

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Docket No. 218-2020-CV-00008

Pamela D. Kelly, *et al.*

v.

Town of Nottingham, NH

MOTION TO DISMISS

Respondent, Town of Nottingham (the “Town”), moves to dismiss Petitioners’ Complaint, and says:

Introduction

Petitioners’ Complaint contains three central arguments. They allege, in summary, that: (1) certain “Camp Roads” servicing their properties were accepted by the Town as Class V highways over the course of several decades; (2) that prior designation of the Camp Roads in 1995 and 2011 as “emergency lanes” was improper because Class V highways cannot be subject to such designation under RSA 231:59-a; and (3) that the Town has an ongoing obligation to maintain the Camp Roads and cannot avoid that obligation by removing the “emergency lane” designation, as would otherwise be allowed under RSA 231:59-a. As a consequence, Petitioners seek declaratory judgments that the roads were accepted by the Town as Class V highways (Counts I and II), and damages for alleged “*ultra vires*” action in designating the Camp Roads as emergency lanes (Count III). These allegations, however, are untimely, not ripe for review, and fail to state a claim for damages. Accordingly, Petitioners complaint should be dismissed in full.

Standard of Review

In reviewing a motion to dismiss, the central inquiry is “whether the allegations pleaded in the plaintiff’s writ are reasonably susceptible of a construction that would permit recovery.” *In re Larue*, 156 N.H. 378, 380 (2007) (quoting *Plourde Sand & Gravel v. JGI Eastern*, 154 N.H. 791, 793 (2007)). The Court “assume[s] all facts pled in the plaintiff’s writ are true, and [construes] all reasonable inferences drawn from those facts in the plaintiff’s favor.” *Hilario v. Reardon*, 158 N.H. 56, 61 (2008) (citing *Berry v. Watchtower Bible & Tract Soc.*, 152 N.H. 407, 410 (2005)). The Court “then engage[s] in a threshold inquiry that tests the facts in the complaint against the applicable law.” *Id.* “If the facts alleged do not constitute a basis for legal relief,” dismissal is appropriate. *In re Larue*, 156 N.H. at 378. In ruling on a motion to dismiss, the Court need not accept as true statements in the complaint that “are merely conclusions of law.” *Karch v. BayBank FSB*, 147 N.H. 525, 529 (2002) (quotation omitted).

Argument

I. Counts I–III are barred by the statutory timelines for appeal set forth in RSA 231:34, 231:48, and 231:49.

Since 1995 and 2011, the Camp Roads at issue in this suit have been designated by the Town as emergency lanes,¹ as is allowed under RSA 231:59-a for any class VI highway or private way. *See* RSA 231:59-a, Compl. ¶¶ 58 and 63. Petitioners now, in 2020, seek to undo those prior designation by alleging that the Camp Roads were improperly treated as class VI highways or private ways, when they should, allegedly, have been recognized as class V highways. This argument is an attempt to undo the effect of votes that occurred years and even decades ago. As such, it is time barred by both RSA 231:34, 231:48, and 231:49.

¹ The factual allegations addressed in this Motion to Dismiss are taken from Petitioners’ Complaint and are assumed to be true for the limited purposes of this Motion.

Under RSA 231, an individual who seeks to challenge the layout or altering of a highway, must do so pursuant to RSA 231:34, which requires an appeal to be filed in superior court within 60 days. *See* RSA 231:34. Likewise, under RSA 231:48 and 49, an individual aggrieved by the discontinuance of a highway, must bring such challenge within 6 months. These are the only mechanisms that allow appellate review of determinations with respect to layout, altering, or discontinuance of highways under RSA 231.

Here, Petitioners claims arise under the above statutory provisions, although, they are not specifically pled as such. In particular, the assertion that the Camp Roads were improperly treated by the Board of Selectmen as class VI highways or private roads, is, in fact, a challenge to the layout or altering of the highways (i.e., a change in their classification). As such, that challenge must have been brought within 60 days under RSA 231:34. If an individual contends, as here, that a Town has improperly altered a highway by changing its classification, that appeal must be brought per the required statutory timeline.

Petitioners' may, nevertheless, contend that their challenge is not to a layout or altering of a highway, but rather, that it relates to an improper reclassification or discontinuance of the Camp Roads from class V to class VI as a result of the votes in 1995 and 2011. If that is the case, then the substance of their challenge is an alleged improper discontinuance of the Camp Roads through an emergency lane designation. However, in that event - i.e., if Petitioners believed that the Town was improperly effecting a discontinuance of a class V highway through designation of such roads as emergency lanes - they were required to raise such challenge within 6 months. *See* RSA 231:48 and 49.

In either event, the purpose and effect of the above statutory provisions is clear. If an individual believes that he or she is being damaged by Town action with respect to the layout,

altering, or discontinuance of a highway, they are required to bring such an appeal under the provisions and timelines of RSA 231, which Petitioners have not done. Accordingly, their claims should be dismissed.

II. Petitioners' request for damages should be dismissed because it is not ripe for review and fails to state a claim.

Petitioners request for damages is premature and should be dismissed. Specifically, Petitioners contend that the 1995 and 2011 votes designating the Camp Roads as emergency lanes, has created “uncertainty as to the continued maintenance of the Camp Roads” which, in turn, has allegedly damaged the fair market value of their properties. Compl. ¶¶ 70-71 (emphasis supplied). The Town, however, has not rescinded its emergency lane designation, has not discontinued the Camp Roads, and has not changed its course with regard to maintenance. Accordingly, any damages alleged are premature and speculative. Further, RSA 231:48-49 provides the exclusive remedy for damages from a discontinuance, and it has not been pled. There is no other statutory right, or common law claim, that enables Petitioners to recover damages for a speculative future change in designation, discontinuance, or maintenance.

Additionally, petitioners complaint does not identify any other theory of liability that could sustain an award of damages for the 1995 and 2011 votes. While petitioners contend in Count III that the Town violated RSA 231:59-a, and thereby engaged in *ultra vires* conduct, that allegation, even if true, does not give rise to a compensable claim for damages. If RSA 231:59-a was violated, the result may be to unwind the designation of the Camp Roads as emergency lanes (as requested in Counts I and II), provided a timely appeal was filed. However, that result would not give rise to any separate claim or statutory right to damages.²

² To the extent Petitioners' contend that the selectmen themselves acted in an *ultra vires* manner, the Town cannot be held liable for such conduct. A municipality cannot be held liable for damages for the *ultra vires* actions of its officials under New Hampshire law. “No action can be maintained against a town for the negligence of its officers

III. Petitioners' request for damages should be dismissed because the Town is entitled to discretionary function immunity.

As discussed above, Petitioners' request for damages is premised on the notion that the Town's prior designations of the Camp Roads as emergency lanes has created such uncertainty regarding their status that it is causing harm to their property values. However, the 1995 and 2011 designations were discretionary decision of the Board of Selectmen. Petitioners concede this point in alleging that the Town's decisions with respect to the Camp Roads were influenced by a number of factors, such as the expenditure of public funds, setting of budget projections, and generation of property tax receipts. *See, e.g.*, Compl. ¶¶ 50–53. Accordingly, the Town is entitled to discretionary function immunity with respect to Petitioners' damages claim. It is well established that when municipalities engage in decision making that involves “the consideration of competing economic, social, and political factors” it is “precisely the type of municipal planning that discretionary function immunity seeks to protect.” *See Tarbell Adm'r, Inc. v. City of Concord*, 157 N.H. 678, 684 (2008) (quotation and citations omitted); *Rockhouse Mountain Prop. Owners Ass'n v. Conway*, 127 N.H. 593, 600 (1986) (“[T]he power to reach a reasonable accommodation of private and public interests in any controversial request for layout requires the exercise of a high enough order of discretion to justify legal immunity . . .”). Therefore, Petitioners' claim for damages should be dismissed.

Conclusion

Petitioners' Complaint should be dismissed for all the foregoing reasons.

or servants in the performance of an act which a corporation of such a character is without authority to undertake.” *Wakefield v. Newport*, 60 N.H. 374, 376 (1880); 14 NH Practice Series: Local Government Law § 1055 (“As a general rule, no action can be maintained against a municipality for the negligence of its officers or servants in the performance of an act which the corporation is without authority to undertake.”)

WHEREFORE, the Town respectfully requests that this Honorable Court:

- A. Dismiss Petitioners' Complaint in full;
- B. Award the Town its costs and attorney's fees; and
- C. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

TOWN OF NOTTINGHAM, NH

By Its Attorneys,

GALLAGHER, CALLAHAN & GARTRELL, PC

Date: February 12, 2020

By: /s/ Robert Dietel

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CERTIFICATE OF SERVICE

I, Robert J. Dietel, hereby certify that I have this date forwarded a copy of the foregoing to counsel of record via the Court's e-filing system.

Date: February 12, 2020

By: /s/ Robert Dietel

Robert J. Dietel (NH Bar #19540)