

**LEGAL AND REGULATORY NOTES, NOVEMBER 2015**

*“No good deed goes unpunished”* – Oscar Wilde

**Vermont Supreme Court Overturns Selectboard’s Highway Decision**

The Vermont Supreme Court’s recent decision in *Massey v. Town of Greensboro*, Entry Order No. 2015-034 (October 2015), shows us that while selectboards may have the first word on laying out, altering, reclassifying, or throwing up town highways, they do not have the last.

The case concerns the legal status of Old Perrin Road in Greensboro, a road that many considered to be a public right of way and one that adjoining property owners use to access their properties. There were, however, no town records evidencing that it had ever been laid out by the town as a public highway, although such documentation may have been among the town records destroyed in a fire in 1831. Uncertainty over the status of the road was an obvious cause for concern for those who used the road to access their homes, and one property owner, David Massey, raised privacy concerns of his own if the road was declared to be open to the public. On August 1, 2012, the Greensboro Selectboard decided to put these concerns to bed and resolve the uncertainty over the road’s legal status by going through the process to officially lay out Old Perrin Road as a class 4 town highway.

State law dictates a specific process for laying out, reclassifying, or throwing up a town highway in 19 V.S.A. §§ 708 et seq. A selectboard must substantially comply with that statutorily-prescribed process or else its actions may be declared void by a court of law. *In re Bill*, 168 Vt. 439 (1998). The process requires advance notice (both to the interested parties and the public), a site visit to examine the premises, and a public hearing. At the hearing, the selectboard must determine whether “the public good, necessity and convenience of the inhabitants of the municipality” warrant the proposed action and whether monetary damages are due to the affected property owners. The decision must be issued in writing and supported by specific findings. 19 V.S.A. § 710.

What is troubling about the *Massey* case is that the Greensboro Selectboard substantially complied with the statutorily-prescribed process, but still lost at the Superior Court level and then again on appeal to the Vermont Supreme Court. The selectboard even included in its decision that “[t]he public good, necessity and convenience of the inhabitants of the Town of Greensboro require that a class 4 public highway right of way be laid out in such a manner as to provide approximately the same access to adjacent properties as the historical Old Perrin Road” in order “to maximize equity” to the public and adjoining property owners. So what did they do wrong? According to the Superior Court, the Greensboro Selectboard’s decision did not clearly demonstrate how laying out the highway served the general public.

It is understood that when a municipal public body holds a hearing, it is not sufficient for that body to make a conclusive declaration about the issue that is the subject of that hearing. Instead, the body must explain how it came to that decision (i.e., give reasons) and explain how those reasons were supported by the facts of the case. The Greensboro Selectboard did give reasons for its decision on Old Perrin Road, but according to both the Superior Court and the Supreme Court, it did not give enough reasons.

As stated above, the law requires that a selectboard find that laying out, altering, reclassifying, or discontinuing a road is in “the public good, necessity, and convenience of the inhabitants of the municipality.” 19 V.S.A. § 710. The word “necessity” is defined in 19 V.S.A. § 501(1) as “a reasonable need which considers the greatest public good and the least inconvenience and expense to the condemning party and to the property owner. Necessity shall not be measured merely by expense or convenience to the condemning party. Necessity includes a reasonable need for the highway project in general as well as a reasonable need to take a particular property and to take it to the extent proposed.” That same law further directs that when determining “necessity,” a selectboard must consider all of the following factors:

- adequacy of other property and locations;
- quantity, kind, and extent of cultivated and agricultural land which may be taken or rendered unfit for use, immediately and over the long term, by the proposed taking;
- effect upon home and homestead rights and the convenience of the owner of the land;
- effect of the highway upon the scenic and recreational values of the highway;
- need to accommodate present and future utility installations within the highway corridor;
- need to mitigate the environmental impacts of highway construction; and
- effect upon town grand lists and revenues.

Although the Greensboro Selectboard had considered many of the above factors, it did not state any findings regarding the public’s need for the highway by looking at its actual or anticipated public usage or the projected costs associated with its construction and maintenance. The selectboard’s stated purpose in laying out the highway, according to the Superior Court, was not to serve any public purpose, but rather to resolve a dispute between a few adjoining landowners.

On appeal, the Vermont Supreme Court upheld the Superior Court’s decision, holding that while it was “sensitive” to the selectboard’s authority over town roads, the power to lay out a town highway ultimately resides with the superior courts, not the towns. “These highway petitions are, in view of the nature and purpose of the inquiry, addressed largely to the discretionary power of the court...”

Even though the Vermont Supreme Court’s ruling in this case was an entry order by a three-justice panel and therefore not considered as binding precedent for other towns, there are two important takeaways from this case. The first is that it is not enough to simply render a decision when holding a hearing. A public body must also state reasons to support its decision and must address each and every factor that is articulated in the relevant statutes. After all, the very purpose of holding the hearing is to collect evidence and consider arguments that support the ultimate decision. The second takeaway is that not every issue that occurs in a town must be addressed by the town government. As both courts noted here, this dispute could have been resolved “as easily through a declaratory judgment or quiet title action” brought by those most affected by it (the adjoining property owners) rather than the town.

The unpublished entry order is archived at <https://www.vermontjudiciary.org/lc/masterpages/unpublishedeo2011-present.aspx>.

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