

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

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| Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. §248, for a certificate of public good authorizing the installation and operation of the "Chelsea Solar Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont |  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|

**INTERVENORS' CLARIFICATION OF COMMENTS AND  
RESPONSE TO PETITIONER'S POST-HEARING FILINGS**

**NOW COMES** Intervenors Apple Hill Homeowners' Association and Mount Anthony Country Club, by and through their attorneys Valsangiacomo, Detora & McQuesten, P.C., and hereby submit the following clarification of comments and response to Petitioner's Post-Hearing Filings as follows:

**I. Introduction**

On March 29, 2019, the Public Utility Commission held oral argument in the above referenced proceeding during which the PUC posed factual questions relating to the "single plant" issue, inter alia, about whether and what portion of Willow Road was public and what length of roadway was to be constructed or upgraded as part of the project proposal. Undersigned counsel indicated her limited familiarity with the facts of this complicated docket and suggested that the Applicant could best answer those questions. Unfortunately, Attorney Thomas Melone and Attorney Michael Melone chose to absent themselves and neither appeared at oral argument to answer the PUC's questions. Instead, they and Attorney Hayden have been filing piecemeal post-hearing documents, some of which contain baseless allegations. In response, Intervenors' counsel offers the following information so that it may assist the PUC:

## **II. Willow Road – length of road to be constructed**

As the PUC is aware, Intervenors' Counsel appeared at oral argument under a limited appearance and is representing the Intervenors *pro bono*. In analyzing whether the access road and infrastructure of the Apple Hill Solar and Chelsea Solar projects are shared and constitute a single "plant," the PUC questioned whether Willow Road was public, where it ended, what it looked like on the ground, and what length of roadway was being built, upgraded, improved or extended by the applicant. The PUC also sought to confirm the length of the GMP power line extension that will serve both projects and determine all components of infrastructure that will be shared by or will serve both Apple Hill Solar and Chelsea Solar.

In discussing the single plant issues, undersigned counsel explained that she was not aware of the exact length of road (indicating that she thought it was  $\frac{1}{4}$  or  $\frac{1}{2}$  mile) but would try to gather that information and provide it during the reserved rebuttal time period. So, during Ms. Hayden's portion of the oral argument, the Intervenors alerted their counsel that "it's a mile extension," which undersigned counsel misunderstood to mean that the road extension was one mile, when they were actually referring to the power line extension. Thus, undersigned counsel's rebuttal response, that the road was being extended one mile, was obviously mistaken and is withdrawn.

## **III. No site control over the access road - again**

With regard to the issue of Petitioner's site control over Willow Road – there is none. Now that Thomas Melone has clarified that Willow Road is a town Class IV road to the boundary of the parcel property, his latest filing demonstrates a complete lack of understanding of municipal road law in Vermont and the Town's legal obligation, or lack thereof, to maintain or repair Class IV roads.

The Petitioner has failed to provide any evidence of an agreement executed between the

Petitioner and the Town which would provide the Petitioner with the right and authority to construct, upgrade, or improve Willow Road. The current road corridor is a path through the woods and would need to be improved significantly to provide shared access to one or both solar projects and accommodate the construction vehicular traffic which would ingress and egress the sites from the yet-to-be-improved Class IV road known as Willow Road. However, that cannot happen without written agreements between Petitioner and the Town and such agreements are not in the record because they do not exist. Thus, once again, the Petitioner has proposed the Chelsea solar project without rights to construct, improve, upgrade or extend the access roadway.

#### IV. Vermont Class IV Road Law

Attorney Thomas Melone misapprehends Vermont municipal highway law. In his August 2, 2019 filing to the PUC, he states as follows:

**As a town highway, it is the obligation of the Town to repair and maintain it.** Under 19 V.S.A. § 301(7) “Town highways” are “class 1, 2, 3, and 4 highways ... that the towns have authority to exclusively or cooperatively maintain.” 19 V.S.A. § 304 provides that “[i]t shall be the duty and responsibility of the selectboard of the town to ... (1) see that town highways and bridges are ... maintained ... when the safety of the public requires ... (2) take any action ... 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 ...” As the aerial photos establish, Willow Road between the existing homes and the project parcel is regularly used by vehicles. See, Exhibit CS-BW-7. **Willow Road is a class 4 town highway which the Town on its own or in cooperation with landowners has the obligation to maintain. Willow Road does not differ in any respect for purposes of a CPG from every other public road in Vermont.**

See Melone filing to PUC dated April 2, 2019 (emphasis supplied). The bold/underlined portions of Mr. Melone's argument are erroneous statements of law and are unsupported by the record evidence. Vermont statutes provide the authority to towns to exclusively or cooperatively maintain

its roads; however state law does NOT require or impose an obligation upon towns to maintain or repair their Class IV roads. The Supreme Court has explained:

Vt. Stat. Ann. tit. 19, § 310(b) grants towns discretion in determining whether to maintain and repair Class 4 highways. The list of factors to be considered in § 310(b), which includes the necessity of the town, the public good, and the convenience of the inhabitants, reinforces the highly discretionary nature of the town's powers. This discretion is not unlimited, however, and citizens challenging a town's decision under § 310(b) can prevail if they show that the town has not acted pursuant to its policy or has acted in an arbitrary and discriminatory fashion. A town's decision will therefore be upheld if supported by its road policy and based on standards or principles.

*David Demarest, et al. v. Town of Underhill*, 201 Vt. 185; 138 A.3d 206 (2016). See copy of case attached hereto.

In the present case, Petitioner has failed to provide any road policy of the Town of Bennington that would demonstrate that it has imposed such a Class IV maintenance and repair obligation upon itself nor has there been any written agreement between the Town and the Petitioner to allow an entity other than the Town, to make improvements to the Class IV road. Thus, Petitioners have failed to demonstrate that they have permission to improve the town road or that the Town is even obligated to repair and maintain the Class IV footpath that currently exists.

**V. Single Plant Issue: Lack of Candor / False representations of material fact**

Lastly, on the issue of the false representations made to the PSB and the Supreme Court regarding the single plant appeal: A trial is the search for the truth. *Nix v Whiteside*, 475 US 157, 171 (1986). This essential court (or administrative tribunal) function of seeking the truth in a contested matter must always be its uncompromised goal. Truth is the foundation of legitimacy of the courts. In order to foster this goal professional participants in the courts business are bound by rules which are intended to foster and preserve truth as the most basic element of the court system. Vermont Rule of Professional Conduct 8.3, which applies to lawyers and judges, requires

reporting of these issues. A lawyers Oath of Office requires the reporting to the judge.

In recognition of the critical role truth plays in our court system, witnesses can be subject to criminal prosecution for purposely not telling the truth. Without strict adherence to the rules intended to protect and preserve this unique aspect of the courts function, citizen trust and confidence will be lost.

There appears to be a pattern of misconduct by these developer-lawyers that strikes to the very heart of the integrity of the judicial process intended to reach the truth. Failure to zealously enforce the rules which are intended to protect truth in the PUC court process will result in loss of citizen trust and confidence in the PUC, and will ultimately compromise its integrity. The CPG should be denied as a consequence of the Petitioner providing information to the PSB and the Supreme Court, that was known to be false at the time of submission, and which was left uncorrected for five years.

**DATED** at Barre, County of Washington and State of Vermont this 5<sup>th</sup> day of April, 2019.

**APPLE HILL HOMEOWNERS ASSOCIATION and  
MOUNT ANTHONY COUNTRY CLUB**

By: /s/  
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Neutral

As of: April 5, 2019 10:30 AM Z

## **Demarest v. Town of Underhill**

Supreme Court of Vermont

January 15, 2016

No. 15-248

### **Reporter**

2016 VT 10 \*; 201 Vt. 185 \*\*; 138 A.3d 206 \*\*\*; 2016 Vt. LEXIS 7 \*\*\*\*

David Demarest, et al. v. Town of Underhill

**Prior History:** [\*\*\*\*1] On Appeal from Superior Court, Chittenden Unit, Civil Division. Dennis R. Pearson, J.

[Demarest v. Town of Underhill, 195 Vt. 204, 87 A.3d 439, 2013 Vt. LEXIS 84 \(2013\)](#)

**Disposition:** Reversed. Judgment entered for defendant, Town of Underhill.

### **Core Terms**

highway, repairs, trial court, appellees, public good, culverts, convenience, discriminatory, inhabitants, roadway, intersection, residents

### **Case Summary**

#### **Overview**

**HOLDINGS:** [1]-The trial court erred in requiring that a town perform certain maintenance on a Class 4 road, as the town's decision was made pursuant to its road policy, which provided that the town was not required to regularly maintain a Class 4 highway and which properly implemented [Vt. Stat. Ann. tit. 19, § 310\(b\)](#), and there was no evidence of an arbitrary or discriminatory purpose in the implementation of the town's policy concerning Class 4 highways.

#### **Outcome**

Reversed; judgment entered for town.

### **LexisNexis® Headnotes**

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Public Improvements > Bridges & Roads

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Governments > Local Governments > Duties & Powers

[HN1](#) **Standards of Review, De Novo Review**

In Vermont, a town's duties with respect to roads are entirely statutory. The applicability of this statutory duty is a question of law, which the court reviews de novo.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Duties & Powers

[HN2](#) **Public Improvements, Bridges & Roads**

[Vt. Stat. Ann. tit. 19, § 310\(b\)](#) grants towns discretion in determining whether to maintain and repair Class 4 highways. The list of factors to be considered in [§ 310\(b\)](#), which includes the necessity of the town, the public good, and the convenience of the inhabitants, reinforces the highly discretionary nature of the town's powers. This discretion is not unlimited, however, and citizens challenging a town's decision under [§ 310\(b\)](#) can prevail if they show that the town has not acted pursuant to its policy or has acted in an arbitrary and discriminatory fashion. A town's decision will therefore be upheld if supported by its road policy and based on standards or principles.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Duties & Powers

### [HN3](#) **Public Improvements, Bridges & Roads**

The Town of Underhill Road Policy echoes the permissive language in [Vt. Stat. Ann. tit. 19, § 310\(b\)](#), providing that a class 4 highway may be maintained to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town, and adding that accordingly, the town is not required to regularly maintain a Class 4 highway.

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Duties & Powers

### [HN4](#) **Public Improvements, Bridges & Roads**

The standard in *Town of Calais v. Cty. Road Comm'r's* does not require Class 4 road policies to add to the language of [Vt. Stat. Ann. tit. 19, § 310\(b\)](#). Nor does that standard require substantive analysis of the road policy itself. Rather, Class 4 road policies must implement [§ 310\(b\)](#).

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Duties & Powers

### [HN5](#) **Public Improvements, Bridges & Roads**

The Vermont Supreme Court's decision in *Town of Calais v. Cty. Road Comm'r's* requires only that a town based its decision regarding maintenance of a Class 4 road on the standards and principles in its road policy, if consistent with [Vt. Stat. Ann. tit. 19, § 310\(b\)](#), and that its decision was not arbitrary or applied in a discriminatory fashion.

Administrative Law > Judicial Review > Standards of Review

Governments > Public Improvements > Bridges & Roads

Governments > Local Governments > Duties & Powers

### [HN6](#) **Judicial Review, Standards of Review**

The only rational construction of [Vt. Stat. Ann. tit. 19, § 310\(b\)](#) and [Vt. Stat. Ann. tit. 19, § 970 et seq.](#), one fully consistent with their broad language, is that the commissioners, as well as the trial court and the appellate court, must review a selectboard's decisions on repair of a Class 4 road consistent with the broad new power the legislature gave the selectboard in this area.

## Headnotes/Summary

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### Summary

**Appeal** by town from order requiring it to maintain Class 4 highway. Superior Court, Chittenden Unit, Civil Division, *Pearson, J.*, presiding. *Reversed*.

### Headnotes

#### VERMONT OFFICIAL REPORTS HEADNOTES

#### [VT1](#) 1.

Highways > Generally > Responsibilities of Government

**[\*\*185]** In Vermont, a town's duties with respect to roads are entirely statutory. The applicability of this statutory duty is a question of law, which the Court reviews de novo.

#### [VT2](#) 2.

Highways > Generally > Responsibilities of Government

The statute dealing with highways, bridges, and trails grants towns discretion in determining whether to maintain and repair Class 4 highways. The list of factors to be considered in the statute, which includes the necessity of the town, the public good, and the convenience of the inhabitants, reinforces the highly

discretionary nature of the town's powers. This discretion is not unlimited, however, and citizens challenging a town's decision under the statute can prevail if they show that the town has not acted pursuant to its policy or has acted in an arbitrary and discriminatory fashion. A town's decision will therefore be upheld if supported by its road policy and based on standards or principles. [19 V.S.A. § 310\(b\)](#).

[VT3.](#)  3.

Highways > Generally > Responsibilities of Government

The standard in *Town of Calais* does not require Class 4 road policies to add to the language of the statute dealing with highways, bridges, and trails. Nor does that standard require substantive analysis of the road policy itself. Rather, Class 4 road policies must implement the statute. [19 V.S.A. § 310\(b\)](#).

[VT4.](#)  4.

Highways > Generally > Responsibilities of Government

The trial court erred in requiring that a town perform certain maintenance on a Class 4 road. The town's decision was made pursuant to its road policy, which provided that the town was not required to regularly maintain a Class 4 highway and which properly implemented the statute dealing with highways, bridges, and trails, and there was no evidence of an arbitrary or discriminatory purpose in the implementation of the town's policy concerning Class 4 highways. [19 V.S.A. § 310\(b\)](#).

[VT5.](#)  5.

Highways > Generally > Responsibilities of Government

The Court's decision in *Town of Calais* requires only that a town based its decision regarding maintenance of a Class 4 road on the standards and principles in its road policy, if consistent with the statute dealing with highways, bridges, and trails, and that its decision was not arbitrary or applied in a discriminatory fashion. [19 V.S.A. § 310\(b\)](#).

[VT6.](#)  6.

Highways > Generally > Responsibilities of Government

The only rational construction of the statute dealing with highways, bridges, and trails and the statutes regarding county road commissioners, one fully **[\*\*186]** consistent with their broad language, is that the commissioners, as well as the trial court and the appellate court, must review a selectboard's decisions on repair of a Class 4 road consistent with the broad new power the Legislature gave the selectboard in this area. [19 V.S.A. §§ 310\(b\), 970 et seq.](#)

**Counsel:** *Christopher D. Roy of Downs Rachlin Martin PLLC*, Burlington, for Petitioners-Appellees.

*John W. O'Donnell of Bergeron, Paradis & Fitzpatrick LLP*, Burlington, for Respondent-Appellant.

**Judges:** Present: **Dooley, Skoglund, Robinson and Eaton, JJ., and Hoar, Supr. J., Specially Assigned.**

**Opinion by:** EATON

## Opinion

**[\*P1] [\*\*\*206] Eaton, J.** The Town of Underhill (Town) appeals from a trial court order affirming a decision of the County Road Commissioners requiring the Town to maintain a segment of Town Highway 26 (TH 26), a **[\*\*\*207]** Class 4 highway.<sup>1</sup> The Town contends that the trial court misconstrued and incorrectly applied the statutory provisions for the maintenance of Class 4 roads and erroneously established its own maintenance standard. We agree with the Town and reverse.

**[\*P2]** TH 26 has existed, in some form, for nearly 150 years. In its present configuration, TH 26 is a 1.54 mile-long, single-lane roadway that intersects Irish Settlement Road to the north, running south until it terminates near a beaver pond at the beginning of the Crane Brook Trail, a legal **[\*\*\*\*2]** trail that goes on to intersect with Pleasant Valley Road. Because of the roadway's gradient, which rises from about 910 feet at the intersection with Irish Settlement Road to 1040 feet at its highest point, runoff generally drains in a constant stream towards the intersection with Irish Settlement Road.

<sup>1</sup> TH 26 is also known as Fuller Road or New Road.

**[\*P3]** In 2001, the Town sought to reclassify a segment of TH 26 between Irish Settlement Road and Pleasant Valley Road as a legal trail, and the remainder of the roadway as a Class 4 highway. Following protracted litigation, these changes became effective in June 2010, and TH 26 became part of the Town's six miles of Class 4 highways.

**[\*P4]** Prior to the reclassification of TH 26, the Town performed periodic maintenance and repair work to both the roadway and **[\*\*187]** the twenty-two culverts that were installed along and under TH 26 over the past thirty years. Although the ditches along TH 26 do not appear to have been maintained since 2010, the Town has continued to do some work, primarily the addition of base material to the roadway. For example, in April 2013, the Town put down 115 cubic yards of 1-and-¼ inch fractured stone. Following severe storms in late May and early June 2013, which caused increased **[\*\*\*\*3]** runoff, the Town made repairs to culverts #1 through #4 at or near the intersection with Irish Settlement Road. The Town also put down another 108 cubic yards of crusher run gravel in late June 2013, followed by another 62 cubic yards in August 2013.

**[\*P5]** Appellees David Demarest, Jeffrey Moulton, and Jonathan Fuller own property on TH 26 in the Town of Underhill. Appellees Fuller and Demarest reside at their properties full time, while two additional residents along the road are part-time residents. On February 28, 2012, appellees filed a notice of insufficiency pursuant to [19 V.S.A. § 971](#) requesting maintenance of TH 26, which had been largely deferred following the roadway reclassification. By letter dated March 1, 2012, the Town denied appellees' allegations, asserting that TH 26 was being maintained to the extent required by the necessity of the Town, the public good, and the convenience of the inhabitants of the Town. In April 2012, appellees brought an action for the appointment of County Road Commissioners pursuant to [19 V.S.A. § 971 et seq.](#) to compel the Town to undertake repairs of TH 26. Specifically, appellees sought repairs and maintenance to drainage, culverts, and the road surface, so as to make it reasonably **[\*\*\*\*4]** safe and accessible for appellees' use as residents of the Town.

**[\*P6]** Three Commissioners were appointed by the trial court. Following proceedings, as required by statute, the Commissioners filed a report with the trial court on June 26, 2013.<sup>2</sup> The Commissioners **[\*\*\*208]** found that TH

26 had undersized culverts, inadequate drainage, insufficiently spaced culverts, unmaintained ditches, lack of proper road crown, evidence of road flooding due to unmanaged beaver pond construction, and inadequate road **[\*\*188]** cover. The Commissioners' report unanimously concluded that TH 26 was "out of repair or unsafe for travel, and that the public good demand[ed] that [TH 26] ... be repaired." The Commissioners acknowledged that under the Town's policy "the town is not required to regularly maintain a class [4] highway," although "class IV highway[s] may be maintained to the extent required by the necessity of the town, the public good, and the convenience of the inhabitants of the town." Despite the Town's policy, however, the Commissioners found that "by making improvements and maintaining the road in the past [the Town] created a situation where property owners abutting [TH 26] have a justifiable expectation that maintenance and repair **[\*\*\*\*5]** will continue." The Commissioners thus ordered the Town to bring all of TH 26 into compliance with all standards and specifications applicable to any private road in the Town serving three or more residences, specifically ordering that the Town replace all five of the culverts that it had graded as "fair" or "poor."<sup>3</sup> According to the Commissioners' estimate, the cost of the updates to TH 26 would be \$68,000. The Town appealed the Commissioners' report pursuant to [19 V.S.A. § 976](#).

**[\*P7]** On appeal, the trial court entered judgment against the Town, adopting the Commissioners' report in part and modifying it in part. Providing that the Town could not "act arbitrarily and must still observe some minimal road maintenance and/or construction criteria which **[\*\*\*\*6]** will ensure basic safety and reliability," the trial court required the Town to undertake many, but not all, of the Commissioners' recommendations. Specifically, the trial court found the following repairs or maintenance to be either "minimal and basic improvements necessary on [the] record," required for "basic safety and convenience," necessary "to restore [TH 26] to basic class 4 condition," or "consistent with minimal observance of the standard of necessity, public good, and convenience": the replacement of five culverts rated as "fair" or "poor"; the addition of

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in substandard condition and present a safety risk because they could fail, which could result in the critical intersection of TH 26 and Irish Settlement Road being over-topped or washed away in the next big storm.

<sup>3</sup> Culverts #2, #3, #14, #15, and #22 were rated by the Town as "poor" or "fair." At least eleven other culverts were rated as "good."

<sup>2</sup> The Commissioners adopted a report filed by appellees' engineer, which indicated that at least five of the culverts are

minimally adequate base and top surface material over all culverts; widening of the road in at least a few spots to twelve feet to allow for the passage of emergency vehicles; ditching maintenance along the entire length of the road; and rebuilding of the most seriously defective stonework around the **[\*\*189]** culverts. The Town moved for reconsideration, which the trial court denied.

**[\*P8]** [VT11](#)<sup>↑</sup> [1] This appeal followed. The Town contends that the trial court erred in requiring maintenance of TH 26 because the decision whether or not to undertake repairs of a Class 4 highway is within the Town's discretion. Specifically, the Town raises two arguments: **[\*\*\*\*7]** (1) that the trial court erred in its interpretation of [19 V.S.A. § 310\(b\)](#) by failing to recognize that [§ 310\(b\)](#) allows for discretion in determining whether to maintain and repair Class 4 highways as long as that discretion is not exercised in an arbitrary and discriminatory fashion; and (2) that this error resulted in the trial court's establishing and applying its own maintenance standard, which was different from both [§ 310\(b\)](#) and the Town of Underhill Road Policy. [HN1](#)<sup>↑</sup> In Vermont, **[\*\*\*209]** a town's duties "with respect to roads are entirely statutory." [Sagar v. Warren Selectboard](#), 170 Vt. 167, 171, 744 A.2d 422, 426 (1999). "The applicability of this statutory duty is a question of law, which [this Court] reviews de novo." [In re Town Highway No. 20](#), 2012 VT 17, ¶ 61, 191 Vt. 231, 45 A.3d 54.

**[\*P9]** [VT12](#)<sup>↑</sup> [2] In [Town of Calais v. County Road Commissioners](#), 173 Vt. 620, 621, 795 A.2d 1267, 1268 (2002) (mem.), we held that [HN2](#)<sup>↑</sup> [19 V.S.A. § 310\(b\)](#) grants towns discretion in determining whether to maintain and repair Class 4 highways. The list of factors to be considered in [§ 310\(b\)](#), which includes the necessity of the town, the public good, and the convenience of the inhabitants, reinforces the highly discretionary nature of the town's powers. This discretion is not unlimited, however, and citizens challenging a town's decision under [§ 310\(b\)](#) can prevail if they show "that the town has not acted pursuant to its policy or has acted in an arbitrary and discriminatory fashion." [Id. at 624](#), 795 A.2d at 1271. A town's decision will **[\*\*\*\*8]** therefore be upheld if supported by its road policy and based on standards or principles. *Id.*; see also [In re Handy](#), 171 Vt. 336, 345, 764 A.2d 1226, 1235 (2000) (describing "a decision arrived at without reference to any standards or principles" as arbitrary and capricious ad hoc decisionmaking) (quotation omitted).

**[\*P10]** In [Town of Calais](#), we affirmed the town's

decision declining to perform maintenance and repairs of a Class 4 highway, finding that it was pursuant to a general town policy that maintenance of Class 4 highways was the responsibility of adjacent **[\*\*190]** landowners, except with respect to "minimal [summer] maintenance." [173 Vt. at 620](#), 795 A.2d at 1269 (alteration in original). We found that the town had "commendably implemented [§ 310\(b\)](#)," thereby "avoiding the kind of ad hoc decision-making that may lead to discriminatory application of discretion." [Id. at 621-22](#), 795 A.2d at 1269.

**[\*P11]** [HN3](#)<sup>↑</sup> The Town of Underhill Road Policy echoes the permissive language in [§ 310\(b\)](#), providing that "[a] class [4] highway may be maintained to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town," and adding that, "[a]ccordingly, the town is not required to regularly maintain a class [4] highway." In its decision, the trial court indicated that because the Town's road policy mirrors [§ 310\(b\)](#), it lacks "any real substance **[\*\*\*\*9]** against which to determine whether [it was] in compliance with its own policy." Instead, the trial court read additional requirements into the standard, such that it also considered whether the Town "observed some minimal road maintenance and/or construction criteria which will ensure basic safety and reliability."

**[\*P12]** [VT13.4](#)<sup>↑</sup> [3, 4] Although we agree with the trial court's description of the Town's road policy as largely parroting the language of [§ 310\(b\)](#), [HN4](#)<sup>↑</sup> the standard in [Town of Calais](#) does not require Class 4 road policies to add to the language of [§ 310\(b\)](#). Nor does that standard require substantive analysis of the road policy itself. Rather, Class 4 road policies must implement [§ 310\(b\)](#). Although the Town's road policy adds little to the statutory language and provides little guidance, it implements [§ 310\(b\)](#), emphasizing the discretionary nature of the decision to maintain Class 4 highways. The Town's decision declining to undertake repairs or maintenance of TH 26 was made pursuant to its policy, which specifically provides that the Town "is not required to regularly maintain a class [4] highway."

**[\*P13]** Whether the Town's decision was arbitrary or discriminatory depends on the Town's duty under its road policy, which **[\*\*\*210]** includes consideration **[\*\*\*\*10]** of the Town's necessity, the public good, and the convenience of the inhabitants of the Town. Opining that the Town's decision amounted to standardless, ad hoc decisionmaking and an abuse of discretion, the trial court acknowledged that while it is

within the Town's "statutory prerogative" to spend less on the maintenance of Class 4 highways than appellees might **[\*\*191]** prefer, this prerogative must be "within reason and based on non-arbitrary factors." The trial court's exploration of this prerogative ended there, however. Rather than addressing the Town's decisionmaking process, the trial court undertook its own analysis of the need for repairs and maintenance, finding certain repairs recommended by the Commissioners to be necessary minimal and basic improvements and still others to be "basic safety and convenience requirements," or "consistent with minimal observance of the standard of necessity, public good, and convenience," and "needed to restore [TH 26] to basic Class 4 condition." Although the trial court did find the Town's decision to be arbitrary, it was "from a strictly road maintenance and proper engineering perspective," rather than resulting from the Town's implementation of **[\*\*\*\*11]** its policy, and was without "actual discriminatory animus against the residents of [TH 26]."

**[\*P14]** [VT/5](#)<sup>↑</sup> [5] The Town, relying on the language in its road policy, determined that TH 26 "is being maintained to the extent required by the necessity of the Town, the public good and the convenience of the inhabitants of the Town." It is not for this Court to consider the merits of the Town's justification or reasoning, or that the trial court agree with the Town's decision or analysis. [HN5](#)<sup>↑</sup> Our decision in [Town of Calais](#) requires only that the Town based its decision on the standards and principles in its road policy, if consistent with [§ 310\(b\)](#), and that its decision was not arbitrary or applied in a discriminatory fashion. There is no evidence of an arbitrary or discriminatory purpose in the implementation of the Town's policy concerning Class 4 highways. Accordingly, there is no basis for a finding that the decision was arbitrary or outside the scope of the Town's broad discretion.

**[\*P15]** [VT/6](#)<sup>↑</sup> [6] We note appellees' concern that the broad discretion under [§ 310\(b\)](#) binds the Commissioners and the trial court, leaving them virtually powerless to reach a differing conclusion absent a showing of arbitrary and discriminatory decisionmaking. **[\*\*\*\*12]** This argument was raised, and addressed by this Court, in *Town of Calais*. We again note, as we did in that case, that although "it is difficult to imagine a circumstance under which any class 4 road would ever be repaired," even when required by the public good, that is not "the policy adopted by the Legislature, and we must implement the Legislature's policy choice rather than the court's." [Town of Calais](#), 173 Vt. at 624, 795 A.2d at 1271. Nearly

fifteen **[\*\*192]** years have passed since that decision, but the Legislature has yet to amend either [§ 971 et seq.](#) or [§ 310\(b\)](#) to clarify the Commissioners' role, or lack thereof, as it relates to repairs and maintenance of Class 4 highways. We are left to restate our conclusion from *Town of Calais* rejecting the argument that [§ 971 et seq.](#) provides for review of a town's decision not to repair a roadway in favor of the argument that [HN6](#)<sup>↑</sup> "[t]he only rational construction of [§ 310\(b\)](#) and [§ 970 et seq.](#)], one fully consistent with their broad language, is that the commissioners, as well as the superior court and this Court, must review a selectboard's decisions on repair of a class 4 road consistent with the broad new power the Legislature gave the selectboard in this area." [Id. at 622-23, 795 A.2d at 1271.](#)

**[\*P16]** **[\*\*211]** Although the Town's road policy establishes less town responsibility for Class 4 highway **[\*\*\*\*13]** repair and maintenance than appellees desire, or even than the Commissioners' recommend, it is fully consistent with the discretion accorded by [§ 310\(b\)](#). Both appellees and the Commissioners are bound to respect the Town's discretion, and cannot "trump the selectboard's decision through their own view of what the public good requires." [Id. at 622, 795 A.2d at 1269.](#) If appellees do not agree that the Town's decision satisfies the necessity of the town, the public good, or the convenience of the inhabitants of the Town, the "[c]onduct of elected officials, detrimental to the interests of the town but not amounting to arbitrary abuse of authority justifying the issuance of a writ, is subject to regulation at the polls." [Couture v. Selectmen of Berkshire](#), 121 Vt. 359, 364, 159 A.2d 78, 81 (1960).

*Reversed. Judgment entered for defendant, Town of Underhill.*

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