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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

10th CIRCUIT- PROBATE DIVISION
BRENTWOOD

THE TOWN OF EXETER, NEW HAMPSHIRE

v.

NEW HAMPSHIRE ATTORNEY GENERAL
DIRECTOR OF CHARITABLE TRUSTS

Docket No. _____

PETITION FOR CY PRES, OR FOR DEVIATION RELIEF.

NOW COMES the Select Board for the Town of Exeter, New Hampshire, and in seeking the ruling of this court either under the rule of *Cy Pres* pursuant to RSA 547:3-c or Deviation Relief pursuant to RSA 547:3-d, states as follows:

1. The Town of Exeter is a municipal corporation formed under the laws of the State of New Hampshire; it has a business address of 10 Front Street, Exeter, New Hampshire 03833.

2. The Attorney General, Director of Charitable Trusts has oversight authority over charitable trusts pursuant to RSA 7:19-20 and has an address of 33 Capitol Street, Concord, New Hampshire 03301. The Director of Charitable Trusts is an indispensable party to this proceeding. See *In re Mary Baker Eddy*, 172 NH 266 (2019).

3. This court has jurisdiction over this matter pursuant with RSA 547:3-c and 547:3-d.

4. Ambrose Swasey, the donor of a trust that is the subject of this petition, was born near Exeter in 1846, grew up in Exeter, was educated as an engineer and began his

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employment career working for a manufacturing business in Exeter.

5. Business opportunities caused him to move to Cleveland, Ohio, where he was successful and accumulated wealth.

6. Historical documents describe him as an engineer, inventor, machinist, entrepreneur, executive, and philanthropist.

7. In his later years Mr. Swasey moved back to Exeter, where he died and was buried, in 1937.

8. By a Trust Agreement dated August 9, 1929, Mr. Swasey, while still living in Cleveland, established and funded a trust for the purpose of "defraying the expense of acquiring a right of way and of constructing a parkway along the riverfront at Exeter, New Hampshire, to be used *solely for park purposes*, and the roadway therein open only to pleasure vehicles". This Trust enabled the initial purchase and construction, and remains in place as it contains provisions for continued annual disbursements of funds for maintenance and upkeep of the property.

9. This gift enabled the town to acquire property for the park along the river, behind the downtown business district, and to build a professionally designed park and roadway, with the park land immediately abutting the river and the roadway running roughly parallel to the river. The road borders the park land and runs from an entrance adjacent to the downtown business district (at Water Street) to a northerly entrance/exit at Newfields Road. After construction in the early 1930s, the road was designated by the Town as a Class V public highway. The park was named and remains "Swasey Parkway".

10. The gift that resulted in this park, and the receipt of annual disbursements, is regarded as having created a separate charitable trust. The members of the town's Select Board are regarded as the trustees of that trust for the purpose of filing this petition.

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11. Over the following decades, as the town's business district has grown and become more active, and with the later establishment, growth and influence of the east/west highway NH Route 101 just a mile north of the park road's northerly terminus, the roadway through the park has more and more been used as a shortcut from the downtown business area to access Route 101 at Exit 10. This has created not only a significantly greater number of vehicles passing through the park road, but also a great number of vehicles moving at increased speeds, all of which detracts from the safety, relaxation and enjoyment of the users of the park land.

The result is that as the road has become busier, that increase has more and more interfered with what Mr. Ambrose intended when he established the trust to create a bucolic park.

12. When creating the Trust Agreement and referring to the intended use of the road, Mr. Swasey specifically described it as being for "pleasure vehicles"; this was consistent with his goal of having Exeter create a place of quiet and serenity for the enjoyment of natural beauty.

13. However, with the growth of the roadway's use by commuter and commercial vehicles traveling through Swasey Parkway, as contrasted with pleasure vehicle usage within the Swasey Parkway, these uses have become competing influences, with the commuter/commercial traffic detracting from Mr. Swasey's intended public goal that the park land be used *solely for park purposes*.

14. To address this problem, at the Town's 2022 Annual Town Meeting the Town's Select Board proposed to the voters to close and discontinue as a public highway the southerly portion of the roadway "from Water Street to the Pavilion."

15. This vote specified that the pavement in that closed and discontinued portion of the roadway was to be retained for the use of pedestrians, non-motorized and maintenance/emergency vehicles, and that the northerly portion of the roadway would

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remain a Class V highway for vehicle access to the park. This change would restore the use of the roadway for "pleasure vehicles" to facilitate the enjoyment of Swasey Parkway itself, as opposed to simply a route to some other destination, and would thereby once again return the property to use *solely for park purposes*.

16. The warrant article was also conditioned on the Town filing this petition and obtaining this Court's approval. See Official Ballot Annual Town Election Exeter, New Hampshire, March 8, 2022, Article 33, attached as Exhibit 1.

17. That warrant article was approved by a vote of 1819 to 1083.

18. Because of the circumstances described above, the original charitable purposes of the trust when applied to the roadway have become impractical, obsolete, ineffective and/or prejudicial to the public interest to carry out, as those terms are used in RSA 547:3-d, I.

19. Alternatively, the Town seeks relief by Deviation under RSA 547:3-c in that a change in circumstances, as described above, has occurred that substantially impairs the accomplishment of the purposes of the Trust.

20. Granting this petition, to allow the Select Board to effectuate the Town vote altering the roadway in Swasey Parkway as contemplated, will be consistent with RSA 547:3-c and 547:3-d, and will be nearer to the original purposes intended by Mr. Swasey, that the park land be solely for park purposes.

21. In seeking this approval and making the proposed road changes, the Town commits that in this process it will address the needs of those with mobility issues, to assure that they will have continued access to the park.

22. On _____, 2022, the Town held the public hearing required by RSA 547:3-d, II, after giving at least fourteen (14) days notice to the public.

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WHEREFORE, your petitioner respectfully requests that this Honorable Court:

- A. Apply *Cy Pres* or Deviation to permit the changes approved by the town's voters; and
- B. For such other relief as the court may deem just.

Respectfully submitted,

TOWN OF EXETER

By Its Attorneys
MITCHELL MUNICIPAL GROUP, P.A.

Date: _____

By: _____
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