VERMONT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

DANIEL MUCHERINO, et al., Plaintiffs v. TOWN OF MARSHFIELD and TAL, LLC, Defendants	Docket No. 299-5-13 Wncv

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case arises out of the partial discontinuance of Cree Farm Road by the Selectboard of the Town of Marshfield. Plaintiffs are residents of Marshfield who, among them, own four parcels with a shared driveway that accesses a portion of Cree Farm Road that was not discontinued. They have used the now-discontinued portion of Cree Farm Road as the only reasonable means of accessing an electric utility easement that benefits their parcels and burdens that of Defendant TAL, LLC. In the complaint, Plaintiffs seek a declaration that the discontinuance is invalid because the Selectboard violated statutory discontinuance procedures and substantive requirements. They also claim that the discontinuance violates the Common Benefits Clause. In the alternative, if the court affirms the discontinuance, Plaintiffs seek a judgment giving them access to their utility easement via the discontinued portion of the road. The Town counterclaimed seeking a declaration that two agreements it signed with Plaintiffs Donny and Dimples Mucherino, promising not to install a "turnaround" encroaching on their property, no longer have any legal effect.

Cross-motions for summary judgment are pending. The Town's motion argues that Plaintiffs already have an access easement as a common law way of necessity, by operation of 19

V.S.A. § 717(c), and that TAL has already conveyed, or attempted to convey, the easement to them. Plaintiffs' motion addresses the validity of the discontinuance and the request for a judgment establishing an access easement.[1]

I. Undisputed Facts

The facts are almost entirely undisputed. Cree Farm Road is in the Town of Marshfield. It extends from the Calais Road past the property of Plaintiffs and onto the property of TAL, where it eventually dead-ends. The road is a hilly, Class 3 public highway that is unpaved, narrow, and has steep embankments. There is a turnaround area at the end of the road. School buses, municipal service vehicles, and other vehicles use the turnaround. "[I]t is not practical or possible for most vehicles to turn around outside of the established pull-off." Plaintiffs' Statement of Material Facts ¶ 4 (filed Dec. 16, 2013).

At some point, TAL installed two small outbuildings, a zip-line, and a three-bay open shed on its property without first obtaining municipal zoning permits. As reflected in the minutes of the Town Selectboard meeting on November 18, 2011, TAL wanted to cure the lack of permits, but was unable to because the development had occurred within the setback from Cree Farm Road. The undesirable prospect was that TAL might have to tear down the new buildings. At the meeting, the Selectboard explained as follows,

> when this situation has come up in the past, rather than tearing down a building, property owners have opted to ask the Town to discontinue part of a road [curing the setback violation]. Jim has met with Road Foreman Dan Tetreault and there is a location for a turnaround. The road would need to be surveyed from the Calais Road (at the property owner's expense) and the property owner would need to pay for the materials for the turnaround. Bob noted that all of the buildings would be in compliance if the road ended at the gate.

[1] Defendant TAL is named as a "party needed for just adjudication" but no direct relief is sought against it. TAL has not responded to either motion.

Complaint, Ex. 1. TAL thus petitioned for a partial discontinuance of the road.

The Selectboard held a discontinuance hearing on December 31, 2011 to consider ending the road at a point 1,772 feet from where it intersects with the Calais Road. At some point, Mrs. Mucherino had expressed concerns about ending the road at that spot. As a result, "they decided to go as far in as possible while still keeping the buildings in compliance with zoning." A new site visit and discontinuance hearing to consider the new endpoint was held on May 15, 2012. The Selectboard decided to partially discontinue the road and issued findings and conclusions on June 19, 2012.

The Selectboard found as follows. In 1957, the Marshfield Selectboard attempted to partially discontinue Cree Farm Road, but municipal records were insufficient to determine the intended endpoint. Cree Farm Road extends from the Calais Road until it enters the property of TAL, where it eventually dead ends. That portion of the road functions as a driveway to TAL and includes the road's turnaround at its endpoint. Discontinuing it as proposed would cure TAL's zoning violations. The findings acknowledge the Mucherinos' concerns about accessing their utility easement and that if vehicles could not use the existing turnaround, they likely might turn around on the Mucherinos' property. The Selectboard summarily concluded that the public good, necessity, and convenience supported discontinuance at the minimum point necessary to cure the zoning violations, but did not explain why.

The decision included a condition that TAL would give the Town an easement allowing the Town and the Town School District—but not the general public—to use the discontinued portion of the road to reach the turnaround. There was no provision for any turnaround for the public. Though the decision itself is silent on the matter, the Selectboard determined at the discontinuance hearing that TAL also would give the Mucherinos an easement ensuring access to

their electric utility easement "unless one already exists."

Things did not go as planned. A letter dated September 6, 2012 from the Selectboard to Avi Datner, the manager of TAL, characterizes the discontinuance as "tentative." It notes that the Town had received the turnaround easement but no access easement from TAL to the Mucherinos had been recorded. It threatened that if the issue was not resolved within 30 days the zoning administrator would take enforcement action against the zoning violations. The letter also includes this:

> Enclosed please find an invoice in the amount of $597.67 for the Town's costs incurred to effect the discontinuance. We do not feel that the taxpayers should bear the cost of the discontinuance, since the sole purpose for discontinuing that portion of the road is to resolve zoning violations for structures that were placed too close to the Town road.

Complaint, Ex. 4. At its December 18, 2012 meeting, the Selectboard instructed the Town Clerk "to send a letter to Mr. Datner saying the road is not discontinued because it has been a year and he has not filed his [property transfer tax return]. At this point the process would have to be started all over again; he is in violation of the Town's zoning regulations." With that, the first discontinuance was discontinued.

In January 2013, TAL again requested a partial discontinuance of Cree Farm Road. A hearing to consider the matter was ordered for February 19, 2013. According to the notice for that hearing, the purpose of the hearing was "to decide whether to confirm the Selectboard's decision of June 19, 2012. At that time the Board voted to discontinue a portion of the road but necessary easements were not completed within the required time frame." The February 19 hearing was continued to March 19, at which time the Selectboard again voted in favor of discontinuance. New findings and conclusions were issued on April 16, 2013. No new site visit had occurred. The new discontinuance decision is virtually identical to the vacated June 19, 2012 decision. This time,

TAL complied with its conditions. The access easement to the Mucherinos apparently has never been recorded, however, because the Mucherinos have not signed the property transfer tax return. Plaintiffs filed this case in May 2013.

Plaintiffs have objected to the discontinuance consistently. In addition to concerns about access to their utility easement, they objected that vehicles would not be able to turn around safely on the road without access to the turnaround on TAL's property.

II. Validity of the Discontinuance

The Town argues that there is no controversy in this case because Plaintiffs already have an easement allowing them access to their utility easement. This argument presumes the validity of the discontinuance and ignores the Town's own counterclaim. The threshold issue in this case is whether the discontinuance is valid. The easement issue matters only if it is.

The discontinuance of town highways is controlled by statute. The selectboard must examine the premises and hold a hearing on the matter. 19 V.S.A. §§ 709, 710. Upon doing so, it may discontinue the highway if doing so serves the "public good, necessity, and convenience of the inhabitants of the municipality." Id. § 710. The Selectboard's findings and conclusions must be issued within 60 days of the examination and hearing. Id. § 711(a). "A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway . . . that is subsequently discontinued shall retain a private right-of-way over the former town highway . . . for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way." Id. § 717(c).

The Vermont Supreme Court has explained the nature of the court's review of a discontinuance decision as follows:

> The rule consistently applied in Vermont has been that "[t]he procedure to be followed in laying out or discontinuing a highway is wholly statutory and the

> method prescribed must be substantially complied with or the proceedings will be void." We presume that action taken by a selectboard in the scope of its official duties is in accordance with statutory requirements. Nonetheless, because the selectboard of a town constitutes an inferior tribunal with certain quasi-judicial powers, when a selectboard acts outside its statutory authority with respect to a discontinuance, the defect is akin to a lack of jurisdiction over the subject matter. The proceedings and order would be void and may be impeached in any way and at any time.

In re Bill, 168 Vt. 439, 442 (1998) (citations omitted). The Court has noted that discontinuance statutes should not be applied so strictly as to produce absurd results. Id. at 445. It also has noted that the substantive standard—public good, necessity, and convenience—is broad and gives the selectboard "a high degree of discretion." Town of Calais v. County Road Commissioners, 173 Vt. 620, 621 (2002).

A. Procedural Defect

Plaintiffs argue that the discontinuance is void because the Selectboard failed to view the premises in the course of the second discontinuance proceeding. The Town argues that it complied with statutory requirements because it already had viewed the site in the course of the first discontinuance proceeding and there was no point to doing it again.

There was no strict compliance. The discontinuance statutes plainly require the selectboard to notify the public of the date and time of both the site visit and the hearing. Those events then must occur and the discontinuance decision must be issued within 60 days thereafter.

The more important question is whether the failure to view the site the second time *substantially complied* with the statutes. In re Bill, 168 Vt. at 442. Vermont case law is not particularly clear on how loose the substantial compliance may be, and cases from elsewhere reveal a variety of approaches to the doctrine. A prominent treatise concludes, at least somewhat helpfully, as follows: "Substantial compliance means 'actual compliance in respect to the substance essential to every reasonable objective of the statute.' This definition provides a test for

judging how much compliance is sufficient." 3 Sutherland Statutory Construction § 57:26 (7th ed.) (WL updated Nov. 2013) (footnote omitted).

In this case, skipping the second site visit did not substantially comply with the statute; it ignored it. A site visit is one of three critical steps in the discontinuance process. The first discontinuance proceeding was over and a new one had begun. The Town's argument that the Selectboard already had viewed the site—a full year earlier—and thus did not need to view it again is no different from simply asserting that the Selectboard's familiarity with the road relieved them of the site visit requirement altogether. Members of selectboards likely are familiar with roads proposed for discontinuance before the formal site visit frequently. The statute nevertheless requires a formal site visit during discontinuance proceedings. The Vermont Supreme Court has specifically said that "[b]efore discontinuing a road, the town's selectboard must give public notice, examine the premises, and hold a hearing. Failure to comply with these procedures will render any purported discontinuance void." MacAdams v. Town of Barnard, 2007 VT 61, ¶ 12, 182 Vt. 259 (citations omitted). The Town failed to comply with these procedures. Enforcing them does not produce an absurd result. The discontinuance is void.

B. Substantive Compliance

Because the Town has issued two nearly identical discontinuance decisions and may choose to correct the procedural noncompliance and issue a third nearly identical discontinuance decision, the court will address Plaintiffs' substantive argument. Plaintiffs argue that the Town has attempted to discontinue the road purely to cure a zoning violation unilaterally created by a private person to the detriment of the public, which would no longer have a safe way to turn around at the end of a narrow, dead-end road. The Town argues that there is no point to maintaining a public highway that merely serves as a private driveway, this discontinuance was needed to clarify

or correct the defective 1957 discontinuance, and discontinuance avoids the risk of potentially costly litigation with the landowner over the zoning violation.

The issue is whether the record includes evidence that supports the conclusion that discontinuance benefits the public good, necessity, and convenience. The general rule is that "[a] street or alley cannot be vacated for a private use, i.e., for the purpose of devoting it to the exclusive use and benefit of a private person or corporation, but it may only be vacated to promote the public welfare." 11 McQuillin Mun. Corp. § 30:190 (3d ed.) (WL updated Oct. 2013) (footnote omitted). "However, if accommodating a landowner is just one of the reasons for vacating a street, this accommodation does not of itself invalidate the ordinance if the public interest is also promoted by vesting the fee in the abutting owner." Id. § 30:189 (footnote omitted). "Ordinarily a city may not upon vacation of a street reserve to itself any rights in it." Id. § 30:188. This is so because the reservation itself demonstrates that the public interest is not served by the discontinuance. *See, e.g.*, Gable v. City of Cedar Rapids, 129 N.W. 737, 739 (Iowa 1911) ("The very fact that it was considered necessary to reserve to the city the use of these streets for water and sewer pipes shows that they will also be needed for the use of the general public.").

The Town's arguments that it discontinued Cree Farm Road to avoid pointlessly maintaining a private driveway, to clarify or correct the defective 1957 discontinuance, and to avoid the risk of potentially costly litigation with the landowner over the zoning violation are not supported by the evidence. Any interest in correcting the 1957 discontinuance does not explain why it might benefit the public to leave the public without access to the turnaround. While the Selectboard clearly wanted to cure TAL's zoning violation, nothing in the record indicates that it

was concerned to avoid litigation with TAL or that TAL had ever threatened to litigate anything.[2] The Selectboard itself expressly stated that the exclusive purpose of the discontinuance was to cure the zoning violation. Complaint, Ex. 4. That is a private benefit to TAL.

If the private benefit to TAL were one effect of discontinuance among others that were in the public interest, the decision to discontinue may well have been within the Selectboard's power. However, the undisputed fact is that vehicles cannot safely turn around on the road without use of the turnaround at the end of the road on TAL's property. *See* Plaintiffs' Statement of Material Facts ¶ 4 (filed Dec. 16, 2013). The Selectboard conceded as much in its decision by effectively reserving the ability to use the turnaround to itself and for school buses. It originally appears to have contemplated creating a new turnaround elsewhere. *See* Minutes of Selectboard Meeting (November 18, 2011) (noting that TAL would have to pay for materials for a turnaround). Nothing in the record indicates that a new turnaround ever was created, however. The discontinued portion of the road clearly served an important public purpose of allowing access to the turnaround. It was not merely a private driveway for TAL.

The Selectboard's discretion to determine the public's interest is broad. Here, that discretion was abused. The discontinuance would provide an exclusive benefit to TAL to the detriment of the public good, necessity, and convenience.

III. Other Claims

Plaintiffs claimed the need for an access easement memorialized in a judgment of the court if the discontinuance were found to be valid. The discontinuance is void. Cree Farm Road remains a public highway. The easement issues are moot.

[2] Ordinarily, one would expect the public interest to be served by enforcing zoning regulations against those in violation rather than by finding ways to deviate from zoning requirements by altering the public highway system.

In the complaint, Plaintiffs claim a violation of the Common Benefits Clause as a separate count. The parties have not briefed this claim. However, the only relief sought due to the alleged constitutional violation is a declaration that the discontinuance is void. Because the discontinuance is void for other reasons, this claim is moot.

The sole remaining claim in this case is the Town's counterclaim. The Town alleges that it signed an agreement with Plaintiffs to the effect that if it were to put in a new turnaround, the turnaround would not encroach on Plaintiffs' property. It claims that it did this to assuage any hard feelings following the discontinuance. Because Plaintiffs sued anyway, it asserts that the agreement lacks consideration and it seeks a declaration that the agreement no longer has any legal effect. Given the court's ruling that the discontinuance is void, this issue appears moot.

ORDER

The Town's motion for summary judgment is denied. Plaintiffs' motion for summary judgment is granted. No independent claim is asserted against Defendant TAL. Thus, judgment will be entered for Plaintiffs. If the Town disagrees that its counterclaim is moot, it may request that the court reopen the case to resolve that matter. Any such request shall be filed by April 1, 2014.

Dated at Montpelier, Vermont this 13th day of March 2014.

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Helen M. Toor
Superior Court Judge