THE STATE OF NEW HAMPSHIRE
SUPREME COURT

DOCKET NO. 2020-0437

BELLEVUE PROPERTIES, INC.

v.

13 GREEN STREET PROPERTIES, LLC & a.

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

OPENING BRIEF FOR BELLEVUE PROPERTIES, INC., PLAINTIFF-APPELLANT

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(Oral Argument)
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1. Whether the trial court erred as a matter of law in dismissing Bellevue's claims after ruling that Bellevue lacked standing because the private right of access conferred by RSA 231:43, III extends only to owners of land that directly abuts, or directly touches, a discontinued highway?

Pl.'s Obj. to Defs.' Mot. to Dismiss at 2-5 (Jan. 24, 2020), Appellant's App. at 123-6; Pl.'s Mot. for Recons. at 2-7 (May 29, 2020), Appellant's App. at 157-62.

2. Whether the trial court erred as a matter of law in finding that Bellevue was not an abutter to McMillan Lane, and therefore, that Bellevue was not entitled to enforce a private right of access to land over which McMillan Lane sits under RSA 231:43, III?

Pl.'s Obj. to Defs.' Mot. to Dismiss at 2-5 (Jan. 24, 2020), Appellant's App. at 123-6; Pl.'s Mot. for Recons. at 2-7 (May 29, 2020), Appellant's App. at 157-62.

3. Whether the trial court erred as a matter of law by dismissing Bellevue's claims after ruling that under the doctrine of *res judicata*, those claims were barred by Bellevue's prior appeal of the Town of Conway's April 11, 2017 vote to discontinue McMillan Lane (Bellevue Prop., Inc. v. Town of Conway, et. al., Carroll Cty., Docket No.: 212-2017-CV-00134 & N.H. Supreme Court Docket No.: 2019-0302) (the "Discontinuance Appeal")?

Pl.'s Obj. to Defs.' Mot. to Dismiss at 5-10 (Jan. 24, 2020), Appellant's App. at 126-31; Pl.'s Mot. for Recons. at 7-10 (May 29, 2020), Appellant's App. at 162-5.

4. Whether the trial court erred as a matter of law by determining that Bellevue was required to assert in the prior Discontinuance Appeal its private right of access under RSA 231:43, III, even though that right arises by operation of law and as of April 11, 2017, the date of the vote to discontinue McMillan Lane, Bellevue's assertion of that right was not yet ripe?

Pl.'s Obj. to Defs.' Mot. to Dismiss at 5-10 (Jan. 24, 2020), Appellant's App. at 126-31; Pl.'s Mot. for Recons. at 7-10 (May 29, 2020), Appellant's App. at 162-5.

STATEMENT OF THE CASE

Pursuant to RSA 231:43, III, the Plaintiff-Appellant, Bellevue Properties, Inc. ("Bellevue"), current owner of the North Conway Grand Hotel (the "Hotel"), a 200 room resort hotel in North Conway, New Hampshire, filed this case against the Defendants-Appellees, 13 Green Street Properties, LLC and 1675 W.M.H., LLC (collectively "Settlers"), to seek declaratory judgment and quiet title to prevent the abrogation of a private right of access of, and title in the nature of an easement to, land on which McMillan Lane, a soon to-be discontinued public highway, is currently situated. *Pet. for Declaratory J. & to Quiet Title* (Nov. 1, 2019), Appellant's App. at 091.

Settlers subsequently filed a Motion to Dismiss Bellevue's Petition, arguing that the doctrine of *res judicata* barred Bellevue's claims and that Bellevue could not assert a private right of access under RSA 231:43, III because it was not an abutter. *Mot. to Dismiss & Req. for Award of Att'ys' Fees* (Jan. 6, 2020), Appellant's App. at 107. Bellevue objected, arguing

that it has standing to enforce a private right of access under RSA 231:43, III and that its claims are not barred by *res judicata*. *Pl.'s Obj. to Defs.' Mot. to Dismiss* (Jan. 24, 2020), Appellant's App. at 122.

After a telephonic hearing, the trial court dismissed Bellevue's claims for a lack of standing, holding that the "right conferred by RSA 231:43, III applies only to owners of land that directly abuts, or directly touches, a discontinued class IV, V, or VI highway," and determining that Bellevue did not qualify as one who has a private right of access under RSA 231:43, III. *Order* (May 19, 2020) at 8, 10 and 16, Appellant's App. at 146, 148, and 154. The trial court also ruled that Bellevue's claims were barred under the doctrine of *res judicata*. Id. at 15-6, Appellant's App. at 155-6. Bellevue's Motion for Reconsideration was denied. *Order* (Aug. 28, 2020), Appellant's App. at 173. This appeal follows.

STATEMENT OF THE FACTS

Since 1999, Bellevue has owned real estate situated at 72 Common Court in North Conway, New Hampshire, known as Tax Map/Lot # 235-98, on which the Hotel operates. See *Order* (May 19, 2020) at 1-2, Appellant's App. at 139-40 (assuming facts alleged in the Plaintiff's Petition are true for the purposes of the Defendants' Motion to Dismiss); *Pet. for Declaratory J. & to Quiet Title ("Pet.")* at ¶¶ 6-7, Appellant's App. at 092. The Hotel is located to the rear of the Settlers Green Outlet Village and Settlers Green Streetside (collectively "Settlers Green"), which consist of retail shops, restaurants, and associated roadway and parking infrastructure. *Pet.* at ¶ 11, Appellant's App. at 093. Settlers Green is located on Route 16

and 302, which is the primary commercial corridor in North Conway. Id. at ¶ 13, Appellant's App. at 093.

Settlers also own real estate in North Conway, New Hampshire, known as Tax Map/Lot # 235/92 ("13 Green Street's Property") and Tax Map/Lot # 235/85 ("1675 W.M.H.'s Property") (collectively "Settlers' Properties"), that are also part of Settlers Green. *Pet.* at ¶¶ 8, 10, Appellant's App. at 092-3. These entities are part of the family of affiliated companies that owns and operates the retail portion of Settlers Green.

Bellevue's Hotel and property abuts 13 Green Street's Property. Id. at ¶ 9, Appellant's App. at 092. Bellevue's property is currently accessible via McMillan Lane, an 870-foot long public highway. Id. at ¶ 12, Appellant's App. at 093. McMillan Lane is part of the road system providing the only public access for motorists on the busy Route 16 and 302 corridor to access Bellevue's Hotel. Id. at ¶ 13, Appellant's App. at 093. McMillan Lane has been a public highway in the Town of Conway since 1992 when it first came into existence. Id. at ¶ 14, Appellant's App. at 093.

At the Town meeting on April 11, 2017, residents of the Town of Conway voted to adopt Warrant Article 27 pursuant to RSA 231:43 to discontinue McMillan Lane as a public highway. Id. at ¶ 15, Appellant's App. at 093. Pursuant to RSA 231:43, II, the Town of Conway notified Bellevue, as an abutter to McMillan Lane, of McMillan Lane's pending discontinuance. *Order* (May 19, 2020) at 3, Appellant's App. at 141; Hr'g Ex. 1, Appellant's App. at 057. Warrant Article 27 was presented to the voters on the Town Meeting ballot as follows:

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

Pet. at ¶ 15, Appellant's App. at 093. Warrant Article 27 conditioned McMillan Lane's discontinuance on the road being open, maintained, and unmodified by Settlers until Settlers obtained Site Plan Review and/or Subdivision approval from the Town of Conway Planning Board to eliminate McMillan Lane and to construct and complete an alternative road prior to closing McMillan Lane. Id.

On October 6, 2017, Bellevue appealed the Town of Conway's vote to discontinue McMillan Lane. (Bellevue Prop., Inc. v. Town of Conway, et. al., Carroll, Cty., Docket No.: 212-2017-CV-00134) (the "Discontinuance Appeal"). *Order* (May 19, 2020) at 3, Appellant's App. at 141. After a bench trial, the trial court affirmed the Town of Conway's vote to discontinue McMillan Lane. Discontinuance Appeal *Order* (Feb. 27, 2019) at 13, Appellant's App. at 212. In its ruling, the trial court affirmed that McMillan Lane's discontinuance has not yet occurred because it was conditional, and that it remains a public way until Settlers constructs

a private roadway replacement for McMillan Lane and dedicates it to public use. See id. at 12-3, Appellant's App. at 211-2 (holding that "[t]herefore, the road will not be formally discontinued until such time as all of the conditions [of Warrant Article 27] have been met.") This Court affirmed the trial court's decision in the prior Discontinuance Appeal on August 25, 2020. (Docket No. 2019-0302).

On or about July 31, 2018, approximately fifteen (15) months after the Town vote to discontinue McMillan Lane, Settlers submitted a concurrent Subdivision/Site Plan Review Application (the "Application") to the Town of Conway Planning Board requesting, *inter alia*, certain boundary line adjustments and site plan approval for development of a Market Basket supermarket, including a large parking lot to serve the supermarket with lighting, landscaping, and associated infrastructure. *Pet.* at ¶ 16, Appellant's App. at 093-4; Hr'g Ex. 6, Appellant's App. at 086. Under this Application, Settlers will replace McMillan Lane with a private right-of-way in a new location. Id.

Settlers' proposed boundary line adjustment, as shown in the Application, also results in title to the land on which McMillan Lane currently sits (44,829 total square feet) becoming part of the following Settlers' Properties: 44,303 square feet of that land to 13 Green Street's Property (Lot 235/92) and 9 square feet to 1675 W.M.H.'s Property (Lot 235/85). *Pet.* at ¶ 17, Appellant's App. at 094. The remaining 517 square feet of that land is to become part of Barnes Road Extension, the proposed private roadway replacement for McMillan Lane. Id. The land on which McMillan Lane currently sits will be replaced with portions of the proposed supermarket's parking and also with associated lighting, landscaping, and

other infrastructure. Id. at ¶¶ 16, 18, Appellant's App. at 093-4; Hr'g Ex. 6, Appellant's App. at 086.

The Town of Conway Planning Board approved Settlers' Application at its November 8, 2018 public hearing, approximately nineteen (19) months after the Town vote to discontinue McMillan Lane. *Pet.* at ¶ 19, Appellant's App. at 094. As a result, if the development proceeds as per the approved Application, Bellevue and its employees, agents, and patrons will no longer be able to access Barnes Road and Common Court over the land on which McMillan Lane currently sits. Id.

Since approval of its Application on November 8, 2018, Settlers has been preparing for the replacement of McMillan Lane and construction of the supermarket, parking, lighting, landscaping, and other infrastructure. Id. at ¶ 20, Appellant's App. at 094. To date, McMillan Lane has not yet been replaced and construction of the supermarket, parking, lighting, landscaping, and other infrastructure has not yet begun. Id. Pursuant to the conditions imposed by Warrant Article 27, as affirmed by the trial court and this Court in the prior Discontinuance Appeal, McMillan Lane presently remains open as a public highway that is owned, maintained, and unmodified by Settlers. Id.

Bellevue has not issued its written consent for the abrogation of its private right of access over the land on which McMillan Lane currently sits pursuant to RSA 231:43, III. Id. at ¶ 23, Appellant's App. at 095. Bellevue is currently asserting a private right of access to that land under RSA 231:43, III and is seeking, among other relief, a declaratory judgment that it is entitled to enforce this private right of access based on the Town of Conway Planning Board's approval of Settlers' site plan to eliminate

McMillan Lane and replace it with parking, lighting, landscaping, and infrastructure for Settlers' proposed supermarket.

STANDARDS OF REVIEW

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

In reviewing a motion to dismiss, the Court's standard of review is whether the allegations in the Petitioner's pleadings are reasonably susceptible of a construction that would permit recovery. Sanguedolce v. Wolfe, 164 N.H. 644, 645 (2013). The Court assumes the Petitioner's pleadings to be true and construes all reasonable inferences in the light most favorable to him or her. Id. The Court then engages in a threshold inquiry that tests the facts in the Petition against the applicable law, and if

the allegations constitute a basis for legal relief, the Court must hold that it was improper to grant the motion to dismiss. Id.

When a motion to dismiss challenges a Petitioner's standing to sue, the trial court must look beyond the Petitioner's unsubstantiated allegations and determine, based upon the facts, whether the Petitioner has sufficiently demonstrated his right to claim relief. Avery v. Comm'r, N.H. Dep't of Corr., No. 2019-0051, 2020 WL 6814782, at *6 (N.H. Sup. Ct., Nov. 20, 2020). If the relevant facts are not in dispute, the Court reviews the trial court's determination on standing *de novo*. Id.

SUMMARY OF THE ARGUMENT

The trial court's dismissal of Bellevue's claims is erroneous and should be reversed, remanding this action to the trial court for proceeding(s) on the merits.

The trial court erred as a matter of law by ruling that Bellevue did not have standing to enforce a private right of access over the property on which McMillan Lane sits under RSA 231:43, III because it does not own land that directly abuts, or directly touches, McMillan Lane. The trial court misinterpreted the plain language of RSA 231:43, III, which affords a private right of access over land on which a discontinued highway sits to "owner[s] of land," a broader category than direct abutters. Under RSA 231:43, III, Bellevue is an owner of land with a private right of access over the land on which McMillan Lane currently sits, and has standing to bring its claims in the present case. Even if this Court upholds the trial court's interpretation of "owner of land" to mean "abutter," Bellevue still has standing to bring its claims under RSA 231:43, III because it is an abutter

to McMillan Lane. The trial court's finding that Bellevue is not an abutter to McMillan Lane is without merit and should be reversed because it is contrary to Bellevue's status as an abutter to McMillan Lane, a status to which the Town of Conway and Settlers admitted, and that the trial court acknowledged, in the Discontinuance Appeal. The trial court and Settlers are therefore estopped from challenging Bellevue's abutter status in the present case.

The trial court also erred as a matter of law by dismissing Bellevue's claims based on its ruling that under the doctrine of *res judicata*, those claims are barred by Bellevue's failure to raise its claims under RSA 231:43, III in the Discontinuance Appeal. The doctrine of *res judicata* does not bar Bellevue's claims because: 1. Bellevue's private right of access under RSA 231:43, III arises by operation of law when McMillan Lane is actually discontinued; 2. the same cause of action was not before the trial court in the Discontinuance Appeal and in the instant matter; and 3. Bellevue's claims regarding its private right of access under RSA 231:43, III were not yet ripe for adjudication in the Discontinuance Appeal, and therefore could not have been brought in the Discontinuance Appeal.

For these reasons, the trial court's dismissal of Bellevue's claims should be reversed based on errors of law.

ARGUMENT

I. THE TRIAL COURT'S DISMISSAL OF BELLEVUE'S CLAIMS IS ERRONEOUS AND SHOULD BE REVERSED, REMANDING THE ACTION FOR PROCEEDING(S) ON THE MERITS.

A. The trial court erred as a matter of law in ruling that Bellevue did not have standing to enforce a private right of access over the property on which McMillan Lane sits under RSA 231:43, III because it does not own land that directly abuts, or directly touches, McMillan Lane.

The trial court's dismissal of Bellevue's claims due to Bellevue's purported lack of standing should be reversed. The trial court erred as a matter of law by holding that only "owners of land that directly abuts, or directly touches, a discontinued class IV, V, or VI highway" have an enforceable right of access under RSA 231:43, III, and that Bellevue did not so qualify because its property "does not directly abut, which is to say directly touch, McMillan Lane." *Order* (May 19, 2020) at 6-10, Appellant's App. at 144-8.

1. The trial court misconstrued the plain language of RSA 231:43, III, under which the private right of access applies to "owner[s] of land" not limited to those who "directly abut" or "directly touch" a discontinued highway.

The foundation of the trial court's dismissal of Bellevue's claims for lack of standing is its ruling that only "owners of land that directly abuts, or directly touches, a discontinued class IV, V, or VI highway" have an enforceable right of access under RSA 231:43, III. *Order* (May 19, 2020)

at 6-10, Appellant's App. at 144-8. However, the trial court misinterpreted "owner of land," the term identifying who has a private right of access under RSA 231:43, III, by baselessly adding to it the qualifiers, "that directly abuts, or directly touches." The trial court's ruling is without merit and contrary to long-standing New Hampshire law regarding statutory construction, and the trial court's dismissal of Bellevue's claims on this basis should be reversed. See Town of Hinsdale, 153 N.H. at 72 (stating that the Court "will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

RSA 231:43, III states that "[n]o owner of land shall, without the owner's written consent, be deprived of access over such highway, at such owner's own risk." This plain language shows that the statute does not limit the private right of access arising out of RSA 231:43, III to only "owners of land that directly abuts, or directly touches, a discontinued class IV, V, or VI highway," as the trial court incorrectly found. None of the trial court's qualifiers of "owner of land" are included in this plain language because the legislature did not see fit to include such language when it derived RSA 231:43, III.

In crafting the plain language of RSA 231:43, III, the legislature also did not see fit to define "owner of land" as "abutter," a concept that the legislature specifically used in RSA 231:43, II. In comparison to RSA 231:43, III, RSA 231:43, II states in part that "[t]he selectmen shall give written notice by verified mail, as defined in RSA 21:53, to all owners of property abutting such highway, at least 14 days prior to the vote of the town . . . ." Distinguishing amongst classes of individuals in statutory construction is not foreign to the legislature; indeed, it is common practice.

When the legislature intends to limit certain rights to a certain class, it expressly does so. As is evident from the plain language in RSA 231:43, II, if the legislature wanted to define "owner of land" in RSA 231:43, III to mean "abutter" or an owner of land abutting a discontinued highway, it would have done so as it did in RSA 231:43, II, where the legislature qualified the "owners of property" entitled to receive written notice as those who "abutt[ed] such highway." In RSA 231:43, III, it is clear from the plain language used that the legislature did not define "owner of land" to mean "owners of land that directly abuts, or directly touches, a discontinued class IV, V, or VI highway."

The legislature's decision not to limit those entitled to a private right of access over a discontinued highway to those who directly abut or directly touch it is valid as a practical, logical matter. As an example, consider Road A as a main thoroughfare. Road B is a dead-end street with sole ingress and egress to the public roadway network via an intersection with Road A. Another dead-end street, Road C, intersects with Road B, and, as such, all landowners on Road C rely upon Road B for access to the public roadway network. Under the trial court's erroneous interpretation of RSA 231:43, III, Road B could be discontinued and removed, thereby severing all access to land on Road C, yet the now landlocked landowners would not have any private rights of access over Road B because they live on Road C and do not directly abut or directly touch Road B. As this example demonstrates, the trial court's interpretation of RSA 231:43, III is not only contrary to the plain language of the statute and the rules of statutory construction, but it is also wholly unsupportable practically.

In its Order, the trial court cited Balise v. Balise, 170 N.H. 521, 525 (2017) as support for its interpretation of "owner of land" in RSA 231:43, III. *Order* (May 19, 2019) at 8, Appellant's App. at 146. However, in Balise, this Court only found that the "right conferred by RSA 231:43, III is a right of access over a discontinued class IV, V, or VI highway . . . [that] is not conditioned upon the discontinued highway being an abutting landowner's sole means of accessing his or her property." 170 N.H. at 524-5. Nowhere in Balise did this Court hold that the private right of access under RSA 231:43, III is limited to owners of land that directly abuts or directly touches a discontinued highway. Because the landowner at issue in Balise was undisputedly an abutter to the discontinued highway, the Court did not even address the applicability of RSA 231:43, III to owners of land who do not directly abut or directly touch a discontinued highway. Therefore, Balise does not support the trial court's faulty determination that only "owners of land that directly abuts, or directly touches, a discontinued class IV, V, or VI highway" have an enforceable right of access under RSA 231:43, III.

Under the plain language of RSA 231:43, III, Bellevue does not have to be an abutter to have a private right of access under RSA 231:43, III; it only has to be an "owner of land," the broader term chosen by the legislature. While the term, "owner of land," is not defined in RSA 231:43, III, its plain and ordinary meaning can be determined by combining the plain and ordinary meanings of "owner," which is "someone who has the right to possess, use, and convey something" or "a person in whom one or more interests are vested," with the plain and ordinary meaning of "land," which is "an immovable and indestructible three-dimensional area

consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it." *Owner*, Black's Law Dictionary (11th ed. 2019); *Land*, Black's Law Dictionary (11th ed. 2019); see also Appeal of Michele, 168 N.H. 98, 102-3 (2015) (finding that "[w]hen a term is not defined in the statute, we look to its common usage, using the dictionary for guidance."). Under this plain and ordinary meaning, Bellevue is an owner of land under RSA 231:43, III with standing to bring its claims in the present case.

In making this argument, Bellevue contends that the universe of "owner[s] of land" that has a private right of access under RSA 231:43, III includes Bellevue, and others like it, who are located across the street from the discontinued highway and are only separated from the boundary of the land on which the discontinued highway sits by a public way. See Balise, 170 N.H. at 524-5 (finding that use of the public highway is not necessary for RSA 231:43, III to apply). Bellevue and others similarly situated to it are just as affected by the discontinuance of a public highway as those who directly abut or directly touch the boundary line(s) of the land on which the discontinued highway sat.

This determination of the universe of "owner[s] of land" does not impose a geographic restraint that cannot be easily or reasonably defined, as the trial court alleged. *Order* (May 19, 2019) at 7, Appellant's App. at 145. The example described *supra* regarding Roads A, B, and C demonstrates that such a determination of the universe of "owner[s] of land" is appropriately definitive in scope. There is also precedent for determining the scope of a broad statutory term like "owner of land" as Bellevue has. In Weeks Rest. Corp. v. City of Dover, 119 N.H. 541, 545

(1979), this Court adopted a fact-based test for determining the scope of "aggrieved persons" having standing to appeal planning board decisions under RSA 36:34, I, which included "factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings." The "Weeks factors," as they have come to be known, remain good law on the issue and have withstood the test of time as a workable standing analysis. The same or similar test could apply when determining the scope of "owner[s] of land" entitled to private rights of access over a discontinued highway under RSA 231:43, III. Applying the "Weeks factors" to this case, the universe of "owner[s] of land" who have a private right of access under RSA 231:43, III includes a broader category than just abutters, such as owners of land who are separated from the discontinued highway only by another public road, like Bellevue who is located across the street from McMillan Lane and is only separated from the boundary of the land on which McMillan Lane sits by Common Court, a public road.

Because the plain language of RSA 231:43, III does not restrict private rights of access to land over which a discontinued highway sits to only owners of land who directly abut, or directly touch, a discontinued highway, the trial court's dismissal of Bellevue's claims based on a lack of standing should be reversed.

2. If this Court upholds the trial court's interpretation that "owner of land" means "abutter," Bellevue still has standing to bring its claims under RSA 231:43, III because it is an abutter to McMillan Lane.

Even if this Court agrees with the trial court's interpretation of RSA 231:43, III to mean that a party must be an abutter to the discontinued highway to be an "owner of land," Bellevue still has a private right of access pursuant to RSA 231:43, III because it is an abutter to McMillan Lane.

The trial court classified Bellevue as an abutter to McMillan Lane in the prior Discontinuance Appeal and is estopped from making a contrary finding in the present case. In the Discontinuance Appeal, the Town of Conway granted abutter status to Bellevue pursuant to RSA 231:43, II. See Hr'g Ex. 1, Appellant's App. at 057 (demonstrating that the Town of Conway notified Bellevue of the pending discontinuance of McMillan Lane under RSA 231:43, II because it determined that Bellevue was an abutter to McMillan Lane); see also RSA 231:43, II (stating that "[t]he selectmen shall give written notice by verified mail, as defined in RSA 21:53, to all owners of property abutting such highway, at least 14 days prior to the vote of the town."). The trial court affirmed Bellevue's status as an abutter to McMillan Lane. See Discontinuance Appeal *Order* (Feb. 27, 2019) at 6, Appellant's App. at 205 (finding that "[b]y letter dated February 16, 2017, Conway notified Bellevue of the proposed Article 27, as required by RSA 231:43, II, as the Hotel abutted McMillan Lane."). This Court affirmed the trial court's decision, which included its finding that Bellevue was an abutter to McMillan Lane, on August 25, 2020. Therefore, as previously

found in the Discontinuance Appeal, Bellevue is an abutter to McMillan Lane.

Settlers is also collaterally estopped from arguing in the present case that Bellevue is not an abutter to McMillan Lane. Collateral estoppel "bar[s] a party to a prior final judgment from relitigating any fact actually determined in the prior litigation." In re Case of Bruzga, 142 N.H. 743, 745 (1998). Relatedly, the doctrine of offensive collateral estoppel applies here with the same result, as that doctrine "results in determining an issue of fact over the actual or potential objection of a present respondent, by applying the determination reached in a prior proceeding in which the respondent was also a party." Id. Collateral estoppel, offensive or otherwise, applies when: "(1) the issue subject to estoppel is identical in each action; (2) the first action resolved the issue finally on the merits; (3) the party to be estopped appeared in the first action or was in privity with someone who did; (4) the party to be estopped had a full and fair opportunity to litigate the issue; and (5) the finding at issue was essential to the first judgment." Tyler v. Hannaford Bros., 161 N.H. 242, 246 (2010). "Collateral estoppel serves the dual purposes of promoting judicial economy and preventing inconsistent judgments." Barry v. N. H. Dep't of Health & Human Servs., 170 N.H. 364, 368 (2017) (internal quotations omitted).

The elements of the doctrine of collateral estoppel have been met in the present case. First, Bellevue's abutter status vis-à-vis McMillan Lane is identical in both the Discontinuance Appeal and in the present case. The Discontinuance Appeal resolved the issue of Bellevue's status as an abutter in its favor, as described *supra*. Settlers and/or their affiliate entities

appeared in the Discontinuance Appeal and had a full and fair opportunity to object to Bellevue's abutter status. Despite having a full opportunity to do so, neither the Town of Conway nor Settlers ever challenged Bellevue's status as an abutter to McMillan Lane. In fact, both the Town of Conway and Settlers admitted to Bellevue's abutter status. See the *Ans. of the Town of Conway* in the Discontinuance Appeal at p. 2, ¶ 10, Appellant's App. at 193 (admitting Bellevue's allegation that it was a "direct abutter" to McMillan Lane); see also *Co-Defs.' Joinder in the Ans. of the Town of Conway*, Appellant's App. at 198 (including Settlers' joinder in this admission). Finally, Bellevue's abutter status was essential to the first judgment in the Discontinuance Appeal. Thus, collateral estoppel bars Settlers' argument in the present case that Bellevue is not an abutter to McMillan Lane and, therefore, lacks standing to bring its claims under RSA 231:43, III.

In addition, Bellevue qualifies as an abutter as that term is defined by statute. The discontinuance of McMillan Lane in connection with Settlers' supermarket development project is, at its heart, a matter of land planning. In New Hampshire land planning matters, it is uniformly accepted that abutters are defined to include landowners directly across the street from the subject property. See RSA 672:3 (defining "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."). It is logical for the term "abutter" to include landowners directly across the street from the subject property because while a property directly across the street does not directly abut or directly touch a property being developed, it is equally affected by such

development. The same analysis applies in the present case, where Bellevue's property is located directly across the street (Common Court) from the southerly boundary of McMillan Lane and where McMillan Lane provides access to Bellevue's property through Common Court. Ex. A to *Mot. to Dismiss & Req. for Award of Att'ys' Fees*, Appellant's App. at 121; Hr'g Ex. 4, Appellant's App. at 083. Bellevue constitutes an abutter as defined by RSA 672:3, and is therefore an abutter for the purpose of RSA 231:43, III, to the extent this Court finds that "owner of land" as used in the statute is limited to abutters of the discontinued highway.

In its Order, the trial court concluded that the definition of "abutter" under RSA 672:3 was inapplicable because it applies only to RSA title LXIV, which governs Planning and Zoning. *Order* (May 19, 2019) at 9, Appellant's App. at 147. The trial court erred in its analysis of the applicability of the definition of "abutter" contained in RSA 672:3. This definition was clearly understood and applied by the Town of Conway when it classified Bellevue as an abutter to McMillan Lane and provided notice to Bellevue of the pending discontinuance pursuant to RSA 231:43, II, a statutory requirement outside of RSA title LXIV. The trial court improperly discounted this significant fact, however, in ruling that RSA 231:43, II's notice requirement to "all owners of property abutting such highway" means that notice is to be given "only to owners of land that directly abuts a proposed or discontinued highway." *Order* (May 19, 2019) at 9, Appellant's App. at 147. The trial court wholly failed to cite any authority supporting its conclusion that "directly abuts" is the standard that applies when determining who receives notice, a conclusion that is not only contrary to the plain language of RSA 231:43, II and RSA 672:3, but is also

violative of long-standing New Hampshire law regarding statutory construction, as described *supra*. The trial court's unsupported, erroneous conclusion should be rejected.

For these reasons, if this Court limits the definition of "owner of land" in RSA 231:43, III to "abutter," Bellevue still has standing to bring its claims in the present case under RSA 231:43, III because as a matter of law, Bellevue is an abutter to McMillan Lane. The trial court's dismissal of Bellevue's claims for lack of standing is erroneous and should be reversed.

B. The trial court erred as a matter of law by dismissing Bellevue's claims after it ruled that under the doctrine of *res judicata*, those claims are barred by the Discontinuance Appeal.

The trial court's dismissal of Bellevue's claims under the doctrine of *res judicata* should be reversed because the trial court erred by ruling that Bellevue's claims are barred by the Discontinuance Appeal. In its Order, the trial court found that *res judicata* barred Bellevue's claims because the cause of action giving rise to the Discontinuance Appeal was the same as that giving rise to the present case, and that "at the time the petitioner filed its earlier case, it knew or should have known that the Town's vote to discontinue McMillan Lane would impact whatever rights it had under RSA 231:43, III." *Order* (May 19, 2020) at 15, Appellant's App. at 152.

However, the doctrine of *res judicata* does not bar Bellevue's claims because: 1. Bellevue's private right of access under RSA 231:43, III arises by operation of law upon the discontinuance of McMillan Lane; 2. the same cause of action was not before the trial court in the Discontinuance Appeal and in the instant matter; and 3. Bellevue's claims regarding its private

right of access under RSA 231:43, III were not yet ripe for adjudication in the Discontinuance Appeal, and therefore could not have been brought in the Discontinuance Appeal. Because the Court erred as a matter of law in finding otherwise, its dismissal of Bellevue's claims should be reversed.

1. Because a private right of access under RSA 231:43, III arises by operation of law upon the discontinuance of a public highway, with no process required of the owner of land, the trial court erred by holding that Bellevue's claims are now barred by *res judicata* because Bellevue failed to raise those claims in the Discontinuance Appeal.

The trial court found that the Town of Conway's vote to discontinue McMillan Lane gave rise to Bellevue's claims under RSA 231:43, and that *res judicata* barred Bellevue's claims in the present case because it failed to bring those claims in the prior Discontinuance Appeal. *Order* (May 19, 2020) at 15, Appellant's App. at 153. However, the trial court's conclusion that Bellevue's claims in the present case must have been brought in the Discontinuance Appeal in order to survive is without merit. Bellevue's private right of access under RSA 231:43, III arises by operation of law upon the discontinuance of McMillan Lane without requiring Bellevue to take any procedural action. To hold otherwise, as the trial court erroneously did, would be to force parties whose private rights of access under RSA 231:43, III may be threatened in the future to attempt to bring unripened claims based on uncertain future events that have not yet occurred. As detailed below, requiring such parties to engage in speculative litigation is not judicially efficient and is contrary to the purpose behind RSA 231:43, III providing a private right of access by

operation of law. Therefore, the trial court's dismissal of Bellevue's claims in the present case under the doctrine of *res judicata* based on Bellevue's failure to bring those claims in the Discontinuance Appeal should be reversed.

2. The trial court erred by ruling that the transaction or occurrence giving rise to Bellevue's cause of action in the present case was the same as that giving rise to the cause of action in the Discontinuance Appeal.

The doctrine of *res judicata* does not bar Bellevue's claims in this case because the second element of this doctrine, that "the same cause of action was before the court in both instances," has not been met. Gray v. Kelly, 161 N.H. 160, 164 (2010). As a basis for its conclusion that the cause of action giving rise to the Discontinuance Appeal and giving rise to the present case was the same, the trial court determined that "the Town's vote to discontinue in this case gave rise to the petitioner's RSA 231:43 claim." *Order* (May 19, 2020) at 15, Appellant's App. at 153. The trial court made this determination even though it also conceded that "the Town's vote in this case did not immediately deprive Bellevue of access to McMillan Lane." Id. at 12, Appellant's App. at 150. The trial court's erroneous determination of the transaction or occurrence giving rise to Bellevue's claims in the present case, and the resulting conclusion that *res judicata* barred those claims, is an error of law that should be reversed.

The transaction or occurrence giving rise to Bellevue's present claims was not the Town of Conway's vote to discontinue McMillan Lane, the cause of action in the Discontinuance Appeal; rather, it was the Town of Conway Planning Board's final approval of Settlers' Application, in which

McMillan Lane would be eliminated and replaced with parking spaces, lights, landscaping, and other infrastructure, abrogating Bellevue's private right of access under RSA 231:43, III as a result.

In erroneously determining that the Town of Conway's vote to discontinue McMillan Lane was the transaction or occurrence that gave rise to Bellevue's claims in the present case such that they are barred by *res judicata*, the trial court incorrectly assumed as a foregone conclusion that: a. Settlers would file with the Town of Conway Planning Board an Application, under which Bellevue's private right of access over the land on which McMillan Lane currently sits would be eliminated; and b. that the Town of Conway Planning Board would approve Settlers' Application. Settlers could have designed its plan for the supermarket development in a way that preserved Bellevue's private right of access over the land on which McMillan Lane currently sits, or Settlers could have refrained from filing an Application entirely. In addition, simply because the Town voters made Planning Board approval a condition of discontinuance does not mean that the Town of Conway Planning Board was required to approve Settlers' future Application. The Town of Conway Planning Board has independent authority to approve or deny Settlers' Application, even if its approval was a condition of the discontinuance of McMillan Lane. RSA 674:43, I. While the Town of Conway Planning Board eventually granted such approval to Settlers, Settlers' Application had not yet been filed as of the time of the discontinuance vote, which meant that Settlers' plan for the land on which McMillan Lane sits was unknown at that time, and there was no guaranty that a plan would be forthcoming or approved. Therefore, as of the time of the discontinuance vote, Bellevue had no ability to know that

Settlers would submit to the Town of Conway Planning Board a plan that would eliminate Bellevue's private right of access under RSA 231:43, III, and that the Town of Conway Planning Board would approve Settlers' submitted plan, until the Town of Conway Planning Board actually did so on November 8, 2018. When Bellevue learned that Settlers' submitted plan intended to eliminate Bellevue's private right of access under RSA 231:43, III, Bellevue raised that issue with Settlers at the Town of Conway Planning Board meeting, in the hopes that that Settlers or the Planning Board would alter the plan to preserve, instead of eliminate, Bellevue's private right of access. Hr'g Ex. 7, Appellant's App. at 088.

If the Town of Conway Planning Board had denied Settlers' Application instead of approving it, Bellevue's claims under RSA 231:43, III would not have arisen because McMillan Lane would have remained "open, maintained, and unmodified" consistent with the condition in Warrant Article 27[1]. As such, the Town of Conway Planning Board's approval of Settlers' Application, and not the Town's discontinuance vote, was the transaction or occurrence that gave rise to Bellevue's present claims under RSA 231:43, III.

Even if Bellevue could have brought its claims under RSA 231:43, III in the Discontinuance Appeal, Bellevue is not now barred by *res judicata* from doing so in the present case because Bellevue's claims in the

[1] Warrant Article 27 states that "[d]iscontinuance is conditioned on the road being open, maintained, and unmodified . . . until such time as Settlers OVP has obtained Site Plan Review and/or Subdivision approval from the Conway Planning Board to eliminate McMillan Lane and shall construct and complete an alternate road with no new egress to the North-South Road prior to closing McMillan Lane.") (emphasis added).

present case are distinct from its claims in the Discontinuance Appeal. Bellevue's claims in the present case also arise from a distinct transaction or occurrence than the transaction or occurrence in the Discontinuance Appeal. The claims brought by Bellevue in the Discontinuance Appeal and the claims brought by Bellevue in the present case are not merely different legal theories for claiming relief on the basis of the same factual transaction or occurrence, such that *res judicata* would apply. See Tarnawa v. Goode, 172 N.H. 321, 328-9 (2019) (applying this proposition and further finding that "[s]ome claims, while they might be brought when other claims between the parties are adjudicated, need not be so brought or otherwise be barred.").

The trial court argued in its Order that Kalil v. Town of Dummer Zoning Bd. of Adjustment, 159 N.H. 725, 730 (2010) supports its conclusion that the cause of action giving rise to the Discontinuance Appeal and giving rise to the present case was the same, and that therefore, *res judicata* bars Bellevue's claims in the present case. *Order* (May 19, 2020) at 14-5, Appellant's App. at 152-3. But, Kalil is wholly distinguishable from this case because in Kalil, the transaction or occurrence giving rise to the plaintiffs' claims in both actions was unequivocally the same ZBA decision denying their variances. Id. Because, as stated *supra*, the transaction or occurrence giving rise to Bellevue's claims in the Discontinuance Appeal is not the same as the transaction or occurrence giving rise to Bellevue's claims in the present case, Bellevue's claims in the present case are not now barred by *res judicata*. Therefore, the trial court's dismissal of Bellevue's claims should be reversed.

3. Bellevue's claims under RSA 231:43, III were not ripe as of the time of the Discontinuance Appeal; therefore, the trial court erred by concluding that Bellevue's claims are now barred by *res judicata* because Bellevue failed to raise those claims in the Discontinuance Appeal.

Bellevue could not have asserted in the prior Discontinuance Appeal its private right of access under RSA 231:43, III because its right was not yet ripe as of the prior Discontinuance Appeal's filing. "[R]ipeness relates to the degree to which the defined issues in a case are based on actual facts and are capable of being adjudicated on an adequately developed record." State v. Exxon Mobil Corp., 168 N.H. 211, 263 (2015). Since a claim that is not ripe cannot be litigated, claims that are not ripe at the time of an initial action cannot be barred by *res judicata* in a subsequent action. See Hill-Grant Living Tr. v. Kearsarge Lighting Precinct, 159 N.H. 529, 538 (2009) (affirming dismissal on summary judgment of claim not ripe for review); Morgenroth & Assocs., Inc. v. State, 126 N.H. 266, 269 (1985) (stating that before *res judicata* bars a later claim, it must be shown that such claim was or could have been litigated in a prior action between the parties for the same cause of action). While Bellevue filed its action against the Town of Conway in the prior Discontinuance Appeal on October 6, 2017, the earliest point where Bellevue's claims under RSA 231:43, III ripened was not until over a year later, on November 8, 2018, when Settlers obtained final site plan approval from the Town of Conway Planning Board to proceed with the elimination of McMillan Lane. Absent that final approval from the Town of Conway Planning Board, McMillan Lane would have remained "open, maintained, and unmodified" in

perpetuity consistent with the condition in Warrant Article 27. The Town of Conway Planning Board approval granted Settlers the requisite authority to eliminate McMillan Lane and to construct on the land on which it currently sits parking spaces, lighting, landscaping, and other infrastructure for the supermarket, eliminating Bellevue's private right of access under RSA 231:43, III as a result. Even at that point, though, Bellevue's claims under RSA 231:43, III were barely ripe, as the actual interference with Bellevue's private right of access has not yet occurred. However, Bellevue proactively brought its claims in the present case based on the Town of Conway Planning Board's approval before any construction occurred and before additional costs were incurred.

When Bellevue appealed the vote to discontinue McMillan Lane on October 6, 2017, it was unknown whether the Town of Conway Planning Board would, in fact, grant any such approval to Settlers in the future. Even if the Planning Board received and then approved the proposed Application, the mere fact that McMillan Lane was to be discontinued does not necessarily equate to the conclusion that the property on which it sits will be developed in a manner that eliminates Bellevue's private right of access. Even with the Town of Conway Planning Board's approval ripening Bellevue's claims in the present case, actual interference with Bellevue's private right of access has not yet occurred because Settlers has not yet constructed an alternate access. Settlers did not file its Application to the Town of Conway Planning Board seeking such approval until July 31, 2018, approximately nine (9) months after Bellevue filed its claims in the Discontinuance Appeal. The Town of Conway Planning Board did not grant final site plan approval to Settlers until November 8, 2018, over a

year after Bellevue filed its action in the Discontinuance Appeal. As of that filing, Bellevue did not know, and could not have known, that Settlers would be authorized to eliminate its private right of access to land on which McMillan Lane sits even after the Town's vote to discontinue McMillan Lane. A municipality's discontinuance of a road for public use does not automatically eliminate a party's private right of access in the land on which that roads sits. Rather, an intervening event must occur, such as approval of an action by the landowner to which fee title of the road reverts to design a project on that land that eliminates private rights of access under RSA 231:43, III, or actual interference by the landowner with the private right of access. In the present case, the intervening event that first ripened Bellevue's claims under RSA 231:43, III was the Town of Conway Planning Board granting final site plan approval to Settlers on November 8, 2018 for its plan to eliminate McMillan Lane and to replace it with parking spaces, lighting, landscaping, and other infrastructure, replacements that will eliminate Bellevue's private right of access to the land on which those replacements will sit.

Contrary to the trial court's finding, a new action is not barred by *res judicata* "simply because it is relevant to the earlier action." See Turkey Creek, Inc. v. Londono, 567 So. 2d 943, 946 (Fla. Dist. Ct. App. 1990), approved, 609 So. 2d 14 (Fla. 1992) (sating that a slander of title claim was not barred by *res judicata* where it had not fully materialized at time that developer answered declaratory judgment complaint in prior action). Thus, Bellevue's claims in the present action did not have to be brought in the Discontinuance Appeal, which had already been filed and was less than a month away from trial when Bellevue's claims under RSA 231:43, III first

ripened. Had Bellevue attempted to make claims under RSA 231:43, III in the Discontinuance Appeal, such claims would have been dismissed due to a lack of ripeness. The actual facts on which those claims would have had to been based, i.e. approval of Settlers' site plan to eliminate Bellevue's private right of access, had not occurred as of October 6, 2017, when Bellevue filed its action in the Discontinuance Appeal. Exxon Mobil Corp., 168 N.H. at 263.

If this Court affirms the trial court's finding that Bellevue's failure to bring its claims under RSA 231:43, III in the Discontinuance Appeal bars those claims in the present case, New Hampshire law will then stand for the proposition that when a party files suit against a municipality and third-party landowner(s) then voluntarily join in the action[2], that party must bring at that time claims against those third-parties that are contingent upon unknown outcomes of potential future events, such as whether those third-parties will seek to obtain the necessary approval(s), whether the third-parties' plan interferes with a private right of access, and whether the plan is actually constructed even if approval(s) are obtained, otherwise they are barred forever. Such a proposition and result is contrary to New Hampshire law regarding ripeness and should be rejected.

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[2] Bellevue filed the prior Discontinuance Appeal against the Town of Conway, not against Settlers. Bellevue named Settlers in the prior Discontinuance Appeal, but not as defendants, to comply with RSA 231:48, which requires appellants of a discontinuance decision to provide notice to abutting landowners in the same manner as the selectmen of the Town. Accordingly, Bellevue did not name Settlers in that action to adjudicate any claims against them, since Bellevue's only grievance ripe at that time was against the Town of Conway regarding its decision to discontinue McMillan Lane.

Under the trial court's reasoning, when Bellevue filed its action in the prior Discontinuance Appeal, Bellevue would have also had to speculatively plead its claims under RSA 231:43, III to maintain its private right of access even though it had not yet vested by operation of law, as follows:

> a. if the Court affirms the Town of Conway's vote to discontinue McMillan Lane and b. if Settlers, as third-party landowners, then decide to proceed to the Town of Conway Planning Board on an application to eliminate the road and c. if the Town of Conway Planning Board then approves the application and d. if the Town of Conway Planning Board's approval allows for the elimination of Bellevue's private rights to access land on which McMillan Lane sits, then Bellevue has a private right of access over McMillan Lane pursuant to RSA 231:43, III; and e. if Settlers moves forward and replaces McMillan Lane consistent with the approved plan, then Bellevue's private right of access must be enforced so as not to be abrogated.

Basing claims on potential, uncertain events that have not occurred as of the time such claims are brought cannot ever be "based on actual facts" and be "capable of being adjudicated on an adequately developed record," such that they survive dismissal based on ripeness. Exxon Mobil Corp., 168 N.H. at 263. Further, the doctrine of *res judicata* only "prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action." Gray, 161 N.H. at 164. A premature claim cannot be litigated. See Hill-Grant Living Tr., 159 N.H at 538 (affirming dismissal on summary judgment of a claim not ripe for review); see also Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 735 (1998) (finding that the ripeness doctrine reflects a judgment that the disadvantages of a

premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of – even repetitive – post-implementation litigation). Because Bellevue's claims regarding a private right of access over the land on which McMillan Lane sits could not have been litigated in the prior Discontinuance Appeal, those claims are not now barred by *res judicata*. Therefore, the trial court's dismissal of Bellevue's claims should be reversed.

CONCLUSION

For all of these reasons, the Plaintiff-Appellant respectfully requests that the trial court's dismissal of its claims against the Defendants-Appellees be reversed, and that the matter be remanded to the trial court for proceeding(s) on the merits.

STATEMENT CONCERNING ORAL ARGUMENT

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

CERTIFICATION CONCERNING THE ORDERS BEING APPEALED

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

Respectfully submitted,

Bellevue Properties, Inc., Plaintiff-Appellant

By its attorneys,

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

Date: February 26, 2021 /s/ Roy W. Tilsley, Jr.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of February, 2021, I have served by e-filing the foregoing Plaintiff-Appellant's Opening Brief and Appendix to Derek D. Lick, Esquire, counsel for the Defendants-Appellees.

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

COPY OF THE DECISIONS BELOW

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

Bellevue Properties, Inc.

v.

13 Green Street Properties, LLC, and 1675 W.M.H., LLC

Docket No. 212-2019-CV-00196

ORDER ON RESPONDENTS' MOTION TO DISMISS

The petitioner, Bellevue Properties, Inc., brought this action against the respondents, 13 Green Street Properties, LLC, and 1675 W.M.H., LLC, seeking to quiet title to real property located in North Conway, New Hampshire.[1] The respondents have filed a motion to dismiss, and the petitioner objects. The court conducted a telephonic hearing on the matter on April 15, 2020. Based on the parties' arguments, the relevant facts, and the applicable law, the court finds and rules as follows.

FACTS

The petition alleges the following relevant facts, which the court assumes are true for the purposes of the respondents' motion to dismiss. See Berry v. Watchtower Bible & Tract Soc'y of N.Y., 152 N.H. 407, 410 (2005). Additionally, the court considers documents submitted by the petitioner at the hearing, the authenticity of which is not in dispute. Bellevue Properties, Inc. is a Rhode Island corporation registered in New Hampshire with a principal place of business at 28 Jacome Way in Middletown, Rhode Island. (Pet. ¶ 1.) 13 Green Street Properties, LLC ("Green Street") is a New Hampshire limited liability company with a principal place of business

[1] This action is one of at least eleven between the same parties. (See Pet'r's Ex. 8); see, e.g., Bellevue Props., Inc. v. Settlers' Tennis, Inc., et al., Merrimack County Super. Ct., No. 217-2007-EQ-00228; Bellevue Props., Inc. v. Town of Conway, et al., Carroll County Super. Ct., No. 212-2014-CV-00051; Settlers' R1, Inc., et al. v. Bellevue Properties, Inc., Merrimack County Super. Ct., No. 217-2016-CV-00606.

at 1340 Centre Street in Newton, Massachusetts. (Id. ¶ 2.) 1675 W.M.H., LLC ("W.M.H.") is a Massachusetts limited liability company registered in New Hampshire with a principal place of business at 1340 Centre Street in Newton, Massachusetts. (Id. ¶ 3.)

The petitioner owns real property located at 72 Common Court in North Conway, identified as Tax Map/Lot No. 235/98. (Id. ¶ 6.) Green Street owns a nearby parcel identified as Tax Map/Lot No. 235/92, and W.M.H. owns a nearby parcel identified as Tax Map/Lot No. 235/85. (Id. ¶¶ 8–9.) The respondents' properties are all located at Settlers' Green Outlets, an outlet shopping center located in North Conway. (Id. ¶¶ 10–11.) From North Conway's main thoroughfare, Route 16/Route 302, the most direct means of accessing the petitioner's property along public ways is by traveling west along Barnes Road, then south along McMillan Lane, which is a class V highway, to Common Court. (Id. ¶¶ 13, 29; Pet'r's Ex. 4.) The respondents' properties may also be accessed along the same public ways. (See id.) The respondents' properties directly abut, i.e. touch, McMillan Lane. (See id.) The petitioner's property does not directly abut McMillan Lane, however, the southern terminus of McMillan Lane is located directly across the street (Common Court) from the petitioner's property. (See id.) Fee title to McMillan Lane became vested in the Town of Conway ("Town") for use as a public way in 1992 as the result of an eminent domain taking. (Id. ¶ 14.)

On April 11, 2017, residents of the Town voted to adopt Warrant Article 27 to discontinue McMillan Lane as a public road. (Id. ¶ 15.) The discontinuance of McMillan Lane was conditioned upon

> the road being open, maintained, and unmodified by the owners of the abutting parcels to which fee ownership of the road reverted [i.e. the respondents] until such time as [the respondents] obtained Site Plan Review and/or Subdivision approval from the Town of Conway Planning Board to eliminate McMillan Lane and to construct and complete, if found necessary by the Planning Board, an alternative road prior to closing McMillan Lane.

(Id. ¶ 15.) The Town notified the petitioner of Warrant Article 27 by written notice dated February 16, 2017 (the "Notice"). (Pet'r's Ex. 1.) The Notice provided, in relevant part: "As required by State law (NH RSA 231:43, II), we are hereby notifying you that a Warrant Article will appear on the 2017 town warrant to abandon McMillan Lane . . . . As a property owner, you are an abutter to such highway and are being notified of the above." (Id.)

On or about July 31, 2018, the respondents submitted a concurrent Subdivision/Site Plan Review Application (the "Application") to the Town Planning Board ("Planning Board"), requesting boundary line adjustments and site plan approval for development of a grocery store, including a large parking lot and associated infrastructure. (Id. ¶ 16.) The plans submitted with the Application proposed the development of a private right-of-way in a new location, using the McMillan Lane area for portions of the grocery store parking lot. (Id. ¶¶ 16, 18.) The Planning Board conditionally approved the Application at its November 8, 2018 public hearing. (Id. ¶ 19.)

Pursuant to RSA 231:48, the petitioner appealed the Town's vote to discontinue McMillan Lane. See Bellevue Props., Inc. v. Town of Conway, 13 Green Street Properties, LLC, 1675 W.M.H., LLC, and Settlers' R2, Inc. (hereinafter "Bellevue v. Conway", Carroll County Super. Ct., No. 212-2017-CV-00134 (Feb. 27, 2019) (Order, Ignatius, J.) (submitted as Pet'r's Ex. 2). The respondents were parties to that litigation. See id. In the course of those proceedings, the petitioner argued that the discontinuance of McMillan Lane deprived it—and, more importantly, the guests staying at its hotel—of the most direct access, along public ways, from North Conway's main thoroughfare. See id. at 11. The parties submitted evidence at a one-day trial to the court, establishing the location of nearby public ways, the boundary lines of the parties' properties, and the ultimate effect of McMillan Lane's discontinuance on the petitioner. See id. at 1–9. By order dated February 27, 2019, the court upheld the

discontinuance of McMillan Lane. (Id. at 15.) Thereafter, the petitioner filed this action, asserting it has a private, statutory easement to access McMillan Lane. (See Pet. ¶ 36.) The respondents now move to dismiss, arguing the petitioner lacks standing and that this action is barred by the doctrine of res judicata. (See Resp'ts' Mot. Dismiss at 4, 7.)

LEGAL STANDARD

When ruling on a motion to dismiss, the Court must determine whether the petitioner's allegations stated in the petition "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 [petitioner's] allegations to be true and construe all reasonable inferences in the light most favorable to [the petitioner]." Id. The Court "need not assume the truth of statements in the [petitioner's] pleadings, however, that are merely conclusions of law" not supported by "predicate facts." General Insulation Co. v. Eckman Constr., 159 N.H. 601, 611–12 (2010). The court "may also consider documents attached to the [petitioner's] pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the [petition]." Ojo v. Lorenzo, 164 N.H. 717, 721 (2013) (quotation, brackets, and ellipses omitted). 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 petition "do not constitute a basis for legal relief." Lamprey, 163 N.H. at 256.

ANALYSIS

The petitioner asserts that it has a private easement right, conferred by RSA 231:43, III, to access McMillan Lane even after its discontinuance. (Pet. ¶¶ 30–32.) The respondents move to dismiss the petition on the alternative grounds of standing and res judicata. (Resp'ts' Mot.

Dismiss at 4, 7.) At the hearing on this matter, the respondents requested that the court rule on both grounds in order to save the time and expense involved in a possible remand should this decision be appealed. Given the history of litigation between the parties and the likelihood of appeal of this decision, the court will address each of the parties' arguments in turn.

I. Standing

The respondents first argue the petition should be dismissed because the petitioner lacks standing to avail itself of the provisions of RSA 231:43, III. (Resp'ts' Mot. Dismiss at 4.) They contend the right of access over discontinued highways guaranteed by RSA 231:43, III applies only to owners of property that directly abuts, or directly touches, a discontinued highway. (Id. at 5–7.) To interpret the statute otherwise, they argue, would produce absurd results. (Id. at 6.) They argue the petitioner's property does not directly abut McMillan Lane and, accordingly, the right of access conferred by RSA 231:43, III does not apply to the petitioner or its property. (Id. at 7.) The petitioner objects, arguing that under the plain language of the statute, the right conferred by RSA 231:43, III applies to all landowners, and it therefore applies to the petitioner as a landowner. (Pet'r's Obj. Resp'ts' Mot. Dismiss ¶ 6.) It argued at the hearing that, even if the statute does not confer a right on all landowners everywhere, the legislature intended to confer the right on a broader, more indefinite class of landowners than simply those with land directly abutting the highway. Further, the petitioner argues that even if the right conferred by RSA 231:43, III applies only to abutters, it is an "abutter" as defined by RSA 672:3 and, accordingly, it is afforded a private right of access under RSA 231:43, III. (Id. ¶ 4.)

"When a 'motion to dismiss challenges the [petitioner's] standing to sue, the trial court must look beyond the [petitioner's] unsubstantiated allegations and determine, based on the facts, whether the [petitioners] have sufficiently demonstrated their right to claim relief.'" Johnson v.

Town of Wolfeboro Planning Board, 157 N.H. 94, 96 (2008) (quoting Ossipee Auto Parts v. Ossipee Planning Board, 134 N.H. 401, 403–04 (1991)) (ellipsis omitted). Because the underlying facts of this case are not in dispute, the parties' arguments require the court to engage in statutory interpretation. When interpreting a statute, the court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." Dietz v. Town of Tuftonboro, 171 N.H. 614, 619 (2019) (quoting Petition of Carrier, 165 N.H. 719, 721 (2013)). The court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. The court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Id. The court does "not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id.

The discontinuance of class IV, V, and VI highways is governed by RSA 231:43, which provides, in relevant part:

> I. Any class IV, V or VI highway, or any portion thereof, in a town may be discontinued by vote of a town . . .
> II. The selectmen shall give written notice by verified mail, as defined in RSA 21:53, 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.

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

The parties' dispute revolves around the phrase "owner of land" contained in RSA 231:43, III. The respondents argue that by "owner of land" the legislature meant "owner of land directly abutting a discontinued highway." The petitioner argues that "owner of land" means "every owner of land." Read in isolation, the plain language of RSA 231:43, III appears to

support the petitioner's interpretation. The statute does not define "owner of land," nor is that phrase defined anywhere else in RSA chapter 231. The court finds, however, that such an interpretation would produce absurd results. Reading the statute to mean "every owner of land" would, without further qualification, confer the statute's right of access upon landowners in other towns, other counties, and perhaps other states. The petitioner acknowledged at the hearing that such an interpretation was perhaps too broad, but argued that the legislature simply intended to expand the right of access to nearby owners of land, even if the land does not directly abut a discontinued highway. While such an interpretation is more reasonable, the court finds it is nevertheless unworkable, as it is too subjective and open to interpretation. Interpreting "owner of land" to mean "nearby owner of land" would impose a geographical restraint that cannot be easily or reasonably defined.

Additionally, interpreting the statute in such a manner could, potentially, conflict with other statutes, particularly in cases such as this, where the land at issue was taken by eminent domain. RSA 498-A:12, for example, provides that "[i]f a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale or otherwise." Holding that all landowners, or even all "nearby landowners," have a right of access over a discontinued highway would make it difficult for a condemnor—the Town in this case—to dispose of a fee that was taken by eminent domain for the purpose of constructing a class IV, V, or VI highway and thereafter abandoned. Should the condemnor fail to identify every conceivable landowner or nearby landowner, the fee disposed of could be subject to ongoing claims of adversity and resultant litigation. Interpreting RSA 231:43, III in this manner would therefore be at odds with the condemnor's unqualified right to dispose of its fee by sale or otherwise. It would also conflict with the remainder of RSA 231:43,

which provides the only means of legally terminating the public's right to travel on a public way. C.f. Stevens v. Town of Goshen, 141 N.H. 219, 222 (1996) (referring to the procedure set forth in RSA 231:43 as "absolute discontinuance"); Glick v. Town of Ossipee, 130 N.H. 643, 646 (1988) ("Only a formal discontinuance can legally terminate the public's right to travel on any public way.").

The court finds that the respondents' interpretation of RSA 231:43, III is most in keeping with the overall statutory scheme. The preceding paragraph of the statute provides that when discontinuing a class IV, V, or VI highway, a town is required to provide notice "to all owners of property abutting such highway." RSA 231:43, II. Read in this context, it is reasonable to conclude that when the legislature wrote "owner of land" in subsection III, it was referring to the "owners of property abutting such highway" described in subsection II. The New Hampshire Supreme Court's decision in Balise supports this interpretation. In Balise, the Supreme Court held that the "statutory right is not conditioned upon the discontinued highway being an abutting landowner's sole means of accessing his or her property." 170 N.H. at 525 (emphasis added). The underlined language demonstrates that the right conferred by RSA 231:43, III applies only to owners of abutting land. Similarly, the trial court in Balise held that "[t]he statutory right of access under RSA 231:43 runs with the land and attaches to all abutting lots to the discontinued road." Balise v. Balise, Rockingham County Super. Ct., No. 218-2015-CV-222 (July 5, 2016) (Order, Anderson, J.). While neither of those courts considered the exact issue presently before this court, it is plain that they both considered RSA 231:43, III applicable only to abutting property. Accordingly, the court rules that the right of access conferred by RSA 231:43, III extends only to owners of land that abuts a discontinued highway.

The parties next dispute whether the petitioner's property abuts McMillan Lane for the

purposes of RSA 231:43, III. The petitioner argues that the court should apply the definition of "abutter" found in RSA 672:3, which provides: "'Abutter' means 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." (See Pet'r's Obj. Resp'ts' Mot. Dismiss ¶ 4.) The petitioner argues that because its property is located across the street from McMillan Lane, the Town provided it notice as an abutter and this court should likewise consider the petitioner an abutter under RSA 672:3 and 231:43, III. (See id.)

The court is unpersuaded by the petitioner's argument. The definition contained in RSA 672:3 applies only RSA title LXIV, which governs Planning and Zoning. See RSA 672:2. Moreover, one of the stated purposes of New Hampshire's planning and zoning laws is to ensure that the "citizens of a municipality" are "actively involved in directing the growth of their community." RSA 672:1, IV. In furtherance of that purpose, the legislature has adopted an expansive definition of "abutter" for planning and zoning activities. In contrast, it appears that in adopting RSA chapter 231, the legislature was concerned primarily with individual owners of land who are affected by the laying out and discontinuance of highways. The notice provision for the laying out of a class IV, V, or VI highway requires that notice be given "to each owner of land over which such highway may pass." RSA 231:9. Similarly, when assessing damages incurred in the laying out of a highway, a town is required to assess the damages sustained by "each owner of land or other property taken for such highway." RSA 231:15. When discontinuing a road, the town is likewise required to give notice to "all owners of property abutting such highway." RSA 231:43, II. Each of these provisions requires that notice be given only to owners of land that directly abuts a proposed or discontinued highway. Based on this overall statutory scheme, the court rules that the right of access conferred by RSA 231:43, III

extends only to owners of land that directly abuts, or directly touches, a discontinued class IV, V, or VI highway.

To the extent the petitioner argues this court's February 27, 2019 Order conclusively establishes that the petitioner was an abutter to McMillan Lane, the petitioner's reliance on the court order is misplaced. In that order, the court found that "[b]y letter dated February16, 2017, Conway notified [the petitioner] of the proposed Article 27, as required by RSA 231:43, II, as the Hotel abutted McMillan Lane." The court was simply relating what was contained in the town's letter, which provided: "As required by State law (NH RSA 231:43, II), we are hereby notifying you . . . [because] you are an abutter to such highway." The court did not find, as a matter of fact, or rule, as a matter of law, that Bellevue was an abutter. Likewise, to the extent the petitioner argues the Town's apparent determination that it was an abutter is controlling in this case, the court disagrees. Whether a party is an abutter for purposes of RSA 231:43 is a question of law, which the court reviews de novo. See Appeal of St. Joseph Hosp., 152 N.H. 741, 744 (2005).

It is undisputed in this case that the petitioner's property does not directly abut, which is to say directly touch, McMillan Lane. Because the right of access conferred by RSA 231:43, III extends only to owners of property that directly abuts a discontinued class IV, V, or VI highway, the court rules that the right does not extend to the petitioner. Accordingly, the court rules that the petitioner does not have standing to bring an action to quiet title to McMillan Lane under RSA 231:43, III. The court therefore dismisses the petition for lack of standing.

II. Res Judicata

The respondents next argue the petition should be dismissed because it is barred by the doctrine of res judicata. (Resp'ts' Mot. Dismiss at 7.) The respondents contend that the parties

in this case were the same as in the 2017 road discontinuance appeal, that the cause of action—the discontinuance of McMillan Lane—was the same, and that the court issued a final judgment on the merits in the underlying suit. (Id. at 8–9.) Accordingly, the respondents argue, the instant action is barred by res judicata. (Id. at 10.) The petitioner objects, arguing this action was not ripe at the time of the earlier proceedings because it had not yet been denied access to McMillan Lane and, accordingly, this action is not barred by res judicata. (Pet'r's Obj. Resp'ts' Mot. Dismiss ¶ 11.)

"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." E. Marine Constr. Corp. v. First S. Leasing, Ltd., 129 N.H. 270, 273 (1987) (quotation omitted). "Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action." Meier v. Town of Littleton, 154 N.H. 340, 342 (2006). In contrast, "[c]ollateral estoppel precludes the relitigation by a party in a later action of any matter actually litigated in a prior action in which he or someone in privity with him was a party." In re Alfred P., 126 N.H. 628, 629 (1985). For the doctrine of res judicata to apply, three elements must be met: "(1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action." Brooks v. Trs. of Dartmouth Coll., 161 N.H. 685, 690 (2011).

The parties do not appear to dispute that the first and third elements of res judicata are present in the instant action. The petitioner and both of the respondents in this action were all

parties to Bellevue v. Conway, Carroll County Super. Ct., No. 212-2017-CV-00134. Although that case may still be on appeal before the New Hampshire Supreme Court, this court's ruling was a final judgment on the merits for the purposes of res judicata. See Brzica v. Trs. of Dartmouth Coll., 147 N.H. 443, 454 (2002) ("The essence of the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action.") (quotation omitted). The court must therefore determine whether this case shares the same cause of action as the earlier proceedings.

"The term 'cause of action' is defined as the right to recover, regardless of the theory of recovery." Merriam Farm, Inc. v. Town of Surry, 168 N.H. 197, 199 (2015). "In determining whether two actions are the same cause of action for the purpose of applying res judicata, [the court] consider[s] whether the alleged causes of action arise out of the same transaction or occurrence." In re Appeal of Univ. Sys. of N.H. Bd. of Trs., 147 N.H. 626, 629 (2002); see also Merriam Farm, Inc., 168 N.H. at 199–200; Sleeper, 157 N.H. at 534. "Res judicata will bar a second action even though the petitioner is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action." Merriam Farm, Inc., 168 N.H. at 200. "The central policy exemplified by the free permissive joinder of claims, liberal amendment provisions, and compulsory counterclaims, is that the whole controversy between the parties may and often must be brought before the same court in the same action." E. Marine Constr. Corp. v. First S. Leasing, Ltd., 129 N.H. 270, 274–75 (1987) (quotations omitted).

The petitioner first argues that it could not have brought the claims raised in this action during the earlier proceedings because they were not yet ripe. As the petitioner correctly observes, RSA 231:43, III provides that "[n]o owner of land shall . . . be deprived of access"

over a discontinued class IV, V, or VI highway. Because McMillan Lane remained accessible to the public after the Town voted to discontinue it, the petitioner had not technically been "deprived of access" over McMillan Lane at the time of the earlier proceedings. Moreover, McMillan Lane was not technically discontinued—in a sense that would deny the public the right to access it—at the time of the Town's vote to discontinue. The petitioner therefore argues it could not have known, for certain, that McMillan Lane would be permanently discontinued and give rise to the right conferred by RSA 231:43, III. (See Pet'r's Obj. Resp'ts' Mot. Dismiss ¶ 13.) The petitioner's argument thus distinguishes between the date of Town's vote to discontinue McMillan Lane and the date that McMillan Lane is actually discontinued; while the former had occurred prior to the earlier litigation, the latter has not yet occurred.

For the purposes of res judicata, the court does not find meaningful the distinction drawn by the petitioner. For the duration of the earlier litigation (from the time the petitioner filed its appeal until this court rendered its final determination), the petitioner was proceeding under the theory that McMillan Lane had been discontinued as of the date of the Town's vote, April 11, 2017. Although the discontinuance was conditioned on approval of a new Application, there was to be no further analysis by the Town regarding the decision to discontinue. See Bellevue v. Conway, Carroll County Super. Ct., No. 212-2017-CV-00134 (Order at 13). As the petitioner has acknowledged in the course of the instant proceedings, it knew during its earlier appeal that the Town's vote to discontinue McMillan Lane could impact any rights it had under RSA 231:43. Therefore, the petitioner knew or in the exercise of reasonable caution should have known that the Town's vote to discontinue McMillan Lane might affect its alleged right of access under RSA 231:43, III.

Additionally, the petitioner argued at length during the earlier proceedings that the court

should reverse the Town's decision to discontinue McMillan Lane because of the hardship the discontinuance would work on the petitioner. During the course of those proceedings, this court heard testimony and considered numerous exhibits that were submitted for the purpose of establishing the parties' respective property lines and the available means, both public and private, of accessing the petitioner's property. All of the evidence and arguments presented at trial in that case therefore arose from the Town's vote to discontinue McMillan Lane. Likewise, the transaction or occurrence giving rise to the petitioner's claims in the instant action was the Town's vote to discontinue McMillan Lane. Because the transaction or occurrence giving rise to both actions was the same, and because the arguments raised and evidence required in both cases is strikingly similar, the court rules that the cause of action is the same for the purposes of res judicata.

In ruling that this action shares the same cause of action as the earlier proceedings, the court finds instructive Kalil v. Town of Dummer Zoning Board of Adjustment, 159 N.H. 725 (2010). In that case, the plaintiff appealed a Zoning Board of Adjustment ("ZBA") decision to the superior court. Id. at 727. After an appeal to the New Hampshire Supreme Court and subsequent remand, the superior court ultimately affirmed the decision of the ZBA and denied the plaintiff's motion for reconsideration. Id. The plaintiff did not appeal. Id. Thereafter, the plaintiff filed a new action against the town, alleging that the decision of the ZBA resulted in inverse condemnation of the plaintiff's property. Id. at 728. The town moved to dismiss, arguing the new action was barred by res judicata, and the trial court granted the motion to dismiss. Id. On appeal, the New Hampshire Supreme Court held that "[b]ecause the plaintiffs' zoning appeal and inverse condemnation claim [arose] from the same factual transaction, they constitute[d] the same cause of action for res judicata purposes." Id. at 731.

Just as the ZBA's decision in that case gave rise to the plaintiff's inverse condemnation claim, the Town's vote to discontinue in this case gave rise to the petitioner's RSA 231:43 claim. The cases are distinguishable in that the ZBA's decision in Kalil immediately deprived the plaintiff of property (assuming the plaintiff had a legitimate inverse condemnation claim), whereas the Town's vote in this case did not immediately deprive Bellevue of access to McMillan Lane. The Town's vote, however, made clear the road would be maintained and open to travel only until the town approved the new Application, and that there were no further Town proceedings to be held on the discontinuance decision. The records in both this case and the earlier action clearly establish that at the time the petitioner filed its earlier case, it knew or should have known that the Town's vote to discontinue McMillan Lane would impact whatever rights it had under RSA 231:43, III. The court rules that because the parties to this action and the earlier action are the same, because the cause of action giving rise to both cases was the same, and because the court rendered a final decision on the merits in the earlier case, the claims raised by the petitioner in this action are barred by the doctrine of res judicata.

III. Attorney's Fees

Finally, the respondents seek an award of their costs and attorney's fees incurred in defending this action and in being required to file a motion to dismiss. (Resp'ts' Mot. Dismiss at 10–12.) The respondents argue this action was brought in bad faith, as evidenced by the petitioner's alleged pattern of bringing serial, yet unsuccessful, litigation against the respondents. (Id. at 10.) The petitioner objects, arguing it is entitled to the relief sought in this action and that the parties' history of litigation has not been as one-sided as the respondents assert. (Pet'r's Obj. Resp'ts' Mot. Dismiss ¶¶ 20–22.)

"The general rule in New Hampshire is that parties pay their own attorney's fees." Fat

Bullies Farm, LLC v. Devenport, 170 N.H. 17, 29 (2017). The New Hampshire Supreme Court has recognized certain statutory and judicially crafted exceptions to this rule. Id. at 29–30. "As to judicially-created exceptions, attorney's fees have been awarded in this State based upon two separate theories: bad faith litigation and substantial benefit." Id. at 30 (quotation omitted).

> Under the bad faith litigation theory, an award of attorney's fees is appropriate when one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, when the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and when it should have been unnecessary for the successful party to have brought the action.

Id. (quotation and brackets omitted). "When attorney's fees are awarded against a private party who has acted in bad faith, the purpose is to do justice and vindicate rights, as well as to discourage frivolous lawsuits." Id. (quotation omitted). Because the respondents in this case proceed only on the bad faith litigation theory, the court will not consider substantial benefit.

The court acknowledges the respondents' frustration with the ongoing nature of the parties' litigation history, particularly given the fact that the parties' last three cases over which this court presided were filed by the petitioner. RSA 231:43, III however is not a model of clarity, and the petitioner's interpretation of that statute, although insufficient to withstand the respondents' motion to dismiss, had some basis in argument. Likewise, the petitioner's assertion that the sequence of Town votes and court orders rendered the issues in this case as not yet ripe for adjudication in 2017 had some basis in argument, even though the court found the arguments not persuasive. Based on the foregoing, the court rules that the respondents are not entitled to recover their costs and attorney's fees.

CONCLUSION

For the foregoing reasons, the respondents' motion to dismiss is GRANTED on both standing and res judicata grounds. The respondents' request for costs and attorney's fees is

DENIED.

So Ordered.

May 19, 2020

Amy L. Ignatius
Presiding Justice

STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

BELLEVUE PROPERTIES, INC.

v.

13 GREEN STREET PROPERTIES, LLC

&

1675 W.M.H., LLC

Docket No.: 212-2019-CV-00196

PLAINTIFF'S MOTION FOR RECONSIDERATION

NOW COMES Bellevue Properties, Inc. ("Plaintiff"), by and through its attorneys, Bernstein, Shur, Sawyer & Nelson, P.A., and submits the within Motion for Reconsideration, stating in support thereof as follows:

1. Plaintiff commenced this action by filing a Petition for Declaratory Judgment and to Quiet Title (the "Petition") in order to protect and preserve its private right of access over the land upon which the discontinued road known as McMillan Lane is presently situated pursuant to RSA 231:43(III). By Order and Notice of Decision dated May 19, 2020, the Court granted 13 Green Street Properties, LLC's and 1675 W.M.H., LLC's ("Defendants") Motion to Dismiss the Petition on the basis that Plaintiff lacks standing to bring such claims and that its claims are barred by *res judicata*. See Order on Respondents' Motion to Dismiss (hereinafter "Order"). However, for the reasons set forth herein, Plaintiff submits that there are grounds for the Court to reconsider its decision and deny Defendants' Motion to Dismiss.

2. A Motion for Reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended . . .". Superior Court Rule 12(e).

A. The Court erred when it determined that Plaintiff is not an abutter to McMillan Lane.

3. The Court dismissed Plaintiff's Petition because it held that only abutters to a discontinued road are entitled to an easement over the road pursuant to RSA 231:43(III) and Plaintiff's property "does not directly abut, which is to say directly touch, McMillan Lane" because Common Court bisects Plaintiff's property and McMillan Lane's southern terminus. However, while the Court points to other instances that the term "abut" or "abutter" is used throughout RSA ch. 231, the chapter does not define those terms and the Court does not cite to any authority supporting its presumption that their definitions exclude properties across the street from a subject parcel.

4. Moreover, the Town of Conway (the "Town") identified Plaintiff as an abutter to McMillan Lane for purposes of its discontinuance and provided Plaintiff with abutter notice thereof. When Plaintiff appealed the discontinuance decision to this Court, it claimed to be an abutter to McMillan Lane. Defendants never objected to Plaintiff's abutter status or standing throughout the discontinuance appeal. Indeed, the Defendants' failure to object to Plaintiff's abutter status is the best evidence that they accepted the Town's conclusion that Plaintiff is an abutter to McMillan Lane. Plaintiff's abutter status was never appealed and, as such, it has become final.

5. Accordingly, Defendants' new position that Plaintiff is not an abutter to McMillan Lane is barred by collateral estoppel. "Collateral estoppel serves the dual purposes of promoting judicial economy and preventing inconsistent judgments." Barry v. New Hampshire Dep't of Health & Human Servs., 170 N.H. 364, 368 (2017) (internal quotations omitted). Collateral estoppel applies when "(1) the issue subject to estoppel is identical in each action; (2) the first action resolved the issue finally on the merits; (3) the party to be estopped appeared in the first action or was in privity with someone who did; (4) the party to be estopped had a full and fair opportunity to litigate the issue; and (5) the finding at issue was essential to the first judgment." Tyler v. Hannaford Bros., 161 N.H. 242, 246 (2010). Here, (1) Plaintiff's abutter status vis-à-vis McMillan Lane is identical in both actions;

(2) the discontinuance action resolved the issue in Plaintiff's favor; (3) Defendants' and/or its sister entities appeared in the discontinuance action; (4) Defendants' had a full and fair opportunity to object to Plaintiff's abutter status in the discontinuance action but did not; and (5) Plaintiff's abutter status was essential to the first judgment as a matter of standing.

6. Since the Court has not identified any authority supporting its interpretation of the term "abut" or "abutter" as excluding properties across the street from the subject parcel, and since Defendants' argument that Plaintiff is not an abutter to McMillan Lane is barred by collateral estoppel, the Court should reconsider its decision and find that Plaintiff's property does abut McMillan Lane for purposes of RSA 231:43. As such, Plaintiff, an abutter, is entitled to a private easement over the discontinued road under the statute.

B. The Court's interpretation of the phrase "owner of land" in RSA 231:43(III) as actually meaning "abutter" of a discontinued road is unsupportable. Even assuming *arguendo* that Plaintiff is not an abutter, it is an owner of land entitled to private easement rights over McMillan Lane under the statute.

7. The Court also dismissed Plaintiff's Petition on the basis that the phrase "owner of land" in RSA 231:43(III) is synonymous with the phrase "owners of property abutting such [discontinued] highway" in RSA 231:43(II), and since Plaintiff is not an abutter to McMillan Lane, it cannot assert private easement rights over same. As a threshold matter, the Court's interpretation of these distinct phrases as actually being one in the same is unsupportable because it "add[s] language that the legislature did not see fit to include." Dietz v. Town of Tuftonboro, 171 N.H. 614, 619 (2019). This Court must "interpret legislative intent from the statute as written." Id. Distinguishing classes of individuals is not foreign to the legislature; indeed, it is common practice. When the legislature intends to limit certain rights to a certain class, such as notice to abutters, see RSA 231:43(II), it expressly does so. When the legislature intends to limit certain rights to a different class, such as private easement rights for owners of land, see RSA 231:43(III), it expressly does so. Had the legislature intended for the class of individuals entitled to private easement rights to be identical to those entitled to notice of

a discontinuance, it would have used identical language in both statutes to describe that class. However, it did not – it used two distinct phrases to describe two distinct classes. It is inconsistent with the plain language of RSA 231:43 to interpret two expressly distinguished classes as actually being one in the same. For this reason alone, the Court should reconsider its decision.

8. The Court's interpretation is also not supported by the statutory canon of "*expressio unius est exclusio alterius*, the expression of one thing in a statute implies the exclusion of another." State v. Mayo, 167 N.H. 443, 452 (2015). "This principle is strengthened where a thing is provided in one part of the statute and omitted in another." Id. (internal quotations omitted). The inclusion of the term "abutter" in RSA 231:43(II) and its omission from RSA 231:43(III) implies exclusion of that term from the latter. Interpreting "owner of land" in RSA 231:43(III) as actually meaning "abutter" to a discontinued highway as set forth in RSA 231:43(II) runs contrary to this fundamental canon of statutory construction because the term "abutter" is expressly included in RSA 231:43(II) but excluded from RSA 231:43(III).

9. Moreover, interpreting "owner of land" in RSA 231:43(III) to mean "nearby owner of land" would not impose an amorphous geographic restraint as perceived by the Court. Simply because precedent interpreting the statute is scarce and no such restraint yet exists does not mean that establishing one would prove unworkable. For example, RSA 36:34(I) (which was repealed in favor of RSA 677:15 in 1983) provided that "[a]ny persons aggrieved by any decision of the planning board . . . may present to the superior court a petition, duly verified, setting forth that such decision is illegal in whole or in part, specifying the grounds of the illegality." In 1979, the Court adopted a fact-based test for determining the scope of "aggrieved persons" having standing to appeal planning board decisions, including "factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings." Weeks Rest. Corp. v. City of Dover, 119 N.H. 541, 545 (1979). The "Weeks factors", as they have come to be known, remain good law on the issue and have

withstood the test of time as a workable standing analysis. There is no reason the same or similar test would prove unworkable for determining the scope of "owners of land" entitled to private easements over a discontinued road. The Court's decision that only abutters are entitled to such easements because determining any broader class would be difficult is unduly narrow and disregards property rights that the legislature intended to recognize by way of RSA 231:43(III).

10. In fact, the prior statutory interpretation of RSA 36:34(I) that the Court overturned in Weeks is strikingly similar to this Court's interpretation of RSA 231:43(III). In Weeks, the Court resolved a discrepancy in its prior holdings between the class of individuals entitled to notice of a planning board hearing pursuant to RSA 36:23 ("abutters") and the class of individuals having standing to appeal a planning board decision to Superior Court pursuant to RSA 36:34 ("aggrieved persons"). In Hancock v. City of Concord, 114 N.H. 404 (1974), and later in Carter v. City of Nashua, 116 N.H. 466 (1976), the Court held that because only abutters and applicants need be notified of a hearing pursuant to RSA 36:23, it was clear that the legislature did not intend to include nonabutters within the class of "aggrieved persons" having standing to appeal under RSA 36:34. Then, in Weeks, the Court overturned this holding because it lead to "harsh results" in that "no one would have standing to challenge a planning board decision concerning a parcel . . . that is bounded on all sides by public streets", which outcome would abridge landowners' constitutional right to apply to the courts for relief from illegality. 119 N.H. at 544. Similarly, this Court's decision that because only abutters need be notified of a discontinuance pursuant to RSA 231:43(II), the legislature did not intend to include nonabutters within the class of "owners of land" having standing to assert private easement rights under RSA 231:43(III) yields an equally harsh result. Under this Court's holding, one public street could serve as the sole access to the greater public roadway network for an entire neighborhood consisting of many landowners on many streets, and if that access road were discontinued, every landowner in the neighborhood except those abutting the access road would become landlocked and without recourse in the Courts because their properties do not abut the discontinued road, even though it is their sole

means of access just the same as those who abut it. The Court's decision in this regard is unsupportable and should be reconsidered.

11. Further, Balise v. Balise, 170 N.H. 521, 525 (2017) does not support this Court's holding because the landowner at issue in that case was undisputedly an abutter to the discontinued road, so the Court did not have occasion to address the applicability of RSA 231:43(III) to nonabutters. Respectfully, this Court's reliance upon Balise in that "it is plain that [the Superior and Supreme Courts] both considered RSA 231:43(III) applicable only to abutting property" see Order at 8, is misplaced and, frankly, inequitable. The fact that the Court in that case only addressed applicability of the statute to an abutter because the landowner in the case was an abutter does not justify the conclusion of law that the statute excludes nonabutters. It is unfair to utilize Balise against Plaintiff in this manner because that Court never had the opportunity to analyze RSA 231:43 in any other context.

12. Finally, to the extent the Court believes Plaintiff's interpretation of RSA 231:43 would be at odds with a condemnor's right to dispose of the fee to condemned and subsequently abandoned land under RSA 498-A, the issues hypothesized by the Court are more academic than practical or likely. The existence of a private easement over land, in the context of RSA 231:43 or otherwise, does not interfere with a condemnor's right to sell or dispose of a fee. RSA 498-A is not the equivalent of layout and acceptance of land as a public highway – the creation and subsequent discontinuance of which is a prerequisite to private easement rights arising under RSA 231:43(III). Rather, RSA 498-A concerns abandonment of land taken by eminent domain which overwhelmingly occurs prior to creation of a public highway and construction of any infrastructure. As such, when a condemnor disposes of a fee to abandoned land, there is typically nobody to claim private rights under RSA 231:43(III) because there was never a public highway to discontinue in the first instance.

13. In the unlikely event that condemned land is laid out and accepted as a public highway before it is abandoned, it is not unusual for land to be sold subject to easements, which is routine in real estate conveyancing. To the extent a grantee were to take title to a fee subject to a private easement

pursuant to RSA 231:43(III), it is consistent with the statutory scheme of RSA ch. 231 because the "right conferred by RSA 231:43(III) is right of access over a discontinued class IV, V, or VI highway." Balise, 170 N.H. at 524. Plaintiff's interpretation of RSA 231:43 does not interfere with RSA 498-A in the manner posited by the Court, and it should reconsider its decision.

C. The Court misinterpreted the transaction or occurrence giving rise to Plaintiff's present claims for purposes of *res judicata*. Plaintiff's claims under RSA 231:43 are not barred by *res judicata*.

14. The Court also dismissed Plaintiff's Petition on the basis that its private easement claim under RSA 231:43(III) is barred by *res judicata* because the transaction or occurrence giving rise to such claim was the Town's vote to discontinue McMillan Lane and Plaintiff did not raise its present claim in its appeal of the Town's discontinuance vote. However, the transaction or occurrence giving rise to Plaintiff's present claims was not the Town's discontinuance vote; rather, it was the Planning Board's approval of a plat showing the elimination of McMillan lane and construction of parking infrastructure over same. In this regard, the Court misinterpreted the subject transaction or occurrence and should reconsider its decision and find that *res judicata* does not bar Plaintiff's present claims.

15. In holding that the Town's vote to discontinue McMillan Lane was the transaction or occurrence that gave rise to Plaintiff's claims such that they are now barred by *res judicata*, the Court appears to assume that the Planning Board would approve Defendants' site plan application, which approval was a condition of the discontinuance. The Court reasoned its holding on the basis that "[t]he *Town's* vote . . . made it clear the road would be maintained and open to travel only until the *town* approved the new Application, and that there were no further *Town* proceedings to be held on the discontinuance decision." See Order at 15 (emphasis added). While hindsight tells us that the Planning Board eventually granted such approval, there was no guaranty that such approval was forthcoming at the time of the discontinuance vote, and the Court appears to have overlooked the fact that the Planning Board had independent authority to deny the Defendants' future site plan application, even if its approval was a condition of the discontinuance decision. If the Planning Board were to deny

Defendants' future application, Plaintiff's claims under RSA 231:43 would be moot because the road would remain in place as a public highway, which is precisely why the discontinuance vote could not have been the transaction or occurrence giving rise to Plaintiff's claims – because they were not ripe until the Planning Board later granted site plan approval.

16. The Town's Board of Selectmen has the authority to "manage the prudential affairs of the town and perform the duties by law prescribed." RSA 41:8. On the other hand, the Town's Planning Board has the authority to "review and approve or disapprove site plans for the development or change or expansion of use of tracts for nonresidential uses or for multi-family dwelling units . . ." RSA 674:43(I). In its Order, the Court appears to have disregarded the distinctions between (1) the purpose and authority of the Selectmen on a discontinuance petition; and (2) the purpose and authority of the Planning Board on a site plan application. These two bodies are distinct political subdivisions of the Town with different purposes and independent authorities. Simply because the "Town" makes Planning Board approval a condition of discontinuance does not mean the Planning Board must approve the subject site plan to resolve that condition in the affirmative. Plaintiff had no way of knowing that the Planning Board would approve Defendants' application in a manner that would interfere with Plaintiff's private right of access under RSA 231:43(III) until it actually did so.

17. As such, it was not the Town's vote to discontinue McMillan Lane that "impacted" Plaintiff's rights, see Order at 15; rather, it was the Planning Board's approval of a plat calling for the elimination of McMillan Lane. Indeed, as of the date of this filing, Plaintiff's private easement rights under RSA 231:43 have not yet arisen. They will not arise until the discontinuance becomes final because the "right conferred by RSA 231:43(III) is right of access over a discontinued class IV, V, or VI highway", Balise, 170 N.H. at 524, and McMillan Lane will not become a discontinued highway until all conditions are satisfied in the affirmative. The Court found in the discontinuance appeal that the discontinuance will not become final until (1) the Planning Board grants site plan approval calling for the elimination of McMillan Lane; and (2) Defendants' construct and complete Barnes Road

Extension. Since the latter has not happened yet, as of the date of this filing, Plaintiff's easement right under RSA 231:43(III) have not yet arisen. Clearly, Plaintiffs' present claims could not have been ripe during the discontinuance appeal because the discontinuance had not (and still has not) occurred. However, Plaintiff's claims have ripened now that the Planning Board has granted site plan approval showing obstruction and interference with Plaintiff's rights that it will have upon the discontinuance going final. Plaintiff's claim to enforce its right ripened upon the approval of concrete plans showing such interference, and Plaintiff is entitled to bring the present declaratory judgment action to obtain relief.

18. Likewise, Plaintiff's private easement claim under RSA 231:43(III) cannot be considered the same cause of action as the discontinuance appeal such that it is now barred by *res judicata* because Plaintiff's present claim is entirely dependent upon the Court ruling against Plaintiff in the discontinuance appeal. Plaintiff's present claim cannot be considered part of the same cause of action as the discontinuance appeal such that it is now barred when Plaintiff's claim under RSA 231:43(III) only arises if Plaintiff loses the discontinuance appeal.

19. Moreover, even assuming *arguendo* that Plaintiff could have brought its present claims during the discontinuance appeal, they are not now barred because Plaintiff did not do so because they do not arise out of the same transaction or occurrence or claim the same relief. "[S]ome claims, while they might be brought when other claims between the parties are adjudicated, need not be so brought or otherwise be barred." Tarnawa v. Goode, 172 N.H. 321, 328 (2019). For example, while an action to partition property in an estate can be brought during the estate administration, it is not barred by *res judicata* if it is not so brought because the two actions are not merely different legal theories for claiming relief on the basis of the same factual transaction. Id. at 328-29. Similarly, here, even if Plaintiff could have brought its private easement claim under RSA 231:43(III) during the discontinuance appeal, it is not now barred because a claim against the Town that it improperly

discontinued McMillan Lane is a distinct claim arising from a distinct factual transaction than a claim against Defendants for interfering with its statutory easement rights.

20. This principle is exemplified by the fact that Defendants did not need to be parties to the discontinuance appeal for Plaintiff's claims against the Town to be fully adjudicated in that case. While Defendants voluntarily chose to participate, Plaintiff's claims were against the Town pursuant to RSA 231:48 because it was "aggrieved by the vote" of the Town to discontinue McMillan Lane. Plaintiff's present private easement claims against Defendants pursuant to RSA 231:43 are distinct claims arising from a distinct transaction or occurrence, as set forth above. Plaintiff's present claims against Defendants cannot be barred by *res judicata* on the basis that they should have been brought in a prior case where Plaintiff was not asserting any claims against Defendants.

21. For the foregoing reasons, Kalil v. Town of Dummer Zoning Bd. of Adjustment, 159 N.H. 725 (2010) is readily distinguishable. In that case, the transaction or occurrence giving rise to the plaintiffs' claims in both actions was unequivocally the ZBA decision denying their variances. Here, the transaction or occurrence giving rise to Plaintiff's discontinuance appeal was the Town's discontinuance decision, while the transaction or occurrence giving rise to Plaintiff's present claims under RSA 231:43 was the Planning Board's approval of a plat calling for the elimination of McMillan Lane in favor parking infrastructure. Kalil is inapplicable to the facts of the instant matter.

CONCLUSION

22. For the foregoing reasons, Plaintiff requests that this Court reconsider its decision granting Defendants' Motion to Dismiss and deny same.

WHEREFORE, the Plaintiff, Bellevue Properties, Inc., respectfully requests that this Honorable Court:

A. Reconsider its decision granting Defendants' Motion to Dismiss;

B. Deny Defendants' Motion to Dismiss;

C. Alternatively, schedule a hearing on this Motion for Reconsideration and then grant the relief requested herein; and

D. Grant such further relief as may be just and equitable.

Respectfully submitted,

Bellevue Properties, Inc.

By its attorneys,
Bernstein, Shur, Sawyer, & Nelson, P.A.

Dated: May 29, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the above date a copy of the foregoing was served through the Court's electronic filing system to all counsel of record.

/s/ Brett W. Allard
Brett W. Allard, Esq.

Denied

Honorable Amy L. Ignatius
August 28, 2020

The plaintiff disagrees with the court's rulings and interpretations of law on three points. There is no material point of fact or law, however, that the court overlooked or misconstrued. Plaintiff's motion for reconsideration is DENIED.

Clerk's Notice of Decision
Document Sent to Parties
on 08/28/2020