

## LEGAL AND REGULATORY NOTES, MAY 2017

### Superior Court Reverses Selectboard's Highway Reclassification Decision

At issue in the case of *Fitzgerald vs. Town of Ira*, No. 503-9-16 Rdcv (2017), was the reclassification of two roads in the Town of Ira, Vermont. Following a voter-backed petition by town residents to reclassify the roads, the Ira Selectboard held a hearing and determined that it was in the “best interest of the Town” to reclassify both roads from class 3 to class 4. A landowner appealed to the Rutland Superior Court, which reversed the selectboard’s decision as “arbitrary.” Although the case is a superior court decision not binding on municipalities statewide like a Vermont Supreme Court decision would be, the case is nonetheless a good reminder that selectboards need to do more than just make bare statements in their reclassification decisions, and instead provide factual support and some amount of rationale for those decisions.

The town highways that the selectboard reclassified, Khale and Fish Hill roads, each branch off from a main through-route and each lead to a single home (according to Google Maps). Practically speaking, reclassifying the two roads to class 4 would have minimized the Town of Ira’s duty to maintain and plow the roads. This is because towns are not generally required to maintain class 4 town highways, pursuant to 19 V.S.A. § 310(b). Landowner and plaintiff Mark S. Fitzgerald, whom one could wager resides in one of the two homes located off Khale Road or Fish Hill Road – and preferred to keep the town plowing his road – appealed the selectboard’s decision to the superior court. The plaintiff argued that the town “failed to make the required finding that the reclassification was required by the public good, necessity, and convenience of the inhabitants of the municipality.”

Fitzgerald appealed to the superior court through Rule 75 of the Vermont Rules of Civil Procedure. Generally, these types of appeals to the superior court from a municipal board receive deferential treatment. This means that the superior court will confine its review of a selectboard’s decision to questions of law, “and consideration of evidentiary questions is limited to determining whether there is any competent evidence to justify the adjudication.” In other words, the superior court will not reverse a selectboard’s decision just because they disagree with it, but will focus on whether a town adhered to the statutory process and made a reasonable determination based on the facts presented at the hearing.

In the case of Khale and Fish Hill roads, even with this deferential standard of review, the court nonetheless sided with the plaintiff. The court explained that although the selectboard’s decision briefly discussed plowing, maintenance, and potential savings to the town, “nowhere in the decision does the board offer any explanation whatsoever about why the classification is in the public good or in the best interest of the town.”

As a good example showing why a reclassification of a road is in the best interests of a town, the superior court referenced a Vermont Supreme Court case upholding another selectboard’s reclassification decision. In *Ketchum v. Town of Dorset*, 2011 VT 49, The Dorset Selectboard reclassified a road based on the rationale that snow removal was unsafe, and importantly, this rationale was supported by factual findings that road crew vehicles had slid off the road in the past.

In contrast, with respect to Khale and Fish Hill roads, the court made it clear that the Ira Selectboard's decision failed to contain "any facts" that supported reclassifying these roads to class 4 from class 3. As a result, the superior court concluded that the decision was "arbitrary," reversing the reclassification of the two roads back to class 3.

Beyond the takeaway from this case that highway reclassification decisions must contain rationale accompanied by supporting facts (a requirement generally applicable to any municipal board's quasi-judicial decision) there is, in addition, a standard that selectboards must specifically address relevant to reclassification determinations. This standard requires that a selectboard find that the laying out, altering, reclassifying, or discontinuing of 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 [town] and to the property owner. Necessity shall not be measured merely by expense or convenience to the [town]. 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.

Note that the superior court in *Fitzgerald vs. Town of Ira* did not specifically address or enumerate the "necessity" factors, either because the plaintiff failed to raise the issue or because the court found other means to reverse the selectboard's decision in that case. Nonetheless, selectboards still must consider each relevant "necessity" factor in order to ensure effective decisions less susceptible to reversal by a court.

For further analysis of what it means to be in the "public good, necessity, and convenience of the inhabitants of the municipality," please read the *VLCT News* Reprint article "[Vermont Supreme Court Overturns Selectboard's Highway Decision.](#)"

The *Fitzgerald vs. Town of Ira* case is currently not published online but it is available at the Civil Division of the Rutland Superior Court.

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