

## **VERMONT SUPREME COURT RULES MUNICIPALITY NOT RESPONSIBLE FOR MAINTAINING CLASS 4 ROADS**

In an extremely favorable ruling for municipalities, the Vermont Supreme Court recently issued an opinion that further narrows a municipality's responsibility to maintain Class 4 roads. The case arose out of a dispute between the Town of Calais and individuals who own property along a Class 4 road. The road in question had washed out in a storm and, as a result, contained very deep ruts. The Town declined to make the repairs, relying on its Class 4 road policy, enacted by the selectboard in 1996, which provides that maintenance of Class 4 highways will be done by adjacent landowners who "shall bear all costs associated with said fourth class road . . . project," except that the Town Road Commissioner will evaluate each class 4 highway annually and "as time permits will perform minimal [summer] maintenance."

The landowners appealed the Town's decision to the County Road Commissioners who ruled that the Town must "provide reasonable access and safety" for the landowners by spending up to \$1,500 to fill in washes and restore waterbars. The Town appealed the County Road Commissioners' decision to Superior Court, arguing that it had no obligation under state law and its policy to maintain the road.

On appeal, the Superior Court went even further than the County Road Commissioners in terms of finding that the Town is required to maintain the road. In its ruling, the Superior Court ordered the Town to *return the road to its former condition* and placed *no cost limitation* on the Town's obligation to make the repairs.

In support of its decision, the Superior Court held that the Town had not fulfilled its statutory responsibility to promote the public good, necessity, and convenience under 19 V.S.A. § 310(b), which provides: 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, or may be reclassified using the same procedures as for laying out highways and meeting the standards set forth in section 302 of this title.

If the Superior Court decision were to stand, it would turn on its head the advice VLCT and town attorneys have given for years with regard to the obligation of a municipality to maintain Class 4 roads. VLCT's advice, based on 19 V.S.A. § 310(b), has been that a town is not required to regularly maintain a Class 4 highway. To ensure consistency, VLCT also recommended that municipalities adopt a policy, like the policy adopted by the Town of Calais in this case, that clearly sets forth the maintenance obligations that a town is willing to incur for Class 4 roads. Needless to say, VLCT was quite surprised and discouraged that the Superior Court had decided to impose maintenance obligations for a Class 4 highway on a town that actually went so far as to adopt a clear policy on the matter.

Thankfully for municipalities, the Vermont Supreme Court reversed the Superior Court's decision and essentially upheld the advice VLCT has been dispensing to towns regarding the maintenance of Class 4 roads. In a 3-2 decision, the Vermont Supreme Court ruled that, based on a plain reading of the statutes, it is clear that a municipality's obligation to maintain Class 4 roads is discretionary as opposed to the obligation to maintain Class 1, 2 and 3 roads, which is mandatory. In support of its ruling the Court noted the use of the word "shall" in Section 310(a) of Title 19 pertaining to obligation to maintain Class 1,2 and 3 roads and the use of the word may in Section 310(b) pertaining

to the obligation to maintain Class 4 roads was clear evidence of the legislature's intent to make the maintenance of Class 4 roads discretionary.

The Court also relied heavily on the fact that the town had adopted a Class 4 road policy in making its decision. Specifically, the Court provided that:

*The Town has commendably implemented § 310(b) through a general policy, avoiding the kind of ad hoc decision-making that may lead to discriminatory application of discretion. Although the policy establishes less Town responsibility for road repair and maintenance than appellees desire, it is fully consistent with the discretion accorded by § 310(b).*

The Court also noted that the only way for a landowner to get a court to overturn a decision of the selectboard not to maintain a Class 4 road is to show "that the town has not acted pursuant to its policy or has acted in an arbitrary and discriminatory fashion." This part of the ruling further emphasizes the importance of having a policy. Without a policy it will be much easier for a landowner to claim that the town acted *arbitrarily* in declining to maintain a Class 4 road. With a clear policy, based on this decision, a town's broad discretion not to maintain a Class 4 road is extremely likely to be upheld.

In sum, this decision confirms and reemphasizes the advice that we have been giving for years with regard to maintaining Class 4 roads – adopt a clear policy and administer it consistently.

*- Jon Groveman, Director, VLCT Municipal Law Center*

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