

VERMONT SUPERIOR COURT  
CHITTENDEN UNIT  
CIVIL DIVISION

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BRIANNE E. CHASE, TRUSTEE OF THE  
REVOCABLE LIVING TRUST OF  
BARBARA S. EASTMAN,  
Plaintiff

**Vermont Superior Court**

Docket No. 333-4-15 Cncv

v.

**MAR 25 2016**

TOWN OF UNDERHILL,  
Defendant

**Chittenden Unit**

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RULING ON MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO REQUIRE  
JOINER

This is an action concerning a landowner's right of way on a town trail. Plaintiff Brianne E. Chase, Trustee of the Revocable Living Trust of Barbara S. Eastman ("Trust"), seeks declaratory judgment stating that the Trust is entitled to a private right-of-way on a portion of Repa Road in Underhill that is now designated as a trail. The Trust also seeks a declaration that the Town of Underhill ("Underhill") has violated the Trust's constitutional right to equal protection by denying its request for a right-of-way because it is not a resident of Underhill.

The Trust now moves for summary judgment, and Underhill moves for summary judgment on the equal protection claim. Underhill also moves for joinder of necessary parties under V.R.C.P 19(a). Elizabeth M. Demas, Esq. represents the Trust, and Hans G. Huessy, Esq. and Liam L. Murphy, Esq. represent Underhill.

Facts

The following facts are undisputed unless otherwise noted. The Trust owns a parcel of land ("Eastman Parcel") in Westford, Vermont, that is adjacent to and bounded on the East by

the Underhill-Westford town line. Prior to 1972, the Eastman Parcel could be accessed by Goodrich Road from the West or Repa Road from the East.

In 1972, the Town of Westford stopped maintaining several portions of Goodrich Road, which it either discontinued or reclassified as trails. In 1996, Underhill attempted to discontinue a portion of Repa Road to the boundary of the Town of Westford, which is also the boundary of the Eastman Parcel. Neither attempt at discontinuance complied with 19 V.S.A. § 790. In 2000, the Selectboards of Westford and Underhill met regarding the discontinuance of Goodrich Road and a portion of Repa Road. The Town of Westford reclassified Goodrich Road as a trail, and Underhill reclassified 238 feet of Repa Road, from the Westford/Underhill town line (which is also the eastern boundary of the Eastman Parcel) to the Arnold driveway, as a trail with a width of three rods. The Repa Trail abuts the Eastman Parcel.<sup>1</sup>

In 2001, the A. Johnson Company, Joseph Bornstein, Underhill, and Westford settled litigation that arose from the redesignation of Repa Road and Goodrich Road. Pursuant to the settlement agreement, the A. Johnson Company and Bornstein have the right to use the trails by motor vehicles for forestry management.

The Trust asserts that Goodrich Road is impassible. *See* Edwards Aff., Ex. 2. Underhill disputes this fact, arguing that Douglas Edwards, a prospective purchaser of the Eastman Parcel, is not qualified to determine that Goodrich Road is impassible. The Trust also asserts, based on the presence of foundation remnants, that there was a farmstead, including a house,

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<sup>1</sup> The Town disputes that the trail “abuts” the Eastman Parcel, arguing that the Trust’s land “does not abut Repa Trail in the normal sense” because the Trust “owns no land to either side of Repa Trail.” The Town does not proffer any evidence to show that this fact is in dispute. “Abut” means “[t]o join at a border or boundary; to share a common boundary with.” Black’s Law Dictionary (10th ed. 2014); *see Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 208, 762 A.2d 1219, 1225 (2000) (“abut” means “[t]o reach; to touch.... No intervening land”) (citing Black’s Law Dictionary (6th ed. 1990), *Sebree v. Board of County Comm’rs*, 840 P.2d 1125, 1130 (1992) (“abut” means “to touch”); *Miller v. Berryhill Nursery Co.*, 218 N.E.2d 467, 470 (1966) (“abutting” means to end, to border on, to touch)).

approximately 500 feet from the point at which the Repa Trail ends at the Eastman Parcel boundary. *See* Crane Aff., Ex. 6. According to the Trust, Repa Road historically provided access to the Eastman Parcel, “particularly to the farmstead.” Underhill disputes these facts, arguing that there is no evidence that shows that the former buildings were a farmstead, and no evidence that the former owners of the Eastman Parcel “particularly” used Repa Road for access to the farmstead. The parties dispute whether the Eastman Parcel would be inaccessible without access via Repa Trail.

The Trust claims that it sought permission from Underhill to upgrade the trail to allow for vehicular and logging access, to serve a single residential building on the Eastman Parcel. While Underhill’s Response to Plaintiff’s Statement of Undisputed Material Facts purports to dispute this fact, Underhill proffers no evidence that supports its claim that the Trust did not follow required procedures for a permit to access the trail.<sup>2</sup> The Trust’s Statement of Material Undisputed Facts refers to minutes from four Selectboard meetings that support the fact that it sought permission to access its parcel via the Repa Trail, but do not prove what procedure is required or that the Trust followed the required procedure. *See* Ex. 5.

Underhill asserts that applicants must submit a form and pay a \$50 fee prior to issuance of a permit pursuant to 19 V.S.A. § 1111. While Underhill proffers a blank Access Permit Application form, which indicates “\$50+ recording fees,” it proffers no ordinance or affidavit as evidence to prove that this form and fee are required for the specific kind of permission that the Trust seeks for use of the Repa Trail. *See* Ex. A. The Trust does not dispute that it did not submit

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<sup>2</sup> The Town submits its Road, Driveway and Trail Ordinance (Adopted Feb. 3, 2015) and argues that section 6.5 provides that work in a town right-of-way requires an Access Permit. *See* Ex. D. Section 6.5 provides for an application process for permits to access highways, not rights-of-way in general. This section of the ordinance does not relate to trails.

the form or the fee, but disputes Underhill's claim that the existing trail ordinance required it to do so. *See* Underhill Trail Ordinance, Ex. 1; *see also* Crane Aff., Ex. 2.

### The Trust's Motion for Summary Judgment

The Trust's Motion for Summary Judgment requests a declaration "providing that [the Trust] has a common law right to use Repa Trail for access to its land, and prohibiting the Town from interference with its use." Alternatively, the Trust requests an order requiring Underhill "to issue a license pursuant to 19 V.S.A. [§] 1111 to [the Trust], its heirs and assigns, granting it permission to use Repa Trail for agricultural purposes including logging, and to serve a single family residence; which License shall run with the land and be recorded in the Town of Underhill Land Records." Although the Trust does not explicitly state that it moves for summary judgment only on Count II of its complaint (common law right-of-way), it provides no argument supported by undisputed facts that the court can reasonably construe for summary judgment on Counts I (right-of-way under 19 V.S.A. § 717(c)) and III (equal protection).

The first issue is whether the Trust has a private right under the common law to use the Repa Trail to access its land. "The general rule is that an owner of property abutting a public road has both the right to use the road in common with other members of the public and a private right for the purpose of access." Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201, 207 (2000). The Supreme Court has noted in dicta that "when a public road is discontinued or abandoned, the abutting landowner retains the private right of access." Id. There are two requirements for the common law right of access: the road must be public, and the person claiming the right must own land that abuts the road. Id. Underhill does not contest that the Trust has a right-of-way over the Repa Trail to the Eastman Parcel; it simply disputes the scope of the right-of-way.

Even when a landowner has a right of access, that right is limited to “reasonable and convenient access,” the extent of which is a question of fact. Okemo Mountain, Inc., 171 Vt. at 209; see Small v. Kemp, 727 P.2d 904, 910 (Kan. 1986) (“The right of access of an abutting property owner upon a public street or highway is merely a right to reasonable, but not unlimited, access to and from the abutting property.”) There is no dispute that the discontinued Repa Road abutted the Eastman Parcel, but the Trust’s evidence does not sufficiently support the scope of its request to use the trail for access by motor vehicles to serve a residence. See Thompson v. Ryan, No. 2006-286, 2007 WL 5313344, at \*2 (Vt. Feb. 2007) (unpublished mem.) (affirming restriction of the scope of landowner’s right of access based upon his “individual and historic use of the right of way”). The court cannot conclude that Repa Road historically served a residence on the Eastman Parcel based on the settlement agreement between Underhill, A. Johnson, and Bornstein. The evidence of stone ruins that may or may not have been a working farmstead does not prove the manner in which Repa Road was used. Even if the Trust’s right of access includes the use of motor vehicles for logging purposes, the court cannot conclude based on the undisputed material facts that the frequent use of the trail with motor vehicles for access to a residence is the same as, or included within, the periodic use of motor vehicles for logging.

19 V.S.A. § 1111 concerns the permitted use of the right-of-way, and provides that a town may issue permits for use. Concerning town highways, a town

may make such rules to carry out the provisions of this section as will adequately protect and promote the safety of the traveling public, maintain reasonable levels of service on the existing highway system, and protect the public investment in the existing highway infrastructure, but shall in no case deny reasonable entrance and exit to or from property abutting the highways.

19 V.S.A. § 1111(b). The factual record is not yet sufficiently developed for the court to conclude whether Underhill denied reasonable access to and from the Eastman Parcel. To begin

with, the undisputed facts do not show that Underhill actually denied the Trust's requests. Further, the facts do not show whether the Trust followed the procedure to apply for a permit, or what that procedure was. On February 17, 2015, the Selectboard conducted a "public forum" at which Attorney Demas summarized the Trust's requests. Various parties spoke about their concerns. Ex. 5. The public forum concluded and "no specific timeline for determination [was] set." *Id.* The undisputed facts do not support an order compelling Underhill to issue a permit under section 1111.

#### Underhill's Motion for Summary Judgment

Underhill moves for summary judgment on Count III, in which the Trust alleges that Underhill violated its right to equal protection under the law. The Trust alleges that members of the Selectboard stated at a public hearing that the Trust's request is "not a sympathetic one, because [the Trust] is not a resident of Underhill, and therefore not necessarily entitled to access over Underhill public highways." Complaint at 5. The Trust alleges that it "has been the recipient of a consistent pattern of discriminatory conduct, imposed by the Underhill Selectboard, denying the Trust access to its property, due to its status as a[n] owner of land in a different town." *Id.* The Trust frames Underhill's actions as a violation of the Trust's right to equal protection as well as Article 7 of the Vermont Constitution.

A town government may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In determining whether a law violates Article 7 of the Vermont Constitution, the court will consider "(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive." *Baker v.*

State, 170 Vt. 194, 214 (1999). The Trust's theory seems to be that there was no basis, other than the Trust's ownership of land in another town, for Underhill to deny the Trust's request for permission to use the Repa Trail.

Underhill claims that it cannot have violated the Trust's constitutional rights by not issuing a permit under 19 V.S.A. § 1111 because the Trust never submitted the requisite application form and \$50 fee. According to Underhill, any alleged delay in issuing a formal response to the Trust's request is due to the Trust's failure to follow the formal procedure to obtain a permit.

While the record indicates that the Trust requested a right of access, wrote letters to the Selectboard, and attended a series of Selectboard meetings, including a public forum on the issue, the undisputed facts do not establish what Underhill's ordinances require of a person requesting access to a trail, or that Underhill ever denied the Trust's request. The existence of an application form does not alone establish that the form or fee are required, nor does the ordinance related to another Underhill trail, or an ordinance providing for a process to apply for access permits to highways, establish that there is no procedure for applying for a permit to use Repa Trail. The undisputed facts are too incomplete for the court to grant Underhill's request for summary judgment on Count III.

#### Motion to Require Joinder

Underhill moves the court to require joinder, or in the alternative, to dismiss for failure to join indispensable parties. The court must order a person to be made a party if:

- (1) in the person's absence complete relief cannot be accorded among those already parties, or
- (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject

to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest.

V.R.C.P. 19(a). In an action for declaratory relief, "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." 12 V.S.A. § 4721.

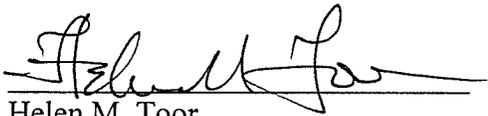
Underhill claims that the Repa Trail passes over land owned by third parties, including David Arnold of South Burlington, Stanley and Sue Stenger of Underhill, and Carl and Carol Menard of Underhill. According to Underhill, these abutting landowners have an interest in the proceeding because "any determination as to the scope of the right-of-way and subsequent improvement and use of the Trail as a road will have an impact" on them. Underhill additionally argues that the abutting landowners could bring their own action contending that the proposed use of the Repa Trail is inconsistent with the scope of the right-of-way.

The Trust argues that Underhill has authority to grant permits to use the trail, and that there is no requirement that the Selectboard include abutting landowners in these decisions. *See* 19 V.S.A. § 304(5) (granting Selectboard the authority to make regulations concerning the use of trails). This argument is unavailing, since this action seeks determination by the court that the owners of the Eastman Parcel are entitled to use motor vehicles on Repa Trail to access a potential future residence, a use that can be distinguished from access for logging purposes or use as a trail. The court's decision could result in substantially increased motor vehicle traffic on the trail. Regardless of whether the abutting landowners would be entitled to participate in Underhill's permitting process for trail use, the court's determination of the scope of the Trust's right of access could impair or impede the abutting landowners' interests. Therefore, the abutting landowners should be joined as necessary parties.

Order

The motions for summary judgment are denied. Underhill's Motion to Require Joinder is granted. The Trust shall file an amended complaint to include David Arnold of South Burlington, Stanley and Sue Stenger of Underhill, and Carl and Carol Menard of Underhill as defendants and proceed with service of process on those parties.

Dated at Burlington this 25<sup>th</sup> day of March, 2016.

A handwritten signature in black ink, appearing to read "Helen M. Toor", written over a horizontal line.

Helen M. Toor  
Superior Court Judge