

Joe Colangelo

From: Jim Barlow <jbarlow@vlct.org>
Sent: Friday, October 04, 2013 11:02 AM
To: Joe Colangelo
Subject: RE: zoning administrator

Joe,

In my opinion, whatever actions the Hinesburg ZA might have taken between August 31st and his reappointment would legally valid under the *de facto* officer doctrine. This doctrine was explained by the Environmental Court in the case of *In re Gilmore Road, LLC, 223-10-08 Vtec*, in which the appointment and authority of members of the Plymouth Planning Commission and ZBA were challenged. The Environmental Court stated:

[T]he acts of the body sitting and acting as both the Planning Commission and as the ZBA, even if not properly appointed as the Planning Commission by the Selectboard, are valid by application of the *de facto* officer doctrine. As described by the United States Supreme Court:

[t]he *de facto* officer doctrine confers validity upon acts performed by a person acting under color of official title even though it is later discovered that the legality of that person's appointment . . . to office is deficient. *Nguyen v. United States*, 539 U.S. 69, 77 (2003) (citing *Ryder v. United States*, 515 U.S. 177, 180 (1995)).

The Vermont Supreme Court has applied the doctrine in cases in which an officer is "in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." *State v. Oren*, 160 Vt. 245, 247 (1993) (quoting *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902)). See also *In re G.V.*, 136 Vt. 499, 501-02 (1978) ("[A]n officer coming into possession of his office under the forms of law and assuming to act under a proper commission is a *de facto* officer whose acts are binding as to third persons, despite some infirmity in the qualifications of the officer.").

I believe a similar analysis would apply to the ZA. I do not think that the ZA's actions and decisions from August 31 to the date of his reappointment could be successfully challenged.

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