

CLARKE DEMAS & BAKER, PLLC
Attorneys at Law

RECEIVED
JAN 11 2016
MURPHY SULLIVAN KRONK

C. KIRK CLARKE
ELIZABETH M. DEMAS
BRUCE D. BAKER

MOLLY BUCCI

PHONE: 802-652-1400
FAX: 802-652-1405

346 SHELBURNE ROAD, SUITE 203
POST OFFICE BOX 4484
BURLINGTON, VT 05406-4484

Of Counsel: PETER L. POTTS

January 6, 2016

Christine Brock, Clerk
Superior Court Chittenden Unit
PO Box 187
Burlington, Vermont 05401

Re: *Brianne E. Chase, Trustee of the Revocable Living Trust of Barbara S. Eastman*
Docket No. **333-4-15 Cncv**

Dear Christine:

I am enclosing Plaintiff's Opposition to Defendant's Motion to Require Joinder and/or to Dismiss, with our certificate of service.

Thank you for your assistance. Please give me a call if you have any questions or concerns regarding this matter.

Sincerely,



Elizabeth M. Demas, Esq.
Clarke Demas & Baker, PLLC
346 Shelburne Road, Suite 203
Burlington, Vermont 05401
(802) 652-1400
edemas@cdbesq.com

cc: Hans Huessy, Esq. ✓
Liam Murphy, Esq.
PO Box 4485
Burlington, Vermont 05406-4485
encs

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 333-4-15 Cnev

Brianne E. Chase, Trustee of the Revocable Living
Trust of Barbara S. Eastman
Plaintiff

v.

Town of Underhill
Defendant

CERTIFICATE OF SERVICE

I, Elizabeth M. Demas, attorney for Plaintiff in the above-entitled matter, hereby certify that I served a copy of Plaintiff's Opposition to Defendant's Motion to Require Joinder and/or to Dismiss, to Defendant, by first class mail to Hans G. Huessy, Esq. and Liam L. Murphy at P.O. Box 4485, Burlington, VT 05406-4485, as Attorneys for Defendant Town of Underhill.

Dated at Burlington, Vermont, this 6th day of January, 2016.

By:



Elizabeth M. Demas, Esq.
Clarke Demas & Baker PLLC
346 Shelburne Road, Suite 602
Burlington, Vermont 05401

CLARKE DEMAS
& BAKER

ATTORNEYS AT LAW

346 SHELburne RD., 2ND FLOOR

P. O. BOX 4484

BURLINGTON, VT 05406-4484

TELEPHONE (802) 652-1400

FAX (802) 652-1405

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No.333-4-15 Cncv

Brianne E. Chase, Trustee of the Revocable Living
Trust of Barbara S. Eastman
Plaintiff

v.

Town of Underhill
Defendant

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REQUIRE JOINDER
AND/OR TO DISMISS PURSUANT TO V.R.C. P. 12 (b) (7) AND 19(a)**

NOW COMES Plaintiff Brianne E. Chase, Trustee of the Revocable Living Trust of Barbara S. Eastman ("Plaintiff"), by and through her attorneys, Clarke Demas & Baker, PLLC, and, pursuant to V.R.C.P. 56, hereby opposes Defendant Town of Underhill's Motion to Require Joinder and/or Dismiss Pursuant to V.R. C.P. 12(b) (7) and 19(a). Defendant asks for joinder of adjoining landowners as necessary parties or dismissal of this suit. Plaintiff submits this opposition.

MEMORANDUM OF LAW

Defendant claims that the abutting landowners are necessary parties, who must be joined in this action, presumably because the Town of Underhill's authority to regulate the use of Repa Trail is no greater than that of the abutting landowners. Neither Vermont statutory provisions nor Underhill's own former or present Trail and Road policies agree with this position.

**THE UNDERHILL SELECTBOARD HAS SOLE STATUTORY AUTHORITY TO
REGULATE ROADS AND TRAILS.**

Plaintiff agrees that the "scope of the ROW is a matter of common law." It is also a matter of statutory law. 19 V.S.A. Section 301(8) defines a "trail" as "*a public right-of-way which is not a highway, and which (A) previously was a designated town highway having the same width as the*

designated town highway, or a lesser width if so designated...” Exclusive authority to regulate trails is granted the selectmen in 19 V.S.A. 304 “Duties of Selectmen (a) *It shall be the duty and responsibility of the selectboard of the town to, or acting as a board, it shall have the authority to: ...*” (5) *grant permission to ... make regulations governing the use of pent roads and trails and to establish penalties not to exceed \$50.00 for noncompliance. Permission shall be in writing and recorded in the town clerk’s office*”.

10 V.S.A. Section 304 also authorizes the selectboard the duty, responsibility and authority to lay out town highways and bridges, and take any action consistent with the provisions of law which are necessary for or incidental to the proper management and administration of town highways. There is no requirement that the selectboard include the abutting landowners in these decisions, and, in fact, the Town of Underhill’s Trail Policy does not require the inclusion of such abutting neighbors..

The “Underhill Trail Ordinance” that was in effect when Plaintiff sought a license or permit to use Repa Trail required the person requesting a permit apply for permission with the Selectboard. The Ordinance did not require that the prospective permittee include the abutting landowners in their request. The abutting landowner was not considered a “necessary party” to that proceeding. The Town cited 19 V.S.A. Section 204(5) (set out above) as partial authority for its ordinance.

The newest “Road, Driveway and Trail Ordinance Town of Underhill, Vermont”, adopted by the Underhill Selectboard on February 3, 2015” (to take effect 60 days thereafter, subsequent to the filing of this action), provides in section 7.3 “*Trails. ... Permission for private repair, maintenance, improvement, or restoration of trails maybe granted by the Selectboard under such conditions as it deems appropriate, including the posting of bonds and provision of signed releases relieving the Town of liability.*” No permission from abutting landowners is required.

THE STATUS OF THE TRAIL AND THE AUTHORITY OF THE SELECTBOARD TO

REGULATE THE TRAIL WAS PREVIOUSLY AFFIRMED BY THE COURT.

In *The A. Johnson Company And Joseph Bornstein. v. the Town of Westford and the Town of Underhill*, Docket No. S1201-00 Cnc, two Westford landowners brought suit requesting a license for access over Repa Trail in Underhill and Goodrich Road in Westford. The Stipulation and Order issued by Chittenden Superior Court granted the A. Johnson Company and Bornstein the right to travel over Repa Trail to reach their Westford properties, for motor vehicle access and logging purposes. The Stipulation and Order found that: “4. Pursuant to 19 V.S.A. Section 304, the Boards of Selectmen of the respective Towns not only have the duty and responsibility, but the authority to make regulations governing the use of trails and to extend permission regarding the use of such trails.” Ironically, those same abutting landowners who the Town of Underhill now solicitously wants included in this suit, were not included in the prior matter, even though the suit involved access over the same 238 foot section of Repa Trail.

Plaintiff brought this suit because the Underhill Selectboard unreasonably refused to issue it a permit to use Repa Trail for access to its Westford land. The Selectboard had, and still has, statutory authority to grant Plaintiff permission to use Repa trail, as it had previously granted the A. Johnson Company and Joseph Bornstein. There is no statutory requirement that abutting neighbors participate in this decision.

Therefore, Plaintiff respectfully requests that Defendants Motion to Require Joinder and/or to Dismiss Pursuant to V.R.C.P. 12 (B) (7) And 19(a) be denied.

DATED at Burlington, Vermont this 6th day of January, 2016.

By: 
Elizabeth M. Demas, Esq.
Attorney for Plaintiff
Clarke Demas & Baker, PLLC
346 Shelburne Road, Suite 602
Burlington, Vermont 05401

Vermont Statutes
Title 19. HIGHWAYS
Chapter 3. TOWN HIGHWAYS

Current through 2015 Legislative Session

§ 301. Definitions

As used in this chapter:

- (1) "Discontinued highway" means a previously designated class 1, 2, 3, or 4 town highway as to which, through the process of discontinuance, all rights have been reconveyed to the adjoining landowners.
- (2) "Legislative body" includes boards of selectmen, aldermen, and village trustees.
- (3) "Selectmen" includes village trustees and aldermen.
- (4) "Pent road" is any town highway which, by written allowance of the selectmen, is enclosed and occupied by the adjoining landowner with unlocked stiles, gates, and bars in such places as the selectmen designate.
- (5) "Throughway" means a highway specially designated giving traffic traveling on the throughway the right-of-way at all intersections.
- (6) "Town" includes incorporated villages and cities.
- (7) "Town highways" are class 1, 2, 3, and 4 highways:
 - (A) that the towns have authority to exclusively or cooperatively maintain; or
 - (B) that are maintained by the towns except for scheduled surface maintenance performed by the agency pursuant to section 306a of this title.
- (8) "Trail" means a public right-of-way which is not a highway and which:
 - (A) previously was a designated town highway having the same width as the designated town highway, or a lesser width if so designated; or
 - (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.

Cite as 19 V.S.A. § 301

History. Added 1985, No. 269 (Adj. Sess.), § 1; amended 1991, No. 47, § 1; 2009, No. 50, §89.

§ 304. Duties of selectmen.

Vermont Statutes

Title 19. HIGHWAYS

Chapter 3. TOWN HIGHWAYS

Current through 2015 Legislative Session

§ 304. Duties of selectmen

- (a) It shall be the duty and responsibility of the selectboard of the town to, or acting as a board, it shall have the authority to:
- (1) see that town highways and bridges are properly laid out, constructed, maintained, altered, widened, vacated, discontinued, and operated, when the safety of the public requires, in accordance with the provisions of this title;
 - (2) take any action consistent with the provisions of law, including determinations made pursuant to subdivision 302(a)(3)(B) or subsection 310(a) of this title, which are necessary for or incidental to the proper management and administration of town highways;
 - (3) purchase tools, equipment, and materials necessary for the construction, maintenance, or repair of highways and bridges, and to incur indebtedness from the municipal equipment loan fund as established in 29 V.S.A. § 1601 for these purchases. It may contract with governmental or private agencies for the use of tools, equipment, road building material, and services;
 - (4) order hills graded, surfaces graveled, or treated with a dust layer, or surface treated with bituminous material, upon any town highway either laid out by them or already existing;
 - (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. Permission shall be in writing and recorded in the town clerk's office;
 - (6) make special regulations as to the operation, use, and parking of motor vehicles on highways under their jurisdiction, as provided in Title 23;
 - (7) make special regulations as to the speed of motor vehicles using the highways under their jurisdiction, as provided in Title 23;

- (8) lay out winter roads and lumber roads pursuant to chapter 9 of this title;
 - (9) change the course of a stream, pursuant to chapter 9 of this title;
 - (10) erect embankment on stream, pursuant to chapter 9 of this title;
 - (11) construct a watercourse, drain, or ditch from a highway across lands of any person, pursuant to chapter 9 of this title;
 - (12) lay out, alter, classify, and discontinue town highways, pursuant to chapter 7 of this title;
 - (13) forward the town's annual plan for the construction and maintenance of town highways to the agency of transportation;
 - (14) keep accurate accounts, showing in detail all moneys received by them including from whom and when received and all moneys paid out by them, to whom and for what purpose, and settle the accounts with auditors not less than 25 days before the annual meeting;
 - (15) receive grant funds and gifts from public and private sources;
 - (16) unless the town electorate votes otherwise, under the provisions of 17 V.S.A. § 2646, appoint a road commissioner, or remove him or her from office, pursuant to 17 V.S.A. § 2651. Road commissioners, elected or appointed, shall have only the powers and authority regarding highways granted to them by the selectmen;
 - (17) number houses and name highways if desired;
 - (18) participate in cooperative purchasing arrangements with the state or other municipalities;
 - (19) prepare a transportation plan and capital budget for transportation for voter approval;
 - (20) retain staff and consultant assistance if needed in carrying out duties and powers;
 - (21) issue permits for work in highway rights-of-way pursuant to 19 V.S.A. chapter 11;
 - (22) regulate the location and relocation of utility wires and poles pursuant to 30 V.S.A. chapter 71; and
 - (23) publish and adopt after public hearing(s) road specifications for highways to be built or rebuilt within the town in compliance with applicable statutes.
- (b) Nothing in this chapter shall be construed to affect the rights and powers conferred on incorporated villages and cities by their charters to appoint street commissioners, collect and disburse highway taxes, and repair and maintain highways under their care.

Cite as 19 V.S.A. § 304

History. Added 1985, No. 269 (Adj. Sess.), § 1; amended 1999, No. 156 (Adj. Sess.), § 28, eff. May 29, 2000; 2001, No. 64, § 21, eff. June 16, 2001.

UNDERHILL TRAIL ORDINANCE

TRAVEL ON TRAILS

SECTION 1. AUTHORITY. This is a civil ordinance adopted under authority of 24 V.S.A. §§ 1971 and 2291(14), and 19 V.S.A. § 304(5).

SECTION 2. PURPOSE. The purpose of this ordinance is to prevent environmental damage and pollution caused by vehicular traffic on the trail. Such damage and pollution are hereby deemed to be a public nuisance.

SECTION 3. DEFINITIONS. For purposes of this ordinance, the following definitions shall apply:

- a. *Motor Vehicle* shall include all vehicles propelled or drawn by power other than muscular power, except tractors used entirely for work on the farm, vehicles running only upon stationary rails or tracks, motorized highway building equipment, road making appliances or snowmobiles, or implements of husbandry.
- b. *Operate, operating or operated* as applied to motor vehicles shall include *drive, driving and driven* and shall also include an attempt to operate, and shall be construed to cover all matters and things connected with the presence and use of motor vehicles, whether they be in motion or at rest.
- c. *Owner* shall include any person, corporation, co-partnership or association, holding legal title to a motor vehicle, or having exclusive right to the use or control thereof.
- d. Crane Brook Trail shall mean the Legal Trail on New Road (Town Highway #26).

SECTION 4. ACTIVITY PROHIBITED. The operation of a motor vehicle is prohibited on the Crane Brook Trail from November 1st until May 1st unless the operator of the vehicle has a valid permit issued by the Underhill Selectboard.

SECTION 5. PERMITS.

- a. Permits shall be issued only to persons who, in the judgment of the Selectboard, have a legitimate need to operate a vehicle on the Crane Brook Trail. For the purposes of this ordinance, 'legitimate need' shall mean a compelling personal or business purpose.
- b. The only acceptable permit shall be one entitled "TOWN OF UNDERHILL PERMIT TO OPERATE A MOTOR VEHICLE ON THE CRANE BROOK TRAIL" and signed by the members of the Underhill Selectboard. One copy of the permit shall be issued to the permittee and one copy shall be filed with the Underhill Town Clerk.
- c. Permits shall be valid for residents and property owners so long as they continue to be residents or property owners. All other permits shall be renewed annually.

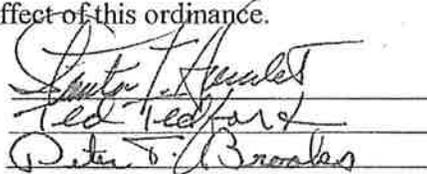
SECTION 6. PENALTIES. Any person who operates a motor vehicle on the Crane Brook Trail from November 1st to May 1st or who allows another person to operate their motor vehicle on Crane Brook Trail without a permit shall be fined \$50.00, with a waiver fee of \$35.00. If the owner and the operator of a vehicle being operated without a permit are not the same person, the owner and the operator shall each be liable for the fine of \$50.00 or the waiver fee of \$35.00.

SECTION 7. ENFORCEMENT OFFICERS. Enforcement shall be performed by the Underhill Town Constable or by any officer of the Chittenden County Sheriff's Department or by any other Vermont law enforcement officer.

SECTION 8. SEVERABILITY. If any portion of this ordinance is held unconstitutional or invalid by a court of competent jurisdiction, the remainder of the ordinance shall not be affected.

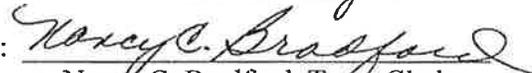
SECTION 9. EFFECTIVE DATE: This ordinance shall become effective 60 days after its adoption by the Underhill Selectboard. If a petition is filed under 24 V.S.A. § 1973, that statute shall govern the taking effect of this ordinance.

Stanton Hamlet, Chair
Walter 'Ted' Tedford
Peter T. Brooks



Wednesday, January 30, 2002 at 11:45 AM

Received for record: February 6, 2002

Attest: 
Nancy C. Bradford, Town Clerk

ADOPTION HISTORY:

1. Agenda item at regular Selectboard meeting held on Wednesday, January 30, 2002.
2. Read and approved at regular Selectboard meeting on Wednesday, January 30, 2002 and entered in the minutes of that meeting which were approved on February 12th, 2002
3. Posted on Friday, February 1st, 2002.
Underhill Town Hall
Underhill Country Store
Jacob's IGA
Underhill Center Post Office 05490
Underhill Flats Post Office 05489
4. Notice of adoption published in the Burlington Free Press on Saturday, February 2, 2002 with a notice of the right to petition.

**TOWN OF UNDERHILL
PERMIT TO OPERATE A MOTOR VEHICLE
ON CRANE BROOK TRAIL**

PURSUANT TO THE ORDINANCE REGULATING TRAVEL ON THE CRANE BROOK TRAIL, as defined in the ordinance, the Underhill Selectboard hereby issues this permit to operate a motor vehicle on the trail to:

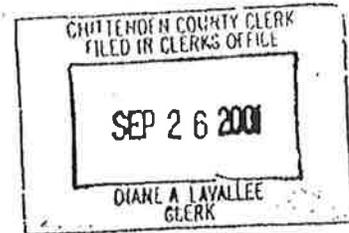
- A. _____ (land owner/resident of the trail) and his/her invited guests); such permit to be valid so long as he/she is an owner/resident; or
- B. _____, a person determined by the Underhill Selectboard to have a legitimate need to operate a motor vehicle on the trail, such permit to expire one year from this date.

Date

For the Selectboard

Westford, Vermont, Town Clerk's Office
Oct. 5, 2001 at
1 o'clock 20 minutes P M
received for record and recorded in
book 93 on page 321-325 of
Land records.
Attest Dianna Rogers
Town Clerk

STATE OF VERMONT
CHITTENDEN COUNTY, SS.



THE A. JOHNSON COMPANY and)
JOSEPH BORNSTEIN,)
Petitioners)
v.) CHITTENDEN SUPERIOR COURT
TOWN OF WESTFORD, Respondent,) DOCKET NO. S1201-00 CnC
and TOWN OF UNDERHILL, Respondent)

STIPULATION TO DISMISSAL WITH PREJUDICE AND ORDER

Now come the Petitioners, The A. Johnson Company and Joseph Bornstein, and the Respondents, Town of Westford and Town of Underhill, in the above-captioned matter, with the approval of their undersigned counsel, and hereby stipulate and agree that the above-captioned matter may be DISMISSED WITH PREJUDICE under the following terms and conditions.

1. Consistent with the Return of the Board of Selectmen for the Town of Westford dated July 28, 2000 and recorded in Volume 88, Page 297 of the Westford Land Records, it is determined that the public good and convenience requires that the Goodrich Road, Westford Town Highway No. 24, be classified as a trail in its entirety. Pursuant to 19 V.S.A. §775, the Selectmen and now this Court designate that the trail be continued at the same width or three rods.

2. Consistent with the Return of the Board of Selectmen for the Town of Underhill dated August 2, 2000 and recorded in Volume 102, Page 33 of the Underhill Land Records, it is

ITZEL, PAGE &
LETCHER, PC
ATTORNEYS AT LAW
1 RATTIFY STREET
WINDMOUNT, VERMONT
05402-1507



determined that the public good and convenience requires that the Repa Road, Underhill Town Highway No. 21, be classified as a trail from the Westford/Underhill Town Line, a distance of 238 feet, more or less, to the Arnold Driveway and the conjunction with the Class III portion of Repa Road. Pursuant to 19 V.S.A. §775, the Selectmen and now this Court designate that said portion of Repa Road shall be continued as a trail at the same width or three rods.

3. Both Joseph Bornstein and The A. Johnson Company may need to continue to utilize the Goodrich Road and Repa Road (hereinafter referred to as the "Trails") for timber management and removal of timber and other forest products on their respective properties as well. As such, the parties enter into this Stipulation and Order to ensure that the Petitioners may not be deprived of access to, or any economic benefits from, their respective parcels.

4. Pursuant to 19 V.S.A. §304, the Boards of Selectmen of the respective Towns not only have the duty and responsibility, but the authority to make regulations governing the use of trails and to extend permission regarding the use of such trails. Likewise, the Board of Selectmen in taking the action noted above and creating Trails in both Westford and Underhill, did not intend by their respective actions to prevent access to and egress from the respective lots of the Petitioners/Appellants.

5. The A. Johnson Company and Joseph Bornstein may use the reclassified Town Highways, now designated as Trails, for access

to The A. Johnson Company and Joseph Bornstein parcels, respectively.

6. The Town of Westford and Town of Underhill shall have no obligation to construct, maintain, plow or repair said Trails within the respective Towns, and all responsibility for maintenance, construction, plowing and repair shall be the responsibility of The A. Johnson Company or Joseph Bornstein, as the case may be.

7. The A. Johnson Company shall acquire no vested rights or interest in the Trails by the construction of or improvements to said Trails for however long a period of time, nor from the use thereof for however long a period of time.

8. The A. Johnson Company and Joseph Bornstein, prior to the construction of any improvements or maintenance of the Trails, shall obtain the approval of the Board of Selectmen and/or Road Commissioner for the respective Towns wherein said Trail is located.

9. The A. Johnson Company and Joseph Bornstein are hereby granted, pursuant to 19 V.S.A. §1111, the right to use the Trails by any motor vehicles, pick-up trucks, four-wheel drive vehicles, logging trucks, logging equipment and the like in order to continue their programs of forestry management on The A. Johnson Company lands and the Bornstein parcel, respectively, and, periodically, to effect the removal of timber from their respective lots during the term of this Stipulation. The parties

agree that the designation of said Town Highways as Trails does not preclude the use of the herein described vehicles.

10. The parties to this Stipulation recognize that the existence of Goodrich Road, or Westford Town Highway No. 24 has been challenged in the matter of Timothy W. Budell and Della J. Budell, Petitioners v. Town of Westford, Respondent, Docket No. S1149-00CnC. If the resolution of the issues in the Budell case affects the existence of the Westford Town Highway No. 24 and the Court determines that said Town Highway does not exist, then this Stipulation is a nullity.

11. This Stipulation shall run with the land and be valid for and binding upon the Town of Westford, the Town of Underhill, The A. Johnson Company, Joseph Bornstein, and their respective heirs, successors, and assigns.

12. The parties understand and agree that this Stipulation will be incorporated into a Court Order in this case.

DATED at Burlington, Vermont, this 14th day of September, 2001.

TOWN OF WESTFORD

By:

Timothy M. Eustace, Esq.

DATED at Montpelier, Vermont, this 19th day of September, 2001.

TOWN OF UNDERHILL

By:

Paul S. Gillies, Esq.