THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2014-0203, Bill McDonough & a. v. Town of Belmont, the court on April 3, 2015, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is unnecessary in this case. The plaintiffs, Bill and Carolyn McDonough, appeal an order of the Superior Court (McNamara, J.) declining to grant damages resulting from the discontinuance of a road abutting their former property. The plaintiffs raise three issues on appeal: (1) whether the trial court improperly dismissed their initial causes of action seeking damages for inverse condemnation, intentional infliction of emotional distress, and unjust enrichment; (2) whether the trial court's interpretation of RSA 231:49 (2009) was erroneous; and (3) whether the trial court improperly excluded certain evidence. We affirm.

The trial court found or the record supports the following facts. The plaintiffs purchased the subject property in Belmont on January 7, 2009, for $275,000. The property abutted four roads. The plaintiffs rented the property to commercial tenants. Later that year, the plaintiffs attempted to sell the property to the Town of Belmont (Town), but, at a town meeting, voters declined to purchase it.

In 2010, the Town began planning a downtown revitalization project, and in 2011, a proposal was made to discontinue and relocate a portion of one of the four roads abutting the plaintiffs' property. On August 21, 2012, the Town voted to pass this proposal. The Town had previously informed the plaintiffs that the road might be discontinued, at which time the plaintiffs again offered to sell the property to the Town. The Town submitted the plaintiffs' proposal to voters on August 21, 2012, who approved it. On October 15, 2012, the Town purchased the property from the plaintiffs for $250,000.

The plaintiffs then brought a complaint against the Town, seeking damages for inverse condemnation, intentional infliction of emotional distress, and unjust enrichment as a result of the discontinuance of the road. The Town moved to dismiss on the grounds that RSA 231:49 provided the sole remedy. The plaintiffs moved to amend to include a claim pursuant to RSA 231:49 and the Town objected. The trial court granted the amendment and also granted the Town's motion to dismiss the original three claims. The plaintiffs additionally sought damages for loss of rental income and diminution in value of their property as a result of the discontinuance.

The trial court found in favor of the Town, ruling that RSA 231:49 provided the exclusive remedy for damages and that the plaintiffs failed to prove that the value of their property diminished as a result of the discontinuance. The court further found that the analysis of plaintiffs' expert was flawed and did not address the issue of diminution in value. Finally, the court found that the mere threat of future condemnation does not require an owner to be compensated unless it amounts to a constructive taking, and here, the plaintiffs' alleged inability to rent the property during the time of the proposed discontinuance did not rise to the level of a constructive taking.

Resolving the issues in this appeal requires us to first determine whether the trial court properly dismissed the plaintiffs' three original claims. In reviewing an order granting a motion to dismiss, we assume the truth of the facts as alleged in the plaintiffs' pleadings and construe all reasonable inferences in the light most favorable to the plaintiffs. Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010). We will uphold the granting of the motion to dismiss if the facts pleaded do not constitute a basis for legal relief. Id.

The plaintiffs' brief does not address the dismissal of their claims for intentional infliction of emotional distress and unjust enrichment. Accordingly, we will not address their arguments as to these two claims. State v. Higgins, 149 N.H. 290, 303 (2003).

As to the plaintiffs' inverse condemnation claim, we conclude that the trial court properly dismissed it. Inverse condemnation requires a governmental interference with property to be more than mere inconvenience or annoyance and must be sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that fairness and justice, as between the State and the citizen, requires that the burden imposed be borne by the public and not by the individual alone. J.K.S. Realty v. City of Nashua, 164 N.H. 228, 234 (2012). Significantly, this case involves only discussions regarding plans for future discontinuance. In J.K.S. Realty we held, as do other jurisdictions, "'that mere plotting and planning by a governmental body in anticipation of the taking of land for public use, and preliminary steps taken to accomplish this, does not, in itself, constitute a taking.'" Id. at 235 (quoting Colorado Springs v. Andersen Mahon Ent., 260 P.3d 29, 33 (Colo. App. 2010)). Even assuming the threat of discontinuance began in 2010 and lasted two years, the plaintiffs fail to establish a basis for legal relief. The road was not, in fact, discontinued at the time the plaintiffs owned the property. The facts alleged are simply insufficient to establish inverse condemnation.

We now turn to the plaintiffs' arguments regarding interpretation of RSA 231:49. In matters of statutory interpretation, we are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. In re Guardianship of Eaton, 163 N.H. 386, 389 (2012). When examining the language of a statute, we ascribe the plain and ordinary

meaning to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. Further, we interpret a statute in the context of the overall scheme and not in isolation. Id. We do not consider legislative history to construe a statute that is clear on its face. Id.

RSA 231:49, entitled "Petition for Assessment of Damages," provides:

> Any person who sustains damages by the discontinuance of a highway, or by the discontinuance as an open highway and made subject to gates and bars, 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, and not thereafter, and like proceedings shall be had as in the case of appeals in the laying out of class IV, V and VI highways.

Although it is arguable that this statute does not apply here, given that the plaintiffs agreed to sell the property to the Town on the same day the Town voted in favor of the discontinuance, we will assume, without deciding, that the statute does apply. Our case law makes clear that an abutting property owner may recover damages for the discontinuance of a road only if the alternative means of access to the property is unreasonable when judged with reference to the existing use of the land. Orcutt v. Town of Richmond, 128 N.H. 552, 554 (1986). Based upon the trial court's findings, we are not persuaded that the alternative access was unreasonable. The plaintiffs' land still abutted three other roads, leaving them reasonable alternative access to their property.

The plaintiffs' remaining arguments do not persuade us that the trial court committed reversible error.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, LYNN, and BASSETT, JJ., concurred.

Eileen Fox,
Clerk