

Kathleen Ramsay

From: Benjamin Putnam <Benj@ndp-law.com>
Sent: Thursday, June 13, 2019 6:10 PM
To: Kathleen Ramsay
Subject: RE: Creek Road

Hi Kathleen,

Thank you for asking me to look into this issue. As some initial background, when a Town highway is discontinued, the Vermont highway laws do not provide a statutory right to damages for landowners whose land was formerly served by the highway. The only remedy specifically prescribed by statute is the following, set forth in 19 V.S.A. 717(c):

“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 or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way.”

Thus, in the case of Creek Road, the landowners served by the discontinued portion would be able to continue using it as a private right of way, with maintenance and repairs being at their own expense. Practically speaking, however, this right would not be of much use if the former roadway ended up eroding into the Otter Creek, so the landowners could end up landlocked.

To avoid this potentially harsh result, the Town could voluntarily take steps to provide alternate access to affected parcels. The specific option you have asked about is whether the Town can assist the Perrins by obtaining a private right of way and constructing a private road to serve their property.

I am not aware of any outright legal prohibition of this approach. The Perrins (and any other affected landowners) would have a right to challenge the discontinuance of Creek Road at a hearing and ultimately in court. The resolution could take the form of a settlement agreement under which the Perrins agreed to waive their rights to challenge the discontinuance in exchange for the Town agreeing to construct (or pay for construction of) the new road.

That having been said, such an arrangement could be criticized as granting a private benefit to a particular landowner, and therefore representing an unfair or unwise use of public funds. The Town could address this criticism by arguing that it is the most cost-effective way to mitigate the effects of the decision to discontinue Creek Road. Nevertheless, the Town should consider whether it would be setting a precedent that could spur other landowners (including other parties affected by the discontinuance of Creek Road as well as other future discontinuances) to ask for similar treatment.

Another issue to note is that the private right of way would need to be purchased or donated through a voluntary transaction. I do not believe condemnation would be available in this situation, since the road would not be a formal town highway.

If the Town did choose this approach, I would recommend against having the Town conduct ongoing maintenance or repairs to the private road. There are liability concerns with having Town employees maintain private property, and it could open the door to requests to have the Town maintain other private roads throughout Middlebury.

As an alternative to the proposal under consideration, the Town could consider a few other options:

1. Lay out the new road as a town highway, rather than a private right of way. This approach would be less vulnerable to criticism that the Town would be conveying a private benefit to a single landowner. The land for the road could

be acquired either through voluntary sale or donation, or by a formal condemnation. Depending on the circumstances, damages might need to be paid for the land taken by the highway. The highway would need to be open to the public, although in theory it could be laid out as a pent road (which could be blocked at the entrance with an unlocked gate). The level of maintenance provided by the Town would depend on whether the highway was laid out as Class 3 or Class 4.

2. Lay out the road initially as a new town highway, but discontinue it at a future date if allowing full public access turned out to create issues. The road would initially be open to the public and could be Town-maintained. If and when the Town decided to discontinue it, a formal hearing process would be required. If the final decision was to discontinue the road, the landowners served by it would retain a private right of way over under Section 717(c), but would need to maintain it themselves.

If you have any further questions or would like to follow up on any of these issues, please let me know.

Best regards
Benj

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From: Kathleen Ramsay [mailto:KRamsay@TownOfMiddlebury.org]
Sent: Monday, June 03, 2019 4:59 PM
To: Benjamin Putnam
Subject: Creek Road

Hi Benj,

As I mentioned this morning, we have a question about Creek Road.

Peter DeGraff presented his [summary and update on Creek Road](#) to the Selectboard on May 28.

At line 275 of the [May 28 Selectboard meeting minutes](#) the question about the legality of the town building/partially maintaining a private driveway came up.

Please let me know if you have any questions or need additional information about this inquiry.

Thanks!
Kathleen

Kathleen Swington Ramsay

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