

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-156

OCTOBER TERM, 2008

Philip Pugliese III	}	APPEALED FROM:
	}	
	}	
v.	}	Bennington Superior Court
	}	
	}	
Town of Bennington	}	DOCKET NO. 418-12-06 Bncv

Trial Judge: David A. Howard

In the above-entitled cause, the Clerk will enter:

This case began with a condemnation proceeding by the Town of Bennington to take a portion of appellant’s property for the purpose of enabling the town to maintain a town road for snow plowing. Landowner appeals from the superior court’s order granting the Town’s request to expand the road across a portion of landowner’s property. On appeal, landowner contends that the Town has damaged his property and that he is the victim of a conspiracy between his neighbor and the Town. We affirm.

The Town selectboard approved an extension to a town highway for purposes of improving public safety and assuring adequate maintenance. See 19 V.S.A. § 708(a) (granting selectmen authority to lay out or alter a town highway). The extension required a taking of a twelve-foot by seventy-foot portion of landowner’s property. Landowner appealed to the superior court. Landowner objected to the plan, alleging that the road was not a town highway, and that the Town was part of a conspiracy to allow his neighbor to wrongfully interfere with his property rights. The superior court referred the matter to a panel of three commissioners. See *id.* § 741 (“The court shall appoint three disinterested landowners as commissioners, to inquire into the convenience and necessity of the proposed highway, and the manner in which it has been laid out, altered or resurveyed . . . .”). Following a site visit and an evidentiary hearing, the commissioners concluded that the road was a town highway based on the town’s maintenance since 1970. The commissioners also concluded that the taking was not necessary because the Town’s snow plows could plow the town highway and turn around within the existing right of way. This conclusion was based, at least in part, on evidence drawn from the site visit, but the visit was not recorded in any manner. The Town filed an objection.

The superior court conducted an evidentiary hearing to consider whether to adopt the commissioners’ report in whole or in part, or to modify it. See V.R.C.P. 53(e)(2) (directing the

court to adopt, modify, or reject report in whole or in part). Through testimony of the town manager and the town highway superintendent, the Town presented the following evidence. The road is a dead-end town highway with a steep grade. For forty years the Town has been plowing the road. For many years, plow trucks turned around at the top of the hill by using a portion of landowner's property. In 2006, landowner erected a fence along his property line, preventing trucks from turning around. Without the extension, the only way to maintain the road in winter is to have a snowplow truck repeatedly either back up the hill and then plow down, or plow up and then back down the steep hill. The witnesses testified that both options were unsafe. The extension would allow plows to plow up the hill, deposit snow, turn around and then plow back down. Landowner did not testify at the hearing. Landowner introduced some exhibits, including photographs, at the hearing through the testimony of the Town's witnesses.

The court found the testimony of the Town witnesses credible, and found that the extension was "necessary for public safety and convenience and good to allow for safe and effective maintenance."<sup>1</sup> The court explained that the extension would increase the safety of plowing the road because trucks could turn around at the top of the road, eliminating the need for plows to back up or down the street. The court also found that the turnaround would allow the plows to plow the entire street. Landowner appealed to this Court.

The standard for laying out a town highway is whether "the public good, necessity and convenience of the inhabitants of the municipality require the highway to be laid out." 19 V.S.A. § 710. The necessity of laying out a public road is a question of fact that is determined by the trial court. Cersosimo v. Town of Townshend, 139 Vt. 594, 597 (1981). "Absent an abuse of discretion the findings must stand." Id. The evidence demonstrated that without the extension, plows would be required to back up or down the steep incline on the street and that this would be a risky and dangerous process. Furthermore, the evidence showed that a safe turnaround at the top could not be accomplished within the current right-of-way. The trial court's findings of necessity in this case are well supported by the evidence, and therefore we affirm the court's order granting the Town's request to extend the road.

Landowner's assertions of a conspiracy between the Town and his neighbor do not alter this conclusion.<sup>2</sup> Landowner alleges that trucks can safely turn around without the extension, that the extension is really just a parking lot for his neighbor's benefit, and that the Town has

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<sup>1</sup> The court rejected the commissioners' report that the extension was not necessary because the plow trucks could safely turn around within the existing right-of-way. The court concluded that the commissioners' report was erroneous because it was: (1) based on information from a site visit that was not recorded for the record, see In re Queechee Lakes Corp., 154 Vt. 543, 552 (1990) ("[S]ite visit observations on which the fact-finder intends to rely must be placed on the record in order to preserve the right of rebuttal and to facilitate review."); and (2) unsupported by the record overall.

<sup>2</sup> Before the commissioners, landowner also asserted that the road was not a town highway. The commissioners concluded that the road was a town highway based on the Town's consistent maintenance of the road since 1970. Before the superior court, landowner did not challenge the commissioners' conclusion on this point and landowner does not address the issue on appeal. Therefore, we do not reach it.

damaged his property. On appeal, landowner seeks to introduce new photographs and other evidence to support these factual claims. We do not consider this evidence in our decision, however, because “our review is confined to the record and evidence adduced at trial.” Hoover (Letourneau) v. Hoover, 171 Vt. 256, 258 (2000). Based on the record evidence, we find no reason to disturb the trial court’s ruling that the extension is necessary for public safety and convenience. See id. (“A trial court’s findings of fact must stand unless, viewing the record in the light most favorable to the prevailing party and excluding the effect of modifying evidence, there is no credible evidence to support the findings.”). The trial court credited the testimony of the Town witnesses and this evidence was sufficient to support the court’s decision.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice