

LEGAL AND REGULATORY NOTES, MARCH 2016

Vermont Supreme Court Upholds Town's Decisions Regarding Class 4 Highway

In 2002, the Vermont Supreme Court declared that towns have a great deal of discretion to determine whether and to what extent to maintain class 4 town highways. *Town of Calais v. Cty. Road Comm'rs*, 173 Vt. 620 (2002). The court based its decision on the difference in the way that Vermont statute addresses class 1, 2, and 3 highways compared to the way it addresses class 4 highways. Whereas a town “shall keep its class 1, 2, and 3 highways and bridges in good and sufficient repair during all seasons of the year,” the town’s class 4 highways “may be maintained to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town.” 19 V.S.A. § 310. As the court noted in the *Calais* case, however, the town’s discretion regarding its class 4 highways is not unlimited; decisions must be made pursuant to the town policy and may not be arbitrary or discriminatory.

The court had occasion to revisit its *Calais* decision in the recent case of *Demarest v. Town of Underhill*, 2016 VT 10. The case involved Town Highway 26, a class 4 highway in the Town of Underhill. In the years since 2010 when the highway was reclassified to class 4, the town did only periodic maintenance to the roadbed and its underlying culverts. Not satisfied with the extent of this maintenance, several landowners with property on the highway requested that the county road commissioners intervene pursuant to 19 V.S.A. §§ 970 et seq. and require that the town repair the road. Those statutes give commissioners the authority in certain cases to order a town to make highway repairs if they deem necessary. In the *Demarest* case, the commissioners did in fact order the Town of Underhill to provide maintenance and repair of TH26 and to replace five of the highway’s culverts to the tune of \$68,000. The town opposed the commissioners’ order and appealed it first to the superior court and then to the Vermont Supreme Court.

The latter court found that the county road commissioners had overstepped their authority by imposing their own set of standards for Underhill’s class 4 highways. In fact, the only issue that the commissioners should have reviewed was whether the town had acted in a way that was discriminatory or which constituted “an arbitrary abuse of authority.” Otherwise, the commissioners should have “respect[ed] the Town’s discretion” in applying its own class 4 highway policy. “It is not for this Court to consider the merits of the Town’s justification or reasoning, or that the trial court agree with the Town’s decision or analysis. Our decision in *Calais* requires only that the Town based its decision on the standards and principles in its highway policy, if consistent with § 310(b), and that its decision was not arbitrary or applied in a discriminatory fashion.” Since the plaintiffs in *Demarest* offered no evidence of an arbitrary or discriminatory purpose, the court found that there was no basis to intervene regarding Underhill’s TH26.

The decision in the case emphasizes the need for every town to adopt and adhere to a class 4 highway policy. Although the court did not go so far as to require such policies, it made it abundantly clear that town decisions regarding class 4 roads are more likely to sustain legal challenges if those decisions are based upon written town policies. For towns that do not already have such policies, the VLCT Municipal Assistance Center has developed a Model Class 4 Highway and Trail Policy, which is available [here](#). Towns may customize the policy to include more specific provisions about maintenance and repairs. For instance, the Calais Town Policy states that the town will only provide minimal summer maintenance and that other maintenance and repairs of class 4 highways are generally the responsibility of the adjacent landowners. For more information about these types of provisions, or for assistance in drafting or reviewing a Class 4 Road policy for your town, please contact MAC at info@vlct.org.

The Demarest case is archived [here](#).

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