

## Municipal &amp; Governmental Law

**Bellevue: Courts Deal Blow to NH Property Owners**

By Paul Alfano

In *Bellevue Properties, Inc. v. Town of Conway & a.*, 173 N.H. 510 (2020), the New Hampshire Supreme Court dealt a blow to New Hampshire citizens seeking to defend their property against overreaching local governments. Although not part of the court's ruling, the decision also implicated Part 1, Article 12-a of the New Hampshire Constitution, which prohibits a municipality from taking property by eminent domain from one person and transferring it, directly or indirectly, to another for "private development or other private use." The case arose in the context of a town vote to discontinue a road providing public, maintained access to a hotel.



and impose fines. "Thus, not only does the evidence demonstrate that [the hotel] currently has access to the now-privately owned [road], it shows that this access will continue given Settlers' significant business and legal interests in continuing to keep the new road open to the public and maintained." Also, "...the trial court found 'no evidence to suggest that Settlers or its successors will cease to maintain the new road once it is built.'" (Brackets and ellipses omitted.)

Conway voted to discontinue McMillan Lane at its 2017 town meeting. The hotel appealed to the superior court. Following a trial de novo, the superior court upheld the discontinuance. The hotel appealed to the supreme court, which issued its decision on August 25, 2020.

**Standard of Review**

The supreme court first needed to settle the legal standard courts should use when considering a highway discontinuance appeal brought by an abutting landowner. The court upheld the trial court's approach of balancing the aggrieved landowner's interest in the road remaining public against the municipality's interests in discontinuing the road. The court also held a municipality may consider factors other than cost savings when deciding whether to discontinue a highway. (Every discontinuance of a class V road presumably saves the mu-

COURTS *continued on page 32***Highway Discontinuances**

A class V road, or "highway," is a local, public road a municipality has the obligation to maintain. The entire public have the right to use a highway for all "viatic" (traveling) purposes. Discontinuance of a highway eliminates the right of the public to use the road and terminates the municipality's obligation to maintain the road. A town may discontinue a highway by town

meeting vote.

An aggrieved party, such as an abutter, may recover damages arising from a discontinuance. RSA 231:48, 49. In other words, the discontinuance of a highway by public authority is a compensable act, similar to the creation of a highway via eminent domain using the layout process. See RSA 231: 8 et seq.

**North Conway Grand Hotel**

The North Conway Grand Hotel is located toward the back of a large retail development in North Conway called Settlers Green. Prior to the discontinuance vote leading to the *Bellevue* litigation, patrons of the hotel had three methods of access, two over public roads, and one over a private road maintained by Settlers Green. McMillan Lane was one of the public roads, and provided access to Route 16, the

main road through town. The other public access came from the rear of the hotel.

Settlers Green submitted an expansion proposal to the planning board. To accommodate the configuration it desired, the developer requested the municipality discontinue McMillan Lane and replace it with a private road Settlers Green agreed to maintain. The new, private road would include bike paths, sidewalks and a 10-foot esplanade, "providing a significant upgrade from McMillan Lane."

Settlers Green committed to making the road available to the public, and the planning board made continued maintenance of the new road a condition of approval. Should Settlers Green stop maintaining the road, "anybody" could bring the violation to the attention of the municipality, and the municipality could revoke Settlers Green's certificate of occupancy

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## Municipal & Governmental Law

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municipality money.)

Here, the annual cost savings to the municipality were \$7,821. The hotel argued the court should consider only the cost savings, apparently believing the amount too meager to justify the discontinuance.

The trial court did not indicate whether the \$7,821 cost savings alone would justify the discontinuance but gave considerable attention to the hotel's ability to have access over the new, private road, and Settlers Green's interests in continuing to keep

the road open to the public and maintained. The trial court found the continued maintenance of the discontinued road important, yet effectively equated a private promise with a public duty. The court went so far as to conclude "Settlers will not cease maintaining the new road or close it to the public."

The promise of a private person to maintain a road, no matter how convincing, is inherently of a different and inferior character than the obligation of a municipality to maintain a road.

If a municipality fails to fulfill its maintenance obligations, aggrieved citi-

zens have clear, statutory remedies. Mere notification of a deficiency triggers municipal action. *See, e.g.*, RSA 231:90 et seq. If a private party fails to fulfill its maintenance obligations, aggrieved citizens may...what? Bring a third-party beneficiary claim? File a mandamus action against the municipality demanding enforcement of site plan conditions?

The hotel appears to have made arguments along these lines, but it faced the headwinds of a deferential standard of review on appeal. The supreme court will uphold a superior court ruling on a discontinuance if it is "supported by some evidence."

But the *Bellevue* decision invokes an issue perhaps even more threatening to private property rights: a municipality taking property from one person and giving it to another.

### An Article 12-a Taking?

Taking privately-owned property from a citizen is an extreme exercise of sovereign power. New Hampshire thus requires municipalities to compensate landowners when taking land for a highway.

In the infamous decision of *Kelo v. City of London*, 545 U.S. 649 (2005), the United States Supreme Court upheld a municipality's use of its eminent domain powers to take land owned by one private citizen for use by another. The court held that taking land for public benefit (the promise of a higher tax base, creation of jobs, and revitalization of an economically distressed area) fell within the Fifth Amendment to

the United States Constitution, which permits takings "for public use."


The decision shocked many, and New Hampshire responded quickly by amending its constitution in 2006 to prohibit a "Kelo" type taking. The amend reads: "No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property." N.H. Constitution, Part 1, Article 12-a.

If a third party owned the land on which Settlers Green wished to build its private road, Conway could have taken the land and made it a highway using the layout process, and the private landowner would have been entitled to compensation. Given New Hampshire also recognizes the discontinuance of a class V highway compensable, is discontinuance a taking? The supreme court noted the possibility of an Article 12-a claim in the *Bellevue* decision, and perhaps would have welcomed the opportunity to entertain it, but the issue did come before the court.

Municipalities have powers few citizens can match, thus the need for constitutional protection. Unfortunately for property owners, the *Bellevue* decision weakens the protections available against municipal action.

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