location of McMillan Lane, the plans associated with its discontinuance, and the location of its own and other properties relevant to McMillan Lane. (*Id*., App. at 59-66.) Bellevue was also well aware that it will lose access rights over McMillan Lane once the Town discontinued it. Though knowing about the impact the discontinuance of McMillan Lane would have on access to its property, Bellevue did not, at that time, claim its private rights of access under RSA 231:43, III. (*Id*., App. at 59-66; 69-73). On February 27, 2019, the Carroll County Superior Court upheld the discontinuance of McMillan Lane. (*Id*., App. at 73.) Bellevue appealed the trial court's decision to this Court, and this Court affirmed the trial court's decision on August 25, 2020. *See Bellevue Props., Inc. v. Town of Conway*, 173 N.H. 510 (2020).

Consistent with the intent of the Warrant Article providing for the discontinuance, on or about July 31, 2018, Settlers submitted a concurrent Subdivision/Site Plan Review Application to the Town Planning Board requesting a site plan approval for development of a grocery store that included a large parking lot and associated infrastructure. (Petition at ¶ 16, App. at 93.) The plans indicated that 517 square feet of McMillan Lane would be utilized for another privately-owned road that will provide access to Common Court (the "Barns Road Extension") and that the remaining section of McMillan Lane would be discontinued and incorporated into parking and other elements of Settlers' expansion. (*Id*. at ¶¶ 16, 18, App. at 93-94.) The Planning Board conditionally approved the Application on November 8, 2018. (*Id*. at ¶ 19, App. at 94). Incidentally, Bellevue appealed that approval, and both the Carroll County Superior Court and this

Court affirmed that approval. *See Bellevue Props., Inc. v. Town of Conway*, 2020 LEXIS 89 (April 2, 2020).

Petition for Declaratory Judgment and to Quiet Title

Eight months after Carroll County Superior Court affirmed the discontinuance of McMillan Lane and more than a year after the Planning Board approved the Settlers Site Plan Review Application that showed McMillan Lane's land reverting back to Settlers' ownership and being incorporated into Settlers' expansion plans, Bellevue filed this declaratory judgment and quiet title suit claiming a private right of access to the discontinued McMillan Lane under RSA 231:43, III. (Petition, App. at 91-98). Settlers filed a Motion to Dismiss Bellevue's Petition. (Motion to Dismiss and Request for Attorneys' Fees, App. at 107-121). The trial court conducted an electronic hearing via Webex on the Motion to Dismiss. (Transcript, App. at 1-56.) During the hearing, Bellevue filed exhibits identifying the location of properties relevant to McMillan Lane, maps identifying the location of McMillan Lane, and site plans depicting the portion of McMillan Lane that will be discontinued. (Trial Exhibits 2, 4, 6, App. at 58, 83, and 86-87.)[1] In essence, the exhibits submitted by Bellevue identified the same information that was known to it and reviewed by the trial court in the Road Discontinuance Case. (*Id*.)

The trial court dismissed Bellevue's Petition after finding that Bellevue lacked standing to assert access rights under RSA 231:43, III and that Bellevue's request was barred by the doctrine of *res judicata*. (Order on Respondent's Motion to Dismiss, App. at 139-155.) Bellevue filed a

[1] The trial court also had available to it a color-coded site plan that had been submitted as an exhibit to the Motion to Dismiss showing the location of the Bellevue's and Settlers' lots in relation to McMillan Lane. (Exhibit 1 to the Motion to Dismiss, App. at 121.) This exhibit specifically shows that Settlers' land is located on both sides of McMillan Lane and that Bellevue's property does not abut or touch McMillan Lane. Rather, Bellevue's property, as shown on the undisputed site plan, is bounded by a different road, Common Court.

Motion to Reconsider on May 29, 2020. (App. at 156.) Bellevue's motion for reconsideration was denied. (Order, App. at 173.) This appeal followed.

STANDARD OF REVIEW

The trial court's dismissal was based, in part, on the interpretation of RSA 231:43, III. This Court reviews matters of statutory interpretation *de novo*. *See Monadnock Reg'l Sch. Dist. v. Monadnock Dist. Educ. Ass'n*, 173 N.H. 411, 417 (2020). "In interpreting a statute, the courts first look to the language of the statute and, if possible, construe that language according to its plain and ordinary meaning." *EnergyNorth Natural Gas v. City of Concord*, 164 N.H. 14, 16 (2012). The courts should interpret the statute "in the context of the overall statutory scheme and not in isolation" to effectuate its overall purpose and avoid an absurd or unjust result. *In re Carrier*, 165 N.H. 719, 721 (2013); *see EnergyNorth Natural Gas*, 164 N.H. at 16. Additionally, the trial court's dismissal was also based on *res judicata*. The applicability of collateral estoppel and *res judicata* is a question of law subject that is also to *de novo* review. *See Tyler v. Hannaford Bros*., 11 N.H. 242, 246 (2010) (citation omitted); *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 159 N.H. 725, 729-30 (2010) (citation omitted).

This is an appeal from a motion to dismiss. "[I]n ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the plaintiff's pleadings are sufficient to state a basis upon which relief may be granted." *Alward v. Johnston*, 171 N.H. 574, 580 (2018) (citing and quoting *K.L.N. Construction Co. v. Town of Pelham*, 167 N.H. 180, 183 (2014)). Generally, when determining whether to grant a motion to dismiss, the trial court should "assume the truth of the facts as alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to the plaintiff." *Beane v. Dana S.*

Beane & Co., 160 N.H. 708, 711 (2010). The trial court "need not accept allegations in the writ that are merely conclusions of law." *Konefal v. Hollis/Brookline Coop. School Dist.*, 143 N.H. 256, 258 (1998) (quotation omitted). The trial court may consider documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint. *See Beane*, 160 N.H. at 711.

"When the motion to dismiss does not challenge the sufficiency of the plaintiff's legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his or her right to claim relief." *Alward*, 171 N.H. at 580 (citation and internal quotations omitted). "A jurisdictional challenge based upon lack of standing is such a defense." *Id.* at 580-581 (citation omitted).

In this instance there is no true dispute that the trial court considered only undisputed facts. Thus, the focus is on the trial court's legal conclusions based on those facts, which this Court will review *de novo*.

SUMMARY OF THE ARGUMENT

The trial court properly concluded that RSA 231:43, III extends ongoing access rights in a discontinued road only to those who own land that abuts the discontinued road, and not to all landowners regardless of where their property is situated. RSA 231:43 governs the discontinuance of public roads, and Section III of the statute provides that "no owner of land shall, without the owner's written consent, be deprived of access over such highway." While Section III does not itself define or identify which "owners of land" have protected rights in the discontinued road, Section II of the statute (immediately preceding the section affording rights in such discontinued roads) requires notice of discontinuance be given only to "owners of property abutting such highway." Thus, when reading the statute as a whole, one can reasonably conclude that the Legislature

intended abutting property owners to be class of land owners protected by the statute. Such an interpretation also avoids the absurd result of interpreting Section III in isolation and as providing access rights to a discontinued road to any "owner of land" anywhere, be they owners of land across town, in another town, in another county or even in an another state. Because Bellevue does not own property that abuts or touches McMillan Lane, the trial court appropriately determined that Bellevue has no standing under RSA 231:43, III to assert a private right of access over the roadway.

The trial court also correctly ruled that Bellevue's claims were barred under the doctrine of *res judicata*. Bellevue challenged the Town's discontinuance of McMillan Lane in the prior Road Discontinuance Case. All facts relevant to the discontinuance of McMillan Lane and the impact of such discontinuance were known to Bellevue at that time. Bellevue could have claimed a right of access over McMillan Lane in the Road Discontinuance Case, as such rights arose from the Town's discontinuance. Bellevue failed to do so. Because *res judicata* bars one from bringing claims in a subsequent suit that it could have brought in an earlier suit involving the same transaction or occurrence, the trial court properly determined that Bellevue was precluded from claiming rights of access over the discontinued McMillan Lane in the present case.

ARGUMENT

I. THE TRIAL COURT'S DISMISSAL OF BELLEVUE'S CLAIMS UNDER RSA 231:43, III WAS PROPER.

A. The trial court correctly interpreted RSA 231:43, III as providing ongoing road access rights in discontinued roads only to owners of land abutting such roads.

The only reasonable interpretation of RSA 231:43 is that only a land owner whose land abuts or touches the road subject to discontinuance has an ongoing right of access over the discontinued road. Bellevue's property

neither abuts nor touches McMillan Lane. Therefore, Bellevue has no standing to assert its rights under RSA 231:43.

Determination of Bellevue's standing to assert a claim under RSA 231:43, III requires consideration of the plain language of the entirety of RSA 231:43. The version of RSA 231:43 in effect as of the time of the Town's discontinuance reads as follows:

> I. Any class IV, V or VI highway, or any portion thereof, in a town may be discontinued by vote of a town; provided, however, that:
>
> (a) Any highway to public waters, or portion of such highway, laid out by a commission appointed by the governor and council, shall not be discontinued except with the consent of the governor and council.
>
> (b) Any class V highway established to provide a property owner or property owners with highway access to their property because of a taking under RSA 230:14 shall not be discontinued except by written consent by such property owner or property owners.
>
> II. The selectmen shall give written notice by verified mail, as defined in RSA 451-C:1, VII, to all owners of property abutting such highway, at least 14 days prior to the vote of the town. In the case of a petitioned warrant article calling for discontinuance of a class VI highway, the petitioners shall bear the cost of notice.
>
> III. No owner of land shall, without the owner's written consent, be deprived of access over such highway, at such owner's own risk.[2]

RSA 231:43. "The right conferred by RSA 231:3, III is a right of access over a discontinued class IV, V, or VI highway." *Balise v. Balise*, 170 N.H. 521, 524 (2017).

[2] RSA 231:43 was amended, effective October 10, 2019. However, the amendment only changed the cross reference to the definition of "verified mail" from RSA 451-C:1, VII to RSA 21:53.

1. RSA 231:43 Confers Access Rights Only to Land Owners Whose Property Abuts a Discontinued Road.

Section III, itself, does not specifically identify which "owner(s) of land" are entitled to continued access to a road that a town discontinues. The courts should interpret the statute, however, "in the context of the overall statutory scheme and not in isolation" to effectuate its overall purpose and avoid an absurd or unjust result. *In re Carrier*, 165 N.H. 719, 721 (2013); *see EnergyNorth Natural Gas*, 164 N.H. at 16. Section II of the statute specifically states that Towns are only required to provide notice of the discontinuance to "owners of property abutting such highway." RSA 231:43, II (emphasis added). This is clear evidence that the Legislature, when drafting the statute, was focused on providing ongoing access rights to only those owners whose properties abutted the to-be-discontinued roadway. Additionally, Section I (b) of the statute, which has similar "written consent" language, also focuses on providing protection to those owners of land whose property is directly accessed by the road being discontinued.

Reading the statute as a whole, it is reasonable to conclude that RSA 231:43 provides protection in the form of ongoing access to a discontinued road only to those owners whose land directly abuts the discontinued road and whose land is directly accessed by that roadway. This is a reasonable reading of the statute. In fact, this Court has implicitly acknowledged that it is abutting property owners who are protected under RSA 231:43. *See Balise*, 170 N.H. at 525 (referring to "abutting landowner's" access rights under the statute).

Bellevue invites this Court to disregard RSA 231:43, II and its requirement to provide notice only to abutting property owners and, instead, to read RSA 231:43, III in isolation. Bellevue's argument for untethering one provision of the statute from the next is that the Legislature

must have purposefully omitted the term "abutter" from RSA 231:43, III. However, Bellevue does not, and cannot explain why such an omission would have been purposefully made. To purposefully omit the word "abutter" from RSA 231:43, III would confer an unfettered right of continued access to a discontinued road to all property owners everywhere, regardless of proximity to the road, regardless of necessity of use and regardless of even whether owner's property is located in the town where the road was discontinued. Such an interpretation would lead to an absurd result that should be avoided.

Bellevue tries to avoid this absurd result, not by naturally looking to the statute as a whole and acknowledging that the term "abutting" used to describe property owners in RSA 231:43, II was meant to identify property owners being conferred rights in the next provision, RSA 231:43, III, but instead by asking this Court to equate the term "owner(s) of the land" as used in RSA 231:43, III with the terms "aggrieved persons" as is used in an entirely separate and unrelated statute, RSA 36:34, I. Bellevue has not provided, and cannot provide a basis for this Court to interpret the terms "owners of land" as "aggrieved persons." The word "aggrieved person" is not used in any section of RSA 231:43. Bellevue also cannot show any reference to the word "aggrieved person" in the legislative history relating to the statute. Bellevue attempts to provide such justification, however, by relying on *Weeks Rest. Corp. v. City of Dover*, 119 N.H. 541 (1979). The *Weeks* analysis is inapplicable to the facts presented here. In *Weeks*, this Court interpreted the term "aggrieved persons" in the context of right to notice in planning board proceedings to include more than just "abutters." This Court did so because it concluded that if it interpreted "aggrieved persons" to mean only "abutters" then "no one would have standing" to challenge a planning board decision if a parcel "is bounded on all sides by public streets." In this case, as noted above, the statute at issue, RSA

231:43, does not refer to "aggrieved persons," as the planning board notice statute at issue in the *Weeks* case did. Thus, the *Weeks* analysis of what is meant by the term "aggrieved persons" does not apply.

When attempting to avoid an absurd interpretation of one section of a statute, it is reasonable to rely on a clarifying word or phrase used in another section of the same statute to make sense of the statute as a whole. A fair and reasonable reading of this Section III of RSA 231:43 is that only those owners of lands whose property abuts the road being discontinued are entitled to ongoing access to that roadway. This is how the trial court interpreted the statute, and the trials court's decision should be affirmed.

2. Bellevue's Property Does Not Abut McMillan Lane, and Therefore It Does Not Have Standing to Assert Access Rights Over McMillan Lane Pursuant to RSA 231:43.

Bellevue is not an owner of land abutting McMillan Lane within the meaning of RSA 231:43. The statute does not define the term "abutter." However, that term is commonly and consistently defined as "to reach" or "to touch." Black's Law Dictionary 320 (6th ed. 1990). Black's Law Dictionary further defines "abut" as: "[t]o touch at the end; be contiguous; join at a border or boundary; terminate on; end at; border on; reach or touch with an end." *Id.* Similarly, the Wolters Kluwer Bouvier Law Dictionary defines "abutting property" as "property that adjoins by sharing a boundary." The Wolters Kluwer Bouvier Law Dictionary (Desk ed. 2012). Using these well-established definitions, it is uncontroverted based on the Conway tax map and site plans submitted to and relied upon by the trial court that Bellevue's land does not abut McMillan Lane. Consequently, Bellevue does not have standing, as a matter of law, under RSA 231:43 to demand ongoing access rights over the now-discontinued McMillan Lane.

Bellevue attempts to characterize itself as an "abutter" for purposes of RSA 231:43 by arguing that it is an "abutter" within the meaning of a

separate statute, RSA 672:3. RSA 672:3 defines "abutter" as "any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board." RSA 672:3. However, as that statute makes clear, that expanded artificial "across the road" definition of "abutter" applies only to proceedings before planning and zoning boards. *See* RSA 672:3. It is not applicable to road discontinuances governed by to RSA 231:43.

Had the Legislature wanted to apply the expanded definition of "abutter" found in planning board and zoning board statutes to RSA 231:43, it could have done so with a simple cross reference. It did not include such a cross reference to the planning and zoning statutes in RSA 231:43 – even though it included a cross reference to another statute, RSA 451-C:1, VII, to identify the type of notice to be given to road abutters. *See* RSA 231:43, II. Because the Legislature did not include an express reference to an expanded "across the road" definition of "abutter" in RSA 231:43, this Court should not read such language into the statute. *See Town of Hinsdale v. Town of Chesterfield*, 153 N.H. 70, 72 (2005) (stating that the court "will not consider what the legislature might have said or add language the legislature did not see fit to include.") Rather, it should conclude that the Legislature intended the standard and typical definition of "abutter" be used, meaning one whose land actually "abuts" or touches the roadway being discontinued.

Such an interpretation also makes sense given the different purposes of the two statutes. The planning and zoning statutes are designed to ensure participation of the broad community in the community's growth (*see* RSA 672:1, IV noting that one of the purposes of planning and zoning laws is to ensure the "citizens of a municipality" are "actively involved in directing the growth of their community."). Thus, it was reasonable for the Legislature to create an expanded definition of "abutter" in the planning

and zoning statutes to effectuate such a purpose. In contrast, the purpose of the statutes governing the layout and discontinuance of roads is to protect the specific rights of individual property owners who are most directly affected by such town actions. *See* RSA 231:9 (notice for laying class IV, V or VI highways should be provided to "each owner of land over which such highway may pass"); RSA 231:15 (a town is required to assess the damages sustained by "each owner of land or other property taken for such highway"); and RSA 231:43, II (the town is required to provide a notice of discontinuance to "all owners of property abutting such highway.") Based on this statutory scheme, the trial court properly concluded that the definition of "abutter," as defined in RSA 672:3, is inapplicable to RSA 231:43, and that RSA 231:43's protections extend only to the owners of the land that directly abut or directly connect to a discontinued road.

Bellevue's remaining argument is equally unpersuasive. While it might be possible to conjure up, as Bellevue attempts to do (*see* Bellevue's Brief, p. 17), a hypothetical situation in which the discontinuance of one road somehow limits public access to a parcel of land abutting only a second public road, that situation would be extremely unusual, and in any event, it is not the situation presented in this case.

First, it would be unusual, if not completely unheard of, for a Town to discontinue a town road such that it leaves a second town road "stranded" without any public connection whatsoever to the town's remaining road network. It is difficult to imagine why a town might take such an approach. In such an instance, the Town would not even have a way to reach the second public road to maintain and plow it if it was "stranded" by the discontinuance of the first road. Bellevue has not presented evidence that such a situation has ever arisen or would arise, and for that reason this Court should not impose an expanded, atypical

definition of "abutter" to RSA 231:43 in an attempt to solve the non-existent "problem" presented by Bellevue's hypothetical.

Second, Bellevue's access is not cut off with the discontinuance of McMillan Lane, and thus Bellevue's hypothetical is not in play here. Bellevue's property is surrounded on three sides by the public portion of a circular road known as Common Court. (See Court Order in the Roads Discontinuance Case, App. at 60.) Common Court, itself, connects to three different roads, which like spokes on a wheel, connect at roughly 90 degree angles traveling outward from the center – (1) Settlers' Green Drive traveling to the west to the main thoroughfare of Route 16/302; (2) the Common Court Connector (also known as Fairway Lane) traveling to the east to the secondary artery of North South Road; and (3) McMillan Lane traveling to the north to short, minor roadway known as Barnes Road. The primary access to Bellevue's property is from Route 16/302 over Settlers' Green Drive and Common Court. (*Id*. at 61, 69-70.) While Settlers' Green Drive is a private road, Bellevue has a deeded easement over that road. (*Id*. at 61.) Additionally, the secondary access point over Common Court and the Common Court Connector to North South Road is all along public roads. (*Id*. at 62.) Bellevue has its signage located at both of these access points, including two pylons on either side of Settlers' Green Drive on Route 16/302, not along the discontinued McMillan Lane. (*Id*. at 61.)

Importantly, neither of these two access points are impacted in any way by the discontinuance of McMillan Lane. Furthermore, as noted in the record, Bellevue will regain its third access point when McMillan Lane is replaced by the Barnes Road Extension, which, when constructed, will provide a connection to Bellevue's property nearly identical to that of the current McMillan Lane. (*Id*. at 70-71, 73.) Thus, this is not a situation like that posited in Bellevue's hypothetical, as Bellevue does not lose all access

to its property because of the discontinuance of McMillan Lane, a road which it does not abut.

In sum, the trial court properly interpreted RSA 231:43 as affording ongoing access rights in McMillan Lane only to those whose properties abut McMillan Lane. Because Bellevue's property does not abut McMillan Lane, the trial court was correct in concluding that Bellevue lacked standing to pursue a claim for such access rights.

B. The trial court correctly concluded that Bellevue's belated claims were barred by *res judicata* because it failed to assert rights of access in the discontinued road, McMillan Lane, in its prior lawsuit challenging McMillan Lane's discontinuance.

Bellevue initiated its first suit arising from Conway's discontinuance of McMillan Lane in 2017, claiming that the discontinuance was improper under RSA 231:48 because it negatively impacted access to Bellevue's property. To the extent Bellevue wished to assert access rights to McMillan Lane based on the Town's discontinuance, it could have and should have done so in the 2017 Road Discontinuance Case. Because Bellevue did not claim such rights when litigating the discontinuance the first time around, the trial court was correct to conclude in this case that Bellevue's claim for access rights arising from the discontinuance was barred.

Res judicata "prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action." *Finn v. Ballentine Partners, LLC*, 169 N.H. 128, 147 (2016) (quoting *Merriam Farm, Inc. v. Town of Surry*, 168 N.H. 197, 199 (2015)) (emphasis added). The doctrine applies when three elements are met: "(1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits." *Id.*

In this instance, the trial court properly determined that the elements of *res judicata* have been met. The first and third elements were not in dispute. With respect to the first element, the parties in this case and in the Road Discontinuance Case are the same – Bellevue Properties, Inc., and the Settlers' entities of 13 Green Street Properties, LLC and 1675 W.M.H., LLC. As for the third element, there can be no dispute that the trial court had entered a decision on the merits with respect to Bellevue's claims in the Road Discontinuance Case and that this Court later did so.

With respect to the second element – whether the cause of action in this case and the Road Discontinuance Case is the same – this Court is to consider whether the causes of action in the two cases "arise out of the same transaction or occurrence." *Sleeper v. Hoban Family P'ship.,* 157 N.H. 530, 534 (2008). "New Hampshire embraces the modern trend to define cause of action collectively to refer to all theories on which relief could be claimed on the basis of the factual transaction." *Id*. (quoting *Eastern Marine Const. Corp. v. First Southern Leasing*, 129 N.H. 270, 275 (1987)); *see also Finn*, 169 N.H. at 147. "Thus, if several theories of recovery arise out of the same transaction or occurrence, they amount to one cause of action." *Finn*, 169 N.H. 128at 147. "Under such an analysis, a subsequent suit based upon the same cause of action as a prior suit is barred even though the plaintiff is prepared in the second action (1) to present evidence or grounds or theories of the case not presented in the first action, or (2) to seek remedies or forms of relief not demanded in the first action." *Eastern Marine*, 129 N.H. at 275 (internal citations omitted).

It is undisputed that the claim in this case and the claims in the Road Discontinuance Case are based on the same factual allegations and arise from the same occurrence – the Town of Conway's discontinuance of McMillan Lane. At the time it filed the Road Discontinuance Case in 2017, Bellevue knew of the Town's discontinuance of McMillan Lane and of

Settlers' plans to raze the roadway as part of its expansion (and build the replacement road, Barnes Road Extension). Bellevue also knew of the purported impact the discontinuance of McMillan Lane may have on it, and it articulated its concerns to the trial court in the hearing on the Road Discontinuance Case.

There is nothing that would have prevented Bellevue from asserting, as an alternative argument in the Road Discontinuance Case to its claim founded on RSA 231:48, that it was also entitled to access rights to McMillan Lane under RSA 231:43 if the trial court were to rule, as it did, that the discontinuance was, in fact, properly undertaken by the Town of Conway. Nevertheless, Bellevue chose not to assert its claimed rights under RSA 231:43 at that time. It chose to wait for more than two years to attempt to make such in this case. That is not permitted under the doctrine of *res judicata*. Indeed, it is precisely this type of case – one that leads to repetitive litigation and undermines finality – that *res judicata* is designed to preclude. *See Eastern Marine*, 129 N.H. at 273 ("Spurred by considerations of judicial economy and a policy of certainty and finality in our legal system, the doctrines of *res judicata* and collateral estoppel have been established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end.").

Bellevue attempts to save its claim by arguing that it did not become ripe until the Conway Planning Board approved Settlers' expansion plans allowing Settlers to raze McMillan Lane. This argument is unavailing. First, it is the Town's vote on the discontinuance of McMillan Lane and not the later Planning Board approval or loss of access that gives rise to a claim under RSA 231:43. This conclusion is supported by Bellevue's own position in its Brief that its "private right of access under RSA 231:43, III arises by operation of law upon the discontinuance of McMillan Lane." (*See* Bellevue Brief, p. 26.) Thus, if it believed it had access rights by

operation of law upon the discontinuance and felt the need to ensure its rights were protected, it could have asserted those rights in the first case, which specifically focused on whether the Town's discontinuance was proper. Bellevue could have simply pleaded for alternative relief – for a declaration that the road discontinuance was improper under Section 48 of RSA 231, or in the alternative, if discontinuance was proper, then for a declaration that it has access rights under Section 43 of RSA 231. Second, Bellevue cannot legitimately argue that its purported claim of access rights was premature at the time it brought the Road Discontinuance Case. While the discontinuance was conditional, there can be no dispute that its access rights were put at risk by the discontinuance vote. Bellevue may claim that the risk to its access was uncertain at the time it brought the Road Discontinuance case because Settlers' expansion plans had not yet been fully approved, but the risk was just as certain at the time it brought this second suit, as the Planning Board approval was on appeal before this Court when this suit was filed.

This Court's decision in the case of *Kalil v. Town of Dummer Zoning Bd. of Adjustment* is instructive. The plaintiff in *Kalil*, like Bellevue in this case, knew that a land use board's decision to deny a request for a variance might result in inverse condemnation of its property. *Kalil*, 159 N.H. 725, 727-28 (2010). Nevertheless, the plaintiff in *Kalil* failed to assert a claim of condemnation in its appeal of the Zoning Board's decision and raised it months after the trial court's order addressing a denial of variance became final. *Id*. This Court held that the plaintiff's claim of condemnation was barred by the doctrine of *res judicata* because it arose from the same factual transaction as the denial of variance and, therefore, constituted the same cause of action for purposes of *res judicata*. *Id*. at 731.

Similar to plaintiff in *Kalil*, Bellevue was fully aware of the purported harm that could be caused by the road discontinuance (including denial of the right of access to the road) at the time it brought its prior suit challenging the road discontinuance, and it should have brought its alternative claim for access rights over the McMillan Lane in that case, if it was going to bring such a claim at all. It failed to do so, and it should shoulder the consequences of its decision not to raise claims under RSA 231:43, III at the time it challenged the discontinuance under RSA 231:48. Like in *Kalil*, this Court should conclude that Bellevue's claims in this case and the Road Discontinuance Case arise from the same event, i.e. the discontinuance of the road, and affirm the trial court's decision dismissing Bellevue's claims in this case as barred bar *res judicata*.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the trial court, which found that Bellevue lacks standing under RSA 231:43, III and Bellevue's claims are precluded by the doctrine of *res judicata*.

REQUEST FOR ORAL ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16(3)(h), the undersigned requests 15 minutes for oral argument.

RULE 16(11) CERTIFICATION

I hereby certify that this Brief is in compliance with the word limit requirement of New Hampshire Supreme Court Rule 16(11). The number of words in this Brief, excluding the Table of Contents and Table of Authorities, is 6280.

Respectfully submitted,

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By their attorneys
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Dated: March 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that this Brief has on this date been forwarded to Roy W. Tilsley, Esq. and Christina A. Ferrari, Esq., counsel for Bellevue Properties, Inc., via the Court's electronic filing system.

/s/ Derek D. Lick
Derek D. Lick, Esq.