THE STATE OF NEW HAMPSHIRE

GRAFTON COUNTY SUPERIOR COURT

Docket No.: 215-2024-CV-00024

Roy R. Stever and Deborah P. Stever,
Trustees of the R&D Stever Family Trust

v.

Town of Easton

VERIFIED COMPLAINT AND REQUEST FOR TEMPORARY, PRELIMINARY, AND PERMANENT INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT AND REQUEST FOR HEARING

Plaintiffs, Roy R. Stever and Deborah P. Stever, Trustees of the R&D Stever Family Trust ("Plaintiffs" or the "Stevers"), by and through counsel, McLane Middleton, Professional Association, hereby complain and request injunctive relief against the Town of Easton (the "Town"), as follows:

INTRODUCTION

1. The Town is trying to take private property without following or satisfying any of the protections afforded by the Eminent Domain Procedure Act, RSA chapter 498-A, including, but not limited to, preliminary steps to initiate a taking and preliminary objections to challenge necessity, public use, and net public benefit of the taking. Instead, the Town is attempting to use a reestablishment statute to set the boundaries of Paine Road where the boundaries were never established. Private property ownership rights are fundamental rights under the New Hampshire and United States Constitutions. In New Hampshire, the statutory safeguards set forth in the Eminent Domain Procedure Act must be followed in all condemnation proceedings. The Town

must be enjoined from failing to follow the correct proceedings for the taking of property under RSA chapter 498-A.

2. Citing RSA 231:27, the Town is seeking to "reestablish" a two-rod uniform public right-of-way width despite any evidence that such a width ever existed for this road and despite a prior Superior Court ruling that Paine Road is not uniform in width but prescriptive. The Stevers are in need of immediate injunctive relief. Pursuant to RSA 228:35, the Town has prepared a survey or map for submission to the Town Clerk and the Secretary of State. If the Town is permitted to make such a filing, the Stevers will lose the right to challenge the Town's "reestablishment" of the road and be limited to monetary damages, which are inadequate because RSA 288:35 contains none of the procedural safeguards set forth in the Eminent Domain Procedure Act, which, as explained below, directly conflicts with, and partially repeals, RSA 228:35. See RSA 498-A:1.

PARTIES

3. Plaintiffs, Roy R. Stever and Deborah P. Stever, have a residential address of 484 Paine Road, Easton, NH 03580. The Stevers, through the R&D Stever Family Trust, own two parcels of land along Paine Road (the "Road") identified as Tax Map 4, Lot 22 and Tax Map 4, Lot 23 and recorded at Book 4069, Page 0760 at the Grafton County Registry of Deeds (the "Stever Property").

4. Defendant, Town of Easton, is a municipal corporation in the State of New Hampshire with an address of 1060 Easton Valley Road, Easton, New Hampshire 03580.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to RSA 491:7. Plaintiffs seek damages and equitable relief within the jurisdictional limits of the Court.

6. Venue is proper in Grafton County Superior Court because the Town is a party and the real estate at issue is located in Grafton County.

ALLEGATIONS COMMON TO ALL COUNTS

I. The Parties' Prior Litigation Concerning the Road

7. Where the Road abuts the Stever Property, it is a narrow one-lane gravel road that traverses the Stever Property. There is a short section of the Road abutting the Stever house and barn that is paved.

8. In 2016 and 2017, the Stevers filed three petitions against the Town concerning the Road. Following a bench trial on August 23, 2019, the Court (McLeod, J.) issued a "Final Decree" ruling on each of the petitions, and individually referring to each of these petitions as Stever I, II, & III. See Ex. 1 (attaching the Court's Final Decree).

9. As relevant to this action, in Stever II, the Stevers sought to quiet title to the Road. Through the course of that litigation, the Stevers stipulated that the Road was a public highway, and that the only issues for the Court to decide were how the Road became a public highway and its width. Ex. 1 at 2.

10. More specifically, the Stevers contended that the Road became a public highway by prescription, prior to January 1, 1968, and that its width was defined by its use. By contrast, the Town contended that the Road was created by dedication and acceptance in 1804, and that the width of the Road was uniformly three-rods throughout. Id.

11. In its Final Decree, the Court found that the Road became a public highway in 1804 through implied dedication and express acceptance. Id. at 5-6. The Court's ruling hinged on the fact that in 1804 the public required access to the Stever Property. Specifically, the Stever Property was the site of a public inn between 1802 and 1815. The Court found that the Stevers'

predecessor in interest impliedly dedicated the Road to the Town of Lincoln, which accepted it as a public highway on October 4, 1804. Id.

12. As to width, the Court reasoned that the dimensions of the road were clear at acceptance but fluctuated over time:

> The traveled way of the Road began as a mere path that could accommodate foot traffic and animal drawn vehicles such as wagons, gigs, sledges and sleighs. Over time, as the use of the Road changed, *i.e.* it was more heavily trafficked and by larger engine driven vehicles such as automobiles, trucks, tractors and skidders, the traveled way widened to accommodate such uses. These changes were evident to the court upon close observation during its two observations of the Road last autumn and this spring. The actual width of the travelled way of the Road in 1804, even if known precisely, would not be definitive in determining the actual width of the Road today or then.

Ex. 1 at 6.

13. The Court rejected the Town's argument that the implied dedication was for a three-rod width. Id.

14. The Stevers stipulated that the Road became a public highway by prescription, to which the Court agreed as an alternative to implied dedication. Id. at 6-7.

15. "[T]he legal test of the width of a highway established by prescription…is how much width has in fact been taken, both for actual travel, and, as incidental thereto, for the safety, convenience, and maintenance of the traveled part." Hoban v. Bucklin, 88 N.H. 73, 80 (1936); Ex. 1 at 7.

16. Although finding that the Road was a public highway, the Court declined to determine the precise width of the road and rejected the Town's attempt to impose a uniform three-rod width. Based upon the evidence presented at trial, the Court could not determine the Road's precise width. What was clear, however, was that the width of the Road was to be determined by its historical or prescriptive use as there was no uniform layout.

17. Although declining to decide the actual width of the Road, the Court did find that the Town's current use of the Road was within its prescriptive rights (*i.e.*, consistent with the historical use of the Road).

18. The Court offered the following dicta:

> Although the court cannot make an exact determination as to the precise width of the Road at this time with the evidence before it, the court nonetheless rules that the Town has established that its current use of the Road is within its prescriptive rights. The court recognizes, however, that the Town, acting through its Board of Selectmen, is given authority under RSA 231:27 to 'reestablish the boundary lines' of any highway within Easton 'which shall have become lost, uncertain, or doubtful' in accordance with the procedures set forth in RSA 228:35.

Id. at 9.

II. The Town's Attempt to Reestablish the Road That Was Never Established

19. Following issuance of the Final Decree, the Town began taking steps to "reestablish" the Road pursuant to RSA 231:27. That statute, entitled "Boundary Lines of Town Highways," provides as follows:

> Selectmen may reestablish the boundary lines, limits and locations of any class IV, V or VI highway or any part thereof which shall have become lost, uncertain, or doubtful, and shall have the same powers and shall proceed in the same manner as the commissioner of transportation as provided in RSA 228:35.

RSA 231:27. The Road is within the class of highway contemplated under this provision.

20. For its part, RSA 228:35, entitled "Reestablishment of Highway Boundaries" provides as follows:

> Whenever in the opinion of the commissioner the boundary lines, limits, or location of any class I or class II highway, or any part thereof, shall have become lost, uncertain, or doubtful, he may reestablish the same as, in his opinion, they were originally established. He shall give in hand to, or send by registered mail to the last known address of, all persons claiming ownership of or interest in the land adjoining such reestablished highway and to the owners of property within the limits thereof, and file with the town clerk of the town in which the highway is located, and with the secretary of state, maps showing the boundary lines, limits, or location of such reestablished highway and such lines, boundaries, limits and

> location as reestablished shall be the lines, boundaries, limits and location of such highway. Any person aggrieved by the reestablishment of such lines, boundaries, limits and location may petition for the assessment of damages to the superior court in the county where the reestablished highway is located within 60 days from the date of filing of such maps with the secretary of state, and not thereafter, and the court shall assess the damages, if any, by jury, provided such reestablished lines, boundaries, limits or location are not the same as originally established. The commissioner shall pay from the funds of his department all expenses incurred hereunder and the amount of final judgment and costs.

RSA 228:35.

21. In August of 2022, the Town, with the help of a land surveyor, marked out a uniform two-rod width for the Road on a plan. The Stevers objected to any marking with no evidence of the original boundaries.

22. The Town claims that a uniform two-rod width is a valid "reestablishment" of the Road under RSA 231:27. However, since the Court's decision in Stever II, the Town has conducted no further reasonable analysis, or undertaken to gather additional evidence to support or define the prescriptive width of the Road it is now claiming to "reestablish."

23. Rather than do the survey work to determine the actual prescriptive width of the Road at all locations, the Town is seeking to impose a uniform two-rod width without evidence that a two-rod road width constitutes a valid reestablishment. Ex. 1 at 8. The Town is trying to establish "smooth boundaries" of a uniform width, not reestablish original boundaries.

24. Consistent with the above, the Town commissioned a survey setting forth a uniform two-rod width for the Road. At various times in this process, however, the Town's proposal for a uniform width of the Road changed and vacillated at times in various sections of the Road.

25. The uniform two-rod road width goes beyond the prescriptive limits of the Road in places, and will result in the taking of the Stevers' property, including, but not limited to, significant portions of their front yard, fence, walls, and hundreds of trees along the traveled

way, including about twenty-five that are over a century old. Moreover, the electrical feed for the Stevers' house and barn and the septic system would also be impacted by this proposed uniform width. The Stevers' driveway is also within the two-rod width proposed by the Town, effectively eliminating their Town approved driveway and an access to their barn. Furthermore, a portion of the Stever Property is encumbered by a Wetland Reserve Program Conservation Easement granted by the Stevers to the United States of America (acquiring agency of the United States is the Natural Resources Conservation Service "NRCS"), dated January 17, 2014 and recorded at the Grafton County Registry of Deeds at Book 4038, Page 896 (the "Conservation Easement"), and the Town's proposed two-rod width will encroach into this Conservation Easement. The Stevers are obligated to comply with the Conservation Easement, and any impact to the Conservation Easement would require NRCS approval within the Agricultural Conservation Easement Program ("ACEP") Easement Subordination, Modification, Exchange, and Termination Policy ("Easement Administrative Action").

26. On January 18, 2024, the Select Board voted to move forward with the reestablishment of the Road consistent with the survey plan. Relying on RSA 228:35, the Town intends to imminently file with the Town Clerk and the Secretary of State, the survey showing the boundary lines, limits, or location of the Road as allegedly "reestablished."

III. The Town's Actions do not Constitute a Reestablishment of the Road

27. The reestablishment statute only permits a town to reestablish or restore a road to its former position. It does not permit a Town to establish dimensions of a road that never previously existed. Interpreting the reestablishment statute,[1] the New Hampshire Supreme Court in Nute v. Town of Wakefield, 117 N.H. 602 (1977) made clear the distinction between establishing a road and reestablishing a road. See id. at 603 ("By necessary implication, to

[1] Then codified as RSA 234:23.

'reestablish' means to restore to a former position; that is, to the position in which originally established." (citations omitted)).

28. In Nute, the Town of Wakefield attempted to "reestablish" a segment of Old Dearborn Road. The parties in that case agreed that Old Dearborn Road was a public highway to its intersection with Camp Road. Id. However, the Court found that the segment of road that the town proposed to reestablish had never been established in the first place, and therefore the reestablishment statute was inapplicable. Id. at 605. Thus, Nute stands for the proposition that the Town may only utilize RSA 231:27 to restore the Road to its former position and not to create a uniform two-rod road that never existed. Absent prior establishment of a roadway, the Town is limited to procedures in eminent domain.

29. Draft Town Select Board Meeting Minutes from January 18, 2024, demonstrate that the Town is not actually seeking to reestablish but to create a Road that meets the Town's purported needs. See Ex. 2 at 1 ("Bob Thibault briefly reviewed prior decisions by the court authorizing the Select Board to set the boundaries on Paine Rd. He noted that the [Select Board] had concluded after reviewing the Existing Conditions Plan, the 2-rod layover, and walking the road multiple times, that a 2-rod ROW would meet the Town's needs for road maintenance and would allow for 2 cars from opposite directions to pass." (emphasis added)).

30. The Superior Court's decision in Joyce v. Town of Stark, Case No. 88-E-62 (1990) (Perkins, J.), further demonstrates that the Town may not use the reestablishment statute to create a uniform two-rod road. See Ex. 3 (attaching the decision). In Joyce, the trial court determined that the prescriptive width of the road at issue in that case was 28 feet. The Town of Stark, however, attempted to "reestablish" the width of the road from 28 feet to 33 feet as it claimed it needed a 2-rod road to properly and safely maintain the road. In so doing, the town

relied upon the language of RSA 228:35, which as set out above, facially permits a town to reestablish a road of any width, so long as it compensates the property owner for any additional land taken.

31. However, the Joyce court correctly determined that this statutory provision contradicted New Hampshire's Eminent Domain Procedure Act (RSA chapter 498-A), which provides "a complete and exclusive procedure to govern all condemnations of property for public uses . . . ." RSA 498-A:1. Relying on this language, the Joyce court determined that the provisions of RSA 228:35 that purportedly allow for the taking of land for a road not already established were repealed by the Eminent Domain Procedure Act. See Ex. 2 at 7. It further found that the Eminent Domain Procedure Act eliminated "any other procedure for condemning private property." Id. Accordingly, the Joyce court found that the prescriptive 28-foot right-of-way could be reestablished under RSA 228:35, but that any width beyond that would require the Town to condemn private property in accordance with RSA chapter 498-A.

32. The New Hampshire Supreme Court recently confirmed in State v. Beattie, 173 N.H. 716 (2020) that "the stated purpose of RSA chapter 498-A is 'to provide a complete and exclusive procedure to govern all condemnations of property for public uses including the review of necessity, public uses, and net-public benefit, and the assessment of damages therefore.'" Id. at 721 (emphasis in original). The Beattie Court specifically noted that it could not "ignore the fact that the legislature provided an exclusive procedure to govern all condemnations" through the enactment of RSA chapter 498-A. Id. at 722. Therefore, the Court declined to apply the standard of review contained in RSA chapter 230 because doing so would "flout the legislature's intent" that all condemnation proceedings be governed by RSA chapter 498-A. Id. at 722.

COUNT I
TEMPORARY, PRELIMINARY, AND PERMANENT INJUNCTIVE RELIEF

33. Plaintiffs incorporate by reference the allegations contained in the paragraphs above, as if fully set forth herein.

34. "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." New Hampshire Dep't of Env't Servs. v. Mottolo, 155 N.H. 57, 63 (2007). A party seeking an injunction must show that there is an immediate danger of irreparable harm to the party seeking injunctive relief, that there is no adequate remedy at law, and that the moving party is likely to succeed on the merits. Id.

35. In the Final Decree, Judge McLeod determined that the width of the Road was prescriptive in nature and declined to impose a uniform three-rod width.

36. Inconsistent with its prescriptive rights, the Town is now attempting to "reestablish" the Road as uniformly two-rods wide in conflict with the Final Decree and without evidence demonstrating that a uniform two-rod road is what was previously established.

37. To accomplish this, the Town is utilizing RSA 231:27 and 228:35 to escape the requirements of the Eminent Domain Procedure Act and "reestablish" a wider road than previously established and pay damages as determined by a jury.

38. Plaintiffs are likely to succeed on the merits of their claim because there is no evidence to support a uniform two-rod width for the Road and RSA 231:35 was superseded by the passage of the Eminent Domain Procedure Act.

39. Plaintiffs will suffer irreparable harm if the Town is permitted to submit a map or survey to the Town Clerk and the Secretary of State, under RSA 231:27 reflecting a uniform two-rod road that goes beyond the prescriptive width of the Road and results in a taking of private property without following the statutory requirements of the Eminent Domain Procedure Act.

40. By bypassing the statutory requirements of the Eminent Domain Procedure Act, RSA chapter 498-A, according to the current language of the statute, should such a submission be made, Plaintiffs will lose the opportunity to challenge the Town's new layout for the Road as not being a valid reestablishment.

41. In addition, if this filing by the Town of a survey is permitted, Plaintiffs will be robbed of the procedural safeguards imposed by the Eminent Domain Procedure Act, chapter RSA 498-A.

42. In light of the foregoing, Plaintiffs request that the Court issue an order enjoining the Town from submitting the survey plan to the Town Clerk and Secretary of State or from taking any action to establish the boundaries of the Road without following the procedures and protections of the Eminent Domain statute.

43. The requested relief is within the jurisdictional limits of this Court.

COUNT II
DECLARATORY JUDGMENT
(RSA 228:35 is inapplicable to boundaries that have never been established)

44. Plaintiffs incorporate by reference the allegations contained in the paragraphs above, as if fully set forth herein.

45. RSA 228:35 allows for the "Reestablishment of Highway Boundaries," not for the establishment of boundaries that were not originally established.

46. "By necessary implication, to 'reestablish' means to restore to a former position; that is, to the position in which originally established." Nute, 117 N.H. at 603(citations omitted).

47. The Town, as part of the underlying litigation with the Stevers, is further limited by res judicata and collateral estoppel to the Final Decree of the trial court. No party appealed

Stever I–III. See Ex. 1. The Final Decree is clear that the Town cannot go beyond the prescriptive width, which has never been established.

48. The Stevers are entitled to a declaratory judgment that because the Town is attempting to "reestablish" a uniform two-rod road that has never been established in the first place beyond the prescriptive road, the reestablishment statute is inapplicable to those areas outside the prescriptive width.

COUNT III
DECLARATORY JUDGMENT
(Eminent Domain Procedure Act RSA 498-A repealed portions of RSA 228:35)

49. Plaintiffs incorporate by reference the allegations contained in the paragraphs above, as if fully set forth herein.

50. RSA 228:35, entitled "Reestablishment of Highway Boundaries," provides, in part, that:

> Whenever in the opinion of the commissioner the boundary lines, limits, or location of any class I or class II highway, or any part thereof, shall have become lost, uncertain, or doubtful, he may reestablish the same as, in his opinion, they were originally established. He shall give in hand to, or send by registered mail to the last known address of, all persons claiming ownership of or interest in the land adjoining such reestablished highway and to the owners of property within the limits thereof, and file with the town clerk of the town in which the highway is located, and with the secretary of state, maps showing the boundary lines, limits, or location of such reestablished highway and such lines, boundaries, limits and location as reestablished shall be the lines, boundaries, limits and location of such highway. Any person aggrieved by the reestablishment of such lines, boundaries, limits and location may petition for the assessment of damages to the superior court in the county where the reestablished highway is located within 60 days from the date of filing of such maps with the secretary of state, and not thereafter, and the court shall assess the damages, if any, by jury, provided such reestablished lines, boundaries, limits or location are not the same as originally established. The commissioner shall pay from the funds of his department all expenses incurred hereunder and the amount of final judgment and costs.

RSA 228:35.

51. The Eminent Domain Procedure Act, RSA chapter 498-A, however, provides the "complete and exclusive procedure to govern all condemnations of property for public purposes and the assessment of damages therefor." RSA 498-A:1. Specifically, the intent of the law is as follows:

> I. It is the intent by the enactment of this chapter to provide a complete and exclusive procedure to govern all condemnations of property for public uses including the review of necessity, public uses, and net-public benefit, and the assessment of damages therefor. It is not intended to enlarge or diminish the power of condemnation given by law to any condemnor and it is not intended to enlarge or diminish the rights given by law to any condemnee to challenge the necessity, public uses, and net-public benefit for any condemnation.
>
> II. Notwithstanding any other provision of law to the contrary, no person's private real property shall be taken pursuant to this chapter unless that real property is to be put to public use, as defined in RSA 498-A:2, VII.

RSA 498-A:1 (emphasis added).

52. RSA chapter 498-A et seq. establishes the only procedure for the taking of property for a public purpose. In doing so, the legislature specifically eliminated any other procedures or process for taking or condemning property and damages.

53. The Stevers are entitled to a declaratory judgment that RSA chapter 498-A repealed the provisions of RSA 228:35 to the extent it permits the taking or condemnation of private property for a road not already established. Joyce v. Town of Stark, Case No. 88-E-62 (1990) (Perkins, J.). Because the Town is attempting to take property for the Road, the Stevers are entitled to a declaratory judgment that the Town cannot take property of the Stevers without following the requirements under the Eminent Domain Procedure Act, chapter RSA 498-A.

COUNT IV
REQUEST FOR ATTORNEYS' FEES

54. Plaintiffs incorporate by reference the allegations contained in the paragraphs above, as if fully set forth herein.

55. "[T]he award of fees lies within the power of the court, and is an appropriate tool in the Court's arsenal to do justice and vindicate rights." Harkeem v. Adams, 117 N.H. 659, 690 (1977).

56. Attorneys' fees may be awarded when a party is forced to litigate against an opponent whose position is patently unreasonable or to enforce a clearly established right. See Harkeem, 117 N.H. at 690; Dugas v. Town of Conway, 125 N.H. 175, 183 (1984) (plaintiff entitled to attorneys' fees in defending its constitutionally and established right to continue to have non-conforming sign); Rochester School Board v. NHPELRB, 119 N.H. 45 (1979) (court found school board acted in bad faith by refusing to negotiate and engaging in dilatory tactics over labor issues); Funtown USA v. Town of Conway, 127 N.H. 312 (1985); Keenon v. Fearon, 130 N.H. 499, 502 (1988) (attorneys' fees and costs awarded to party who is forced to defend against an unfounded claim or one brought in bad faith); Town of Nottingham v. Bonser, 131 N.H. 120, 133 (1988) (persistent course of action warranted fee award).

57. The Stevers should be awarded their attorneys' fees and costs because the Town is taking action that is patently unreasonable and unnecessarily compelled Plaintiffs to file a legal action to enforce their clearly established right to protect their private property.

58. Accordingly, the Stevers request that the Court award them reasonable attorneys' fees and costs incurred in this action and in having to defend its established rights.

RELIEF SOUGHT

WHEREFORE, Plaintiffs request that this Honorable Court order as follows:

A. Enter judgment in favor of Plaintiffs and against the Town;

B. Issue a temporary restraining order and preliminary and permanent injunctive relief enjoining the Town from filing maps or survey plans with the Town Clerk or the Secretary of State as required by RSA 231:27 or for setting any boundaries for the Road without following the exclusive procedures in RSA chapter 498-A;

C. Declare RSA 228:35 inapplicable in this case as the Town's actions are not a reestablishment;

D. Declare RSA 498-A repealed portions of RSA 228:35;

E. Order the Town to reimburse the Plaintiffs for their costs and attorneys' fees associated with having to seek judicial intervention to vindicate their clearly established and constitutional right to receive just compensation before the taking of their land;

F. Award Plaintiff pre and post judgment interest; and

G. Grant such other and further relief as may be just and proper.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all matters so triable.

Respectfully submitted,

R ROY R. STEVER AND DEBORAH P. STEVER
Trustees of the R&D Stever Family Trust

Dated: January 30, 2024

By Their Attorneys,

McLANE MIDDLETON, PROFESSIONAL ASSOCIATION

By: /s/ Jennifer L. Parent

Jennifer L. Parent (NH Bar No. 11342)
Graham W. Steadman (NH Bar No. 269003)
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105-0326
Telephone (603) 625-6464
jennifer.parent@mclane.com
graham.steadman@mclane.com

VERIFICATION

Date: January 30, 2024

By: _____
Roy R. Stever

STATE OF New Hampshire
COUNTY OF Grafton

Personally appeared Roy R. Stever and swore that the facts contained herein are true to the best of his knowledge and belief.

Date: January 30, 2024

Katharine A.K. Soukup
Justice of the Peace/Notary Public

KATHARINE A.K. SOUKUP
NOTARY PUBLIC
State of New Hampshire
My Commission Expires
November 22, 2026

Date: January 30, 2024

By: Deborah P. Stever
Deborah P. Stever

STATE OF New Hampshire
COUNTY OF Grafton

Personally appeared Deborah P. Stever and swore that the facts contained herein are true to the best of her knowledge and belief.

Date: January 30, 2024

Katharine A.K. Soukup
Justice of the Peace/Notary Public

KATHARINE A.K. SOUKUP
NOTARY PUBLIC
State of New Hampshire
My Commission Expires
November 22, 2026

Exhibit 1

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS.

Roy R. Stever and Deborah P. Stever, Trustees of the
R & D Stever Family Trust

v.

Town of Easton

Docket Nos. 16-CV-127, 17-CV-4 & 17-CV-307

FINAL DECREE

The plaintiffs, Roy Stever and Deborah Stever, as trustees of the R&D Stever Family Trust, ("the Stevers") have filed three petitions against the defendant, the Town of Easton ("the Town"), regarding the status of a section of Paine Road ("the Road")[1] in the town of Easton. An issues to court trial (bench trial) was held over the course of several days commencing on January 10 2019, and concluding on March 1, 2019. The court viewed the Road in mid-November 2018 and again in mid-May 2019. Both parties thereafter filed requests for findings of fact and rulings of law along with memoranda of law on the legal issues before the court. Based on the evidence presented, the court makes the following findings and rulings.

I. Summary of the Cases

The Stevers have filed three petitions against the Town. For ease of discussion, the court refers to each in the order they were filed with the court, *i.e.* Stever I, Stever II, and Stever III.

In Stever I, the Stevers petition for declaratory judgment regarding certain town

[1] Throughout its existence, the Road has been referred to as Paine Road, Back Road, and Jones Road. (Trial Tr. Vol. II, 200:11–24, Jan. 11, 2019.)

CLERK'S NOTICE DATE
8/23/19
CC: S. Ray; H. Trimarco; Eric. S. White, Trustee of Frederick W. White II, 1981 Trust; Eric White, Individually; B. Waugh; C. Moser; US of America Natural Resources; M. Decker;

meeting votes. The Stevers have since stipulated that procedural defects pertaining to the 2016 town meeting votes were corrected by the 2018 town meeting votes. The only issues left for the court to resolve in Stever I, therefore, are whether RSA 231:22-a authorized reclassification of the Road from a class VI highway to a class V highway to summer cottages and, if so, whether RSA 231:22-a is constitutional on its face.

In Stever II, the Stevers petition to quiet title to the unpaved portion of the Road, specifically by requesting the court to declare that the road that passes through the Stevers' property is not a public highway. The Stevers have since stipulated that the Road is a public highway. The court, therefore, must only determine how the Road became a public highway and the width of same. The Stevers contend that the Road became a public highway by prescription prior to January 1, 1968, and that the width of the Road is limited to the width acquired by prescription at that time. The Town, on the other hand, maintains that the Road was created by dedication and acceptance in 1804, and that the width of the entire Road is three rods, or 49.5 feet.

In Stever III, the Stevers petition the court for writs of certiorari and mandamus and orders granting declaratory and injunctive relief against the Town as well, all stemming from the Board of Selectmen's vote on September 25, 2017, to allow a non-abutter to plow the Road for logging purposes. In their complaint, the Stevers allege that the Board's act was not permitted by RSA 43:1, that the Board's action constituted an alteration of a public highway, and that the Board's action constituted a laying out of a right of way for removal of lumber under RSA 231:40–42. For the limited purpose of addressing Stever III, the Stevers presume that the Road is designated a highway to summer cottages pursuant to RSA 231:79–80. The Stevers ask the court to answer eight questions:

a. Whether under the provisions of RSA 231:79–80 (Highways to Summer Cottages) the Town is obligated to close and post the Road as closed to public vehicular use from December 10 through April 10?
b. Whether, if the Selectmen do not close the Road, may the general public (non-abutters) use the Road from December 10 through April 10 for vehicular passage?
c. Whether, if the Selectmen do close the Road, the general public (non-abutters) may use the Road from December 10 through April 10 for non-vehicular passage?
d. Whether the direct abutters may privately plow and keep open the Road for access to their property from December 10 to April 10.
e. Whether non-abutting persons may privately plow and keep open the Road from December 10 through April 10.
f. Whether the Selectmen are required to hold a public hearing under the provisions of RSA 43:1, et seq. to allow either an abutter or a non-abutter to plow and keep open the Road from December 10 through April 10.
g. Whether the Selectmen shall or may require a bond from either abutters or non-abutters to allow either an abutter or a non-abutter to plow and keep open the Road from December 10 through April 10.
h. Whether the action of the Selectmen allowing the Road to be plowed is an (i) alteration of a layout and/or (ii) a layout of a right-of-way for removal of lumber under RSA 231:40–42.

(Pls.' Trial Mem., 2–3.) The facts necessary for resolution of Stever I and Stever III are undisputed, and, therefore, the court is tasked with resolving only the parties' disputes as to the law in those cases. As for Stever II, the court held a trial to resolve the parties' disputed facts concerning how the Road came to be a public highway and the width of the public way.

II. Analysis

As an initial matter, the court addresses two preliminary issues. First, the court reaffirms its ruling that the Stevers' motion to amend their complaint to add a claim for an unconstitutional taking is denied as untimely because they assert an entirely new cause of action. Second, the court addresses an evidentiary issue brought up during the trial, at which the Town sought to admit the affidavit of its former road agent, Robert Peckett, because he was unavailable to testify. The Stevers objected on multiple grounds, including

because they would not be permitted to cross-examine Peckett and because a selectman who is a party to this case served as the notary public for Peckett's affidavit. The court makes no specific ruling as to whether the affidavit is admissible but rules that it will not consider Peckett's affidavit because it finds it unnecessary to make its decree.

a. Stever II

The following facts are derived from the evidence and testimony presented during the bench trial. A graveled portion of the Road, approximately .6 miles of the 2-mile road, traverses and abuts the Stevers' property.[2] The parties dispute when and how the Road became a public highway and the width of the Road. In 1804, before the Town of Easton was founded, the Town of Lincoln identified publicly this Road for the first time. (Pls.' Ex. 2.) During a town meeting in Lincoln on October 4, 1804, the Town of Lincoln "[v]oted to except the road as it is now laid out from Franconia Line to Landaff." (Id.) The Stevers' expert, Gardner Kellogg, testified that he assumes that the Town of Lincoln's use of the word "except" was intended to convey the meaning of the word "accept," in essence accepting the road as it was already laid out prior to the town meeting. (Trial Tr. Vol. 1, 81:2–21, Jan. 10, 2019.) The evidence is persuasive based on the record before the court that the Road has been in existence in some form since at least 1804. The Stevers contend that the Road was made a public highway by prescription, while the Town maintains that the Road was made a public highway by dedication and acceptance.

"In an action to quiet title, the burden is on each party to prove good title as against all other parties whose rights may be affected by the court's decree." *Hersh v. Plonski*, 156 N.H. 511, 514 (2007) (quotation omitted). "A public highway may be created: (1) through the taking of land by eminent domain and the laying out of a highway by some

[2] Only .4 miles of the gravel road traverses the Stevers' property.

governmental authority; (2) through the construction of a road on public land; (3) through twenty years of use by the public before 1968; or (4) by dedication and acceptance." *Id.* at 514–15; RSA 229:1 (2017). "Dedication is 'the devotion of land to a public use by an unequivocal act of the owner of the fee manifesting an intention that it shall be accepted and used presently or in the future for such public use.'" *Id.* at 515 (quoting Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 Urb. Law. 859, 916 (Fall 2006)). "To be effective, there must be both an offer of dedication and acceptance: that is, the landowner offers up its property to the municipality and the municipality accepts it." *Id.* (quotations and brackets omitted). "Both an offer to dedicate and an acceptance may be express or implied." *Id.* "Dedications . . . can be implied from circumstances or by acts or conduct of the owner that clearly indicate an intention to devote land to public use or from which a reasonable inference can be drawn." *Id.* at 516.

In this case, the court rules that the Road was made a public highway by implied dedication and express acceptance in 1804. By 1804, Jonathan Tuttle, Esquire, lived in what is now the Stevers' residence, and he owned the surrounding land. The evidence presented at trial supports the Town's assertion that Tuttle's home served as a public Inn between 1802 and 1815. (Def.'s Ex. B, 77; Trial Tr. Vol. II, 278:2–279:5, Jan. 11, 2019.) Based on the fact that the public required access to the property during this time, it is clear that Tuttle impliedly dedicated this portion of the land, which was already prepared as a road, to the Town of Lincoln which accepted the road as a public highway on October 4, 1804. (Pl.'s Ex. 2.) Thereafter, the Town of Lincoln began improving the Road. The Town of Easton then began to maintain the Road once the Town was founded on July 20, 1876.

The Stevers contend that the dedication and acceptance would be void because it did not specify the width of the road. They fail, however, to support this legal assertion. In support of their position, the Stevers cite *Hayes v. Shackford*, 3 N.H. 10 (1823). In this very brief opinion the New Hampshire Supreme Court was tasked with ruling on whether a highway was duly laid out by a board of selectmen. The Supreme Court wrote:

> Was, then, the return, made by the selectmen in this case, in July, 1821, sufficient? In our opinion it was not. It does not state how wide the road was to be; and this seems to us to be a fatal objection. In cases of this kind, the property of individuals is taken and appropriated to the use of the public; and it must be important to the owners of the land to know, with a reasonable certainty, how far their property is thus appropriated; and it is not unimportant to those, whose duty it is to keep roads in repair, to be able easily to ascertain the extent of the easement.

Hayes, 3 N.H. at 11–12. As an initial point, the Road at issue in this case was not laid out by the Town, but rather accepted by the Town as a dedication by landowner(s). Second, the Road was already in existence at the time of the dedication and acceptance. Therefore, the owner(s) were on clear notice as to the dimensions of the Road. The travelled way of the Road began as a mere path that could accommodate foot traffic and animal drawn vehicles such as wagons, gigs, sledges and sleighs. Over time, as the use of the Road changed, *i.e.* it was more heavily trafficked and by larger engine driven vehicles such as automobiles, trucks, tractors and skidders, the travelled way widened to accommodate such uses. These changes were evident to the court upon close observation during its two observations of the Road last autumn and this spring. The actual width of the travelled way of the Road in 1804, even if known precisely, would not be definitive in determining the actual width of the Road today or then.

Furthermore, even if the court were not to find that the Road had become a public highway by dedication and acceptance, the court would find that it was created by

prescription prior to 1968. "To establish a highway by prescription it must appear that the way was used by the general public continuously without interruption for a period of twenty years under a claim of right without the permission of the owners." *Blake v. Hickey*, 93 N.H. 318, 319 (1945) (citation omitted). The evidence submitted and testimony elicited at trial persuasively supports that the Town has established that that the Road has been used by the general public continuously for more than 20 years without permission from the abutting landowners. Furthermore, the Stevers concede that the Road became a public highway by prescription. (Pls.' Mem., 14.)

A more thorny issue concerns the width of the Road. Assuming, as the Stevers' contend, that the Road was made a public highway by prescription, the court analyzes the width of the Road as acquired by prescription. The Stevers contend that the width of the Road is limited to the width acquired by prescription prior to 1968. There is no credible evidence to show that the Road's width has changed since 1968. On the contrary, the Town presented evidence from Anna Darvid, a resident of Easton who has resided in the same house in Easton since her birth 88 years ago. Darvid testified that she drove the entirety of Paine Road on June 21, 2017, in anticipation of this litigation. As a life-long resident of Easton, Darvid testified credibly that she has been and remains very familiar with Easton's roads, and that the Road has not changed and still follows the same course she walked as a young woman in the early 50s and in the 60s and 70s with her sister-in-law, Elizabeth. Darvid explained that she has always considered the Road to be public because members of the public regularly made use the Road and the Town has maintained the road throughout her lifetime. (Trial Tr. Vol. II, 205:4–205:24, 206:11–207:15.)

> [A] highway established by prescription is not as a matter of law restricted in width to the track of actual travel. In a case of prescription, the easement is not necessarily limited to the travelled path and the ditches on each

> side . . . . The space between the wrought road and its exterior limits may be needed for various purposes, as for furnishing earth and other materials for making the road, constructing culverts and watercourses, making changes in the travelled path, and avoiding obstructions by snow; and for these and other reasons the space given to highways is very generally much more than what is occupied by the travelled path . . . .

Hoban v. Bucklin, 88 N.H. 73, 79 (1936) (citations, quotations, and ellipses omitted).

Based on the above-cited standard and the evidence presented at trial, the court cannot determine as a matter of law what the precise width of the road is. The Stevers contend that at the most, the limit of the prescriptive rights are the disturbed area minus "(i) the turnout on the westerly side of the Road opposite the 'logging road' and (ii) the turnout on the westerly side of the Road just north of the 48" CMP (culvert) and 20" Maple (the Maple depicted on the east side of the road near the 48" CMP)." (Pls. Trial Mem., 15.) The Town, on the other hand, maintains that the entire Road width is three rods, and, therefore, the Road as used and maintained today, including all turnouts and culverts, is within the prescriptive right of way.

> The established line of travel with reasonable allowance at the sides is not the legal test of width of a highway established by prescription. The inquiry is how much width has in fact been taken, both for actual travel, and, as incidental thereto, for the safety, convenience, and maintenance of the traveled part. The center line of the wrought roadway may or may not be the center line of the highway. More land on one side of the line than on the other may be taken for highway use. Topography and soil may call for road construction with substantial variations of width on each side.

Id. at 80

The court rules that the Stevers have failed to establish that the turnouts and culverts are not within the prescriptive right of way. Although it is difficult to establish an exact measurement of the right of way, the Stevers' position is contrary to the state of the law regarding the width of a public highway established by prescription. The width is not merely the traveled way, but also the area outside of the traveled way necessary for

maintenance and use of the traveled way. The Stevers point to the fact that there is a lack of physical evidence on the ground that would mark the edges of the right of way but, if anything, that fact works against the Stevers. In point of fact, there is some physical evidence, but it is spotty and varies with the abutting terrain, and thus is not particularly probative as to the Road's actual width at all points. The lack of consistent physical evidence in this case makes it particularly difficult for the court to make an accurate ruling as to the precise measurement of the right of way along the entire section of the Road in dispute. The fact that there is no consistent, physical evidence that persuasively delineates the outer bounds of the Road at all points supports the Town's contention that their prescriptive rights extend further than the traveled way. The Town, however, has also failed to establish that the Road is three rods wide.

Although the court cannot make an exact determination as to the precise width of the Road at this time with the evidence before it, the court nonetheless rules that the Town has established that its current use of the Road is within its prescriptive rights. The court recognizes, however, that the Town, acting through its Board of Selectmen, is given authority under RSA 231:27 to "reestablish the boundary lines" of any highway within Easton "which shall have become lost, uncertain, or doubtful" in accordance with the procedures set forth in RSA 228:35.

b. Stever I

During meetings held in 2016 and 2018, the Town voted to reclassify the Road from a class VI highway to a class V highway to summer cottages. The Stevers contend that the Town's action in reclassifying the road as a class V highway was not authorized by RSA 231:22-a.

To answer the Stevers' question regarding whether the statute authorized the Town to reclassify the Road, the court must engage in statutory interpretation. "When examining the language of a statute, [the court] ascribe[s] the plain and ordinary meaning to the words used." *Blagbrough Family Realty Tr. v. A & T Forest Prods., Inc.*, 155 N.H. 29, 43 (2007). The court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add words that the legislature did not include." *Id.* *RSA* 231:22-a provides in relevant part:

> I. A class VI highway or portion thereof may be reclassified by vote of the town as a class V highway, or as a class IV highway if located within the compact sections of cities and towns as set forth in RSA 229:5, IV and V.
>
> . . .
>
> III. Any class VI highway may be made subject to reclassification under this section, regardless of whether such class VI status resulted from a layout pursuant to RSA 231:21, a discontinuance subject to gates and bars pursuant to RSA 231:45, or by the failure of the town to maintain and repair such highway in suitable condition for travel thereon for 5 successive years or more as set forth in RSA 229:5, VII.
>
> . . .
>
> V. This section shall not be deemed to limit the authority of the selectmen to layout an existing class VI highway as a class IV or V highway upon petition pursuant to RSA 231:8. This section shall not affect the classification of any highway which has been reclassified by other means prior to June 18, 1990.

RSA 231:22-a, I, III, V (1990). The Stevers argue that the Town lacked authority to vote to reclassify the Road from a class VI road to a class V road because the Road lapsed to a class VI road prior to 1990. The Stevers maintain that paragraph V of RSA 231:22-a precludes the Town from reclassifying the Road. The Town, on the other hand, contends that the Stevers have failed to show that the Road lapsed into class VI status before June 18, 1990, and that even if they had proven such the statute would not preclude the Town from reclassifying the Road because paragraph V of RSA 231:22-a is only a savings clause not intended to preclude the Town from reclassifying roads that had lapsed to class VI status

before June 19, 1990, but rather intending to confirm that the statute would not be construed retroactively to invalidate or make illegal any reclassification that had occurred prior to the statute's effective date in 1990.

The court agrees with the Town. RSA 231:22-a, II clearly states that **any** class VI highway is subject to reclassification, including roads which class VI status resulted in "the failure of the town to maintain and repair such highway in suitable condition for the travel thereon for 5 successive years or more." Furthermore, the plain language of the section to which the Stevers refer to as fatal does not preclude the Town from reclassifying a road that lapsed into class VI status prior to 1990. On the contrary, the plain language of paragraph V merely acts to preserve any such reclassification that occurred prior to the effective date of RSA 231:22-a, so as not to retroactively invalidate numerous prior reclassifications or lapses. The applicable language of paragraph V is that RSA 231:22-a "shall not affect the classification of any highway which has been reclassified by other means prior to June 18, 1990." RSA 231:22-a, V. It does not, however, state that RSA 231:22-a does not apply to roads reclassified or that lapsed into class VI status prior to June 18, 1990. Had the Legislature intended to exclude the applicability of the statute to roads classified as class VI roads after June 18, 1990, it would have said so. Instead, it merely included a final savings clause to protect the classification of roads classified prior to the effective date of the statute. Based on the plain language of the statute, the Town was authorized to vote to reclassify the road from a class VI road to a class V road.

Next, the Stevers contend that RSA 231:22-a is constitutionally invalid on its face because the statute permits a taking without providing the requisite due process protections found in Part I, Articles 12 and 15 of the New Hampshire Constitution and

defined by RSA 231:21-a, I. (Pls.' Trial Mem. at 6.) As the New Hampshire Supreme Court has recognized, "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules—or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Duffley v. N.H. Interscholastic Athletic Ass'n*, 122 N.H. 484, 491 (1982) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Assuming, *arguendo*, that RSA 231:22-a, I, conferred upon the plaintiffs a protected property interest, that property interest was created and defined by statute, and the court must therefore look to the text of the statute itself to determine the extent of the property interest here at issue.

As the plaintiffs have acknowledged, (Pls.' Trial Mem. at 6), RSA 231:21-a, I, provides, in relevant part:

> All [class VI] highways shall be deemed subject to gates and bars; provided, however, that any gates or bars maintained by private land owners shall be erected so as not to prevent or interfere with public use of the highway, and shall be capable of being opened and reclosed by highway users. The selectmen may regulate such structures to assure such public use, and may cause to be removed any gates or bars which fall into disrepair or otherwise interfere with public use of the highway.

RSA 231:21-a, I. To the extent this statute confers upon private land owners a right to erect and maintain gates and bars, such right is subject to several qualifications under the plain and ordinary meaning of the statute. *See Kenison v. Dubois*, 152 N.H. 448, 451 (2005) (noting that the court "first examine[s] the language of the statute, and, where possible, . . . ascribe[s] the plain and ordinary meanings to the words used"). Of particular import in this case, any right conferred by RSA 231:21-a, I, is subject to an unqualified right of the selectmen to remove any gates or bars that fall into disrepair or interfere with public use of the highway.

the Fifth and Fourteenth Amendments to the United States Constitution. (Pls.' Trial Mem., 3.)

The court finds that the plaintiffs' argument fails for two reasons. First, the property right asserted by the plaintiffs in this instance is the right to maintain gates and bars as defined by RSA 231:21-a, I. (Pls.' Trial Mem. at 6.) As the New Hampshire Supreme Court has recognized, "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules—or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Duffley v. N.H. Interscholastic Athletic Ass'n*, 122 N.H. 484, 491 (1982) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Assuming, *arguendo*, that RSA 231:22-a, I, conferred upon the plaintiffs a protected property interest, that property interest was created and defined by statute, and the court must therefore look to the text of the statute itself to determine the extent of the property interest here at issue.

As the plaintiffs have acknowledged, (Pls.' Trial Mem. at 6), RSA 231:21-a, I, provides, in relevant part:

> All [class VI] highways shall be deemed subject to gates and bars; provided, however, that any gates or bars maintained by private land owners shall be erected so as not to prevent or interfere with public use of the highway, and shall be capable of being opened and reclosed by highway users. The selectmen may regulate such structures to assure such public use, and may cause to be removed any gates or bars which fall into disrepair or otherwise interfere with public use of the highway.

RSA 231:21-a, I. To the extent this statute confers upon private land owners a right to erect and maintain gates and bars, such right is subject to several qualifications under the plain and ordinary meaning of the statute. *See Kenison v. Dubois*, 152 N.H. 448, 451 (2005) (noting that the court "first examine[s] the language of the statute, and, where

possible, . . . ascribe[s] the plain and ordinary meanings to the words used"). Of particular import in this case, any right conferred by RSA 231:21-a, I, is subject to an unqualified right of the selectmen to remove any gates or bars that fall into disrepair or interfere with public use of the highway.

RSA 231:22-a, the statute presently at issue, provides that "[a] class VI highway or portion thereof may be reclassified by vote of the town as a class V highway . . . ." RSA 231:22-a, I. "The warrant article for such a reclassification may be inserted . . . by the selectmen pursuant to RSA 39:2 . . . ." RSA 231:22-a, II. Additionally, RSA 231:21 provides that "[a]ny highway may be laid out subject to gates and bars across the same." Construing these statutes in context, *c.f. State v. Kelley*, 153 N.H. 481, 482 (2006) (noting that the court "consider[s] words and phrases within the context of the statute as a whole, and in light of the policy or purpose advanced by the statutory scheme"), it does not necessarily follow that reclassification of a class VI highway necessitates the removal of gates or bars. However, in the event a class VI highway is reclassified pursuant to a warrant article inserted by the selectmen, *see* RSA 231:22-a, II, and the reclassification results in the removal of gates or bars by the selectmen to prevent their interference with public use of the highway, such removal is a valid exercise of the selectmen's unqualified rights under RSA 231:21-a, I. The selectmen's exercise of this right does not offend the land owner's right to erect and maintain gates and bars because the landowner's right is subject to that of the selectmen. As such, removal of the gates or bars would not constitute a taking under the State Constitution. The statute is therefore valid on its face. *See State v. Hollenbeck*, 164 N.H. 154, 158 (2012) ("To prevail on a facial challenge to a statute, the challenger must establish that no set of circumstances exists under which the Act would be valid.") (quotation omitted).

Second, the court finds that even if removal of gates or bars constitutes a taking under the constitution, RSA Chapter 231 affords an affected land owner adequate due process of law. Although RSA 231:22-a itself does not necessarily provide for notice, a hearing, or just recompense, RSA 231:21 provides that "[w]henever the public good requires it [gates and bars] may be removed and further damages assessed, upon like proceedings as in the laying out of highways." RSA 231:9 and 10 provide for notice to each owner of land over which a highway may pass. RSA 231:11 provides for a public hearing at which the selectmen "shall hear all parties interested who may attend and any evidence they may offer." RSA 231:15 provides for the assessment of "damages sustained by each owner of land or other property taken for such highway." RSA 231:17 provides that "[n]o land or other property taken for a highway or alteration shall be appropriated or used for making the same until the damages assessed therefor are paid or tendered to the owner or his guardian or conservator." Therefore, in the event that reclassification of a class VI highway necessitates the removal of gates and bars, RSA Chapter 231, utilized in conjunction with the procedural mandates of RSA Chapter 488-A, provides adequate due process of law. Accordingly, the court holds that RSA 231:22-a does not violate the due process protections of the State Constitution.

c. Stever III

The parties agree that no findings of fact are necessary to resolve Stever III. Purely for purposes of Stever III, the Stevers assume that the Road is a public highway to summer cottages. The parties also stipulate to the following facts:

(1) Plaintiffs own land on both sides of the Road.
(2) The public rights to the highway are easement rights only and that the Plaintiffs own the fee to the land under the highway to the centerline of the highway that abuts their property.

(3) In the fall of 2017, a private individual who resides on Paine Road but does not abut the Road requested permission from the Selectmen to plow the Road in order to allow his logging trucks to traverse the Road over the upcoming winter.
(4) At a meeting on September 25, 2017, without notifying abutters of the Road or holding a public hearing, the Selectmen voted to allow the non-abutting resident of Paine Road to plow the Road for logging purposes.

(Def.'s Trial Mem., 16.) The Stevers ask the court to answer eight questions:

1. **Do the provisions of RSA 231:79–80 (Highways to Summer Cottages) obligate the Town to close and post the Road as closed to public vehicular use from December 10 through April 10? No.**

The Stevers contend that pursuant to RSA 231:79–80 the Town must close the Road and must post notice of the closing and opening of the Road. The Town maintains that it is merely exempt from keeping the Road open and maintaining the highway during the winter months but may keep open the Road year round if it so chooses. Based on the plain language of the statutes, the Town is not obligated to close the Road from December 10 to April 10, but rather it is exempt from keeping the Road open and maintained during those months if it so chooses. *See* RSA 231:79 ("The selectmen shall be exempt from keeping open and repairing highways to summer cottages from December 10 to April 10."). The Town, therefore, is only obligated to post notice of opening and closing of the Road if it indeed closes the Road during the December 10 through April 10 season. *See* RSA 231:80 ("The selectmen shall seasonably post or cause to be posted at the entrances of such highways notices of the closing and opening thereof."). In short, the answer to the Stevers' question is no.

2. **If the selectmen do not close the Road, may the general public (non-abutters) use the Road from December 10 through April 10 for vehicular passage? Yes.**

If the selectmen do not close the Road, then the general public can use the Road year round because it is a public highway.

3. **If the selectmen do close the Road, may the general public (non-abutters) use the Road from December 10 through April 10 for non-vehicular passage? Yes.**

Even if the selectmen "close" the Road during the winter season, non-abutters will still be permitted to use the Road for non-vehicular travel just as they would be permitted to traverse an unmaintained Class VI road. Even when the Road is "closed," it continues to be a public highway for the public's use, subject, however, to the Board of Selectmen's authority to regulate its public use pursuant to RSA 44:11.

4. **May direct abutters plow and keep open the Road along and for access to their property from December 10 through April 10? Yes.**

Such use is permitted subject, however, to the Board of Selectmen's authority to regulate its public use pursuant to RSA 44:11. See also RSA 236:9.

5. **May non-abutting persons privately plow and keep open the Road from December 10 through April 10? Yes.**

The Stevers did not brief this question in their memorandum of law. The court, therefore, does not know what the Stevers' legal argument is as to this question. The court assumes, based on the Stevers' other arguments, that the Stevers believe the answer to this question is no. The court finds no support in the law for denying the public the right to plow the Road during the winter months, subject, however, to the Board of Selectmen's authority to regulate its public use pursuant to RSA 44:11. See also RSA 236:9.

6. **Are the selectmen required to hold a public hearing under the provisions of RSA 43:1 to allow either an abutter or a non-abutter to plow and keep open the Road from December 10 through April 10? No.**

The Stevers contend that the Town is required to hold a public hearing under RSA 43:1 whenever anyone wants to plow and keep open the Road during the winter months. The Town's position, however, is that no one needs to ask for permission to plow the road for any lawful purpose generally allowed for an unmaintained Class VI highway. The

Stevers contend that having individuals plow the road as members of the public during the winter season conflicts with the rights or claims of the property owners and the Town. This position is unavailing. Again, the Road is a public highway and may be used by the public. When an individual uses a public highway, he or she does not acquire any ownership interest in the highway or the soil below the highway. Instead, individuals in the public merely use the rights that have already been acquired by the Town. Because plowing the Road does not conflict with the property owner's or the Town's rights, the Town is not required to hold a public hearing to decide whether one may plow the Road in the winter season.

7. **May the selectmen require a bond from either abutters or non-abutters to allow either an abutter or a non-abutter to plow and keep open the Road from December 10 through April 10? No.**

The Town maintains that it may not require a bond from either abutters or non-abutters to allow either abutters or non-abutters to plow and keep open the Road during the winter months "unless they have specific reason[s] to anticipate damage to the road surface." (Def.'s Trial Mem., 28.) The court agrees with the Town. The plain language of RSA 236:9–11 deals with excavation or disturbance to shoulders, ditches, embankments, or road surfaces of public highways. Nothing in the statute or in either party's pleadings demonstrates that plowing snow alone inherently disturbs roads. For this reason, the answer to the Stevers' question is no.

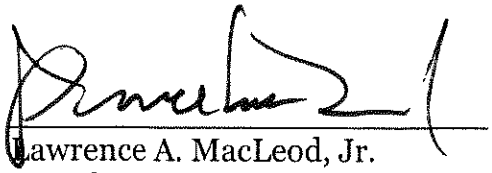
8. **Is the action of the selectmen in allowing the Road to be plowed an alteration of a layout and/or a layout of right of way for removal of lumber under RSA 231:40–42? No.**

The Stevers argue that in allowing the Road to be plowed during the winter months, the Town altered the layout of the highway. They maintain that "the selectmen altered the status of the Highway to Summer Cottages from being a closed highway as defined in RSA

231:79–80 to being open, notwithstanding that a private party is plowing the Road." (Pls.' Trial Mem., 23.) RSA 231:81 provides that "a highway to summer cottages may be opened, maintained and repaired the entire year: (a) By the selectmen, upon petition, pursuant to the procedures of RSA 231:8–12; or (b) By majority vote of the town." Allowing a member of the public to plow for his or her own benefit from December 10 to April 10 does not constitute opening and maintaining the Road by the Town. Based on the plain language of RSA 231:81, if the Town intended to open and maintain the road for the entire year, it could only do so by a majority vote of the Town or by the selectmen, upon petition, pursuant to the procedures laid out in RSA 231:8–12, which would require the selectmen to provide notice "to each owner of land over which such highway may pass." RSA 231:9. Here, however, merely allowing a member of the public to plow the Road for his own benefit does not constitute the Town assuming responsibility in opening, maintaining, and repairing the road year round. For this reason, the answer to the Stevers' question is no.

The Town posed an additional question in its trial memorandum. It asks: "If the Selectmen allow a private party to plow and keep open the Road from December 10 through April 10, are the [Town] and the Stevers exempt from liability for damages and injuries to persons using the Road?" (Def.'s Trial Mem., 28.) The Town contends that the answer is yes. It contends that the Town and the Stevers would be exempt because the Town has no duty to maintain or plow the Road between December 10 and April 10. (*Id.*) Because this issue has not been adequately briefed, the court will not address it.

SO ORDERED, this 23rd day of August 2019.



Lawrence A. MacLeod, Jr.
Presiding Justice

Exhibit 2

As TOWN OF EASTON
Select Board Meeting – Draft Minutes
January 18, 2024

Select Board
Zhenye "Zak" Mei (Chair) – Present
Bob Thibault – Present
Toni Woodruff – Not Present

Select Board Secretary
Kathy Ryan –Present

"These minutes of the Town of Easton Select Board have been recorded by the secretary. Though believed accurate and correct, they are subject to additions, deletions, and corrections by the Select Board at the next meeting when the Board votes its final approval of the minutes. These minutes are made available at this time to conform to the requirements of New Hampshire RSA 91 – A: 2."

The meeting was officially called to order at 5:33 pm by Zak Mei.

Public in Attendance: Ned Cutler, Deborah and Roy Stever, Bev and Bob Lamanna, Laura Sabre, John and Maria Hynes, Anita and Bob Craven, Sue Mulholland, Darrel Gearhart, Matt Decker, Kirsten Hoffman (remote), Chris Dulmaine (remote), Eric White (remote), Christine Alaimo (remote)

Paine Road:

- Zak Mei introduced Matt Decker as the Town's legal counsel and stated the purpose of this special meeting; to review the Paine Road Existing Conditions Plan and give residents of Paine Rd an opportunity to ask questions and offer input.
- Bob Thibault briefly reviewed prior decisions by the court authorizing the Select Board to set the boundaries on Paine Rd. He noted that the SB had concluded after reviewing the Existing Conditions Plan, the 2-rod layover, and walking the road multiple times, that a 2-rod ROW would meet the Town's needs for road maintenance and would allow for 2 cars from opposite directions to pass.
- Bob T. outlined the process going forward; to finalize the plan, send copies to the Secretary of State, the Town Clerk, and all interested parties. He noted that after submission to the Secretary of State, any parties impacted by the ROW decision would have 60 days to submit objections/ litigations. After 60 days the designated ROW would become final.
- John Hynes spoke in favor of the SB's actions, describing the long process and attempts by the Stevers to impede the process. There was some debate between the Stevers and other parties over the underlying motivations of the Stevers when they lobbied to close the gravel portion of Paine Road.
- Debbie and Roy Stever spoke in opposition to the plan and refuted statements made by John Hynes.
- Matt Decker stated that as legal counsel for the Town, he represents all persons present as well as the SB. He noted that the court's final decision was regarding the width of the road and that the SB was reestablishing a previously established road. Issues with the USDA boundaries on the Stever's property are subordinate in time to the existing road. He also clarified that nothing physical would change on the road. The travel way is to remain as it is. The ROW is just an easement. He

reiterated that the RSAs allow the Town (SB) to reestablish the road right-of-way boundaries.

- Roy Stever read an email he sent earlier that day to the SB and other interested parties outlining the Stever's objections to the Paine Road Existing Conditions Plan.
- Zak Mei noted that owners of lots 17, 18, and 21B, Map 4, had not been updated.
- Bob Thibault moved to instruct Tom Smith to finalize the Existing Conditions Plan with ownership updates to Map 4, lots 17, 18, and 21B. Zak Mei seconded. All in favor; none opposed. Passed.
- Bob Thibault moved that the Town would proceed to reestablish the boundaries of Paine Road when the Existing Conditions Plan is finalized, in accordance with the relevant RSAs, and that the parties affected by the ROW would be mailed notification 4 days prior to filing the documents with the Secretary of State and the Town Clerk. Zak Mei seconded. All in favor; none opposed. Passed.
- Matt Decker concluded by summarizing the steps the SB would be taking to reestablish the Paine Road boundaries as shown in the Existing Conditions Plan. He noted that the surveyor's task was to draw only the existing conditions and that it was the SB's task to determine the boundaries.

At this point in the meeting, everyone except the Stevers, Ned Cutler, and Darrel Gearhart left the meeting.

Ned Cutler – Hazard Mitigation Plan Resolution

- Bob Thibault read the Hazard Mitigation Plan summary as presented by Ned Cutler. He then made a motion to approve the 2024 Hazard Mitigation Plan. Zak Mei seconded. All in favor; none opposed. Passed.
- Bob Thibault read the 2024 Hazard Mitigation Plan Resolution and moved to adopt the resolution. Zak Mei seconded. All in favor; none opposed. Passed.
- Signed by Bob Thibault, Zak Mei, and Ned Cutler.

Minutes:

- The January 2, 2024, meeting minutes were reviewed.
- Bob Thibault moved to accept the minutes as written. Zak Mei seconded. All in favor; none opposed. Passed.
- Roy Stever asked if the SB had received and read his Jan 17 emailed objections to the minutes. The SB responded, yes.

Vouchers and Checks: All vouchers were accounted for, accepted, and signed.
Treasurer's Report: The January 18, 2024, report was read by Darrel Gearhart.

• Woodsville Guaranty Savings Bank - Checking Account:	$	33,773.93
• Woodsville Guaranty Savings Bank - Money Market Account:	$	3,128.22
• PDIP (Public Depository Investment Pool) Account	$	99,994.47
• ZBA Escrow (logging) Account	$	4,332.41
• Total Balance:	$	141,229.03

- Bob Thibault moved, and Zak Mei seconded a motion to approve the Treasurer's Report as read. All in favor; none opposed. Passed. The two members of the Board who were present signed the report.
- Darrel Gearhart noted that the Tax Collector will be making a large deposit tomorrow.

Old Business

ARPA Funding

- Zak Mei discussed determining the GPS coordinates of the appropriate culverts to be communicated to the engineers.

P&S Meeting for Yearly Accounting

- Meeting set for February 1st.

Tri Town Meeting

- Set for Monday, January 22 in Franconia. Budget numbers may change, but will be known in time for the Easton Budget Hearing on January 29, 6 pm.

New Business

Valley View Road

- SB discussed reported damage to the road and the need for ditching and grading when weather permits.

Sugar Hill Road Numbering

- Darrel Gearhart related the difficulties emergency responders had to locate 135 Sugar Hill Road. The address is a shared driveway with "Whit's End" signage. SB to contact residents to discuss options – private road or place all address number signs at Sugar Hill Road junction.

Additional Business

Stever Tax Issue

- Bob Thibault reported that the Assessor was at the TH and reviewed the tax payments on the Stever's property, Map 4, lot 23, under Forest Protection Plan. He presented the Stevers with a print out of records from 2011-2022. They plan to review the records and respond.

Legal Fees

- The Town received notice that the hourly rate for legal counsel had increased to $245/hour.

Bob Thibault made a motion to close the meeting at 6:54 pm. Zak Mei seconded. All in favor; none opposed.

Next Select Board Meeting – Monday, February 5, 2024, 6 pm.
Budget Hearing, Monday, January 29, 6 pm.

Respectfully submitted,
Kathy Ryan, Secretary

Exhibit 3

THE STATE OF NEW HAMPSHIRE

COOS, SS. SUPERIOR COURT

William and Deborah Joyce

v.

Town of Stark, New Hampshire

88-E-62

ORDER

Plaintiffs, William and Deborah Joyce ("the Joyces") petition this court to dismiss the action taken by defendant Town of Stark ("the Town") pursuant to R.S.A. 228:35 and 231:27 re-establishing the boundaries of a road which passes over their property. In the alternative, plaintiffs seek damages for the loss of useable farm land which was allegedly taken by the Town in the aforementioned action. A hearing on the request for dismissal was held on May 23, 24, and 29, 1990. Based on the evidence presented at the hearing, supplemented by a view of the subject property and road, the court grants plaintiffs' request in part. The reasons are set forth below. The facts are as follows.

The Joyces are the owners of property which lies in both the Town of Stark and the Town of Northumberland. A class 5, gravel highway runs across their property in an east-west direction which is known as North Road, North Side Road, or the Molly Brook Road. (hereinafter referred to as "North Road"). North Road was established by an easement by prescription and has been in existence as a road since at least 1892.

Mr. Joyce bought his farm property in 1971. In the spring of 1972, he erected an electric fence along the edge of both sides of the road, using grade stakes. These stakes were periodically knocked down or broken during snow plowing or road grading. When that occurred, Mr. Joyce would replace the stake with a slightly larger one until, in 1988, he replaced the stakes with cut off telephone poles. At that point, the Town complained to Mr. Joyce that the posts were creating a safety hazard, preventing the Town from properly maintaining the road, and encroaching upon the Town's right-of-way. Upon advice of counsel, the Town then sought to re-establish the boundaries of its right-of-way over the Joyce property, pursuant to R.S.A. 228:35 and 231:27.

R.S.A. 228:35 provides that:

> Whenever in the opinion of the commissioner the boundary lines, limits, or location of any class I or class II highway, or any part thereof, shall have become lost, uncertain, or doubtful, he may reestablish the same as, in his opinion, they were originally established. He shall give in hand to ... all persons claiming ownership of or interest in the land adjoining such reestablished highway and to the owners of property within the limits thereof, and file ...with the secretary of state, maps showing the boundary lines, limits, or location of such reestablished highway ... Any person aggrieved by the reestablishment of such lines, boundaries, limits and location may petition for the assessment of damages to the superior court ..., and the court shall assess the damages, if any, by jury, provided such reestablished lines, boundaries, limits or location are not the same as originally established.

R.S.A. 231:27 authorizes selectmen to reestablish the boundary lines, limits or location of any Class IV, V or VI highway in the same manner as the commission, as provided in R.S.A. 228:35.

Citing these statutes as authority, the Town notified plaintiffs by letter dated October 26, 1988 that it was reestablishing a two rod right-of-way (33 feet) over plaintiffs' land consisting of one rod on either side of the center line of the existing road. Attached to the letter was a copy of the town tax map with the relevant section of North Road highlighted. The same documents were submitted to the secretary of state, as required by statute.

Plaintiffs now petition this court to set aside the reestablishment, claiming that the Town's actions under R.S.A. 321:27 were improper because the location of North Road had not become lost or uncertain.

As a preliminary matter, the court finds that the documents submitted to plaintiffs and the secretary of state by the Town do not technically comply with the statutory requirements as they show only the general location and limits of the reestablished road. However, the court further finds that the intent of the statute has been met. Reading the documents together, supplemented by testimony of Town officials, it is clear that the boundaries sought to be reestablished are to be measured from the centerline of the current travel portion of North Road which is bordered by plaintiffs' fence. To cure any technical defect, the

Town shall be required to have the relevant portion of North Road surveyed, at its own expense, and to submit to all necessary parties a metes and bounds description of the road in accordance with this order.

Addressing the merits of plaintiffs' claim, the court notes the distinction between the travel portion of a road and the extent of a right-of-way, the latter being a broader term which may include the travel portion and land abutting it. "[T]he legal test of the width of a highway established by prescription...is how much width has in fact been taken, both for actual travel, and, as incidental thereto, for the safety, convenience, and maintenance of the traveled part." Hoban v. Bucklin, 88 N.H. 73, 80 (1936). The parties agree that the location of North Road has remained essentially the same since 1892. The crux of their dispute is whether the road, as defined by the fence line erected by plaintiffs, is the extent of the Town's right-of-way. The width between the posts varies from 22 feet to 25.5 feet, with an average width of 24 feet. The Town contends that over the course of the prescriptive period it has used a greater width in its maintenance of the road and further, that it requires at least a two rod right-of-way to properly and safely maintain the road.

During the course of the hearing the Town presented evidence concerning the safety hazards that the current fence creates due to its interference with proper road maintenance and, additionally, the minimum width which would allow for proper and

safe road maintenance. Plaintiffs timely objected to this evidence as irrelevant. The court deferred ruling at that time. It now sustains that objection. The Town is attempting to reestablish that which was once established. To the extent that the Town requires more land now to properly maintain a road, those facts are not relevant to a determination of what has been established by use over time. See Hoban v. Bucklin, 88 N.H. 73 (1936). Accordingly, the court will not consider the objected-to evidence in its resolution of the matter.

The court heard conflicting testimony about the width of the relevant portion of North Road from numerous people who had traveled over or maintained the road from as early as 1940. Based on that evidence, the court finds that the Town has established its right to a 28 foot easement by prescription. In support thereof, the court makes the following findings.

Since the 1940's, the width of the travel portion of North Road varied between 16 and 18 feet. Prior to the erection of the current fence in 1972, there had been a fence on at least one side of the road, since the 1940's, which was set back from the road approximately 6 - 8 feet. The section of land located between the old fence and the travel portion of the road had been used in the maintenance of the road, both as a graded ditch and for plowing of snow. In 1972, plaintiffs erected the current fence approximately 4 inches back from the travel portion of the road. The distance between the fence posts was an average of 22 feet. Snow has continued to be plowed beyond that fence

approximately 3 - 4 feet on each side of the road. The evidence established that since the 1940's the Town has consistently used 28 feet for the travel portion of North Road and maintenance thereto.

Having established a 28 foot easement by prescription, the court finds that the Town may properly reestablish the boundaries of this easement pursuant to R.S.A 228:35 and R.S.A. 231:27. However, the Town has sought to "reestablish" a 33 foot right-of-way, 5 feet in excess of that which it has a prescriptive right to claim. It contends that it is authorized to do so by statute, citing the latter portion of R.S.A. 228:35 which provides that damages may be assessed against the Town if the "reestablished lines, boundaries, limits or location are not the same as originally established." By inference, it is suggested, the Town may "reestablish" a road of any width, so long as it compensated the property owner for the additional land being taken. In essence, the Town could condemn private property for public use under the guise of reestablishing a road.

The court agrees that the language of R.S.A. 228:35 appears to permit such an action. However, subsequent to the enactment of that statute, and amendments thereto, the legislature enacted the Eminent Domain Procedure Act, R.S.A. 498-A, which sets forth the "complete and exclusive procedure to govern all condemnations of property for public purposes and the assessment of damages therefor." R.S.A. 498-A:1 (emphasis added). The court is unable to construe the latter portion of R.S.A. 228:35 in a manner which

could be consistent with the Eminent Domain Procedure Act. To the contrary, the Act specifically eliminates any other procedure for condemning private property. The strong language of the Act is "evidence of convincing force" to support a finding that the provisions of R.S.A. 228:35 allowing for the taking of land for a road not already established and the assessment of damages therefor have been impliedly repealed. Opinion of the Justice, 107 N.H. 325, 328 (1966).

Accordingly, the court finds that the Town may reestablish a 28 foot right-of-way over plaintiffs' land. Should the Town wish to extend the right-of-way beyond that width, it must do so in accordance with R.S.A. 498-A.

The parties requests for findings of fact and rulings of law are acted upon as follows:

Plaintiffs' Proposed Findings of Fact:

GRANTED: 1, 2, 3, 4, 5, 6, 7, 9, 10, 11.

DENIED: 8, 12 (no evidence), 13, 14, 19, 20, 21, 22.

NEITHER GRANTED OR DENIED: 15, 16, 17, 18, 23, 24.

Plaintiffs' Proposed Rulings of Law:

GRANTED: 1, 2, 3, 4, 8, 10, 11, 13.

DENIED: 5 (as worded), 6 (as worded), 7, 9 (as worded).

NEITHER GRANTED OR DENIED: 12, 14, 15.

Defendant's Proposed Findings of Fact:

GRANTED: 1, 2, 3 (except for date), 4, 8, 9, 11, 14 (as to first sentence), 15, 18.

DENIED: 10, 12, 14 (as to second sentence), 19.

NEITHER GRANTED OR DENIED: 5, 6, 7, 13, 16, 17.

Defendant's Proposed Rulings of Law:

GRANTED: 1, 2, 3, 4, 5.

So ordered.

DATE: 7/10/90 H. W. P

Harold W. Perkins, Presiding Justice