May 12, 2025

Testimony to the House Transportation Committee Regarding Trails Language in H.488, 5/9/25

Testimony to the House Committee on Transportation

Attn: Chair Matt Walker

Re: VLCT Testimony on trails language in H.488 and the risk it may pose to municipalities if the Tunbridge case is resolved in favor of the landowner.

May 9, 2025

Dear Chair,

If the trails language included in H.488 is passed, VLCT's Municipal Assistance Center (MAC) attorneys don't think the threat of a takings claim against a municipality is very high for a couple reasons.

First, it has been the generally accepted legal interpretation that towns have the right to maintain their legal trails. The petitioner in the Tunbridge case highlights that there is no explicit municipal authority for the maintenance of legal trails in Vermont Statute. However, Dillon's Rule, which guides the scope of municipal authority, is not so rigid as to require the Legislature to explicitly spell out each and every possible authority, and it accounts for additional functions that may be "incident, subordinate[,] or necessary to the exercise" of those explicit authorities (*Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486, 380 A.2d 64, 66 (1977)). Maintenance authority for legal trails is clearly implied or incident to multiple explicit grants of authority related to legal trails:

- Legal trails are public rights-of-way, and maintenance rights are necessary to preserve e intended use of the easement under common law. The holder of a dominant estate in an easement, though, is entitled to use an easement "in a manner that is reasonably necessary for the convenient enjoyment of the servitude." As a public right-of-way, it is implied that the

holder of the dominant estate (easement holder, e.g., the town) has the authority maintain it for its designated public use.

- Authority to regulate the use of its legal trails. 19 V.S.A. § 304(a)(5), "Duties of selectboard . . . (5) Grant permission to enclose pent roads and trails by the owner of the land during any part of the year, by erecting stiles, unlocked gates, and bars in the places designated and ***to make regulations governing the use of pent roads and trails*** and to establish penalties not to exceed $50.00, for noncompliance." (Emphasis added). If you can regulate the use of trails, it is necessary to be able to maintain them for that use.
- Authority to lay out new legal trials for access or recreational use. 19 V.S.A. § 301(8)(B). "Trail" means a public right-of-way that is not a highway and that: . . . (B) a new public right-of-way laid out as a trail by the selectmen for the purpose of providing access to abutting properties or for recreational use. Nothing in this section shall be deemed to independently authorize the condemnation of land for recreational purposes or to affect the authority of selectmen to reasonably regulate the uses of recreational trails." If you can lay out new trails for recreation, then it is necessary to be able to maintain them for that use.

VLCT's legal opinion is that these changes will add clarity to the existing interpretation and general practice rather than cause a potential liability risk for our members.

Secondly, even if the court sides with the petitioner and rules landowners who hold an interest in the underlying property (abutters) have the exclusive right to maintain legal trails despite their public status, it's not clear that municipalities that rely on these proposed provisions would be subject to a Takings claim for their maintenence. The purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). It's unclear whether a municipality improperly maintaining their legal trails is forcing the landowner who holds an underlying interest in the right-of-way to bear any burden since this is a public right-of-way.

Moreover, legal trails are either a downgraded former town highway or a recreational trail laid out by the selectboard. For each, the town has condemnation authority and there is a damages and appeal process for impacted landowners. 19 V.S.A. §§ 708 et seq. The landowners either assented to the public right-of-way or were compensated for it in the process of laying out the trail or the highway that preceded it. Any case involving a town performing maintenance in the right of way of

a legal trail then will focus only on the damages caused by the maintenance and not the use because the town retains that right in their public right of way. For general trail work this is unlikely to be significant and may resolve with a simple injunction commanding the municipality to stop maintenance.

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Attachments

Letter to House Committeee on Transportation from Kail Romanoff