THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

Pamela D. Kelly, et al.

v.

Town of Nottingham

Docket No. 218-2020-CV-00008

ORDER

Plaintiffs have brought this action seeking declaratory judgment (Counts I and II) and damages (Count III), alleging that Defendant improperly classified the roads by which Plaintiffs access their properties as emergency lanes and thereby caused a diminution in the value of their properties. Defendant moves to dismiss all counts. Plaintiffs object. A hearing was held on June 11, 2020 at which all parties were represented by counsel. For the reasons that follow, Defendant's Motion to Dismiss is GRANTED in part and DENIED in part.

Factual Background

For purposes of this order, the Court assumes the truth of the following facts as set forth in Plaintiffs' complaint. Plaintiffs own a number of properties located in the town of Nottingham. The various properties are accessible by certain gravel roads, which Plaintiffs have labeled "Camp Roads." Each Plaintiff lives on a property that is accessible by a Camp Road, and, for some of those properties, the Camp Roads provide the only access.

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For over 40 years, Defendant has regularly maintained the Camp Roads, including performing repairs, improvements, and winter maintenance. Defendant has raised and appropriated public funds to perform such maintenance. Throughout this time, Defendant has issued permits for construction of new homes on lots and approved subdivisions of properties that are accessible by Camp Roads.

In 1995 and 2011, Defendant, by and through its Board of Selectmen, declared the Camp Roads "emergency lanes," purporting to do so under RSA 231:59-a. Pursuant to that statute, towns may, but are not required to, maintain emergency lanes. To date, Defendant has continued to maintain the Camp Roads but with no guarantee of continuing to do so beyond September 2020.

Analysis

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The Court "need not, however, assume the truth of statements that are merely conclusions of law." Id. "The trial court may also consider documents attached to the plaintiff's pleadings, or documents the authenticity of which are not disputed by the parties[,] official public records[,] or documents sufficiently referred to in the complaint." Beane v. Dana S. Beane & Co.,

P.C., 160 N.H. 708, 711 (2010). "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

As an initial matter, there has been some confusion as to the Plaintiffs' theory of the case. In Count III of their complaint, Plaintiffs argue that "[t]he Defendant exceeded its powers and/or failed to adhere to statutory requirements for the proper and lawful declaration of Class VI highways and/or private roads as 'emergency lanes.'" (Compl., ¶ 107.) In contrast, in their objection, Plaintiffs state:

> [T]he Defendant incorrectly states that the Plaintiffs' claim for damages is based upon allegations that the Board of Selectmen were acting or operating outside of any statutory authority to act . . . . Nonetheless, the Petitioner[s] accurately and adequately [have pled] that the Defendant, as a Board of Selectmen, was authorized under R.S.A. 231:59-a to declare certain Class VI and/or private roads as emergency lanes. As such, the Defendant was acting within its statutory authority.

(Pls' Obj. at 5.) In their surreply, Plaintiffs repeat this same language, but add responsively that, even if Defendant's actions fell within its statutory authority, "there is ample support for the proposition that a municipality may be held liable" for those actions, with citation to two cases in which a city or town was found liable for negligently performing acts they were lawfully authorized to perform. (Pls' Surreply at 7.)

After hearing, the Court understands that Plaintiffs do not generally challenge the town's authority to reclassify Class VI roads and private ways as emergency lanes pursuant to RSA 231:59-a. Rather, they contend that Camp Roads are not subject to the RSA 231:59-a process, because they are Class V roads, not Class VI highways or private ways, and therefore the town is obligated to maintain the roads absent

discontinuance or reclassification.[1] Plaintiffs argue further that discontinuance of the public's right to use a class V road requires a town vote, action beyond the acts of the Board of Selectman that occurred in this case in its failed attempt to convert the Camp Roads to emergency lanes. As the Court understands, it is the declaration that the Camp Roads are emergency lanes without proper legal process and the concomitant uncertainty about continued road maintenance that arose from that declaration, about which Plaintiffs complain. The declaratory relief the Plaintiffs seek is intended to resolve that uncertainty in Plaintiffs' favor, and the damages sought are to compensate Plaintiffs for any losses they suffered as a result of that uncertainty. With this clarification, the Court will address the Defendant's arguments for dismissal.

I. Damages and Failure to State a Claim

In Count III of their complaint, Plaintiffs seek damages. They contend that the unlawful designation of the Camp Roads as 'emergency lanes' has caused uncertainty as to whether Defendant will continue to maintain the Camp Roads, resulting in a decrease in property values. Defendant argues that Plaintiffs' claim for damages is premature, as mere uncertainty surrounding the continued maintenance of the Camp

[1] RSA 229:5, VI establishes a duty on towns to maintain Class V highways. RSA 231:45-a, II provides: "No vote or other action of the governing body shall be effective to reclassify a class [] V highway as a class VI highway, except for the failure to maintain and repair that highway in suitable condition for travel thereon for 5 or more successive years as provided by RSA 229:5, VII. RSA 229:5, VII defines Class VI highways to include "all highways which have not been maintained and repaired by the town in suitable condition for travel thereon for 5 successive years." It does not appear from the facts pled to date that reclassification by lack of maintenance would apply. However, Defendant has not yet answered or made clear whether it agrees or disagrees that the Camp Roads were ever class V roads by way of implied acceptance, as Plaintiffs' contend, before the Board's votes in 1995 or 2011, although it is evident that it posits that Camp Roads were properly made emergency lanes at least by 2011.

Roads does not create a claim for damages, and, to the extent the damage claim is cognizable, the damages are speculative in nature and thus not ripe for consideration. Defendant additionally argues that, even if Plaintiffs' property values decreased as a result of the "emergency lanes" declaration, Defendant is entitled to discretionary function immunity, rendering it immune from liability for its decision-making. Finally, it contends that RSA 231:59-a, IV prohibits suit against a town for actions taken in connection with establishing or maintaining emergency lanes or failing to establish or maintain them.

The Court agrees with Defendant that Plaintiffs have not alleged concrete damages sufficient to give rise to a claim. As noted above, Plaintiffs argue their property values have been negatively effected by the possibility that Defendant will at some point in the future cease its maintenance of the Camp Roads. However, nowhere in the complaint do Plaintiffs allege that any individual has attempted unsuccessfully to market a property or sold a property for a reduced value as a result of Defendant's actions or otherwise incurred actual damages following either the 1995 or 2011 declarations by the Board of Selectmen. The possibility of an impact based on possible future action of the Defendant does not carry the day.

Furthermore, any legal uncertainty will be resolved in the declaratory judgment action, which properly may "be brought before an actual invasion of rights has occurred." Portsmouth Hosp. v. Indemnity Ins. Co. of North America, 109 N.H. 53, 55 (1968). Plaintiffs have had this legal vehicle available to them since 1995. To the extent the town Board acted improperly in declaring Camp Roads emergency lanes, undoing that decision and declaring the Camp Roads to be class V roads will fully

resolve the alleged uncertainty and cure any potential loss. To the extent the town Board acted properly or Plaintiffs' failed to competently and timely raise their complaints, they will not be entitled to damages even if the property values were effected by the declaration.

Because Plaintiffs' claim for damages is not grounded in sufficient facts and the resolution of the claims will obviate any arguable damage not yet suffered, Plaintiffs have failed to allege an essential element of their claim. In light of this, the Court need not address Defendant's argument regarding discretionary function immunity or its claim that a damage action is barred by RSA 231:59-a, IV. Accordingly, Defendant's motion to dismiss with respect to Count III is GRANTED. Plaintiffs shall have thirty (30) days from the date of issuance of this Order to amend the Complaint to plead sufficient facts; otherwise, the ruling shall be final.

II. Declaratory Judgment and Statute of Limitations

Defendant argues Plaintiffs' declaratory judgment claims are time-barred under RSA 231:34; 231:48; and 231:49. Defendant further argues that they are barred by RSA 31:126. The parties argue about the meaning of specific terms within those statutes and whether such terms are applicable to the facts of this case. The Court will address each statute in turn.

A. RSA 231:34

RSA 231:34 states that a person may appeal to the superior court within 60 days if he or she is "aggrieved by the decision of selectmen in the laying out or altering of a highway." Defendant focuses on the word "altering" and contends that, because the Board of Selectmen "altered" the Camp Roads to "emergency lanes," Plaintiff's, having

failed to appeal to the superior court within 60 days, have lost their opportunity for redress. However, consistent with Plaintiffs' argument, the Court finds that the action taken by the Defendant as described in the Complaint does not constitute the "altering" of a highway, and, thus, the time limitation contained in the statute does not apply to bar the claims.

"[T]he proper interpretation of a statute is a question of law for [the] court to decide." Thayer v. Town of Tilton, 151 N.H. 483, 486 (2004). "In interpreting a statute, [the Court] first look[s] to the language of the statute itself and, if possible, construe[s] that language according to its plain and ordinary meaning." State v. Surrell, 171 N.H. 82, 85 (2018). The Court "interpret[s] statutes in the context of the overall statutory scheme and not in isolation." State v. Moran, 158 N.H. 318, 321 (2009). The Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Surrell, 171 N.H. at 85.

The dictionary definition of "alter" is "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing something else" or "to become different in some respect." Webster's Third New Int'l Dictionary 63 (2002). This definition offers little toward resolution of the dispute. Here, the question is not what "alter" means, a commonly understood word; rather the question when scrutinizing the sentence is what has been effected by the alteration. For the statutory limitation to apply, based on a plain reading of the pertinent phrase – the "altering of a highway," it is the highway itself that has to have been altered or made different by municipal action, not the classification or the legal status of the

roadway. Cf. RSA 231:59-a (emphasis added). ("This section shall not be deemed to *alter the classification or legal status* of any highway or private way[.]") Had the legislature intended to limit the timeframe for a challenge to the altering of a highway classification or legal status, it would have done so.

The Court also finds support for this interpretation in the other provisions of the statutory framework, as well as in cases that have interpreted them. Historically, cases dealing with the alterations of roads have addressed physical alterations of those roads, not reclassification. See, e.g., Hinckley v. City of Franklin, 69 N.H. 614, 615 (1899) ("The question is whether such a change as was here made was an alteration within the meaning of the statute. The object of the act appears to be to compensate the landowner for changes made in the surface of the land after the highway has been built."); Sawyer v. Town of Keene, 47 N.H. 173, 178 (1866) ("The injurious alteration or repair complained of here, in the original application, was the raising of the highway in front of plaintiffs' house . . . ."). Additionally, other statutes under RSA Chapter 231 appear to focus on physical alteration. For example, RSA 231:12 states, "They may lay out such highway over any ground they may deem most suitable, and alter any highway as they judge proper, without regard to intermediate limits or particular monuments described in the petition." RSA 231:13 states: "[T]he selectmen of 2 adjoining towns, acting jointly and by a vote of the major part of each board, may lay out any new highway, or alter any existing highway within such towns."

In light of the foregoing, the Court finds that "altering," as used in RSA 231:34, refers to physical alteration of a highway and not the alteration of its legal status by

discontinuance or reclassification. Therefore, the time limit on appeals is inapplicable to the instant case and, thus, does not bar Plaintiffs' claims.

B. RSA 231:48 and 231:49

RSA 231:48 states, "Any person or other town aggrieved by the vote of a town to discontinue any highway . . . may appeal therefrom to the superior court . . . within 6 months after the town has voted such discontinuance and not thereafter." RSA 231:49 similarly notes:

> [a]ny person who sustains damages by the discontinuance of a highway . . . by vote of the town, and from which no appeal has been taken, may petition for the assessment of damages to the superior court in the county in which the highway is situate within 6 months after the town has voted such discontinuance . . . .

Defendant argues that its declaration of the Camp Roads as "emergency lanes" constituted a discontinuance, and, therefore, Plaintiffs needed to bring their claim within six months of the discontinuance. Plaintiffs counter that RSA 231:48 and RSA 231:49 are inapplicable, as no discontinuance occurred. The Court agrees with Plaintiffs.

First, the Defendant is writing its own fictional story. A discontinuance of the public's rights in a highway requires a town vote, which apparently did not occur in 1995 or 2011, nor apparently was there any attempt to bring a request to discontinue Camp Roads to town vote with proper notice to abutters. It appears from the facts presented that Defendant's Board of Selectmen was operating under RSA 231:59-a to change Camp Roads to emergency lanes, which is a reclassification, not a discontinuance. As to the difference between discontinuance and reclassification, the New Hampshire Supreme Court has stated:

> A town meeting vote is necessary for the discontinuance of a highway; that is, the legal termination of the public's right to travel on that highway. Reclassification, however, does not terminate the public's right to travel on a highway, and a town meeting vote is therefore not necessary to effect a reclassification. Indeed, the legislature has never established a formal procedure for reclassifying highways, leaving towns free to respond as they see fit to changing population patterns and attendant changes in road maintenance needs.

Glick v. Town of Ossipee, 130 N.H. 643, 647 (1988). This highlights that there is a distinction between discontinuation that occurs after a town vote and a reclassification by action of the town board. Because there are no facts to suggest a formal discontinuance of the Camp Roads ever occurred, RSA 231:48 and 231:49 do not apply to bar Plaintiffs' claims.

C. RSA 31:126

RSA 31:126, in its entirety, states:

> Municipal legislation, after 5 years following its enactment, shall, without further curative act of the legislature, be entitled to a conclusive presumption of compliance with statutory enactment procedure. Any claim that municipal legislation is invalid for failure to follow statutory enactment procedure, whether that claim is asserted as part of a cause of action or as a defense to any action, may be asserted within 5 years of the enactment of the legislation and not afterward.

Defendant interprets "municipal legislation" to include a vote of a board of selectmen, contending that it was incumbent upon Plaintiffs to bring its challenge to the "municipal legislation" within five years of the declaration of the Camp Roads as "emergency lanes" in 1995 and 2011. Therefore, Defendant claims Plaintiffs are time-barred by RSA 31:126. Plaintiffs in objection cite RSA 31:129, which states that any subdivision, including RSA 31:126, "shall not affect any claim of invalidity which is founded upon the substance of the municipal legislation, or upon the lack of authority of the municipality or

its officials, under the federal and state constitutions and laws, to enact such legislation." Because Plaintiffs claim Defendant's Board of Selectmen lacked the authority to declare the Camp Roads as "emergency lanes," RSA 31:126 is inapplicable.

Even assuming the Board's action constitutes "municipal legislation," RSA 31:129 makes clear that RSA 31:126 applies to procedural deficiencies in municipal legislation, not substantive ones. Here, Plaintiffs' declaratory judgment action alleges substantive deficiencies, as Plaintiffs argue, not that the Board erred in the process of declaring Camp Roads to be emergency lanes. Because Plaintiffs' argument is substantive, not procedural, and challenges the authority of the Defendant over the Camp Roads, RSA 231:126 does not apply to bar Plaintiffs'' claims.

Conclusion

In sum, the Motion to Dismiss is GRANTED as to Count III and DENIED as to Counts I and II.

SO ORDERED.

June 29, 2020

Date

Judge Diane M. Nicolosi

Clerk's Notice of Decision
Document Sent to Parties
on 06/30/2020