

THE HISTORY AND LAW OF VERMONT TOWN ROADS  
(3.6.12 version)

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## 1. Introduction

In the beginning there was the landscape, crushed and folded and drained. The valleys and the mountains and the waters determined how people moved on that landscape, by foot or horse or canoe, for thousands of years. Animal paths became foot paths for human traffic, and horses. When settlers arrived, the paths grew into trails, which became town roads.

The road network is a town's history carved in dirt and gravel. There is no more permanent monument to the first settlers. Buildings collapse, are abandoned or replaced. Landscapes change from open to wooded in a few years. But highways rarely change. They may stray from their original beds, as sharp corners get rounded, and wet spots are avoided, but they leave deep creases on the face of the town.

Until something happens, we take roads for granted. When a bridge goes out, a stretch of gravel road is swept away in a flood, the snow accumulates in high drifts, when the roadbed is deep with mud or ribbed for our jostling pleasure, only then do we think about these ribbons of public property. In law, they are called easements or public rights-of-way.

Other than schools, the most important function of local government is maintenance of highways. There are 30 to 50 miles of town roads in most Vermont towns, a portion of which are regularly maintained in all seasons, and another portion that remain essentially untouched by the road crew. It takes about four hours to clean the snow off roads in our town, with two trucks and the grader. If the storm is continuing, the boys will knock off for an hour, and then go back to it. Their journeys take them to the four corners of the town, up steep hills and down dark valleys, past the remote homes and those in the village. They need tire chains for the steepest going, and sometimes they have to back up the hill, so that the sand can help the tires grip the road when it's very icy. In the spring, dirt roads are scraped and graveled, waterbars revamped, guardrails straightened, and culverts and swales demucked.

Maintenance is just the beginning of road law challenges. Occasionally, but regularly, selectboards are faced with the dizzying need to change the status of a road. Those who have now built new homes on a Class 4 highway want it reclassified, and maintained at public expense throughout the year. The board is wondering why it should maintain private driveways that once served multiple residences. An old highway, recently discovered, runs right through the site for a new house, and everyone agrees it should be rerouted and reclassified a trail. An old bridge needs reconstruction, and temporary and permanent easements are needed to fix it properly. In these instances, the selectboard is required by law to follow a particular process, beginning with a proper notice and leading to a site visit, hearing, written decision, and award of damages, if necessary.

How these decisions are made depends on the facts of each case, but the law is uniform and knowable. Most of it is in Title 19, in the chapters dealing with town roads. Some of it is in case law, the collected decisions of the Vermont Supreme Court. Some of it has yet to be determined.

The law is not all you need. The vault in the Clerk's office contains a set of historical records of town highways all the way back to the beginning. The official town highway map is posted on the wall of the office, and represents the selectboard's best judgment on what roads are public. If town records are complete, there are such maps for each year back to 1931, when the state first mandated them. Other maps are valuable too, such as Beers Atlas or earlier county maps, in

locating home sites of earlier residents. Knowing everything you can about the history of a road before any action is taken is essential.

Disputes will continue as long as roads run and towns grow. How they are resolved depends on the character of the parties involved. Somebody's feelings are going to be hurt in the process. It's destiny. If this guide does its job, the process will be dignified and fair.

## 2. History of Vermont Road Law

In highway law, history counts. The validity of something done long ago often depends on whether it was done properly under the law of the time the act was done. To know whether a public highway has been properly discontinued, for instance, you must first determine when and how it was laid out, and then whether the discontinuance followed the right process.

Whether a highway was properly laid out, altered or discontinued is the critical fact that settles disputes over the boundaries and ownership of roads. While acquiescence or repose is a principle that carries some weight in this process, it is not enough to dispense with the historical record. History in this business is always present, and the errors and omissions of long-dead officials seldom forgiven or forgotten.

What follows is a tracing of Vermont highway law from 1777 to the present, to identify significant legislative and judicial trends and highlight the leading cases that have an impact on the search for answers about a highway. The primary sources are the acts and resolves of the Vermont General Assembly<sup>1</sup> and the reports of the Vermont Supreme Court.<sup>2</sup>

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<sup>1</sup> References to legislative acts are found in the laws of particular years and in the regular compilations of statutes every decade or so. A footnote to "No. 7 (1822)" refers to the act with that number in the Laws of 1822. Early volumes of laws used "Chapter" instead of "No." Until 1851, the legislature described amendments of existing law by referring to the act passed in a previous year, as in "Chapter 13. An Act, in amendment of an act, entitled, 'An act reducing into one, the several acts, for laying out, making, repairing and clearing highways,'" Laws of 1821, 82. The "Act, reducing into one the several acts, for laying out, making, repairing and clearing highways," was passed in 1797, as part of the second compilation of Vermont law; the 1821 amendment uses the 1797 as the basis for the amendment. After 1851, the practice changed to permit the act to refer to the most recent compilation of laws. For instance, No. 18 of the Laws of 1869 was entitled, "An act in addition to Section seventy-nine of Chapter twenty-four of the General Statutes, entitled 'Of Laying Out Highways and Bridges.'"

There have been fifteen official compilations of Vermont statutes. It is important to understand the abbreviations used in order to locate the origins and changes to particular laws. The revisions of 1787, 1797, 1807, 1824 and 1834 are all described with an "R.," followed by the year and a page number. The compilations that follow 1834 and their abbreviations are as follows: Revised Statutes (1840) (R.S.); Compiled Statutes (1851) (C.S.); General Statutes (1863) (G.S.); General Statutes, 2d Ed. (1870) (also G.S.); Revised Laws (1880) (R.L.); Vermont Statutes (1894) (V.S.); Public Statutes (1906) (P.S.); General Laws (1917) (G.L.); Public Laws (1933) (P.L.); and Vermont Statutes Annotated (1947) (V.S.A.). Not all "compilations" are merely collections of statutes to date; occasionally they contain comprehensive revisions of the laws in existence at the time the compilation was adopted.

<sup>2</sup> References to Vermont cases follow a standard format after 1829, the year of the first volume of Vermont Reports. In that volume the case of *Noyes v. Town of Morristown* is reported. Its citation is *I Vt. 353* (1828), showing the volume (I), the page the case begins (353) and the year the Vermont Supreme Court handed down the opinion (1828).

Before Volume I of Vermont Reports, there were seven volumes of cases published, six of them privately by the judges themselves and one (Daniel Chipman's 1824 volume) by order of the General Assembly. These are: Nathaniel Chipman, *Reports and Dissertations* (Rutland: Anthony Haswell, 1793) Part I; Second Edition (Rutland: Tuttle & Co., 1871); Royall Tyler, *Vermont Reports* (New York: I. Riley, 1809, 1810), 2 vols.; William Brayton, *Reports of Cases* (Middlebury: Copeland & Allen, 1821); Daniel Chipman, ed., *Reports of Cases* (Middlebury: I. W. Copeland, 1824-5), 2 vols. in one; Asa Aikens, *Reports of Cases* (Windsor: Simeon Ide, 1827-8), 2 vols. For several early cases, see also William Slade, Jr., ed., *Vermont State Papers* (Middlebury: I. W. Copeland, 1823), 548-556. Professor Samuel Hand and Jeffrey Potash compiled and microfilmed early Vermont Supreme Court cases in 1979, now available at the

Where a public highway once carried travelers to market, there may now be only parallel stone walls or no evidence of a roadway at all. The court tells us that the public highway, if never discontinued or “thrown up on paper,” is still there. Like the law, the public right-of-way is never lost to abandonment or disuse. Although both are sometimes hard to find, their authority continues unabated long after those who made and used them are gone.<sup>3</sup>

## 2.1 First Roads, First Laws, 1749-1799

Long before there was a Vermont, there were Indian trails, and paths created by lonely men with a hatchet and a compass,<sup>4</sup> roads created by formal vote of the proprietors of towns, and military roads. The first town highways were mandated by town charters. Charters did not lay out highways, but they provided the authority for proprietors and towns to create highways, often without the need for compensation. The charter of Berlin, for instance, provides that the grant is to be divided into 70 shares, “containing by Admeasurement 23040 Acres, which Tract is to contain Six Miles square, and no more; out of which an Allowance is to be made for High Ways and unimprovable Lands by Rocks, Ponds, Mountains and Survey thereof....”<sup>5</sup> The first division lot in Berlin amounted to 103 acres, 100 for settlement and three unspecified acres reserved for highways that could be laid out without formal “taking” of any private property, since those acres were never actually granted to the proprietor. Few complained. Usually landowners welcomed a highway across their lands because the highway increased the value of the land.

The first Vermont law having an impact on highways was the Vermont Constitution of 1777. Article 2d of Chapter I provided, “That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money.” This was the first constitutional guarantee in the history of government that just compensation would necessarily be paid for the taking of private property for public use. It remains today the foundation of all laws on eminent domain.<sup>6</sup>

The first statute on highways was enacted in 1778. As seen through its 1779 successor, its principal feature was a highway tax, imposed by the state directly on each male person sixteen to sixty, who would be required to work at least four days a year on town roads, at a rate of eighteen shillings a day. Refusing or neglecting to work your share could result in a thirty shilling fine per day. It also provided a mechanism for determining the value of damages, when selectmen had laid out a highway across a person's property. Three to five freeholders would

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Division of Public Records, Middlesex, Vermont. See “Litigious Vermonters, Court Records to 1825,” Occasional Paper #2, Center for Research on Vermont (1979).

<sup>3</sup> “Law says the judge as he looks down his nose,  
Speaking clearly and most severely,  
Law is as I've told you before,  
Law is as you know I suppose,  
Law is but let me explain it once more,  
Law is the Law .”

W.H. Auden, “Law like Love” (1940).

<sup>4</sup> See James Wilbur, Ira Allen (Boston and New York: Houghton Mifflin Company, 1928) Vol. I, 34-5.

<sup>5</sup> Albert S. Batchellor, ed., The New Hampshire Grants (Concord: Edward S. Pearson, 1895), 35. For charters issued by the State of Vermont, see Charters Granted by the State of Vermont, State Papers of Vermont II, ed. Franklin H. Dewart (Montpelier: Secretary of State, 1922).

<sup>6</sup> In 1793, the words, “any particular man's” were replaced with “any person's” property, signifying an early recognition of the rights of property owned by all people, regardless of sex.

appraise the damage. The 1779 law ordered all towns to conduct a formal survey of all highways and to keep good records.<sup>7</sup> Towns could elect one or more highway surveyors (*savairs*, in the original spelling in one town's records) at town meeting to oversee the working off of the tax. Selectmen had the clear authority to lay out public--and private--highways, in these years.<sup>8</sup> The law on highway maintenance changed over the years, increasing the rate of the tax and the day rate of compensation, until its abolishment in 1884.

In 1781, highways were for the first time to be laid out after a mandatory survey, "by the Compass," and all highways previously laid out were to be so surveyed within two years, or "shall not be deemed lawful." Furthermore,

[A]ll Highways that have been laid out within any of the towns of this State, either by the Selectmen, or by a Committee appointed for that Purpose, who have returned a Bill setting forth where such Highway began, and the General Course of such Highway, by such and such Monuments, and through such and such Lands, which are well known by the Inhabitants in the town, and accepted by the Town, and put upon Record in the Town-Clerk's Office; which Highway hath been cleared out and repaired by the town, and improved as a public Highway for the space of six Months, shall be deemed a lawful Highway. . .<sup>9</sup>

This was the first recognition of dedication and acceptance in Vermont highway law history. There was a concern for definition and precision in highways, even at this early stage of Vermont law. While towns were not always regular in following the laws of Vermont, the impact of this 1781 law was cumulative. Over the course of years, towns would learn that straightening out the historical and ground record of their highways was of value even beyond the fact that the law required it. This 1781 law also provided that no damages were to be paid when highways were laid out over undivided land or where allowance land existed.<sup>10</sup>

Up to this point, it is not uncommon to find highway layouts that describe the road running from one settler's house to another settler's barn, without any courses or distances. In 1782, the legislature changed that, ordering highways to be "surveyed by Chain and Compass and a Survey thereof made out, entered and recorded in the town Clerk's office of the town where such road lies, ascertaining the Breadth, Course and Distance of such road." No damages were to be paid for highways laid out over land granted with allowances by the charter, but the land under the highway was to be set over to the owner of the lot in lieu of damages. Three freeholders could petition to have a highway laid out, and if selectmen refused an appeal could be taken to the local Justice of the Peace or a member of the Governor and Council.<sup>11</sup>

The legislature was deeply involved in highway affairs at this early stage of Vermont history. In 1778, the General Assembly resolved to make a new road from Bennington to Wilmington,

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<sup>7</sup> "An Act for Laying Out and Altering Highways," (February 24, 1779) Laws of Vermont 1778-1780, State Papers of Vermont XII ed., Allen Soule (Montpelier: Secretary of State, 1964), 867. [Hereafter, XII State Papers].

<sup>8</sup> "[W]here a new highway, or common road from town to town, or place to place, shall be found necessary, and where old highways with more conveniency may be turned or altered, that upon any person or persons making application, the selectmen of each town respectively, be, and are hereby impowered by themselves or others whom they shall appoint, to layout or cause to be laid out such roads, and likewise private ways for such town only as shall be thought necessary, so as no damage is done to any particular person in his land or property, without due recompence be made by the town, as the selectmen and the parties interested may agree. . . ." Id.

<sup>9</sup> "An Act to Settle and Establish All Highways that are Laid Out in this State," Laws of Vermont 1785-1791, XII State Papers of Vermont XII, ed. John A. Williams (Montpelier: Secretary of State, 1965), 11-12.

<sup>10</sup> Undivided or common land is land of the town, covered by the charter but not yet defined or allocated to any person. Allowance land is land reserved by the proprietors to use in bartering for roads across private land, sometimes shown on lotting plans separating quadrants of lots, not necessarily to be used as highways, but to offset land taken for roads that followed the terrain.

<sup>11</sup> "An Act Directing the Laying of Highways," XIII State Papers 129-130.

because of the “badness” of the existing road.<sup>12</sup> In 1782, legislation ordered the selectmen of Pownal to repair the “dug way, by the side of the Hoosick River, on the great road leading to Williamstown [Massachusetts], that is much out of repair, so that the traveling public is almost stopped,” by the following June 1, on penalty of fifteen pounds fine.<sup>13</sup> In 1783, the legislature authorized a lottery to build bridges over the Black and Williams River in Rockingham, on the road from Westminster to Windsor.<sup>14</sup> In 1784, it overruled the Assistant Judge of Bennington County who had allowed damages of 360 pounds to a freeholder whose land had been taken for a highway by the selectmen of Shaftsbury, because allowance lands on the freeholder’s grant were not considered in the award of damages.<sup>15</sup> The law provided ample authority to selectmen to lay out public highways within the town, but highways that crossed town lines, linking towns to markets, became the province of the legislature to direct.

In 1787, county courts were given authority to lay out highways when selectmen refused or neglected to do so, on application of three or more freeholders. The court appointed three indifferent freeholders from the adjoining towns, “who shall view the premises, and if they shall find it necessary for the better accommodation of the Public, as well as individuals, to layout a new road, or to turn or alter one already laid out . . . ,” then the county court would lay out the road and order the board of selectmen to pay damages for any taking.<sup>16</sup> The road may have been laid out by the county, but it became a town highway for purposes of construction, repair and maintenance from that point on. The power to discontinue that same highway was not lodged with the selectmen.

After a rewrite of the law on highways in 1792, following statehood, selectmen were empowered to divide the town into districts for the purposes of highway repair, appointing highway surveyors for each district, and with the power to alter the district boundaries from time to time. Voters could change district lines at town meeting. The highway surveyor could now order out residents to clear snow from the highways or work on roads and bridges in emergency situations, over and above the tax they paid during the regular seasons. The surveyor had to keep regular accounts of the work performed and make returns of these records to the selectmen of the work done and the taxes paid. The law also dealt with those who would seek to enclose highways without permission by providing selectmen with powers to direct the taking down of barriers on penalty of having the town do it and charge the landowner for the cost.<sup>17</sup> Even today, some people have a hard time recognizing public rights crossing private property.

The various laws relating to highways were at last brought together in a single act in March of 1797, when a new compilation of Vermont laws was adopted by the General Assembly. The laws were amended as well. Towns were made liable for all damages caused by the insufficiency of the highways and bridges. The county courts became responsible for working out the allocation of the costs of repairing a bridge between two towns. The law provided a \$30 penalty

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<sup>12</sup> XII State Papers 31.

<sup>13</sup> “An Act Directing the Selectmen of the Town of Pownal to Mend a Certain Piece of Road in said Town,” XIII State Papers 84.

<sup>14</sup> “An Act Granting a Lottery for the Purpose of Building Bridges over Black River and William’s River,” XIII State Papers 192-193.

<sup>15</sup> “An Act to Set Aside and Render Null and Void in Law a Certain Order Therein Mentioned,” XIII State Papers 248-49.

<sup>16</sup> “An Act Directing the Laying Out of Highways,” Laws of Vermont 1785-179/, XIV State Papers 325-327 (ed. John A. Williams (Montpelier: Secretary of State, 1966)).

<sup>17</sup> “An Act for Mending and Repairing Highways,” Laws of Vermont 1791-1795, XV State Papers 115-116 (ed. John A. Williams (Montpelier: Secretary of State, 1967)).

for wantonly “damnifying” a highway by taking away plank, posts, timber or rocks or digging pits for gravel or clay in the roadbed.<sup>18</sup> The rules on laying out highways, adopted prior to that time, remained in force in the new compilation.

## 2.2 Turnpikes and Early Town Roads; Road Law to 1831

Vermont’s first turnpike was chartered by the General Assembly in 1796 and ran from Bennington to Wilmington. The road bed was already established. Dozens of other turnpike companies were formed over the next several decades. Elijah Paine started the Paine Turnpike in 1799, running along the established public highways of the towns of Berlin, Williamstown, Northfield and Brookfield, with a right-of-way of not less than sixty feet and a traveled portion of eighteen feet. Paine erected three turnpike gates for the collection of tolls, which amounted to five cents for every man with a horse, and on up to a high of thirty-one cents, three mills for a four-wheeled pleasure carriage drawn by two horses.<sup>19</sup> Paine was in financial trouble by 1820 and the legislature turned the highway back to the towns as public highways.<sup>20</sup>

The law authorizing selectmen to “set over” allowance lands in lieu of damages to landowners was amended in 1800 to permit the town to give title to old roads or highways adjoining or running through that person's land, “when there shall not be such allowance lands,” instead of money damages. While this is the first clear authority of towns to “shut up and discontinue” roads, it was not a general authority, since it was linked directly to the compensation for taking land through the laying out or alteration of highways.<sup>21</sup>

The three-rod right of way was first established by a statutory change in 1806. Three or more freeholders were also given the right to petition the selectmen to “extend any public roads already laid out, to the width of three rods, or more if they see fit.” That same year the legislature authorized twenty landowners to join in a petition to the selectmen to build a bridge within a town. It also set a one year deadline for selectmen to open a highway laid out by the legislature or the county courts, as some towns thought they had an option on whether to follow the direction of these other authorities.<sup>22</sup>

Until 1808, Vermont law required highways to be laid out by chain and compass. After that date, the legal method was by rod and degrees, a far more reliable methodology.

The first statutory recognition of a town's authority to discontinue highways came with the amendments of 1813. Roads laid out by the county court or the legislature could only be discontinued by the entity that laid them out, however. The first law on pent roads was also adopted that year. It required the written permission of the selectmen to lay out or discontinue these roads to be recorded with the town clerk, and allowed selectmen the power to enlarge or restrict the number of gates and bars, “as to them shall appear reasonable.”<sup>23</sup>

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<sup>18</sup> Revision of 1797, 347-50.

<sup>19</sup> “An Act Granting the Right of Making a Turnpike Road from Brookfield to Onion River to Elijah Paine, His Heirs and Assigns,” Laws of Vermont 1796-1799, XVI State Papers 364-367 (ed. John A. Williams (Montpelier: Secretary of State, 1968)).

<sup>20</sup> Paul Hodge of the Agency of Transportation has compiled copies of all turnpike and toll road charters.

<sup>21</sup> “An Act, in addition to an act, ‘An Act reducing into one the several acts for laying out, making, repairing and clearing highways,’” Laws of 1800, 15.

<sup>22</sup> “An Act, in addition to an act, entitled ‘an act reducing into one the several acts for laying out, making, repairing and clearing highways,’” Chapter 67 (1806), 85-88.

<sup>23</sup> No. CXXII, (1813), 165.

The earliest reported Vermont Supreme Court case on highways, *Fisher v. Beeker*, was published in 1816. Commissioners appointed to lay out a turnpike road had set over an old road to be discontinued, but the discontinuance and setting over to the adjacent landowner were not part of the record. If the action is not in writing, wrote the court, then the setting over is irregular and void. Parol (oral) evidence is insufficient to prove it.<sup>24</sup> Today we know the importance of the written record, as a defense against attacks on the validity of local action.

The amendments of 1820 required selectmen to record a certificate in the town clerk's office showing the opening of every public highway. Freeholders unhappy with the damages awarded them by selectmen for laying out or altering a public highway were allowed to appeal to a Justice of the Peace in an adjoining town, who would appoint three disinterested freeholders to assess the damage. If damages awarded were in excess of \$40, then the county courts had jurisdiction.<sup>25</sup>

That same year the legislature first authorized county courts to lay out highways in or through two or more towns, where formerly only the legislature could exercise this power. A petition signed by seven freeholders could be presented to the county court, whose judges would then appoint committees to lay out or alter the roads. Petitioners would serve selectmen in the affected towns with a citation to appear and express their opinions on the proposal. After the county roads were laid out and constructed, the selectmen became responsible for opening (with a certificate) and maintenance of those highways. In the same act, highways in or through two or more counties became the responsibility of the supreme court.<sup>26</sup>

Towns failing or neglecting to open highways laid out by the courts or the legislature within the timeline set for opening were liable for indictment by the grand jury of the county, starting in 1821. The fine the towns paid went toward the construction of the roads.<sup>27</sup>

In 1822, the law governing the laying out of highways by the courts or legislature required that the committees appointed to lay out the roads consist of persons from towns other than the ones through which the highways would run. This reflects a growing appreciation for the adversarial relationship between the towns and the courts or the legislature. That year the law also provided that selectmen might layout cross-roads or lanes of a width of less than three rods, "any law or usage to the contrary notwithstanding."<sup>28</sup>

The power to lay out a highway on the line between two towns was amended in 1824 to allow selectmen to make the decision, without the imposition of the county court. The legislature also authorized committees appointed by the county court or supreme court to lay out highways on the line between towns when expedient, giving the committees the power to allocate the costs of construction and maintenance among or between the towns. No highway could be laid out by the courts, however, unless application had first been made to the selectmen of such towns and the petition had been refused.<sup>29</sup> The tug of war between court power and town power was moving back toward the towns.

This trend is also seen in the 1825 law authorizing selectmen to contest facts in the county committee's report or impeach the fairness of the committee. In order for the selectmen to prepare for their day in court, the report had to be deposited with the court at least fifteen days before the session began or the matter would have to be heard in the next term of the court. The

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<sup>24</sup> *Fisher v. Beeker*, Brayton 75 (1816).

<sup>25</sup> No. 6, (1820), 20-22.

<sup>26</sup> Chapter 7 (1820), 22.

<sup>27</sup> No. 12 (1821), 82.

<sup>28</sup> No. 14 (1821), 18.

<sup>29</sup> No. 29 (1824), 29-30.

legislature also recognized the right of the supreme court to discontinue any road established by its order and repealed the law authorizing the setting over of allowance lands or old roads in lieu of money damages for highway takings.<sup>30</sup> This was not the end of allowance lands as a subject of public taking or as a substitute for compensation in the taking of land, however, as the idea lives on in statute today.<sup>31</sup>

The year 1827 brought a radical, albeit short-lived change in the way highways were laid out in Vermont. A committee of five persons per county, called county road commissioners, was appointed by the legislature each year to receive all petitions to lay out roads and bridges in one or between two or more towns. They made personal inspections and issued final and conclusive orders on highways. They recorded their orders with town clerks and made orders for the time of highway openings. They could order repairs of bridges or roads upon petition of seven freeholders and penalize towns for neglecting the orders of the county road commissioners.<sup>32</sup> Two years later the legislature reaffirmed selectmen's responsibilities for the maintenance of all highways and authorized selectmen to appeal the decision of the road commissioners to county court. The law, as it had after 1824, provided that no petition could "be accepted by the road commissioners" unless the selectmen had first seen and rejected it.<sup>33</sup> The experiment ended in 1831, when the 1827 and 1830 laws were repealed, reinstating the law in place before they were adopted.<sup>34</sup> Thus ended the movement to make counties political subdivisions with broad administrative powers in Vermont.

The following year the legislature first gave the courts the latitude to direct selectmen to open different parts of a highway on different timetables, rather than all at one time. The county court could discontinue highways laid out by the county road commissioners between 1827 and 1831, and county clerks were appointed ex officio clerks of the county road commissioners in order to complete their records.<sup>35</sup>

### **2.3 Road Law from 1831 to 1892.**

In 1831, the Vermont Supreme Court first applied the statute requiring a certificate showing the opening of a highway. The county road commissioners had laid out the road in 1828, but had not recorded any certificate of the opening. The farmer over whose land the highway would pass erected fences across the highway. When a traveler tore those fences down the farmer sued for trespass and won. Without a certificate there was no public highway. The case describes the circumstances that led to the adoption of the county road commissioner system, highlighting the fight between selectmen and the county court in laying out highways across town lines. "When a road is laid through the lands of one of our citizens," wrote the court, "it is necessary that he should be enabled to know when his dominion over the soil ceases, when he is no longer at liberty to keep it enclosed; and on the other hand every individual in community should be able

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<sup>30</sup> No. 11 (1825), 22-23.

<sup>31</sup> Title 19, Section 810 provides, "When a lot of land remains entire, as originally divided among the proprietors of a town, and is owned by one person, or jointly, to which a quantity of land was allowed for the use of highways more than has been taken up by highways already laid out, and a highway is laid through the lot, the allowance land may be taken into consideration in estimating the damages sustained by the owner."

<sup>32</sup> No. 17 (1827), 13-15.

<sup>33</sup> No. 12 (1830), 8-19.

<sup>34</sup> No. 4 (1831), 7-8.

<sup>35</sup> Nos. 8, 9, 10 (1832), 6-7.

to ascertain when a road becomes a public highway, so that he has an undoubted right to travel thereon. . . .”<sup>36</sup>

A highway laid out by the county court in 1799 in the town of Manchester over an established roadway was discontinued by the court in 1825. The highway as laid out passed over the lands of Samuel Pettibone, who in 1786 had conveyed part of his land to Amos Chipman, “bounding him, on the west, by the east line of said highway.” Upon discontinuance the successor in title to Chipman, one William Purdy, was given one half of the highway. Pettibone’s heirs objected, and the Supreme Court found that this was a mistake. The county court had awarded private land to an individual without compensation. Pettibone’s heirs should have received the entire roadway. The case is interesting in what it has to say about the interests of landowners over which a highway passes:

By the establishment of an ordinary highway, the public acquires but an easement in the land; the right of making, repairing and using the highways, as an open passage or thoroughfare. Subject to this right the owner of the soil retains, and may exercise all his rights of property therein. He may take from it stone, timber, and the like, which are not wanted for the support of the highway. And he may vindicate his qualified right of possession by action of trespass or ejection, against those who attempt to appropriate the land to any other than this public purpose. From these principles it regularly follows, that when the highway is discontinued, the land becomes discharged of this servitude, and the owner is restored to his former and absolute right.<sup>37</sup>

In 1834, the legislature authorized grand juries to indict towns that failed to build or repair bridges so ordered by the courts or the legislature. Damages would complete the necessary work. That same year the law was changed to allow twenty freeholders to petition selectmen to build a bridge before May and, if selectmen had failed to do so within six months, to petition the county court to appoint commissioners to do so.<sup>38</sup> Selectmen were allowed to petition the county court in 1835 for an extension of the time to lay out and build a road or bridge, providing they gave notice of their petition to the selectmen of other, affected towns. The committee appointed by the county court had to consider whether other towns would benefit from the building of a bridge and apportion costs accordingly.<sup>39</sup>

A second case arising from the era of the county road commissioners reached the Vermont Supreme Court in 1836. The selectmen of Shrewsbury had attempted to discontinue a highway laid out by the county road commissioners. The issue was the effect of the 1831 repeal of that law. The Court was short and to the point in concluding that “[t]he select men have no authority to discontinue roads laid out by the road commissioners, a committee of the legislature, or a committee appointed by the supreme or county court.”<sup>40</sup>

By the 1830’s the age of turnpikes was coming to an end. In 1839, the legislature provided a legal mechanism by which the corporations could sell their stock to the towns through which the highway passed. That same year the courts were authorized to take the real estate of turnpike companies for public highways, upon payment of damages.<sup>41</sup>

The “Compiled Statutes” was adopted by the General Assembly in 1839. This volume included the first authority to resurvey town highways. If a survey had not been properly recorded or its record preserved, or if the terminations and boundaries could not be ascertained,

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<sup>36</sup> Patchen v. Morrison, 3 Vt. 590 (1831).

<sup>37</sup> Pettibone v. Purdy, 7 Vt. 514 (1832).

<sup>38</sup> Nos. 11, 14 (1834), 9-11.

<sup>39</sup> Nos. 17 & 19 (1835), 17-19.

<sup>40</sup> State v. Shrewsbury, 8 Vt. 223 (1836).

<sup>41</sup> No. 8 (1839), 16-17; C.S., 189.

the selectmen of a town now had the power to make a resurvey and have it recorded. Recognizing that mistakes had occurred, however, the legislature provided that fences and buildings erected and continued for more than fifteen years within the highway right-of-way could not be removed or the enclosed lands taken for the highway without compensation.<sup>42</sup>

The first law authorizing appeals from selectmen's decisions relating to highways to the courts was adopted in 1839.<sup>43</sup> That same year, the law on maintenance of highways was amended to require three-quarters of the work of male residents be done in the spring. Recovery of damages for those suffering loss as a result of the insufficiency of a highway or bridge was limited to those driving carriages of 10,000 pounds or less, and there were other rules designed to protect the roadbed and bridges. Selectmen were authorized to establish tolls and appoint persons to run ferries over any river, creek, pond or lake.<sup>44</sup>

In a Vermont Supreme Court decision that year, the court explained that, "In petitions to discontinue roads, laid out by committees appointed by this court, the practice of the court is to appoint the same committee that laid out the road to attend to the question of discontinuance."<sup>45</sup>

In 1840, the court took a town to task for failing to maintain winter roads. The main path of a road was blocked by snow drifts. After four to six weeks, travelers went around, along a ditch on the side of the road. When the plaintiff tried to get around the drift in a sleigh, the sleigh tipped over, and plaintiff was injured. He sued the town for damages. This Court affirmed a verdict for plaintiff, holding that the facts showed that the road was "insufficient and out of repair" and the town was guilty of the "most gross neglect" for not clearing the road.<sup>46</sup>

Selectmen were first authorized to discontinue highways laid out by a committee of the legislature, beginning in 1842, although if the highway extended into another town or county only the courts could exercise this power.<sup>47</sup>

The first notable case from Vermont to reach the U.S. Supreme Court was decided in 1848 and involved the condemnation of the West River Bridge between Brattleboro and Dummerston in 1843. The court authorized selectmen to condemn bridges (and impliedly toll roads), taking them from private corporations for compensation.<sup>48</sup>

Beginning in 1845, towns could purchase turnpikes and continue to collect tolls on these highways for a period of up to five years, until reimbursed for the purchase of the stock. Highways near the town line could be laid out only by the selectmen of both towns or the county court, "on account of the position of the line or nature of the soil over which it may be laid," with the costs of construction and maintenance apportioned accordingly.<sup>49</sup>

A new mechanism for reviewing the equity of court orders to lay out, build or repair roads was adopted in 1847. Selectmen could apply to the courts for relief. Courts would appoint three commissioners, not inhabitants of the subject town, to examine and reapportion, if necessary, the costs of road takings and alterations, giving due consideration to the special benefits accruing to other towns. This introduced the concept of "excessive burden" to Vermont highway law.<sup>50</sup>

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<sup>42</sup> C.S., Title X, Chapter XX, Sections 8 & 9, 125.

<sup>43</sup> R.S. 20, § 26.

<sup>44</sup> R.S., 123-44.

<sup>45</sup> *Livingston v. Towns of Jerico [sic] and Underhill*, 11 Vt. 96 (1839).

<sup>46</sup> *Green v. Town of Danby*, 12 Vt. 338, 341 (1840),

<sup>47</sup> No. 10 (1842), 18-19.

<sup>48</sup> *The West River Bridge Company v. Dix et al.*, 47 U.S. 507 (1848).

<sup>49</sup> Nos. 21, 22 & 23 (1845), 13-15.

<sup>50</sup> No. 27 (1847), 22-23.

In a case decided by the Vermont Supreme Court in 1849, Carlos Baxter, the owner of a large tract of woodland, pasturage and tillage in the village of Burlington, sued the Winooski Turnpike Company for damages sustained by him due to the “gross neglect” of the company to maintain the turnpike. He claimed that his horses, wagons, oxen and carts, “were mired, and were driven into ruts, sloughs and holes and over stones and rocks in said road, and were thereby greatly injured and destroyed.” The county court had awarded Baxter nothing for his loss and the Supreme Court agreed. “To enable a person to maintain a private action for the erection of a public nuisance, he must have sustained some damage more peculiar to himself than to others, in addition to the inconvenience common to all. . . .”<sup>51</sup> The case is important for two reasons. It shows the condition of the highways at mid-century and it underscores the basic rule of highway takings that damages must be specific to the individual in order to justify recovery. If you suffer what everyone suffers, you do not suffer at all.

A landowner sued a town for trespass for maintaining a highway that had been laid out, constructed and used for eight or ten years. He had acquiesced to the public use and had even accepted damages for the taking, but later decided the highway wasn't laid out properly because of a lack of a certificate of the opening of the highway. Too late, answered the court. The farmer had treated it as a legal highway, and that was enough to justify holding against him.<sup>52</sup>

Beginning in 1850, towns could vote to have the highway tax paid entirely in money, assuming they had elected a road commissioner. Road commissioners replaced highway surveyors and the old district system was abolished, if towns chose to approve the change.<sup>53</sup> That same year the law allowed selectmen to change the location of a bridge or highway swept away or destroyed by flood in order to avoid obstructions. New land needed for the relocation could be taken, if compensation was paid, and the former site of the bridge or highway discontinued.<sup>54</sup>

A Worcester farmer, whose property was crossed by a circuitous public highway, plowed up and cultivated a portion of the highway he believed was discontinued after the town selectmen straightened the road. Unfortunately, the selectmen had never made a record of the straightening of the highway (called an alteration). When the new road became muddy, a traveler tore down the fence and traveled through the field, damaging the crops, along the old roadbed. The court held the highway was properly altered, that by the act of opening the new highway, the old road had been discontinued. “The fact of the alteration being made, and the straightened road being opened, in fact, for travel, under the direction of the selectmen, made it a public highway, to all intents, by acquiescence of the authority of the town, who have the control and are liable for the sufficiency of the highways, within their limits.”<sup>55</sup>

Montpelier paid damages to a traveler in 1858 for failing to cut a road of adequate width through a snow drift.<sup>56</sup>

After 1858, selectmen were required by law to erect posts for fastening horses near the gates and bars of pent roads. They were also obliged to provide at least one watering trough by the roadside in each highway district, but could not spend more than five dollars on each for these troughs. The per diem labor tax was still the principal source of revenue for highways; landowners could pay in money, of course, rather than in work, but by working it off they could

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<sup>51</sup> Baxter v. Winooski Turnpike Co., 22 Vt. 114 (1849).

<sup>52</sup> Felch v. Gilman et al., 22 Vt. 38 (1849).

<sup>53</sup> C.S., 160-84.

<sup>54</sup> No. 31 (1850), 24.

<sup>55</sup> Closson v. Hamblet, 27 Vt. 728 (1855).

<sup>56</sup> Barton v. Town of Montpelier, 30 Vt. 650, 653 (1858).

enjoy a twenty-five percent discount. Selectmen could decide where the work would be done. In 1858, the law declared that no landowner could gain possession of any land within a highway right-of-way merely by possession.<sup>57</sup> In 1860, a town could vote to provide lampposts and lamps on its streets.<sup>58</sup>

A landowner erected a fence where he believed the right-of-way of the highway ended, and the town tore it down, claiming a six-rod right-of-way for the highway. The public had used and occupied a four-rod right-of-way for more than fifteen years. When the dispute reached the Vermont Supreme Court in 1860, the court gave no weight to the argument of the town that the land in front of the landowner's dwelling had been dedicated to the public because it had not been fenced. The law previous to 1839, according to the court, required all improved land to be fenced along the highway right-of-way. But this was 1860, and the court found it reasonable to assume that the lack of such fencing in earlier years did not mean the land had been dedicated to the public. What the public had used was the important part. Possession and use for even less than fifteen years might be enough to justify dedication, and the extent of that use would determine the legal right to possess that land.<sup>59</sup>

Roads gradually improved in condition. The legislature authorized surveyors to take materials within the highway right of way to assist in building or repairing highways beginning in 1866. Selectmen could erect fences to prevent snowdrifts after 1868, and the following year could legally order hills graded and surfaces graveled. The removal of loose stones in the roadbed was targeted for special attention by the legislature after 1870, apparently to avoid slippage, and selectmen could be fined \$5 for failing to remove them. That same year towns were first given the authority to purchase the franchise of bridge companies, although the town was specifically prohibited from collecting tolls. Towns were also allowed to discontinue county roads that had not been used for more than one year.<sup>60</sup> In 1874, the legislature established a process for draining low or swamp lands, giving selectmen the authority to apportion damages among affected landowners.<sup>61</sup>

Beginning in 1880, towns were required by law to levy a tax of twenty-five cents on the dollar of the grand list for highway purposes and could decide that it be collected entirely in money, as opposed to labor. These towns would then elect street commissioners, replacing the highway surveyors, and the tax collector would collect the tax. After 1880, a town was not liable for damage caused by the insufficiency of its highways, although the town would still be responsible for damages from bridges (and later culverts).<sup>62</sup>

The law governing the width of highways was amended in 1884, authorizing roads built in incorporated villages or cities used to connect with existing highways to be less than three rods. Towns were not to be assessed for maintaining a highway in another town, beginning that year, except for highways on or near the line.<sup>63</sup>

In 1886, selectmen were given authority to lay out, establish and construct ditches, drains or watercourses across lands of individuals for the purpose of drainage. Landowners had to be compensated, but special benefits of the drainage could be considered in the award. That year selectmen were given authority to apply to the county if the town's highway tax was more than

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<sup>57</sup> No. 23 (1858), 28-29.

<sup>58</sup> G.S., 171-212.

<sup>59</sup> *Morse v. Banno et al.*, 32 Vt. 600 (1860).

<sup>60</sup> Nos. 48, 56 (1870), 88-89, 95, 96.

<sup>61</sup> 1874, No. 18.

<sup>62</sup> Compare Revision of 1797, Ch. XXVI, § 13 with Revised Laws, §§ 3125-3144..

<sup>63</sup> Nos. 16 & 18 (1884), 17, 18-20.

an average of \$1.50 on a dollar of the grand list for an average of five years. The legislature also redefined alteration by including the raising or lowering of the road bed more than three feet as a taking of property. In such cases, the landowner was entitled to notice, a hearing and damages. Damages were also first available for resurveys as well as for laying out or altering highways in 1886.<sup>64</sup>

In an 1890 case, the Court helped define when a resurvey is authorized. A Sheldon highway had never been surveyed. The selectmen “resurveyed” in and found that the line ran directly through a store. When their actions were challenged, the court declared the resurvey void. In order to be resurveyed, a highway must first have been surveyed. With none existing the selectmen had no jurisdiction.<sup>65</sup> Their only choice was to lay out a new highway.

## 2.4 Centralization.

A highway tax payable in labor had been a feature of Vermont law since 1778, but in 1884 the system was abolished.<sup>66</sup> In 1892 the tax was raised to twenty cents on the dollar, up from fifteen cents in 1884. The legislature imposed a state five cent highway tax in 1892 on every town and city grand list, to be collected by the state treasurer and reapportioned and repaid to the several towns on the basis of highway mileage. This law also required selectmen to file an annual report with the state, swearing to information on the mileage of all highways in the town. The state highway money came with strings--it couldn't be used for bridges; it was for permanent repairs of main thoroughfares. If unspent, it could be held over until the following year if needed. The office of road commissioner was created in 1892, an elected position authorized to superintend the expenditure of the highway taxes. Town road commissioners in each county were required to meet in May and August annually to “consider such matters as the state commission may present to their attention and the best methods of general road work.”

In 1894, the Vermont Supreme Court ruled that under existing Vermont law a town could not lay out a lane unless it connected existing highways.<sup>67</sup> Two years later, the legislature responded, authorizing lanes less than three rods in width that connected with public highways only at one end. The first requirement for a public hearing before the board of selectmen prior to discontinuance of a public highway became law in 1896, along with the right of appeal to the county court, in the same manner as for the laying out of highways. Towns assessed for bridges or highways in another town were given authority to petition the County court to vacate these assessments.<sup>68</sup>

A state highway commission had been created in 1892, and while it lasted only until 1896, the policy of direct state involvement in highways was established during its existence. In 1898, the legislature created the position of state highway commissioner, to oversee the payment of the state highway tax and ensure that highways were constructed and repaired in accord with state standards. The first automobile regulations came in 1902, the first licenses in 1904.<sup>69</sup>

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<sup>64</sup> Nos. II, 13 & 15 (1886), 8, 10, II.

<sup>65</sup> *Trudeau v. Town of Sheldon*, 62 Vt. 198 (1890).

<sup>66</sup> Laws of 1884, No. 12, § 1, 3.

<sup>67</sup> *Bridgman et al. v. Hardwick*, 67 Vt. 137, 31 A. 33 (1894).

<sup>68</sup> Nos. 68, 69 (1896), 56.

<sup>69</sup> V.S. §§ 598-639.

In 1901, the Supreme Court invalidated a city charter authorizing condemnation with no provision for judicial review.<sup>70</sup> There was no longer any question whether the business of highways was quasi-judicial.

Selectmen were first authorized to lay out temporary roads for the removal of lumber in 1904, with the right to award damages to landowners and discontinue those highways when necessary.<sup>71</sup>

In 1906, Vermont gave surveyors the right to enter private property to conduct their work, as long as they did as little damage as possible, redefining the laws of trespass. That same year the law first required towns to place stone or iron monuments marking the boundaries of the highways. Timetables were established for selectmen's decisions on laying out, altering or discontinuing highways. The law requiring towns to compensate persons who had erected buildings or fences within the right-of-way for more than fifteen years was repealed in 1906.<sup>72</sup> Towns were required to appropriate a sum of not less than one-fifth of the grand list annually for the repair of highways, on top of the state tax.<sup>73</sup>

Four years later, the Vermont Supreme Court decided the claim that there was a public highway in front of the old Union Station in White River Junction. At stake was whether the state and the town had to pay for a subway to eliminate a grade crossing. The railroads first maintained that a public highway had been laid out in 1863 across an area now covered by tracks. The survey included this description: "Thence south 69 deg. east, 7 rods and 10 links to the track of the Central Vermont Railroad. Said survey being the northerly line of said highway three rods in width southerly from the said northerly line." The railroads argued that this description established the track as a monument and that the principle that courses and distances are governed by fixed monuments should apply. The court disagreed, finding that the track was no monument, that the word "track" in the survey actually meant "railroad right-of-way." The court gave great weight to the 1849 law that prohibited laying out a public highway across a railroad at grade.

The railroad next argued that, even if the area in front of the Union Station was not a formally laid-out public highway, it had been established a public highway by dedication and acceptance. The court found dedication in the manner by which the railroad treated the property, allowing the public to travel over it, but no acceptance without proof that the town had maintained that section of road. There was no specific evidence of an unequivocal act of the town, and "[p]eople cannot by going where they will lay out highways at their will. The adoption of a dedicated way as a highway must be evidenced by acts of the proper town authorities, and mere use by the public is not enough."

The railroad's final argument was a shot in the dark. It argued that even if the highway was not laid out legally either by a statutory process or dedication and acceptance that it constituted a road in fact. The court spent little time with this, excusing it with the comment that "we know no such thing as a highway which nobody is bound to repair."<sup>74</sup>

In 1917, the court extended its policy on dedication and acceptance. This time the highway was a former town highway discontinued in 1878. The public never recognized the discontinuance and continued to use the highway as it had before. When the present owners of

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<sup>70</sup> Stearns, et al., v. The City of Barre, 73 Vt. 281, 291 (1901).

<sup>71</sup> No. 65 (1880), 68-69.

<sup>72</sup> P.S., Chapter 170, 744-766.

<sup>73</sup> P.S., 767.

<sup>74</sup> Bacon et al. v. Boston & Maine R.R. et al., 83 Vt. 421, 76 A. 128 (1910).

the land over which the new highway passed sued to enjoin the public from using it, the court agreed. As the town had neither repaired nor recognized the old road, there was no acceptance and no right-of-way created.<sup>75</sup>

The state gave its support to the federal aid system in 1917, providing for federal funds to assist in the construction of rural post roads.<sup>76</sup>

After the selectmen of the town of Barton petitioned the county court to discontinue a highway between two towns, the Vermont Supreme Court in 1918 invalidated the action, as the statute required seven freeholders to petition the county court, and did not recognize such a request by selectmen. The court dismissed the petition and the appeal. “The 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.”<sup>77</sup>

That same year the Vermont Supreme Court voided action by the selectmen of Berkshire who had given no notice to abutting landowners in the belief that the resurvey would simply establish existing terminations and boundaries, but the description of the resurvey used the words, “the foregoing resurvey follows and approximates the original survey as nearly as the line can be determined.” This did not set well with the court; it was too indefinite and uncertain to give rise to a finding of fact that no new land was taken in the resurvey. The resurvey was void, according to the court. Without notice to the abutters, the selectmen did not have jurisdiction to proceed with the resurvey.<sup>78</sup>

The legislature first granted selectmen the right to lay out trails, or alter highways into trails, in 1921.<sup>79</sup>

The Vermont Supreme Court decided *Gore v. Blanchard* in 1922. People had been using land to reach a pond for fishing and ice-cutting without ever asking permission of the owner for many years. The town had done nothing to improve the road, but the court could not find even dedication on the part of the landowner:

[N]o presumption arises where, as in the instant case, it merely appears that some of the inhabitants of a certain locality, even with the knowledge of the land owner, traveled over a small, worthless strip of uncultivated, unenclosed land for the purpose of getting ice in the winter, and occasionally for the purpose of fishing. Such use did not damage or inconvenience the land owner, and to have opposed it would have been regarded as unneighborly and churlish. There is no claim that ordinary travel ever passed over this way, except the plaintiff, ever claimed to use it as a matter of public right. ..<sup>80</sup>

## 2.5 The Federal Presence.

In 1931, the legislature first required town selectmen to file with the town clerk a list of all highways laid out and all discontinued during the year, on or before May 15 of each year. The first town highway maps stem from this era. “Highways that are not traveled shall be treated as discontinued under this chapter.”<sup>81</sup>

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<sup>75</sup> *Way & Way v. Fellows*, 91 Vt. 326, 100 A. 682 (1917).

<sup>76</sup> G.L., 768.

<sup>77</sup> *Barton v. Sutton*, 93 Vt. 102, 106 A. 583 (1919).

<sup>78</sup> *Town of Berkshire v. Nelson & Hall*, 92 Vt. 440, 105 A. 28 (1918).

<sup>79</sup> No. 21 (1921), 106.

<sup>80</sup> *Gore v. Blanchard*, 96 Vt. 234, 118 A. 888 (1922).

<sup>81</sup> 1931, No. 86.

The state finally gave up its state highway tax in 1931, when the income tax was adopted for Vermont taxpayers. The state highway system was also created in 1931 and the executive branch of state government first given the authority to lay out highways. That same year selectmen were first authorized by law to treat road surfaces with bituminous material or a dust layer.<sup>82</sup>

In 1944, the Vermont Supreme Court decided that pent roads could be laid out by dedication and acceptance. The pent road in controversy had never been laid out by the town. The defendant left the gate open a number of times. He found “it was difficult to avoid soiling his shoes when he got out of his automobile to open and close the gate, and that the cattle impeded his passage.” He defied the requirements of the law on pent roads because he wanted “to see what the law was going to do about it.” Following a jury trial, he was fined \$5 for each of ten separate infractions. The pent road, according to the court, was a public highway, since both gates and road had been in existence for 50 years, the gate had been kept in repair at the expense of the town and the road worked by it. The fact that it came to a dead end did not change its character.<sup>83</sup>

Both dedication and acceptance were found to exist by the court in its 1947 decision in *Springfield v. Newton*, long regarded as the leading dedication and acceptance case. At issue was a bridge, the only access to one man's property, serving no other property but his. To avoid flood damage the village of Springfield built a retaining wall, which supported one end of the bridge abutment. The bridge was repaired more than once by the town. About twenty-five cars a day crossed the bridge, only to turn around after discovering they made the wrong choice. The owners never tried to stop this practice, which had extended for more than thirty years. The court could find no written evidence of an intent on the part of the selectmen to maintain the bridge, and decided it was not a public highway bridge, but wrote that if a written authorization for repairs could be found this would constitute strong evidence of acceptance.<sup>84</sup> The law at the time required a road commissioner to receive written authorization from selectmen (not, as was done in this case, by a single selectman) before proceeding with bridge repairs. The lack of this order was enough to conclude there was no acceptance.

In 1954, the court ruled that landowners retain the fee of the soil embraced within the limits of a public right-of-way, with full right of its enjoyment in any manner not inconsistent with the enjoyment of the easement by the public. The public has “no right to the trees or herbage growing upon the land, or to the stone and minerals under the soil. These are as much the property of the owner of the freehold as before.”<sup>85</sup>

The law on discontinuance was clarified in 1956 after a dispute arose relating to land formerly used for Route 302 in Montpelier, near the Berlin town line. A curve had been eliminated and the land no longer used for the highway was left in an uncertain state. The City of Montpelier owned the land under the highway in fee. The issue was whether, once the land was no longer used for highway purposes, the title reverted to the predecessor in title. The deed settled the controversy. If it had included the words, “for the use of a highway,” reversion would have occurred by the relocation of the highway, but lacking those words the court interpreted the deed as a conveyance of an absolute grant. The city's interest was not an easement but a fee.<sup>86</sup>

In 1957, the laws relating to highways were substantially rewritten by the addition of laws giving the state full authority to lay out the Interstate system and purchase the land under the

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<sup>82</sup> No. 61 (1931), 97.

<sup>83</sup> *Judd v. Challoux*, 114 Vt. 1, 39 A.2d 357 (1944).

<sup>84</sup> *Springfield v. Newton*, 115 Vt. 39, 50 A.2d 805 (1947).

<sup>85</sup> *Abell v. Central Vermont Railway*, 118 Vt. 189, 191, 102 A.2d 847 (1954).

<sup>86</sup> *Montpelier v. Bennett*, 119 Vt. 228, 125 A.2d 779 (1956).

land outright. In 1957, as part of a comprehensive rewrite of the highway statute, the Legislature repealed the special funding authorization for winter maintenance of state aid highways and allowed towns to use their normal state aid funding to cover up to half the cost of such maintenance.<sup>87</sup>

The rule that statutory methods of laying out, alteration and discontinuance are to be strictly followed to be effective was underscored in 1958 when the efforts of Manchester selectmen were voided by the Vermont Supreme Court. The selectmen had altered a highway into a trail, although the highway passed through three towns, and selectmen in other towns did the same at about the same time. Under the law at the time, the selectmen did not have jurisdiction to alter this highway.<sup>88</sup> Only the county court could make that decision.

That same year the city of Montpelier began condemnation proceedings to lay out a public highway over a subdivision road. In the midst of that proceeding the city claimed that the landowner had dedicated the land to the public by a series of acts it offered as proof, including the landowner's running of public sewer and water lines down its private street. The Vermont Supreme Court had no patience for this argument. "To permit the municipality to claim title in the public way it seeks to condemn deprives the proceedings of all foundation. It would render the judicial condemnation proceedings nothing but a sham."<sup>89</sup>

The legal presumption that a landowner adjoining a highway owns to the center line of the highway was tested in 1962 when a dispute arose over a discontinued section of highway in the Town of Barre. Defendants owned a house erected on the former right-of-way, but no land. Plans to move the house were delayed, and after discontinuance of the highway the owners claimed a right to remain, based on their continued occupancy. This was no taking by prescription, according to the court. The defendants took no interest in the property as a result. "We recognize that the administration of town affairs, particularly in regard to highways is seldom conducted by officials skilled in the law. To impose on selectmen the burden of exhaustively searching the land and probate records to determine the precise status of the title to the fee of an abandoned highway would defeat the result which the statute sought to achieve, namely, to provide a practical and expedient means of settling the title and confirming the legal presumption which already prevails."<sup>90</sup>

In 1963, the Vermont Supreme Court held that when a highway is reduced to a trail, the three rod width is not presumed. A mere footpath might suffice, and even then might be occupied by abutting landowners if the selectmen agree.<sup>91</sup>

The width of highways is often a source of legal conflict between adjoining neighbors. In 1965, the court heard the case of a wooden stairway that led from the site of the highway to Nelson Pond in Calais. The highway had been laid out in 1852 with a three-rod right-of-way. An expert witness testified that the road had moved one rod west of the present traveled highway, while other experts said that it was "an impossibility to accurately re-survey a highway laid out and surveyed more than one hundred years previously." The court decided to use the highway as presently traveled, rather than trying to invent something out of a history it couldn't reconstruct, relying on the law that authorized selectmen to "use and control for highway purposes one and

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<sup>87</sup> See 1957, No. 250, §§ 18, 48.

<sup>88</sup> *Petition of Mattison and Bentley*, 120 Vt. 465, 144 A.2d 778 (1958).

<sup>89</sup> *Demers v. Montpelier*, 120 Vt. 380, 141 A.2d 676 (1958).

<sup>90</sup> *Murray v. Webster*, 123 Vt. 194, 199-200, 186 A.2d 89 (1962).

<sup>91</sup> *Whitcomb v. Springfield*, 123 Vt. 395, 189 A.2d 550 (1963).

one-half rods each side of the traveled portion thereof when termination and boundaries cannot be ascertained.”<sup>92</sup>

Before 1974, there were public roads and trails. That year the legislature required selectmen to classify town highways. Thereafter, classification determined maintenance, and knowing whether a road was Class 3 or Class 4 set the standard for how it should be treated. The transformation was quiet. The law did not mandate hearings; selectmen simply decided which highways should receive maintenance in all seasons, making them Class 3 highways. The remaining roads would be Class 4, and maintained according to the “public good, necessity, and convenience of the inhabitants of the town.”<sup>93</sup> The town highway map became a critical tool in determining the responsibility of towns to maintain particular highways.

The Supreme Court held in 1975 that, when a landowner can show the traveled portion of a highway has moved, the presumption that the selectmen can control one and one-half rods on either side of the present traveled way is lost when applied to the hunt for the proper width of a highway.<sup>94</sup> This decision was overturned by *Town of Ludlow v. Watson* (1990), when the Court recognized a change in the statute.

In 1976, a landowner lost his battle to prove that a road was a public highway in the City of Barre. The landowner’s arguments that discontinuance did not have to be done by official act when the original taking is by condemnation were rejected by the court.<sup>95</sup> In another case, the court ruled that no matter how long utility lines had been erected, they could not qualify for adverse possession against the rights of landowners.<sup>96</sup>

In 1977, the court had another opportunity to discuss dedication and acceptance, this time relating to highways. Distinguishing *Springfield v. Newton*, which involved a bridge, the court found no written authorization necessary to prove acceptance on the part of a town. Acceptance may be inferred from the behavior of town officials alone.<sup>97</sup> In this case, *Gardner v. Town of Ludlow*, “testimony of prior repairs and maintenance, putting stop signs at the end, and including the road as an untraveled road in the 1962 Highway Map,” along with other evidence, was sufficient.<sup>98</sup>

A landowner from Benson attempted to show that a highway the town alleged was discontinued was still open because the highway continued into the town of Hubbardton. The only evidence he had was a copy of an unofficial 1869 Beers Atlas for the area. This source was not enough, according to the court, in 1983, to prove the existence of a highway.<sup>99</sup> There must be better evidence than that to prove a public highway.

## 2.6 The Modern Era: 1986 to the Present.

Title 19 was recodified in 1986, changing the basic law substantially for the first time in nearly a century.<sup>100</sup> Among the changes was a new version of the law on the presumption of the right-of-way when a highway has demonstrably wandered over time. Before 1986 the law

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<sup>92</sup> Savard v. George and Bolles, 125 Vt. 250.214 A.2d 76 (1965).

<sup>93</sup> No. 63 (1973), 102-113.

<sup>94</sup> Town of Dorset v. Fausett, 133 Vt. 476, 346 A.2d 200 (1975).

<sup>95</sup> Capital Candy Co. v. Savard, 135 Vt. 14, 369 A.2d 1363 (1976).

<sup>96</sup> Dodge v. Washington Elec. Co-op., Inc., 134 Vt. 320, 359 A.2d 647 (1976).

<sup>97</sup> Gardner v. Town of Ludlow, 135 Vt. 87, 369 A.2d 1382 (1977).

<sup>98</sup> Id. at 90.

<sup>99</sup> Traders, Inc. v. Batholomew, 142 Vt. 486, 459 A.2d 974 (1983).

<sup>100</sup> No. 269 (1986), 847-931.

provided that when terminations and boundaries cannot be ascertained, the selectmen may use and control one and one-half rods on either side of the traveled portion. The new version provides that, “A roadway width of one and one-half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined.” The court recognized a change in policy in the new wording.

The phrase “existing traveled way” makes clear that the statutory width arises in relation to the existing traveled way rather than in relation to the traveled way as it was originally established.

This language change removed the requirement that the traveled portion of the road remain unchanged during its existence. Rather, the new version of the statute recognizes the inevitable fact that the precise location of roadways shifts over time. Thus, the presumption of a three-rod road applies whether or not the traveled portion has changed over time.<sup>101</sup>

In 1990, in the case of *Town of Ludlow v. Watson*, the court revisited the issue of the need for a certificate for opening a highway. Two highways were involved, laid out in 1816 and 1817 respectively, but not opened until after 1820, but with no record of a certificate on file. The court refused to treat the highways as defective. The regularity of an official act--laying out the highways--which is dependent upon some coexisting or preexisting act or fact creates a presumption in favor of the act or existence of this fact. The court linked the laying out in 1816 and 1817 with the lack of a record and found a presumption that the highway was opened prior in 1820.<sup>102</sup>

The following year the court affirmed reclassification of a Charleston highway in spite of selectmen’s objections. The court found the Class 4 highway in contention served residents in need of full-season maintenance, and changed it to Class 3.<sup>103</sup> Shortly thereafter, the legislature added new language to 19 V.S.A. § 310, eliminating the difference between Class 3 and 4 town highways, for purposes of reclassification, on the condition of the road or the degree of maintenance it receives.

The court denied an attempt to claim damages for negligent design of highways in the Town of Colchester in 1997, after agreeing that the traditional governmental/ proprietary distinctions for calculating municipal liability for negligence remain viable in Vermont law.<sup>104</sup> As highway design is governmental, there would be no liability.

Essex Town residents complained to the selectboard about the condition of their road. The board held a meeting and denied their request for improvements, and residents appealed to the county road commissioners. Before the commissioners could be appointed, the superior court dismissed the case, concluding that the town had responded within 72 hours after receiving the complaint, and acted on it, by denying it, leaving residents no right to appeal. The superior court took a hard line on 19 V.S.A. § 971, saying that an appeal to the county road commissioners was only ripe if the town *failed to act* within 72 hours. The supreme court reversed this decision in 1998 and remanded the case to the commissioners, to reconsider the request to improve the highway.<sup>105</sup>

In 1998, the Supreme Court issued its decision entitled *In re Bill*. It involved a road laid out in New Haven from Weybridge to Vergennes in 1812. The selectmen held a hearing and issued a decision discontinuing that road in 1926, and the town had treated that portion of the highway

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<sup>101</sup> *Town of Ludlow v. Watson*, 153 Vt. 437, 571 A.2d 67 (1990).

<sup>102</sup> *Kelly v. Town of Barnard*, 155 Vt. 296, 583 A.2d 614 (1990).

<sup>103</sup> *Hansen v. Town of Charleston*, 157 Vt. 329, 335, 597 A.2d 321, 324 (1991).

<sup>104</sup> *Hillerby v. Town of Colchester*, 167 Vt. 270, 706 A.2d 446 (1997).

<sup>105</sup> *Villeneuve v. Town of Essex*, 167 Vt. 618, 713 A.2d 815 (1998).

as thrown up ever since. A landowner argued successfully that the discontinuance was invalid, as the neighboring towns would have to hold hearings and agree with New Haven for the process to be valid. The Court refused to consider the 1931 act discontinuing all untraveled Vermont town roads as a defense.<sup>106</sup>

In 1999, the Supreme Court decided *Sagar v. Warren Selectboard*. Over the strong dissent of the Chief Justice, the court concluded that Warren must plow Lincoln Gap Road in the winter, because it is a Class 2 highway.<sup>107</sup> This led directly to a legislative correction, authorizing towns to avoid winter plowing on Class 2 and 3 highways, if they followed a process requiring the adoption of town ordinance and a public vote on the issue, now codified in 19 V.S.A. §§ 302 & 310. There was another process for continuing no winter maintenance for Class 3 highways never previously plowed added by this change in the law.

That same year, the court concluded that a bridge in Derby did not have to be repaired when the residents could not prove dedication and acceptance, even though the town had performed some emergency repairs on the bridge. It was solely for the benefit of a single landowner, and without a showing of any public use, the court could find neither necessity nor public good in making the repairs, even if it had been shown to be a Class 4 bridge.<sup>108</sup>

There is a highway on the side of Okemo Mountain that has triggered more highway wisdom from the Court than any other Vermont road in recent years. It has engendered two important decisions of the Vermont Supreme Court.<sup>109</sup> Each deserves a careful review.

The landowner wanted access to his property throughout the year, although the state and the ski area closed it in the winter, as it crossed a ski trail. In *Okemo I*, the Court agreed that it was a public road, and that closing it in the winter was a violation of the owner's common law right of access, a taking without just compensation, in violation of Article II of the Vermont Constitution.

The real gem of the pair, however, is *Okemo II*, where the Court recognized a common law right of access in land served by a discontinued town highway.

Under the common law, property owners have a right to access abutting public roads. The general rule is that an owner of property abutting a public road has both the right to use the road in common with other members of the public and a private right for the purpose of access. Although we have never detailed the specifics of these rights, our decisions have recognized them.

Under this doctrine, when a public road is opened adjacent to private property, the owner of the abutting property obtains a right to access the public road by operation of law, and when a public road is discontinued or abandoned, the abutting landowner retains the private right of access. The right of access has two requirements: (1) the person claiming the right must own land that *abuts* the road, and (2) the road must be a *public* road.<sup>110</sup>

In *Okemo II*, the Court rejected an order requiring this public road to be opened in the winter, and ordered damages to be paid to the landowner in lieu of injunctive relief.

In 2002, Calais landowners' Class 4 highway washed out, and the selectboard refused to rebuild it. On appeal, the County Road Commissioners reversed the selectboard, ordering the road bed reconstructed. When the case reached the Supreme Court, the tide turned in the Town's favor.<sup>111</sup> How much maintenance Class 4 highways receive is a decision expressly reserved for

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<sup>106</sup> In re Bill, 168 Vt. 439 (1998).

<sup>107</sup> *Sagar v. Warren Selectboard*, 170 Vt. 167, 744 A.2d 422 (1999).

<sup>108</sup> *Smith v. Town of Derby*, 170 Vt. 553, 742 A.2d 757 (1999).

<sup>109</sup> *Okemo Mountain, Inc. v. Town of Ludlow*, 164 Vt. 447, 671 A.2d 1263 (1995) [*Okemo I*]; *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 762 A.2d 1219 (2000) [*Okemo II*].

<sup>110</sup> *Id.* at 207-208.

<sup>111</sup> *Town of Calais v. County Road Commissioners*, 173 Vt. 620, 795 A.2d 1267 (2002).

the selectboard, according to the court. The policy of deferring to the judgment of the board is now the law of Vermont, with only one exception. Only in cases of outright discrimination or arbitrariness will the Court intercede.<sup>112</sup>

*Okemo III* was decided in 2004. In a surprise reversal of its earlier ruling, the Court concluded that the landowner was not entitled to any damages against the State of Vermont for what it admitted was a taking of a property interest.<sup>113</sup>

In 2003, the Supreme Court issued its decision in a Georgia road case, voiding a town's reclassification of a highway into a trail due to an ineffective description.<sup>114</sup>

After neighbors challenged a town's maintenance of a highway running along the southern shore of Lake Champlain, the Vermont Supreme Court ruled that dedication and acceptance stops when neighbors object to the work, in 2006.<sup>115</sup>

In 2006, the legislature addressed ancient roads through an act relating to "unidentified corridors," given the name, Act 178. This law made substantive changes to the common law of highways, including a process for identifying and settling questions relating to highways that were properly laid out by road survey or dedication and acceptance, that do not appear on the July 1, 2009 highway map, and are no clearly observable on the ground. That act also affirmed the validity of discontinuances, however imperfectly accomplished, if 30 years had passed since the hearing.<sup>116</sup>

Notable and well-publicized instances of municipalities' efforts to restore old roads, particularly in the towns of Chittenden and Barnard, were part of the reason for the change in the law. One Barnard case reached the Vermont Supreme Court in 2007. *McAdams v. Town of Barnard* held that landowners have a right to insist that the town inform them of all public roads crossing their property, in an effort to quiet title, when challenged.<sup>117</sup>

Decisions on ancient roads multiplied after the new law took effect. Perhaps the most important is *Austin v. Town of Middlesex* (2009), in which a highway survey was found in town records, without any indication that it was approved by selectmen, and without a certificate of opening. The Supreme Court declared the road private, there being no evidence of dedication and acceptance other than its inclusion on town highway maps.<sup>118</sup>

In 2008, the high court affirmed the route of an old town road along the course of a neighbor's driveway one rod in width, from a contested survey.<sup>119</sup>

A Bethel road runs up a hill and appears to end at a house, but the survey showed it running beyond. In *Town of Bethel v. Wellford* (2009), the Supreme Court affirmed the decision of the

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<sup>112</sup> *Couture v. Selectmen of Berkshire*, 121 Vt. 359, 364-65, 159 A.2d 78, 82 (1960).

<sup>113</sup> *Department of Forests, Parks & Recreation v. Town of Ludlow*, 2004 WL 2415883 (Vt.), 2004 VT 104.

<sup>114</sup> *In re Town Highway No. 20*, 175 Vt. 626, 834 A.2d 17 (2003).

<sup>115</sup> *Town of South Hero v. Wood*, 2006 VT 28, 898 A.2d 756 (2006).

<sup>116</sup> The act amended 19 V.S.A. § 717(b) to read, "(b) A town or county highway that has not been kept passable for use by the general public for motorized travel at the expense of the municipality for a period of 30 or more consecutive years following a final determination to discontinue the highway shall be presumed to have been effectively discontinued. This presumption of discontinuance may be rebutted by evidence that manifests a clear intent by the municipality or county and the public to consider or use the way as a highway. The presumption of discontinuance shall not be rebutted by evidence that shows isolated acts of maintenance, unless other evidence exists that shows a clear intent by the municipality or county to consider or use the highway as if it were a public right-of-way."

<sup>117</sup> *McAdams v. Town of Barnard*, 182 Vt. 259 (2007).

<sup>118</sup> *Austin v. Town of Middlesex*, 186 Vt. 629 (2009).

<sup>119</sup> *Oppenheimer v. Martin*, 184 Vt. 561 (2008).

trial court, recognizing that the road continued across the field, despite various anomalies in the survey and a lack of evidence of maintenance on the road.<sup>120</sup>

In 2010, the high court reaffirmed the principle that a road cannot be taken by adverse possession, and confirmed the existence of a town highway in Royalton based on an 1804 survey, despite a lack of evidence of dedication and acceptance. “[W]here public rights-of-way are concerned, the lack of maintenance by the municipality or use by the public is not enough to extinguish public ownership,” the court explained. “Even as the law governing discontinuance has become less strict, a municipality must still take some formal step.”<sup>121</sup>

The Town of Vernon surveyed a road in 1801 across land served by a part of the original track. As with many ancient roads, this one continued through the property. As in *Austin v. Middlesex*, the survey in this case, while it was clearly “initiated under the authority of the selectboard, it is not officially approved or adopted by the selectboard as required.”<sup>122</sup>

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The history of Vermont's laws on highways is, of course, not over, not by a long shot. Each year the law changes, and the courts interpret the laws that are in place in new ways. Nothing remains the same for long. The law of the past, however, remains our basic source in determining whether highways have been laid out, altered or discontinued properly. That, if nothing more, must give us some confidence in the value of history and the permanency of former law.

A road crosses a ski trail on Okemo Mountain. A town insists landowners take down fences to widen a highway. A road washes out in Calais. A town starts finding old roads where nobody knew they ran in 200 years. These are heady times for the road law enthusiast, a kind of Golden Age, where fundamental decisions are being made on a regular basis. At present, local control is in the ascendancy. But as more of Vermont feels development pressure, as formerly remote sections of town are opened up to housing, the tension to resist changes in the highway system can only increase, and new policies will emerge to fit exigent circumstances.

### 3. THE LAW OF VERMONT TOWN ROADS

[A] highway may be as important to accommodate farms, unoccupied as dwelling places, as if they were so occupied. The owners must in some fair way have access to them for themselves and their cattle, summer and winter. And the reason no dwelling houses are built, or occupied, on many lands, is the want of highways. It surely requires no labored argument, to expose the absurdity of requiring a man to cross a mountain with his produce, or bargain with a crusty neighbor, as he best can, or commit a trespass, every time he enters on his own land, by crossing that of others,--which it seems to me must be the result, if one may not ask a highway, merely to accommodate his land. How can he build a house, if he should choose to, unless have some convenient road to his land?

Judge Isaac Redfield, in *Paine v. Leicester* (1849).<sup>123</sup>

#### 3.1 Introduction.

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<sup>120</sup> *Town of Bethel v. Wellford*, 186 Vt. 612 (2009).

<sup>121</sup> *Benson v. Hodgdon*, 187 Vt. 607 (2010).

<sup>122</sup> *Merritt v. Daiello*, 2010 WL 7799806, October 21, 2010 (unreported).

<sup>123</sup> *Paine v. Leicester*, 22 Vt. 44, 49-50 (1849).

The law of highways is principally found in Title 19 and the various decisions of the Vermont Supreme Court, interpreting those statutes and common law principles of highway. At the heart of all highway law is the constitutional principle of taking.

### 3.1.1 Public taking.

The taking of property for the use of highways is an invasion of the rights of private property, an imposition of the greater rights of the public over those of individuals. “All land is, in fee, the property of the sovereignty. Originally it forms a portion of the public domain, until parceled out to private persons, either natural or artificial.”<sup>124</sup>

When all land was wilderness, there was no taking. Before independence, there was no constitution, but there was an inherent right to take property for public purposes and consequent duty to pay for the taking. The Vermont Supreme Court has stated that “the right of eminent domain is an attribute of sovereignty, and existed before the adoption of the constitution, and would continue to exist independently of it if not mentioned in it.”<sup>125</sup>

When the first Vermont Constitution was adopted in 1777, the founders used the Pennsylvania Constitution as a model. Among the provisions unique to Vermont was Article 2nd, dealing with the public use of private property. This Article guarantees, “That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”

Deciding when there is a taking, whether the taking is necessary, and what damages are entailed, are basic questions in highway decisions.

Not every exercise of authority over private property is the exercise of eminent domain. For instance, when the trustees of the Village of Wells River, to avoid damage to the highway from high water, burned the mill and its contents and blew up and destroyed the dam, the Vermont Supreme Court concluded that this was not a taking, and that no compensation was owed the owner of the mill and the dam. This was the police power at work—averting imminent public injury--and the Village was exempt from liability.<sup>126</sup> In drier times, if the Village wanted to condemn the mill for a public purpose, such as a highway or municipal building, damages would necessarily be available to the owners, because the constitution and the statute require it. There is no taking with the appropriate exercise of the police power, in emergencies such as that flood or every day of the year, or through the power to enact and enforce zoning and other land use controls. Rezoning land to limit the number of lots or the use of property in non-compensable.

The best definition of taking comes from the Vermont Supreme Court. “Any permanent occupation of private property for public use and exclusion of the owner from its beneficial use, regardless of how title is left, must be by the exercise of the right of eminent domain, and must be compensated for, unless it can be referred to some other governmental power, as the police power. The subjection of land to an easement of the character of a highway is a taking as much as though the absolute title passed.”<sup>127</sup> The court and the legislature in their own ways have determined that a taking is involved whenever a highway is laid out or altered, whenever snow fences are laid down to prevent snowdrifts in the road, whenever a highway grade is raised more than three feet, or even when poor highway drainage forces water to damage private property.

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<sup>124</sup> *Armington et al. v. Barnet, Ryegate and Newbury*, 15 Vt. 745, 751 (1843).

<sup>125</sup> *Stearns, et al., v. The City of Barre*, 73 Vt. 281, 291 (1901).

<sup>126</sup> *Aitken v. Village of Wells River*, 70 Vt. 308, 313 (1898).

<sup>127</sup> *Sanborn, et al. v. Village of Enosburg Falls*, 87 Vt. 479, 484 (1913).

Even the laying out of temporary logging roads is a taking, requiring notice, survey and hearing, damages, and the rest.<sup>128</sup>

There is no dispute about whether the laying out of a highway is a taking. Discontinuance is not a taking. No compensation need be paid to those with property no longer served by a public road, after the highway is thrown up. The widening of a highway from one to two lanes may be a taking; at least the law requires formal notice, site visit, hearing and written decision before a road is that seriously altered. Normal maintenance is not.

### **3.1.2 An easement for a public right-of-way.**

What is taken, when private property is burdened with a public right-of-way? According to the court, the “taking of land for a highway does not divest the owner of his title in fee. The public acquire only an easement; and the right of the owner to use, occupy and control the land in any manner, which is not inconsistent with the public enjoyment of the easement, still remains.”<sup>129</sup> Think of the right of way as a metaphor--the conceptual equivalent of a three-rod swath of fabric laid over private property, eliminating the possibility of trespass and authorizing the reasonable use of the land by the town, acting on behalf of the public.

There is always a question of how much land ought to be taken in laying out a highway, and whether materials necessary for working the road, including gravel, may also be taken. “Every species of property which the public needs may require, and which government cannot lawfully appropriate under any other right, is subject to be seized and appropriated under the right of eminent domain. Land for the public ways, timber, stone and gravel with which to make or improve the public ways, buildings standing in the way of contemplated public improvements are liable to be thus appropriated.”<sup>130</sup>

There is, however, an “implied limitation upon the power, that the public will take only so much land or estate therein as is necessary for their public purposes.”<sup>131</sup> But a town may take gravel, earth or other material needed to repair or build highways that are located within the bounds of the highway right-of-way, whether it is to be used in that location or on some other town highway.<sup>132</sup>

“No doubt the fee of the land remains in the landowner; and he may maintain trespass, subject to such rights, as are acquired under the easement, which the public get. The public have simply a right of way, and the powers and privileges incident to that right. We think digging the soil and using the timber and other materials, found within the limits of the highway, in a reasonable manner, for the purpose of making and repairing the road, or bridges, are incident to the easement.”<sup>133</sup>

After getting the permission of the highway surveyor, Mrs. Drew cut the grass growing in the highway over the land of Cole, “that her children might go and come from school in the highway, without getting their clothes wet.” She fed the grass to her horse. When the owner of the land under the highway complained, the court held that the grass, when cut, was the property of Cole. “The right to take the herbage, or emblements, is about all that is left to the owner of

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<sup>128</sup> 19 V.S.A. § 958.

<sup>129</sup> *Livermore et al. v. Jamaica*, 23 Vt. 361, 364-5 (1851).

<sup>130</sup> *LaFarrier v. Hardy et al.*, 66 Vt. 200, 206 (1894).

<sup>131</sup> *Hill v. Western Vermont R.R. Co. et al.*, 32 Vt. 68, 76 (1859).

<sup>132</sup> 19 V.S.A. § 916.

<sup>133</sup> *Slocum v. Catlin et al.*, 22 Vt. 38, 41-2 (1849).

soil burdened with the easement of a public highway.” Mrs. Drew was ordered to convey to Cole an equivalent in grass as she had taken.<sup>134</sup>

The court explained, “Taking land for a highway gives the public nothing more than a right of way in the land. Such right of way gives the public no right to the trees or herbage growing upon the land, or to the stone and materials under the soil. These are as much the property of the owner of the freehold as before.”<sup>135</sup> The trees cut down during the widening of a highway belong to the landowner, and not the town. It is always best to mention this to the landowner at the beginning of a road construction or maintenance project.

With federal projects, the fee, not just an easement, is the preferred purchase. Today, in practice, there is no significant difference in the appraisal of property taken as a fee or as a right-of-way. The same rule applies when the owner of land under a public right-of-way is the subject of a new taking of the underlying fee. In such cases, damages are nominal.

### 3.1.3 Dedication and acceptance.

There are two methods of laying out the public right-of way. One is statutory condemnation. The other is dedication and acceptance.

The earliest Vermont case on highways involved a challenge to the establishment of a square in the old village of St. Albans. This was the first time that the Court recognized dedication and acceptance. “Without deciding what length of time is necessary to create a right in the public, we think we may safely say, that where the public have had the use and enjoyment of a way for fifteen years, or more, they have acquired a right, which cannot be disturbed.”<sup>136</sup>

The general rules on dedication and acceptance were established in 1947. “A dedication of a road as a highway is the setting apart of the land for public use, and may be either express or implied from the acts of the owner. It need not be evidenced by any writing or by any form of words, but may be shown by evidence of the owner's conduct, provided his intention, which is the essential element, clearly appears.”<sup>137</sup> The owner acquiesces to the public right of way over his or her property, dedicating his or her rights to the land, by not preventing maintenance of the road and travel by the public or by deed or agreement.

There must also be acceptance. The highway must be accepted and adopted by the proper town authorities, “from evidence that the town acting through the proper officials has voluntarily assumed the burden of maintaining the road and keeping it in repair, and where it is found that labor or money has been expended and repairs made thereon the conclusion is justified that the town has recognized the public character of the road and that it is a highway.”<sup>138</sup>

No acceptance is shown, however, merely by the use of a highway by the public. Some act of the town recognizing it as a highway must be shown.<sup>139</sup> A verbal instruction, given by a selectman to a road commissioner, is not sufficient, but a written authorization for repairs (an order) would be. For the purpose of dedication and acceptance, a highway includes a bridge.<sup>140</sup>

The principle of dedication and acceptance does not, however, work in reverse. A landowner cannot occupy land within the highway right of way for 15 years and then claim that the right of

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<sup>134</sup> Cole v. Drew and wife, 44 Vt. 49, 53 (1871).

<sup>135</sup> Id.

<sup>136</sup> State v. Wilkinson, 2 Vt. 481, 486 (1829).

<sup>137</sup> Springfield v. Newton, 115 Vt. 39, 45 (1947).

<sup>138</sup> Id.

<sup>139</sup> Tower v. Rutland, 56 Vt. 28, 32 (1884).

<sup>140</sup> See 1 V.S.A. § 119.

way has been taken by adverse possession. “A right or interest within the limits of a highway shall not be acquired by anyone by possession or occupation.”<sup>141</sup>

### **3.1.4 Statutory condemnation.**

There are two ways to start the process of changing the status of highways. One is by petition, filed by landowners or voters; the other, by the motion of the selectboard. The procedure is the same, regardless of how the process begins. The statute explains,

Persons who are either voters or landowners, and whose number is at least five percent of the voters, in a town, desiring to have a highway laid out, altered, reclassified, or discontinued, may apply by petition in writing to the selectmen for that purpose. The selectmen may also initiate these proceedings on their own motion.<sup>142</sup>

The petitioners asking for this review do not need to be the same petitioners who asked for the highway to be laid out.<sup>143</sup>

Where the petition is defective, but the selectboard has acted on it, the court may still find that a highway has been laid out. “The statute that [landowners or voters of a town] may petition to have a highway laid out, altered, or discontinued, was designed to afford a mode of compelling action by the selectmen; but they may act without a petition, or upon an improper one, and have their action good, for their action is the vital thing, however induced.”<sup>144</sup> The general rule, however, is that defects in the procedure of laying out a highway are fatal to the process.

In some towns, developers offer quit claim deeds to roads, if they are turned into Class 3 highways. Towns will insist on having the road built to Class 3 standards, before considering the acceptance of such deeds. Before such roads can become public highways, the full laying out process ought to be followed. Without it, there is no forum for the public to participate in the process.

### **3.1.5 Town highways as public highways.**

Town highways are not a purely local matter: “[I]t is plain from the provisions of the statute, and from the entire course of usage and sentiment on the subject, that, as between towns, the matter of highways is one of mutual comity, the inhabitants of each town having in all other towns the same free and full right to use and enjoy the highways as the inhabitants of such other towns have. In this way the duty imposed on each town respectively, is compensated and counterbalanced in respect to other towns, by the fruits of the equal duty proffered to the inhabitants of each town by every other town in the state.”<sup>145</sup>

Selectboards do not act purely in the interest of those who live in town, but for all of the traveling public, even those from New York. “The town or its inhabitants have no more interest in the highways within its limits, than any other citizens. The public highways throughout the state are of general concern, and, as such, must of necessity be perpetually under the control of the Legislature, unless granted to individuals or private corporations.”<sup>146</sup>

### **3.1.6 State relations.**

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<sup>141</sup> 19 V.S.A. § 1102.

<sup>142</sup> 19 V.S.A. § 708(a).

<sup>143</sup> Moore et al. v. Chester, 45 Vt. 503, 505 (1873).

<sup>144</sup> Brock v. Town of Barnet, 57 Vt. 172, 177 (1884).

<sup>145</sup> Id.

<sup>146</sup> Panton Turnpike Co. v. Bishop, 11 Vt. 198 (1839).

In 1892, the state first allocated five percent of the state highway tax to the towns on the basis of road mileage. In 1898, the office of state highway commissioner was created and given supervision of state road funds, although town highway commissioners were still authorized to expend the money. In 1912, this changed, and the state highway money had to be spent under the direct supervision of the state highway commissioner and his assistants.<sup>147</sup> The state's role in transportation matters has grown ever since, as a result of federal money, the growing practice of paving roads, floods, and the need for uniform standards of construction and maintenance. There is money, but the legislature has never entirely relieved the towns from the cost and responsibility of constructing and maintaining class 3 and 4 town highways and bridges.

A closer look reveals that town officials, in making decisions, spending money and doing work on roads, aren't *town* officials at all. "[S]electmen, in laying out highways, are engaged in a public and governmental undertaking, and are in a real sense officers of the State." But that does not mean they are entirely free from liability. "[I]n this work they are in just as true a sense the agents of the town in the matter of engaging surveyors, buying materials, and employing help to construct the road. As long as they act within the scope of their authority in these matters, they bind the town by their contracts."<sup>148</sup>

### 3.2 How statutory condemnation works.

Proper procedure is everything. The statute provides special standards for notice, site inspection, hearing, survey, notice to landowners to vacate the land, the opening of a highway, alternate methods of assessing damage, and judicial appeal. Following the statute to the letter should be easy, where the law is clear. The basic law is found in 19 V.S.A. §§ 701-750.

#### 3.2.1 Notice.

After receiving a petition or deciding on the board's own motion to lay out, alter, reclassify or discontinue a highway,

[t]he selectmen shall promptly appoint a time and date both for examining the premises and hearing the persons interested, and give thirty days' notice to the petitioners, and to persons owning or interested in lands through which the highway may pass or abut, of the time when they will inspect the site and receive testimony. They shall also give notice to any municipal planning commission in the town, post a copy of the notice in the office of the town clerk, and cause a notice to be published in a local newspaper of general circulation in the area not less than ten days before the time set for the hearing. The notice shall be given by certified mail sent to the official residence of the person(s) required to be notified.<sup>149</sup>

The statutes define "interested person" or "person interested in lands" as "a person who has a legal interest of record in the property affected." This includes all those with land abutting the highway, land served by the highway, mortgagees and owners of rights-of-way, among others.<sup>150</sup> All must receive certified mail notices of the action to be taken, at least 30 days before the hearing. Here is a model notice:

Notice of Hearing  
On Laying Out a Highway  
Selectboard, Chipman, Vermont

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<sup>147</sup> *Stalbird et ux. v. Town of Washington*, 106 Vt. 213, 216-7 (1934).

<sup>148</sup> *Id.* at 21.

<sup>149</sup> 19 V.S.A. § 709.

<sup>150</sup> 19 V.S.A. § 701(6).

The Selectmen of the Town of Chipman hereby give notice to the persons named below as owners or persons interested in lands and rights that may be affected by a decision of said selectboard, acting on a petition to lay out a town highway.

The petition asks that highways within the Green River Subdivision be laid out as third class town highways. The board and any member of the public will meet at the gatehouse of the Green River Subdivision at 10:00 a.m. on Saturday, November 26, 2012 for a site inspection of the highways to be laid out, and then meet at the town offices at approximately 11:00 a.m. to conduct a hearing on the question of laying out the highways.

As required by law, notice of this site inspection and hearing is being provided by certified mail to each of persons owning or interested in lands through which the highways pass, listed below, as well as the municipal planning commission. A copy is to be posted in the office of the Town Clerk, and published in the Barre-Montpelier Times-Argus, a local newspaper of general circulation in the area, not less than 10 days before the time set for the hearing.

If the Selectboard determines that the public good, necessity and convenience of the inhabitants of the town require the laying out of these highways, the Board will reconvene a meeting at 10:00 a.m. on Saturday, January 3, 2012, at the town office, for the purpose of assessing damages to be paid to persons owning and interested in the lands to be taken for these highways.

The petition and other pertinent information relating to the proposed highways are available for public inspection and copying in the office of the Town Clerk of the Town of Chipman during business hours. A survey showing the subdivision roads is also available for review and copying at the town office.

The following persons have been notified of the public hearing: ..... [fill in].

Signature of selectboard member giving notice

As with all actions of the selectboard, the decision to begin the process of laying out a highway, or any of the other options, including reclassification, alteration and discontinuance, must be made at a duly-warned regular or special meeting of the board, by motion and vote, and with the action recorded in the minutes of the meeting.

### **3.2.2 Site inspection and hearing.**

The open meeting law requires that the hearing conducted by the selectboard be open to the public.<sup>151</sup> The board may deliberate in private, following the hearing.<sup>152</sup> According to the open meeting law, the site inspection may be conducted without the attendance of the public, although

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<sup>151</sup> 1 V.S.A. § 312(a).

<sup>152</sup> 1 V.S.A. § 312(e).

this is inadvisable in highway hearings. As the statute on laying out highways requires public notice of the time of the inspection, the public should be allowed to attend.<sup>153</sup> It would be rude and impolitic to try to prevent anyone from attending the inspection. Certainly the parties—petitioners, those interested in the question of whether to lay out, alter, reclassify or discontinue a road—must be included.

The inspection is not the time for people to start giving evidence about the proposed action. Selectboard members in particular ought to ask anyone who is making arguments or giving evidence to hold those thoughts until the hearing begins.

In order to memorialize what the board saw at the inspection, the chair or other member ought to describe the route, condition of the highway right-of-way and traveled way, the persons who attended, and any other information on which the board may later rely in making the decision, in words. Although tape recording the session is not mandated, keeping a good record of the hearing is essential and highly recommended. The description of the site visit also needs to be included in the written decision of the board.

A notary (such as the town clerk) should swear in all witnesses, including any town official who intends to testify. The oath asks, “Do you solemnly swear that the evidence you shall give, relative to the cause now under consideration, shall be the whole truth and nothing but the truth. So help you God.”<sup>154</sup>

If any member of the selectboard has an interest in the lands affected by the proposed action, they should step down from the board for this matter. This recusal extends to a member of the selectboard who is related by blood or marriage to anyone interested in the action who is a first cousin or closer.<sup>155</sup>

If the matter is brought before the selectmen by petitioners, as the hearing opens, let them go first, after being sworn, to explain why they think the highway ought to be laid out (or altered, reclassified or discontinued). Hear from each of the landowners and persons interested in the highway. The road commissioner of the town may be a useful witness, on the subject of the cost of laying out and maintaining the highway. The treasurer may be useful in relating the amount of taxes generated by the land along the proposed highway. And if the question is whether to reclassify a highway from class 4 to class 3, members of the planning commission or the zoning administrator may be useful in testifying on the relation between the proposal and the bylaws and town plan.<sup>156</sup>

Board members are judges in this situation, and ought not to give evidence themselves, or be sworn to do so. Remaining alert to what is said is critical, but they should only ask questions, not give their own opinions. The board should treat this as a decision that can only be made after all the evidence is weighed and considered, and not give any indication of the outcome of the hearing until the written decision is issued.

What about others who want to testify? The statute does not give them a formal role as parties to a hearing to lay out, alter, reclassify or discontinue a highway, but to ignore them completely would be too severe. After all, they will be bearing the cost of maintaining the highway until it is laid out or denied the opportunity to use the road if it is discontinued. With a criterion involving the “convenience of the inhabitants of the municipality” to deal with, boards

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<sup>153</sup> 1 V.S.A. § 312(g); 19 V.S.A. § 709.

<sup>154</sup> 12 V.S.A. § 5810.

<sup>155</sup> 12 V.S.A. § 61.

<sup>156</sup> 19 V.S.A. § 708.

ought to take testimony from anyone who has anything to offer, not just interested persons, as a way of building a record to support their findings on this question.

The standard for deciding to lay out, or not to lay out, a highway, is the board's judgment that the "public good, necessity and convenience of the inhabitants of the municipality require" the laying out, alteration or reclassification.<sup>157</sup> It should be on everybody's mind throughout the process, stated aloud at the hearing and included in the written decision that follows.

### 3.2.3 Necessity

The only one of the three terms that is defined in statute is "necessity." The statutory definition is found in 19 V.S.A. § 501(1):

"Necessity" shall mean a reasonable need which considers the greatest public good and the least inconvenience and expense to the condemning party and to the property owner. Necessity shall not be measured merely by expense or convenience to the condemning property. Due consideration shall be given to the adequacy of other property and locations and to the quantity, kind and extent of cultivated and agricultural land which may be taken or rendered unfit for use by the proposed taking. In this matter the court shall view the problem from both a long range agricultural land use viewpoint as well as from the immediate taking of agricultural lands which may be involved. Consideration shall also be given to the effect upon home and homestead rights and the convenience of the owners of the land; to the effect of the highway upon the scenic and recreational values of the highway; and to the effect upon town grand lists and revenues.

This does not mean "an imperative, indispensable or absolute necessity but only that the taking be reasonably necessary to the accomplishment of the end in view under the particular circumstances."<sup>158</sup> In one case, the court, reviewing the actions of a selectboard, found that evidence that "the roads would aid in fire protection, that the town tax revenues would increase without an undue burden in the cost of maintaining the highways, that they would connect two present dead-end town roads so that traffic could flow east and west on one town road and that they would permit more efficient and economic maintenance, particularly during the winter plowing seasons," sufficient to uphold a decision to lay out a highway.<sup>159</sup>

### 3.2.4 Survey.

No highway should be laid out without a survey. A survey is not required for discontinuance, as long as there is a written description of what has been discontinued. The more specific the description the better. An attempt to save a few dollars by avoiding a survey is usually imprudent. Metes and bounds descriptions that appear solely in words are so risky; typos can destroy everything a board has done so easily. The best practice is to hire a surveyor. The law explains,

When selectmen accept, lay out, or alter a highway, as provided in this chapter, they shall cause a survey to be made in accordance with the provisions of section 33 of this title and shall mark each termination of the survey by a permanent monument or boundary or refer the termination or survey by course and distance, to some neighboring permanent monument. The survey shall describe the highway and the right-of-way by courses, distances and width, and shall describe the monuments and boundaries.<sup>160</sup>

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<sup>157</sup> 19 V.S.A. § 710.

<sup>158</sup> *Cersosimo v. Town of Townshend*, 139 Vt. 594, 597 (1981).

<sup>159</sup> *Id.*

<sup>160</sup> 19 V.S.A. § 704.

The board must also monument the newly laid out or altered road on the ground.<sup>161</sup> As the court explained back in 1861, “The town is entitled to have the limits of the highway defined with such certainty that its officers or servants may have the means of knowing how far they may work the highway without incurring any hazard of becoming trespassers.”<sup>162</sup>

### 3.2.5 The decision.

The board has 60 days to make a decision. The decision needs to be in writing, and once issued it has to be recorded in the town records. “Recorded” does not mean just filed. It ought to be bound in an official book, either with the land records or in some separate volume of official town proceedings. Here is a model decision:

Decision and Order of the Selectmen  
Of the Town of Chipman  
For the Laying Out of Public Highways  
in the Green River Subdivision

At 10:00 a.m. on November 26, 2012, the Selectboard held a site inspection and at 11:15 a.m. convened a hearing for the purpose of taking testimony of interested persons and others on whether the public good, necessity and convenience of the inhabitants of the municipality require the highways in the Green River Subdivision to be laid out as class 3 highways in the Town of Chipman.

During the site inspection, the board and others walked the highways, inspected the drainage and curbing, and viewed the curb cut to Green River Street. [List those who attended the site visit and those who participated in the hearing.]

During the course of the hearing, the following exhibits were introduced by the petitioners: (1) a copy of a survey of the Green River Subdivision, by Peter Marker, R.L.S. # 1111, dated 7-3-88; (2) a spec sheet on the construction of the subject highways, prepared by the architect for the subdivision; (3) a letter from the engineer for the Wilderness Construction Co., the builder of the highways, explaining how the construction was handled; and (4) a copy of the town's ordinance on new highways.

Based on the evidence and exhibits presented at the hearing, the board makes the following findings and decision:

1. There are 1.7 miles of highways within the Green River Subdivision. The right of way proposed to be taken is owned by the Green River Subdivision Association, which consists of the owners of all the lots within the Subdivision.

2. These same highways have been constructed in accord with the town's ordinance on new highways to Class 3 standards.

3. The estimated cost of maintaining these highways, including plowing, is \$6,000 per year.

4. The State highway fund pays the town of Chipman \$\*\*\*\* per mile for class 3 highways, which for the 1.7 miles would amount to \$\*\*\*\* in this calendar year.

5. The laying out of the highway will aid in providing fire protection services to residents, in maintenance of sewer and water systems, including drainage, and give the town better access to lands beyond the Subdivision.

6. There are an estimated 40 trips per day on the highways of the Green River Subdivision by residents and other users of the highway.

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<sup>161</sup> 19 V.S.A. § 710.

<sup>162</sup> State v. The Town of Leicester, 33 Vt. 653, 655 (1861).

7. The public good, necessity and convenience of the inhabitants of the municipality require that the 1.7 miles of highways in the Green River Subdivision ought to be laid out as public highways.

Based on the preceding findings, the Chipman Board of Selectmen orders that the Green River Subdivision highways are Class 3 public highways of the Town of Chipman, with a three rod right of way, as described on the survey provided by the Association.

Based on evidence presented at the hearing, the Board also finds that the persons owning or interested in the lands to be taken are not entitled to any damages from this taking, since the laying out of the public right of way is over an existing private highway. The benefit to the landowners of having the highway maintained and plowed balances any residual damages related to the laying out.

The landowners affected by this order shall have a period of six months from the date of this order to remove all buildings, fences, timber and wood from the area now covered by the public right-of-way, after which the town shall assume control of the land over which it passes, for purposes of highways.

Signatures, Selectboard

#### Appeal Rights

Any person interested in this decision to lay out new Class 3 highways or who objects to the decision on compensation may appeal this decision to the Superior Court of this county within 30 days of the decision, in writing. V.R.C.P. 75; 19 V.S.A. § 740.

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There are no explicit requirements for what is written in the decision, beyond an obligation to make a fair report of what the board has done and why. The addition of a section on appeal rights is important in alerting parties to their rights and reminding all of the deadline, after which the decision cannot be appealed (unless the process has not been followed).

#### 3.2.6 Damages.

When the selectmen determine that a person, through whose land the highway passes or abuts, is entitled to damages, the town shall pay or tender to him or her, damages as the selectmen determine reasonable before the highway is opened.<sup>163</sup>

Determining damages is no easy part of the laying out process. The court has defined “just compensation” as “reimbursement of the fair market value of the property taken, plus the damage suffered by the remainder. Hard and fast rules are not encouraged, however, given the degree of difference between different properties and situations.”<sup>164</sup>

There are three methods of determining fair market value of property taken--the cost approach, the income approach, and the market data approach. These methods ought to be used independently of each other. The market data approach is the traditional method. The market data approach uses "sales of property of comparable value in the same general locality" to determine the fair market value of the property taken.<sup>165</sup> The proper market value is “the difference between the value of the entire tract before the taking and its value thereafter.”<sup>166</sup>

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<sup>163</sup> 19 V.S.A. § 712.

<sup>164</sup> Crawford v. Highway Board, 130 Vt. 18, 24 (1971).

<sup>165</sup> Rome v. State Highway Board, 121 Vt. 253, 255-6 (1959). 34

<sup>166</sup> Essex Storage Electric Co. v. Victory Lumber Co., 93 Vt. 437, 448 (1919).

If data on market value is unavailable, then the cost approach may be used. The income approach, involving the capitalization of net income, has been used and accepted by courts as a method of valuation, in cases where “the yield of a business is lessened or destroyed as a result of the taking of the land upon which the business is situated.” The court has concluded that a “business may be inextricably related and connected with the land where it is located so that an appropriation of the land means an appropriation of the business. More often, however, this is not the case and an appropriation of the land has but a limited effect on the business.”<sup>167</sup>

The statutory definition of “damages” is found in 19 V.S.A. § 501(2):

Damages resulting from the taking or use of property under the provisions of this chapter shall be the value for the most reasonable use of the property or right in the property, and of the business on the property, and the direct and proximate decrease in the value of the remaining property or right in the property and the business on the property. The added value, if any, to the remaining property or right in the property, which accrues directly to the owner of the property as a result of the taking or use, as distinguished from the general public benefit, shall be considered in the determination of damages.

Vermont is unusual in allowing “business loss” as a factor in considering damages. The court has said that, “[t]he first step in calculating business loss involves proving the value of the business as a whole. . . . Whether business loss may exist is determined by subtracting the highest-and-best-use value of the land taken from the value of the business thereon as a whole.”<sup>168</sup>

In estimating the damages sustained by a person owning or interested in lands, by reason of laying out or altering a highway, the benefits which the person may receive shall be taken into consideration.<sup>169</sup> When the alleged benefits, however, are based on advantages shared by all landowners--such as the increase in the value of an owner’s timber and wood, because of the access provided by the highway, or the rise in value of real estate resulting from the building--the benefits may not be considered.<sup>170</sup> The benefits must be direct and peculiar to the property retained.

Braintree laid out a public highway over the private road built by George Prince. The commissioners appointed to assess the damage concluded that Prince should be awarded \$300, calculating into the equation Prince's costs in building the highway. The Court disagreed and concluded that the \$300 was not warranted, since Prince “sustained no greater injury in consequence of his private road being adopted as a highway than he would have sustained had there been no private road and the commissioners had laid a highway over the route.”<sup>171</sup>

In a later case, landowners complained that the relocation of a highway caused them a loss of business, but the court explained,

In diverting traffic from in front of [a landowner’s] buildings to the new route there is no invasion of their rights nor is there any legal injury to the land remaining. Access to their buildings remains unchanged. The buildings and lands about them will remain exactly as before establishment of the new route except that travel past the buildings will doubtless be diminished. But the State owes no duty to the [landowners] in regard to sending public travel past their door. Our trunk line highways are built and maintained to meet public necessity and convenience in travel and not for the enhancement of property of occasional landowners along the route. Benefits which come and go with changing currents of public travel are not matters in which any individual has any vested right

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<sup>167</sup> Record v. State Highway Board, 121 Vt. 230, 237 (1959).

<sup>168</sup> Sharp v. Transportation Board, 141 Vt. 480, 487-8 (1982).

<sup>169</sup> 19 V.S.A. § 811.

<sup>170</sup> Adams v. Railroad Companies, 57 Vt. 239, 250 (1884).

<sup>171</sup> Prince et al. v. Town of Braintree, 64 Vt. 540, 543 (1892).

against the judgment of those public officials whose duty it is to build and maintain those highways.<sup>172</sup>

If the effect of the taking is to enhance the value of property, there may still be a need for compensation. In 1958, the court ruled that, “The fact that the remaining lots increased in value because of the new public way does not preclude the plaintiffs from compensation as a matter of right. . . . General advantages shared by the claimant with other property owners, occasioned by the general rise in property values, cannot be assessed against the plaintiffs. Allowance of set off for general benefits would exact contribution from the claimant for equal benefits enjoyed by his neighbors without charge.”<sup>173</sup>

Where the rights condemned have no market value, because they are not subject to frequent trade in the market, evidence of cost may be considered.<sup>174</sup> The cost does not fix the compensation, however. “If the evidence [the plaintiff] presents concerning the land reflects both the value of the land and the business on it, as it almost inevitably does in the case of farm land, for instance, then, to compensate the landowner for his business loss, that is, farm income as well as the land, is to give him double compensation.”<sup>175</sup>

Mineral deposits, including sand and gravel, cannot be ignored, but such “deposits cannot be made the subject of a separate evaluation, apart from the land where it is contained, and added to the market value of the land as additional compensation for the taking.”<sup>176</sup> The farm as an entire unit should be considered. “Buildings and other improvements which add to the value of the land in its most reasonable use will contribute to the total market value of the property taken. By the same token, a structural improvement might add little or nothing to value of the condemned property unless it is of such nature and character that it is adapted to some potential or prospective use from which the land derives its principal worth. . . . And while material to the market value, the independent replacement or construction costs are not recoverable as such.”<sup>177</sup>

Frustration of the owner's plans for future development of the frontage is equally noncompensable.<sup>178</sup> No damages are available when a public highway is reduced to the status of a trail by the statutory method.<sup>179</sup> This is because the right to require maintenance or repair is a right held in common by all the citizens and taxpayers of the state, and not just landowners.

No damages are available for the taking of personal property--cattle, farm machinery, dairy equipment, etc.--independent of business loss, except as it may be a fixture attached to the real estate.<sup>180</sup>

Board members should not try to calculate the value of land taken on their own. Expert testimony is needed, either in the form of a licensed appraiser or the listers of the town, who are trained to calculate valuation, based on the sales of other properties. The income method, discussed above, is particularly in need of such assistance. The cost method, mentioned earlier, also benefits from experts, or at least documentation of comparable (or actual) costs.

Just as the decision on the laying out or alteration is appealable to superior court, so is a decision on damages. In this case, the appeal is to the state's District Court, for the appointment

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<sup>172</sup> Nelson et ux. v. State Highway Board, 110 Vt. 44, 53-4 (1938).

<sup>173</sup> Demers v. Montpelier, 120 Vt. 380, 388 (1958).

<sup>174</sup> Id. at 389.

<sup>175</sup> Penna v. State Highway Board, 122 Vt. 290, 293 (1961).

<sup>176</sup> Farr v. State Highway Board, 123 Vt. 334, 337 (1963).

<sup>177</sup> Smith v. State Highway Board, 125 Vt. 54, 56-7 (1965).

<sup>178</sup> Children's Home v. State Highway Board, 125 Vt. 93 (1965).

<sup>179</sup> Perrin v. Town of Berlin, 138 Vt. 306, 307 (1980).

<sup>180</sup> Sharp v. Transportation Board, 141 Vt. 480, 484-5 (1982).

of commissioners to review and confirm or reverse the selectboard's decision.<sup>181</sup> In practice, some superior judges actively discourage the appointment of county road commissioners in such cases, as there is almost always a review of their doings, and an opportunity for the court to overturn their decision.

### **3.2.7 Vacating land and opening the highway.**

Once a highway is laid out or altered, the board needs to order the landowner to remove whatever buildings, fences, timber, wood or trees from the public right-of-way. This should be included in the board's decision. The law gives landowners six months after formal notice to complete the removal. If landowners appeal the compensation, the work can still proceed.<sup>182</sup>

After the time for vacating the land passes, the selectmen may take possession, unless there is an appeal to the superior court on the question of the necessity of laying out or alteration. If there is an appeal solely on damages, the town may remove obstructions, and open the lands for working and travel, if the damages have been paid.<sup>183</sup>

The law formerly required a certificate of opening, but that was eliminated in the year 2000. In fact, the law now explains, "The lack of a certificate of completion of a highway shall not alone constitute conclusive evidence that a highway is not public."

### **3.2.8 Appeals.**

When landowners or petitioners disagree with the board's decision on the laying out or alteration, or on the assessment of damages, there is a right to appeal. There are three options. There is an appeal to superior court, which is the most common route. There is an appeal by petitioners to the district court. There is also arbitration.

In arbitration, if the damages offered by the selectmen are unacceptable to the property owner, or interested person, the selectmen with the consent of the other party, may agree to refer the question of damages to one or more disinterested persons mutually selected, whose award shall be final. The reference or award, and the proceedings used in settling the damages, shall be included in the proceedings of the selectmen returned to the town clerk for recording.<sup>184</sup>

If this fails, the matter may be taken to a district judge for the appointment of commissioners to appraise the damages. The petition does not delay the opening of the highway.<sup>185</sup> This petition must be made within 60 days after the highway is opened for travel, or within a year for persons who did not receive notice of the selectmen's hearing.<sup>186</sup>

The most commonly used appeal is to the superior court. For decisions on laying out and altering highways, there is a statutory appeal route. Section 740 states:

When a person owning or interested in lands through which a highway is laid out, altered, or resurveyed by selectmen, objects to the necessity of taking the land, or is dissatisfied with the laying out, altering or resurveying of the highway, or with the compensation for damages, he or she may apply by petition in writing to the superior court in the same county, or in either county when the highway or bridge is in two counties, following the procedures of chapter 5 of [Title 19]. Any number of aggrieved persons may join in the petition. The petition shall be brought within twenty days after the order of the selectmen on the highway is recorded. If the appeal is taken from the

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<sup>181</sup> 19 V.S.A. § 726.

<sup>182</sup> 19 V.S.A. § 713.

<sup>183</sup> 19 V.S.A. §§ 714.

<sup>184</sup> 19 V.S.A. § 725.

<sup>185</sup> 19 V.S.A. § 726.

<sup>186</sup> 19 V.S.A. § 727. The process is laid out in 19 V.S.A. §§ 728-733.

appraisal of damages only, the selectmen may proceed with the work as though no appeal had been taken. Each of the petitioners shall be entitled to a trial by jury on the question of damages. Further appeal may be taken to the supreme court.

The court may appoint commissioners--three disinterested landowners--as commissioners to inquire into the questions raised on appeal. The matter is handled differently in different courts. Some hold trials, where the questions are reheard before a judge, or jury in the case of damage challenges. In other cases, where a jury trial is not requested, the matter may be submitted on motion, if there are no material facts in contention. Once the Court has rendered its decision ordering that a highway be laid out or altered, the Court fixes the time for its opening.<sup>187</sup> A copy of the decision must be recorded in the town clerk's office.<sup>188</sup>

There is another appeal route for petitioners, displeased with a selectboard's inaction on a petition to lay out, alter, or discontinue a highway, to court. Five percent of voters or landowners may petition the civil division of the superior court for a hearing on the question.<sup>189</sup>

An appeal to the Vermont Supreme Court is a purely appellate matter, without evidentiary hearings. Oral argument is available upon request before the court.

The process for appealing selectboard decisions on reclassifications and discontinuances is not as straightforward. Section 740 does not include specific authority for such appeals, and some courts have ruled that such appeal must proceed under Rule 75 of the Vermont Rules of Civil Procedure, which allows a much narrower scope of appeal. Service of such an appeal is different from the simple notice allowed in appeals of laying out and alteration of highways. With Rule 75 the appeal must be served as a complaint, and failure to file properly may result in dismissal. The standard for overturning decisions of the selectboard on reclassifications and discontinuances is very steep. Proof that there are other highways similar to yours with better maintenance or a different classification or less traffic is insufficient to qualify for reversal of the selectboard's decision.

Discrimination appears to be the sole remaining argument in favor of reversal, and even then the evidentiary bar is very high. In 1976, the court ordered reclassification after hearing a report about what one of the selectmen had said at the hearing. "The record strongly suggests that personal elements may well have influenced a decision which should be one of policy, with a quoted statement by one selectman that they wanted no more teachers living in far corners of the town. One of the petitioners is a college teacher."<sup>190</sup> Good reason to watch what you say at any hearing.

### **3.2.9 The federal law on condemnation.**

All projects that involve the use of federal funds must follow the federal Uniform Relocation and Real Property Acquisition Act of 1973, as amended.<sup>191</sup> This law, by which the federal authority is transferred to the Vermont Agency of Transportation, requires compliance with standards of fairness whenever land is condemned, and federal funds will be used for the construction or payment of damages. As most bridge work and road construction money is federal, these basic standards apply:

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in

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<sup>187</sup> 19 V.S.A. § 765.

<sup>188</sup> 19 V.S.A. § 705.

<sup>189</sup> 19 V.S.A. § 750.

<sup>190</sup> *Gilbert v. Town of Brookfield*, 134 Vt. 251, 253 (1976).

<sup>191</sup> 42 U.S.C.A. §§ 4601

the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.

(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with [section 3114\(a\)](#) to [\(d\) of Title 40](#), for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by subchapter II of this chapter will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is

left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.

(10) A person whose real property is being acquired in accordance with this subchapter may, after the person has been fully informed of his right to receive just compensation for such property, donate such property, and part thereof, any interest therein, or any compensation paid therefor to a Federal agency, as such person shall determine.<sup>192</sup>

### 3.3 Classification and maintenance.

The system of classification of town highways dates from 1974. Prior to this, towns were obliged to maintain all town highways.<sup>193</sup> From 1974 until 2002, the law required all-season maintenance of all Class 1, 2 and 3 highways. Class 4 roads were always treated differently. Then the Vermont Supreme Court decided *Sagar v. Town of Warren Selectboard* in 1999, and the old distinctions were lost.<sup>194</sup> The legislature reacted. Now a town may choose not to plow a Class 2 or 3 highway in winter months, as long as it is willing to accept a proportionately-smaller amount of state highway aid for maintenance and follows certain procedures. For Class 3 highways that had never been plowed before 2001, the town needs to post a notice that the lack of winter maintenance will continue.<sup>195</sup>

The majority of collisions on interest between towns and landowners arise from decisions relating to classification and maintenance. Everyone who resides on a town road believes that paying taxes ought to justify access throughout the year to their property, but not all highways receive equal maintenance. The decision on how much maintenance a road receives depends on the discretion of the selectboard, and under present law the board's decision always gets the benefit of the doubt. The *Sagar* case proved to be a trigger for this new age of deference to local authority, particularly after *Town of Calais v. County Road Commissioners* (2002). There the court affirmed the selectboard's decision not to rebuild a Class 4 road after it washed out, even though it prevented the landowner from reaching his homestead.<sup>196</sup>

Not all highways are alike, or need to be treated alike. "A class 4 highway need not be reclassified to class 3 merely because there exists within a town one or more class 3 highways with characteristics similar to the class 4 highway." In making that decision, selectboards may consider "whether the increased traffic and development potential likely to result from the reclassification is desirable or is in accordance with the town plan."<sup>197</sup>

#### 3.3.1. Class 4 highways.

Class 4 highways are all highways other than Class 1, 2 and 3 highways. The statutory obligation to maintain them is vague, described as "to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town. . . ."<sup>198</sup> Some are

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<sup>192</sup> 42 U.S.C.A. § 4651.

<sup>193</sup> See 19 V.S.A. § 14 (1957).

<sup>194</sup> *Sagar v. Warren Selectboard*, 170 Vt. 167 (1999).

<sup>195</sup> No. 154 (1999, Adj.Sess.), § 30; 19 V.S.A. § 310(d), which provides, "For class 2 and 3 highways that have routinely not been plowed and made negotiable prior to July 1, 2000, the process requirements of subdivision 302(a)(3)(B) of this title and subsection (a) of this section shall not be required. A property owner adversely affected by this subsection may request the selectboard to plow and make negotiable a class 2 or 3 town highway. However, a property owner aggrieved by a decision of the selectboard may appeal to the transportation board pursuant to subdivision 5(d)(8) of this title."

<sup>196</sup> *Town of Calais v. County Road Commissioners*, 173 Vt. 620 (2002).

<sup>197</sup> 19 V.S.A. § 708(b).

<sup>198</sup> 19 V.S.A. § 310(b).

plowed; most are not. Some are regularly maintained; others get a grader visit once a year, unless there are washouts. Selectboards know they need to be consistent in decisions relating to maintenance, particularly maintenance in winter. Decisions not to plow invite dissent and lawsuits.

Towns are not liable for damages to automobiles due to highway design or maintenance of highways, but bridges and culverts, on maintained Class 3 and 4 highways, when improperly maintained, can be the subject of liability to the town.<sup>199</sup> Safety ought to be the first concern, above budgets, above personnel problems.

### 3.3.2. Trails.

“Trail” means a public right-of-way which is not a highway and which:

(A) previously was a designated town highway having the same width as the designated town highway, or a lesser width if so designated; or

(B) a new public right-of-way laid out as a trail by the selectmen for the purpose of providing access to abutting properties or for recreational use. Nothing in this section shall be deemed to independently authorize the condemnation of land for recreational purposes or to affect the authority of selectmen to reasonably regulate the uses of recreational trails.<sup>200</sup>

Trails require no maintenance whatsoever. As the statute explains, “Trails [are] not . . . considered highways and the town shall not be responsible for any maintenance including culverts and bridges.”<sup>201</sup>

The right-of-way for each highway and trail is a presumed three rods wide unless there are records to show otherwise.<sup>202</sup> The width of trails laid out after July 1, 1967 is as the selectboard designates. Those trails created from previously-existing highways prior to that date retain the same width of right-of-way as it had as a highway, although not more than three rods.<sup>203</sup>

### 3.3.3. Pent Roads.

Originally the statute called them “private roads,” but it was clear that the landowner could not forbid anyone from using the highway, once it had been surveyed.<sup>204</sup> Today a pent road includes “any town highway which, by written allowance of the selectmen, is enclosed and occupied by the adjoining land owner with unlocked stiles, gates and bars in such places as the selectmen designate.”<sup>205</sup>

The powers of the selectmen include “granting permission to enclose pent roads and trails by the owner of the land during any part of the year, by erecting stiles, unlocked gates and bars in the places designated and to make regulations governing the use of pent roads and trails and to

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<sup>199</sup> 19 V.S.A. §§ 302(a)(5) & 985.

<sup>200</sup> 19 V.S.A. § 310(8).

<sup>201</sup> 19 V.S.A. § 302(a)(5).

<sup>202</sup> Just not knowing, without having investigated, whether there is a record containing the width of a highway, cannot satisfy this statute.

<sup>203</sup> 19 V.S.A. § 702.

<sup>204</sup> Warren v. Bunnell, 11 Vt. 600 (1839).

<sup>205</sup> 19 V.S.A. § 301(4).

establish penalties not to exceed \$50.00 for noncompliance. Permission shall be in writing and recorded in the town clerk's office."<sup>206</sup>

### **3.3.4. Highways between two towns.**

"The selectmen of two adjoining towns may, by agreement, lay out, reclassify, or discontinue a highway on the line between the towns, or erect a bridge over a stream between the towns, if a majority of the selectmen of each town assent."<sup>207</sup>

The laying out process works in almost the same way as a laying out within a town. Selectmen of one town may be petitioned by five percent of the voters or landowners of the two towns.<sup>208</sup> The two boards then meet together for the hearing.<sup>209</sup> Expenses are apportioned by agreement among the selectmen.<sup>210</sup>

If the highway passes from one town to another (or more), selectboards from each involved town must follow the steps laid out above for highways within a single town. Selectboards from two or more towns may hold joint hearings, although the ultimate vote and decision should be made separately by each selectboard. If the various boards all agree, fine; if the various boards disagree, then the question may be appealed to the superior court, where the court may appoint disinterested commissioners and review their final decree.<sup>211</sup>

When selectboards decide to discontinue highways between two towns, they may choose to designate the highways as trails. The law requires boards to notify the Commissioner of Forests, Parks and Recreation whenever such roads are being discontinued, and the Commissioner may designate the discontinued highway as a trail.<sup>212</sup>

When a highway crosses or is near the line between two towns, one town may reclassify or discontinue the highway without the consent of the other town, provided notice is given to the other town before the hearing on discontinuance.<sup>213</sup>

### **3.3.5 Resurvey.**

The statute law authorizes towns to resurvey roads, if the selectboard discovers the original survey was improperly recorded or its record not preserved, or if the original right-of-way is lost.<sup>214</sup> But the statute is an invitation to a lawsuit, if the town fails to follow the same process it would use for laying out a highway, that is, notice, site visit, hearing and written decision. If the board has evidence to support a conclusion that no new land of any resident is taken during the resurvey, perhaps no compensation need be paid the landowner, but a full due process ought to be accorded every resurvey.

### **3.3.6 Alterations; Widening.**

The formal process of laying out a highway must also be followed whenever a highway is altered. Alteration is defined in the law as "a major physical change in the highway such as a

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<sup>206</sup> 19 V.S.A. § 304(a)(5).

<sup>207</sup> 19 V.S.A. § 790.

<sup>208</sup> 19 V.S.A. § 792.

<sup>209</sup> 19 V.S.A. § 793.

<sup>210</sup> 19 V.S.A. § 791.

<sup>211</sup> 19 V.S.A. § 771.

<sup>212</sup> 19 V.S.A. § 775.

<sup>213</sup> 19 V.S.A. § 794(c).

<sup>214</sup> 19 V.S.A. § 33.

change in width from a single lane to two lanes.”<sup>215</sup> No one has as yet plumbed the sensitivity of this definition, but a reasonable argument could be made that a decision to pave a gravel road might also qualify as an alteration.

The widening of the public right-of-way also requires the full process, and a likely award of compensation to those whose lands are taken in the exercise.<sup>216</sup>

### **3.3.7 Regrading; raising the road bed.**

The law requires notice and an opportunity for a hearing, a finding of necessity and damages, whenever the highway road bed is cut down or raised in front of a dwelling house or other building adjacent to the highway more than three feet.<sup>217</sup> Damages are not available, statutorily or constitutionally, according to the Court, when less than three feet are involved, since the damages “are to be treated as having been taken into consideration in fixing the compensation allowed to abutting owners upon the original laying out of the highway.”<sup>218</sup>

However, if the three foot threshold is reached over a period of time, as consequences of repairs by successive road commissioners or selectmen, no taking occurs. “[O]ne ordinary repair cannot be added to another ordinary repair and make the result an alteration under the statute; and . . . in order to establish liability in such a case, it must be shown that the change or changes complained of were made at one time, or according to a fixed plan.”<sup>219</sup>

Note that the procedure to be following for determining damages for changes in grade is not the same as that for laying out highways, although the two processes are not very different. For damage awards, use the provisions of 19 V.S.A. § 923, which in turn requires using the appeal procedures of Chapter 5 of Title 19. This same process is used for notice, site inspection, determining need, awarding damages and appeals when “the selectmen determine that a highway is liable to be obstructed by snowdrifts” and decide that fences adjoining the highway ought to be laid down or decide that snow fences ought to be built or maintained to prevent snowdrift obstructions to the highway.<sup>220</sup>

### **3.3.8 Water Damage.**

Sluices, drains, and water bars constructed within the limits of the highway to protect the highway, which in turn weaken the culverts and bridges, subject the municipality to damages for injuries suffered due to the culvert or bridge.<sup>221</sup> But there is no liability for injuries caused as a result of sluices, drains, and water bars constructed to protect the highway, when water settles on the top of the road.

A town’s failure to unclog a culvert, from which the flow of a natural stream has been diverted, is a taking, and subject to compensation. But water accumulating on the surface of a highway is not.<sup>222</sup> “[T]he corporate duty to build and keep in repair their highways imposes upon towns certain obligations very like those existing between the owners of adjoining lands. . . .

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<sup>215</sup> 19 V.S.A. § 701(2).

<sup>216</sup> 19 V.S.A. § 703.

<sup>217</sup> 19 V.S.A. § 924.

<sup>218</sup> Fairbanks, et al. v. Town of Rockingham, 75 Vt. 221, 224 (1903).

<sup>219</sup> Hoyt & Hoyt v. Village of North Troy, 93 Vt. 8, 9 (1918).

<sup>220</sup> 19 V.S.A. §§ 925-928.

<sup>221</sup> 19 V.S.A. § 985.

<sup>222</sup> Sargent v. Town of Cornwall, 130 Vt. 323, 327 (1972).

Such town must build the road, keep it in repair, if it is obstructed, open it, and if it is injured or destroyed by any person, they are the party entitled to redress and compensation.”<sup>223</sup>

After the State’s salting of Route 114 in Island Pond made a well unfit for use, the court held this was a taking, and compensable, independent of any need to show negligence. Sovereign immunity does not protect the State from liability for this taking.<sup>224</sup>

### **3.3.9. Access and use permits.**

A curb cut needs a town permit. Any work within the public right-of-way requires a permit, granted by the selectboard, with such conditions as the board believes are reasonable. The one rule is that a town cannot deny some access to each parcel of land.<sup>225</sup> Some towns grant these permits by noting action in the minutes of the meeting, but the best practice is a written application from the landowner, specifying precisely what is intended. A town may even insist on a bond to cover the cost of restoration, if the landowner fails to perform.

## **4. Ancient Roads**

In 2006, the General Assembly tackled the issue of ancient roads. Committees took testimony from title companies, snowmobile clubs, selectboards, and private citizens on the dilemma caused by the discovery of unexpected town highways in Barnard and Chittenden, among other towns, and the litigation that was inspired by landowners seeking clear title and towns trying to protect newly-discovered public rights-of-way. The problem is, but for a handful of towns, no one knew for certain the basic facts of the laying out, alteration, and width of any town highway.

The resulting legislation was entitled, “An Act relating to Unidentified Corridors.” An unidentified highway is a road that does not appear on the official town highway map on July 1, 2009 as a highway or a trail, is not clearly observable on the ground, and yet has been officially laid out by a prior selectboard or taken by dedication and acceptance by the town by proof of maintenance.<sup>226</sup>

No unidentified corridor (UC) will exist before July 1, 2009, and none will exist after July 1, 2015.<sup>227</sup> At that point, to know what roads in a town are public highways, you will only need to look at the official highway map. Any highway later discovered to have otherwise qualified as a UC will have to be laid out anew, as the law will regard those roads as discontinued by operation of law.

During their short life, UCs will be treated differently than any other species of public highway. They cannot serve as official subdivisions, the way most easements do. The town will have absolutely no obligation to maintain them, or any duty of care.<sup>228</sup> If they have been used during the last 10 years, that use may continue, but otherwise UCs are just temporary ideas, without any guarantee of public access, until the town makes them trails or public highways.<sup>229</sup>

### **4.1 Choices**

Towns have several options under this new law.

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<sup>223</sup> Haynes v. Burlington, 38 Vt. 350, 359-60 (1865).

<sup>224</sup> Timms v. State, 139 Vt. 342, 345 (1981).

<sup>225</sup> 19 V.S.A. § 1111.

<sup>226</sup> No. 178 (2006).

<sup>227</sup> 19 V.S.A. § 302(a)(6)-(7).

<sup>228</sup> 19 V.S.A. § 302(a)(6)(E)-(J).

<sup>229</sup> 19 V.S.A. § 302(a)(6)(C).

They can do the research and locate the UCs, and then decide whether to convert them into highways or trails. Those UCs not converted will then be discontinued by operation of law on July 1, 2015.

Most towns will want to know what they are about to lose before deciding how to proceed. That will take a serious investigation of the highway and land records of the town. The state is providing a small subsidy to some towns, but the principal cost of this investigation will be borne by volunteers, diligently reviewing ancient records.

Towns can undertake what some call a “mass discontinuance,” through a selectboard vote to discontinue all highways other than those on the official highway map. This may only be done before July 1, 2009, and not thereafter.<sup>230</sup> A vote to discontinue requires a posted and published public notice, explaining the process of how voters can disapprove that vote. Petitioners have 44 days to file, and the board has no discretion. The vote decides whether the decision to discontinue those highways should be disapproved.

A third option is to do nothing. By waiting until 2015, without identifying any UC or transforming those roads into public highways or trails, those ancient roads that were laid out by road survey or dedication and acceptance which do not appear on the official town highway map, and are not clearly observable on the land will also be discontinued by operation of law. The sweep of that discontinuance includes both UCs that were never converted into highways or trails and roads that were never found that fit the definition of a UC.

There is another reason to consider completing the research. However daunting the process is, the town needs to know all that it can about its highways. The research effort will systematically identify the legal basis for all the town’s present highways, not just UCs. Ancient roads do not glow in the dark of the vault. The records of ancient roads look exactly the same as the surveys of what will become Main or Elm in later years. Rarely were roads named and numbers were not used.

Knowing the width and location of the public right-of-way is essential. How else can the road crew distinguish between their lawful jurisdiction and private property, or a landowner tell what is a taking and what is proper maintenance. The width and location of roads is not always decided by use.

Here is the process in a nutshell. Towns begin their research on their roads. They identify and document roads and propose them to AOT. After July 1, 2009, the first UCs will appear on the official town highway maps. More will be added over the next four or five years, and one-by-one, or all together in one process, the towns will decide whether they should be made into highways or trails, or discontinued. Towns have until September 1, 2014 to complete the research.<sup>231</sup> That is the last day a town can submit evidence to the Agency of Transportation to convince its officials to put the UC on the official highway map. Those waiting until the last minute, however, will have to add any UC to the 2015 highway map and then convert it to a public highway or trail before July 1, 2015. The 2015 highway map will be definitive. It will not contain any UCs, only highways and trails.

#### **4.2 First steps**

Assembling the evidence is the first step in the process of identifying UCs. A special committee, or perhaps the conservation commission, planning commission, or local historical society, should be appointed by the selectboard to conduct the investigation. That committee’s duty will include locating the records of the road survey, alteration, reclassification, and discontinuance

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<sup>230</sup> 19 V.S.A. § 305(h).

<sup>231</sup> No. 178 (2006), Sec. 11.

of every road that exists or ever existed in town. Among its powers is the right to enter private property to find evidence of the road. This requires a 14-day notice to the landowner.<sup>232</sup>

“Clearly observable” is a title standard, recognized in *Traders, Inc. v. Bartholomew* (1983) by the Vermont Supreme Court as sufficient to overcome extinguishment by operation of law by the Vermont Marketable Title Act.<sup>233</sup> In that case, a road was “clearly observable” by physical evidence of its use, including photographs, testimony of witnesses, and disturbance of the ground. Parallel stone walls are also important monuments in locating highways.

Town road records are sometimes kept together in a road book or road survey book, but in most towns they are scattered throughout the early town meeting record books, among the meeting minutes and vital records, and in the land records. A thorough review of every book in the vault to locate these road records is an essential first step, starting with the first records of the town (which may be proprietors’ records, as some proprietors laid out early roads even before the town was settled) and proceeding to the present day.

Make photocopies of everything vital you find. Mark each copy with the volume and page number so you can locate them again, and don’t skimp on photocopying. Use the 11” x 14” paper if you can, even if the page is smaller than that, and change the machine’s controls to darken copies to enhance readability of a faded page. If no good copy can be made, then copy out the record by hand, including everything that’s written on the page.

Then organize these records chronologically. Roads naturally run from other roads, so knowing that a particular road exists before the road you are tracing is laid out is important information for your search. Surveys are not always kept in order of their adoption, and they become separated from the copies of the petitions of landowners who have requested them.

### 4.3 Maps

The next most important sources of information are maps. The earliest map of Vermont is by the New York Surveyor General Claude Joseph Sauvier. It includes an extensive road network through many vacant areas, linking the first settlements. There are later statewide maps, but the earliest town maps are from the mid to late 1850’s, published by Wallings, McClellan, or Doten or others. These are available for viewing and copying at the Vermont Historical Society Library in Barre or on CD from [oldmaps.com](http://oldmaps.com) at a modest price. The cds are invaluable for zooming in on particular roads, for the names of the landowners at each turn in the road. There are also the Beers Atlas maps of Vermont towns, by county, published in the late 1860’s and 1870’s, which are generally available at libraries and in some town clerk’s offices (check out the maps hanging on the walls). These are also available through [oldmaps.com](http://oldmaps.com). There are county gazetteers with maps as well. The names of residents are printed on these maps, the very names that appear in the road records of each respective era.

Early topo maps are available on the net at <http://docs.unh.edu/towns/VermontTownList.htm>. Sometimes searching these maps can give you a look at whether the land would support a road in this place, although you will be surprised where some early roads were laid out. Some were used by exclusively by people, horses and maybe oxen, without even a wagon track.

A copy of the town lotting plan is a vital resource of information about early roads. This is one of the earliest records of the town, and shows the town cut into squares, often listing the first, second, third, and other divisions of the town. The numbers of each box, identified by lot, range, and division number, as well as the name of the original proprietor granted the lot, are often used as

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<sup>232</sup> 19 V.S.A. § 302(a)(6)(B).

<sup>233</sup> *Traders, Inc. v. Bartholomew*, 142 Vt. 486 (1983).

starting or ending points of roads in early surveys. Look on the walls of the town clerk's office, or in the earliest records of the town—the proprietors' records—for this plan. The State Archives in Montpelier may have records the town has not kept. The mapping division of the Department of Forests, Parks & Recreation is another source of these plans

Get a copy of the tax map of the town, and a straight edge ruler. Comparing the lotting plan with the tax map, you can connect lines of current parcels and learn the lot and range numbers of the original lots. Early deeds describe such lots as “drawn to the right of Enoch Bisbee,” and add, “Lot 4 in the seventh range in the second division.” Sometimes only one of these directions is present in the record.

Town proprietors, those who paid for the charter, did not often subdivide the entire town into lots at first. Several years might pass before they got around to the rest of it. A second, third or even fourth division is not uncommon, as undivided lands were parceled out to the proprietors or their successors in equal shares.

In this example, proprietor Enoch Bisbee drew the fourth lot in the seventh range in the second division as his share. Chances are, even if he never stepped foot in town, his name is likely to be repeated in deeds as late as 1850, especially if the original lots remain intact. The lotting plan links you to the landowner; the landowner links you to the road survey, as petitioner or by direct reference in the survey.

#### **4.4 Vendues**

You can become frustrating trying to find who lives where in town. There are important clues in vendue records. These are found in the land records or the town meeting records, and recite the results of levies on land for delinquent taxes, usually state property taxes. Vendue records appear as charts. These charts are organized by the names and numbers of the original proprietors. In the next columns over, you learn the amount of land assessed, the tax, and the name of the person who paid the property or purchased it for the delinquent taxes. The person paying the tax may be the present owner, the occupier of land with an uncertain title, or perhaps the next owner, as a result of the tax sale. With luck, you may see three or more of these sets of records, from 1784 to as late as 1820, and by comparing the charts you can connect the original grantee with his successors in title.

#### **4.5 Local history**

Read every scrap of local history you can find, starting with the town history. Review the description of the town in Abby Maria Hemenway's *Vermont Historical Gazetteer*, which is available at most libraries; the county histories; anything ever written about the town in the journal *Vermont History* (published by the Vermont Historical Society); diaries, town meeting minutes, whatever you can find. Read Esther Munro Swift's *Vermont Place Names* for the origin of the names of brooks, lakes, mountains, and settled areas of town. The best place to find these materials is the Vermont History Center in Barre. A day spent collecting materials is a necessary prerequisite to this study.

Keep track of the locations of the early school district lines, and the highway districts. Before the 1890's, there were usually a dozen or more of each in every town of both types of districts, and they are sometimes mentioned in the road surveys.

The object of this part of your search is to learn all you can about the first settlers and those who came after them, to connect a lot or cellar hole with a name that may appear on the early maps. This is historical detective work, and you should look for every clue you can find that can help in refining your search. Names of the early settlers, and their families, and later settlers, are available

in vital records (births, marriages, deaths), deeds, town histories, and town meeting records. Learning the cast of characters and keeping them straight can save you hours.

#### 4.6 The Road Survey

Road surveys list courses and distances. Let's look at one survey closely. It tells us this is a road laid out on November 1, 1793, beginning at Charles Read's dwelling house, thence "N 34° E 30 rods," the first of 25 different descriptions that follow, terminating at Joseph Baker's northeast corner. It tells us it was laid out three rods wide, and lists the selectmen and the surveyor who performed the work.

The early surveyor held a compass in his hand, put the needle on north, and sighted the direction between his position, holding one end of the chain, and the man holding the other end of it, usually the full length of the chain, which was four rods (66 feet) in length. Later surveyors had compasses mounted on poles or tripods, with leveling bubbles. It was rough work in deep forest and every season but the coldest months of the year.

The direction "N 34° E" is 34 degrees east of the north arrow. Today degrees are measured more precisely, but minutes and seconds are rare in these early records. Sometimes in early records you will see a one-half (½) degree added to a number, but early surveyors were usually content to stay with whole degrees.

The distance "30 rods" is 495 feet. A rod is 16.5 feet. The chain they carried was four rods long. A chain contained 100 links of about 7.92" each. Converting rods or chains into feet makes sense in order to compare lengths of road in the survey with lengths on the most recent highway maps that use miles or feet, but thinking in rods, and knowing how to convert rods to portions of a mile is also useful.

Be wary of degrees. Magnetic north is not the same year to year. It moves because of changes in the earth's magnetic field. Expect to deal with adjustments. North may change, but the footprint will remain the same.

Earlier surveyors used a system of notation that is sometimes frustrating. They did not trust large-numbered degrees, so they would write "E 3° S," putting east ahead of south. To be consistent, and make this fit on your mapping program, you may need to convert this to "S 87° E," exchanging the position of south and east and changing the degree by subtracting the number from 90° to make the correction.

Making a list of the names of those residents mentioned in the road surveys is useful in connecting roads to others. After you are underway, you will know where Charles Read's house stood, where Joseph Baker's northeast corner lay. When Read's or Baker's name comes up again, you have a valuable reference point.

This is the heavy lifting part of the job. You may be entering data on three or four hundred roads before you are done. As each is plotted, however, you will begin to "read" the footprint sufficiently to connect the survey with a particular area in town, or a track in the woods. By connecting roads to other roads you will begin to recreate the road network, building it up from the beginning, and creating an authoritative record of the town's highways.

#### 4.7 Plotting

The footprint of a road is the easiest way of linking road surveys with existing roads, or roads that appear in the older maps. There are programs available at low cost that draw that footprint as you enter the courses and distances information from the survey. Mapdraw Deedplotter is one of these. <http://www.informatik.com/mapdraw.html>. There is a charge for many of the programs,

running as high as \$200. With a little hunting, you may find free programs allowing you to enter data and print out the map of what you have entered. Professionals use Cad programs. Others, such as ArcView, are downloadable, some without charge.

Watch the scale when printing out these footprints, as it ought to match the scale of the base map you'll be using to display your discoveries. Sometimes it help to print these lines on mylar paper, and slide the image around to fit a particular road on the map or space between two maps. Comparing the route with your topo map may also be helpful.

It is inspiring how accurate most of these early road surveys are, when compared with existing roads.

Make sure you attach the mapped version of the highway to the road survey for later reference.

Never forget we are dealing with a road network. First came main stems, then arms and legs, out to the more remote parts of the town. By cellar holes alone, you can tell that much of the landscape that is now only used for forestry was once developed. If there was a farm, there was likely a public road.

#### **4.8 Deeds**

In conducting an ancient road search, deeds are critical resources. They link the property to the landowner at the time a road is laid out, altered, or discontinued. There is not time, however, to do a complete title search on every landowner throughout the town's history. Your use of deeds should be used as locational devices. If the road runs from Deacon Joshua Pike's barn to Hiram Butler's pasture, open the land records index and find what Pike and Butler owned the year the road was laid out.

This is going to be tedious, but productive. Deacon Pike was both a grantee and later a grantor of this property. The index lists names alphabetically for each category. Write down all the references, and look for the homestead. This is likely the first major purchase, as opposed to small pieces he might have bought or lots he owned as speculation. It is also likely the last piece he sells, or is cut up by his estate after his death. What you want to know is where he lived, based on what he owned, in the year the road first legally went by his barn.

Just to keep the words straight: a grantor conveys property to a grantee, with warranty deeds. Transferors quitclaim their rights to transferees. Mortgagors convey property on condition of repaying a loan to mortgagees (think banks, or in early Vermont the wealthy landowner who served that function). Some early deeds are conditional warranty deeds, providing that the conveyance will be complete only upon payment of the debt.

Grantees are likely to be mortgagors: they buy property, and give a mortgage to the seller to buy it on time, just like today, except before mid-19<sup>th</sup> century there were usually no banks. Beware of the conditional deed, which reads like a warranty deed but includes a repayment plan, thereby merging what today are three documents—the deed, mortgage, and note.

The deeds in Deacon Pike's deed might not say where he lived, but if you trace his grantor's title back a generation or two you will likely find a reference to a lot and range number, or the name of the original proprietor.

#### **4.9 Linking the sources**

You have plotted the road survey's courses and distances, and printed it to the scale of a base map. The best base map is probably the large size town highway map, showing the current roads and trails. Ideally, you can superimpose the lotting plan onto this map, using the tax map as a

standard for testing your conclusions. Write down the lot numbers and proprietors' names on each lot.

Place the names of the various owners of the lots you have found for different periods at the location of their homestead, and provide annotations on the origin and alteration of all roads. Keeping track of the petitioners also helps. Chances are good if they signed the petition, their property was going to be reached by the road.

Comparing the footprints you have printed out to the lines on the town highway map should reward you with immediate results.

This becomes a process of elimination. As each present road is identified and marked on the map, what remain are anomalies. Some of these may be highways that have been discontinued by formal decision of the selectboard. There may be roads that have no history.

#### **4.10 Getting onto the map**

Once a town has identified a UC, it must follow a special procedure before submitting the request to the AOT for a decision on whether to include it on the official map. This process begins with a public hearing, on 45-days' notice, to those owning land through which a UC passes. It makes sense to include notice to all landowners whose property would be affected by the road. At that hearing, the selectboard will review all the evidence of the road, including road surveys, and decide whether a UC exists. The decision, and the evidence, is then conveyed to the AOT for a separate decision.<sup>234</sup>

The law expects the selectboard or its appointees to draw the UC on the official town highway map as part of this submission. Surveys are not required by the state. If AOT officials are convinced that there is a UC, the highway will be added to the official map, for possible conversion into a highway or trail, or discontinuance.

If AOT denies the selectboard's request, the town can appeal that decision to the Transportation Board.<sup>235</sup> That decision is appealable to the Vermont Supreme Court. Individual landowners directly affected by the UC may appeal to the board and the court, without the need for a petition signed by five percent of the voters.<sup>236</sup>

#### **4.11 What remains**

Battles over what constitutes a town highway will not end on July 1, 2015. The new law does not address highways that are in fact clearly observable, were properly laid out, and were not on the official highway map. These highways will not be discontinued in 2015. No town will ever be entirely free of road disputes, as those affirming the existence of a highway laid out by dedication and acceptance or road survey, not on the map, argue you can see evidence of the road right here.

The regular disagreements over the location, width, and classification of town highways will also continue unabated by the new law, except those fights will be fewer, given the hard work the town has done in researching its road network.

The law is never finished either. Every year the legislature makes changes to Title 19, and the courts continue to enlarge the canvas of doctrines that make up the jurisprudence of Vermont town roads. This is just a beginning.

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<sup>234</sup> 19 V.S.A. § 305(e).

<sup>235</sup> 19 V.S.A. § 305(f).

<sup>236</sup> 19 V.S.A. § 708(a).