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Legal and Regulatory Notes

Vermont Supreme Court holds Town Not Required to Restore Highway Prior to Reclassification

David Demarest and Jeffrey Moulton own real property adjacent to Town Highway 26 (TH 26) in Underhill. In 2001, the Underhill Selectboard reclassified portions of TH 26 as a legal trail. As required by statute, the selectboard provided public notice, conducted a site visit and public hearing, and voted to order the reclassification. In fact, the selectboard complied with all of the statutory procedures for reclassifying the highway to a legal trail, except that it forgot to record the reclassification order in the Town land records, as the law requires.

Following the 2001 reclassification attempt, the Town curtailed maintenance of TH 26 and its condition deteriorated significantly in the following years. Nine years later, in February 2010, interested persons filed suit against the Town asserting that the reclassification of TH 26 was ineffective because the selectboard had failed to record the reclassification order. The litigants sought a court order declaring the 2001 reclassification ineffective and requiring Underhill to repair TH 26 to its 2001 condition and maintain it as a town highway.

In response to the maintenance lawsuit, the selectboard undertook a new reclassification proceeding for TH 26. It once again provided public notice, conducted a site visit and public hearing, and voted to order the reclassification. In its new reclassification order (duly recorded in the land records we presume), the selectboard decreed that TH 26 should consist of three separate segments – a class 3 town highway, a class 4 town highway, and a legal trail.

Not satisfied with the outcome of the second reclassification proceeding, Demarest and Moulton appealed the selectboard's order to superior court. While that appeal was pending, the superior court ruled in the original maintenance litigation that the selectboard's 2001 reclassification order for TH 26 was ineffective because the Town had failed to record the order in the Town land records. The superior court then stayed further action in the maintenance litigation, pending resolution of Demarest and Moulton's reclassification appeal. Ultimately, the superior court upheld the selectboard's 2010 order to reclassify TH 26.

Dissatisfied with the superior court's decision, Demarest and Moulton appealed to the Vermont Supreme Court (*Demarest and Moulton v. Town of Underhill*, 2013 VT 72), where they presented several arguments. First, they argued that the superior court erred in failing to follow the process set forth in 19 V.S.A. §§ 740-743. These statutes require that when a party is "dissatisfied with the laying out, altering, or resurveying of a highway" and appeals to superior court, the court is obligated to "appoint three disinterested landowners as commissioners, to inquire into the convenience and necessity of the proposed highway, and the manner in which it has been laid out, altered, or surveyed…" 19 V.S.A. § 741. After making inquiry into the selectboard's decision, the commissioners report back to the court with their findings. The superior court is free to "accept or reject the report in whole or in part" and "by its own order or decree may establish, alter, resurvey or discontinue the highway, and may render judgment for the appellants for any damages as they have severally sustained." 19 V.S.A. § 742.

Addressing this argument, the Supreme Court noted that its holding in *Ketchum v. Town of Dorset*, 2010 VT 49, has made clear that reclassification decisions do not fall within 19 V.S.A. §§ 740-743 and that

appeals of reclassification decisions are subject to on-the-record review by the superior court under Rule 75 of the Vermont Rules of Civil Procedure. On-the-record review is to be utilized in all reclassification appeals, regardless of the class of the highway.

Next, Demarest and Moulton argued that the superior court should have stayed their reclassification appeal while the underlying maintenance case was decided, reasoning that the 2010 reclassification decision should have occurred in the context of what the road conditions would have been had the Town not allowed TH 26 to deteriorate. Otherwise, they argued, the selectboard was simply "parlay[ing] its breach of duty into a justification for municipal action manifestly designed to ratify its breach after the fact."

The Supreme Court rejected this argument as well, observing that the original attempted reclassification of TH 26 in 2001 and the Town's subsequent lack of maintenance had not been challenged by anyone for nearly a decade. Now Demarest and Moulton were seeking to require Underhill to return TH 26 to its 2001 condition before the selectboard considered again whether to reclassified it. But it was appropriate for the selectboard to base its 2010 reclassification decision on the condition of TH 26 as it was in 2010, not as it might have been in 2001. "There is no legal requirement that a town must conduct all necessary maintenance before it can reclassify its roads, and there is no showing that the Town acted unreasonably or arbitrarily in not conducting maintenance between 2001 and 2010," said the Court, and the relevant evidence in the case supported the Town's decision to reclassify TH 26 in 2010.

The decision in *Demarest and Moulton* contains several lessons for Vermont municipalities, the most important of which is to make sure that *every* step of the statutory process for reclassifying a town highway is followed. From noticing the selectboard's hearing and site visit to recording the final order of reclassification, the statutory process must be adhered to. Any procedural misstep can provide those dissatisfied with the selectboard's reclassification decision an opportunity to challenge the decision in court. In this case, if the Underhill Selectboard had simply recorded its 2001 reclassification order in the Town's land records as 19 V.S.A. § 711 requires, two costly and protracted lawsuits would have likely been avoided.

The *Demarest and Moulton* decision also reinforces the Court's holding in *Ketchum v. Town of Dorset*, 2011 VT 49. All highway reclassification decisions, regardless of the class of the highway, are subject to on-the-record review by the superior court under Rule 75 of the Vermont Rules of Civil Procedure. The primary question for the reviewing court is not whether it would decide differently on the reclassification but whether, based on the evidence contained in the record, a reasonable person could have reached the same decision as the selectboard that the "public good necessity and convenience of the inhabitants of the municipality require the highway to be ... reclassified." 19 V.S.A. § 710. This is good for municipalities in that the reviewing court will give significant leeway to the local reclassification decision and will uphold the local decision if the correct standard was applied and credible evidence supports the selectboard's conclusion.

The downside to Rule 75 on-the-record review is that it naturally places a greater focus and emphasis on process – giving proper notice, holding a fair hearing, issuing a clear decision, and creating a complete record to support that decision. Here, a court will be far less forgiving to local decision makers. Again, procedural missteps can provide those dissatisfied with a selectboard's reclassification decision an opportunity to challenge the decision in court. This risk is heightened in a Rule 75 appeal.

In the end, however, *Demarest and Moulton* is a very favorable decision for Vermont towns. The Underhill Selectboard undoubtedly made a critical mistake when it failed to record the 2001 reclassification order for TH 26 in the Town's land records – one mistake that probably resulted in tens of thousands of dollars in legal fees for the Town. But the selectboard was able to fix that mistake in 2010 by going through the reclassification process again. In doing so, the selectboard was able to consider the condition of TH 26 as it existed in 2010 and was not obligated to restore TH 26 to its 2001 condition. Had

the courts held otherwise, evidence in the case indicated that the cost to Underhill in culverts, bridges, and gravel could have easily exceeded $100,000.

The decision is archived at http://info.libraries.vermont.gov/supct/current/op2012-403.html.

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