

# VERMONT HIGHWAY LAW

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A Summary of Selected Vermont  
Statutes and Common Law

prepared by

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# VERMONT HIGHWAYS

## I. NATURE, CHARACTER AND DEFINITION

### 1. GENERAL NATURE AND CHARACTER OF PUBLIC HIGHWAY

The term "highway" is generic and applies to all public roads and ways which are open to the general public for travel and transportation, without distinction, discrimination or restriction, subject only to such regulations as may be necessary to secure to the travelling public the largest practical benefit and enjoyment.<sup>1</sup> Highways, which are intended for the use of the public generally and maintained at public expense, are to be distinguished from private roads or ways, which are intended for the exclusive use and benefit of particular individuals and are not maintained at public expense.<sup>2</sup>

### 2. VERMONT PUBLIC HIGHWAYS; DEFINITIONS

By statute, Vermont has identified and defined those roads and ways which are recognized as public highways. Specifically, only those roads or ways which (a) are laid out in the manner called for by statute, (b) have been constructed for public travel over lands conveyed to and accepted by a municipal corporation or to the state by deed or a fee or easement interest, (c) have been dedicated to the public use and accepted by the city or town within which such roads are located, or (d) may be laid out by the state highway board or town.<sup>3</sup> In addition, the term "highway", when used in Vermont statutes, by definition includes rights of way, bridges, drainage structures, signs, guardrails, vegetation, scenic enhancements and structures.<sup>4</sup>

The Vermont statutes also specifically recognize pent roads,<sup>5</sup> scenic roads,<sup>6</sup> state highways,<sup>7</sup> throughways,<sup>8</sup> and town highways<sup>9</sup> as public highways. On the other hand, a trail, even though it is considered a public right of way, is not a highway.<sup>10</sup> Prior to the 1985 statutory amendment, trails were considered highways pursuant to 19 V.S.A. § 292 which stated, in part, that "Pent roads and trails shall be deemed highways." Upon amendment and recodification, the definition of the term "trail" was changed to provide among other things, that a "trail...is not a highway..."<sup>11</sup> Accordingly, the holdings of Whitcomb v. Town of Springfield, 189 A.2d 550, 123 Vt. 395 and Perrin v. Town of

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<sup>1</sup> 39 Am. Jur.2d, Highways, Streets and Bridges, § 1 (1968).

<sup>2</sup> Id. § 3.

<sup>3</sup> 19 V.S.A. § 1 (12)

<sup>4</sup> Id.

<sup>5</sup> Id. § 301 (4).

<sup>6</sup> Id. § (14); § 250 et seq.

<sup>7</sup> Id. § (18); §14.

<sup>8</sup> Id. § (19); § 301 (7).

<sup>9</sup> Id. § 1 (21); § 301 (7).

<sup>10</sup> Id. § 301 (8).

<sup>11</sup> Id.

Berlin 415 A.2d 221, 138 Vt. 306, to the extent effected by the 1985 statutory amendment redefining a trail, are no longer controlling.

Town highways are defined as those exclusively maintained by the towns<sup>12</sup> and state highways those exclusively maintained by the state agency of transportation.<sup>13</sup> In addition, state highways are further defined as those highways designated on the "Vermont State Highways" map which is filed with the Secretary of State.<sup>14</sup> Throughways, as the name implies, are those specially designated highways which give the traffic travelling thereon the right of way at intersections.<sup>15</sup>

A pent road is by definition any town road which, by written allowance of the selectmen, is closed with unlocked stiles, gates and bars and occupied by the adjoining landowner.<sup>16</sup> It has been held that although pent roads are public highways,<sup>17</sup> they are not open highways.<sup>18</sup> Accordingly, the public's use of a pent road is subject to the adjoining landowner's right to enclose the roadway by gates, bars or stiles and occupy the same as part of his field, provided such gateways are reasonably necessary and do not interfere with the reasonable use of the road by others.<sup>19</sup>

Finally, the status of winter roads and lumber roads, neither of which is specially defined should be discussed. The selectmen are given the authority under certain circumstances to lay out winter roads and lumber roads.<sup>20</sup> Pursuant to the general statutory definition of highways, any road laid out by the board or town is a highway.<sup>21</sup> This general language when coupled with the authority to "lay out, prepare and open a winter highway for travel in place of the obstructed (public) highway," seems clearly to establish that winter roads so laid out and opened at public expense are public highways.

The question of whether a lumber road is a public highway is not as straight forward. At first blush it appears that the purpose of a lumber road is to provide private access to otherwise landlocked or inaccessible tracts of timber and therefore the use of such a lumber road would not be available or beneficial to the general public. In addition, the statute relating to lumber roads provides that the selectmen may only lay out a "right of way" and not a "highway" or "road."<sup>22</sup> Further, in contrast to the statute authorizing, presumably at public expense, a winter road to be "prepared" and "opened", the statute pertaining to lumber roads contains no directive that the lumber road so laid out be "prepared" or "opened", all of which raises the issue of whether lumber roads are intended to be public highways.<sup>23</sup>

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<sup>12</sup> Id. § 1 (21); § 301 (7).

<sup>13</sup> Id. § 1 (18).

<sup>14</sup> Id. § 14 (a).

<sup>15</sup> Id. § (19); § 301 (5).

<sup>16</sup> Id. § 301 (4).

<sup>17</sup> *Judd v. Challoux*, 39 A.2d 357, 114 Vt. (1944); *Wolcott v. Whitcomb*, 40 Vt. 40 (1867).

<sup>18</sup> *Judd v. Challoux*, supra.

<sup>19</sup> *Judd v. Challoux*, supra; *Wolcott v. Whitcomb*, supra.

<sup>20</sup> 19 V.S.A. § 304 (a)(8); 19 V.S.A. § 955.

<sup>21</sup> Id. § 1 (12).

<sup>22</sup> Id. § 958.

<sup>23</sup> Id.

A close reading of the statutory definitions, however, reveals not only that all roads laid out by the town are considered highways, but that the definition of "highways" includes rights of way.<sup>24</sup> One case has held that the selectmen may lay out a road to provide winter use over one man's land to provide access to another man's woodlot, even though such a road was laid out for the special convenience of the woodlot owner and the public would have no beneficial use of the right of way once laid out.<sup>25</sup> This case further held that a road so created was a pent road and that the woodlot owner had no greater rights than those of the general public in the road and that the adjoining landowner over whose land the road was laid out could enclose the same with a gateway.<sup>26</sup> The question then becomes whether all such lumber roads so laid out are pent roads. The answer, it seems, must be given in the affirmative.

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<sup>24</sup> Id. § 1 (12).

<sup>25</sup> Brock v. Town of Barnet, 57 Vt. 172 (1884).

<sup>26</sup> Id.

## II. ESTABLISHMENT

### 1. GENERALLY

The establishment of highways in Vermont, either by the state or one of its municipalities, is purely a governmental function.<sup>1</sup> Accordingly, the establishment of a highway must be done in a method recognized in Vermont otherwise a public highway is not created.<sup>2</sup>

In Vermont, a highway may only be established pursuant statute or by dedication and acceptance.<sup>3</sup> It has been said that in as much as the public cannot take an easement over the lands of another by grant, prescription, which presupposes a grant, in its strict sense, has no application to highways.<sup>4</sup> However, it has also been said that adverse use of land by the public for highway purposes, when coupled with the recognition and acceptance of the highway by municipal officials, is sufficient to establish a public highway.<sup>5</sup>

### 2. ESTABLISHMENT BY STATUTORY PROCEEDINGS

#### A. Brief Overview of Statutory Procedures<sup>6</sup>

The selectmen of a town are empowered to lay out, alter and classify town roads,<sup>7</sup> lay out winter and lumber roads<sup>8</sup> and grant permission to enclose pent roads and trails<sup>9</sup> in accordance with the appropriate procedures set forth in Title 19 of the Vermont Statutes Annotated.<sup>10</sup> The state highway board is similarly empower to act with respect to establishing roads in unorganized towns and gores.<sup>11</sup>

The procedure for laying out a highway begins with a written petition to the selectmen by voters or landowners who number at least five percent of the voters in the town wherein the petitioners desire to have the highway laid out.<sup>12</sup> The selectmen may also initiate the proceedings to lay out a highway on their own motion.<sup>13</sup> Upon receipt such an application, the selectmen are required to promptly establish a time and date for

<sup>1</sup> *Stalbird v. Town of Washington*, 172 A. 623, 106 Vt. 213 (1934).

<sup>2</sup> 39A C.J. S. Highways, § 2 (1976).

<sup>3</sup> 19 V.S.A. § 1 (12); *Cersosimo v. Town of Townshend*, 431 A.2d 496, 139 Vt. 431 (1981); *Demers v. City of Montpelier*, 141 A. 2d 676, 120 Vt. 380 (1958); *Town of Springfield v. Newton*, 50 A.2d 605, 115 Vt. 39 (1947).

<sup>4</sup> *Gore v. Blanchard*, 118 A. 888, 96 Vt. 234 (1922).

<sup>5</sup> *Town of Springfield v. Newton*, supra; *Gore v. Blanchard*, supra; *Way v. Fellows*, 100 A. 682, 91 Vt. 326 (1917); *Boston & M.R.R. v. Daniel*, 290 F. 916 (1923).

<sup>6</sup> This overview sets forth only the basic procedures in laying out a highway. Procedures for appeal from the award of damages, subsequent petitions by those objecting to or dissatisfied with the laying out of the highway and highways established pursuant to court order are beyond the scope of this paper.

<sup>7</sup> 19 V.S.A. § 304 (12).

<sup>8</sup> *Id.* § 302 (8).

<sup>9</sup> *Id.* § 304 (5).

<sup>10</sup> See: 19 V.S.A. § 701 et seq. and §§ 955,958 and 923.

<sup>11</sup> 19 V.S.A. § 16.

<sup>12</sup> *Id.* § 708 (a).

<sup>13</sup> *Id.*

examining the location of the proposed highway and holding a hearing to receive testimony of interested persons.<sup>14</sup> In addition to giving at least thirty days written notice by certified mail to persons owning or having an interest in the lands through which the highway may pass or abut, the selectmen are required to give notice to any municipal planning commission in the town, post a notice in the town clerk's office and publish the notice in a local newspaper of general circulation at least ten days before the date set for the hearing.<sup>15</sup>

If the selectmen determine, after the inspection of the proposed highway location and hearing, that the public good, necessity and convenience of the town require the highway to be laid out, the selectmen shall cause the proposed highway to be surveyed (if the location of the highway right of way cannot be determined) and shall cause the bounds of the survey to be monumented.<sup>16</sup> Within sixty days of the hearing, the selectmen are required to return the original petition with a report of their findings, proof of service of the notice of hearing on all affected parties, and the survey to the town clerk's office.<sup>17</sup> The selectmen's order laying out the highway and the survey shall then be recorded by the town clerk.<sup>18</sup>

The selectmen are also required to determine what damages, if any, a landowner through whose land the highway is laid out or abuts is entitled. Upon the selectmen's determination of reasonable damages, the town is required to pay or tender such damages to the affected landowner before the highway is opened.<sup>19</sup>

The order laying out a highway is required to fix the time within which the owner of the lands through which the highway shall pass must remove his buildings, fences, and trees.<sup>20</sup> The time stated in the selectmen's order shall not, without the consent of the landowner, be less than two months if no buildings are involved, or if their are buildings which must be moved, not less then six months.<sup>21</sup> In addition, notwithstanding the foregoing, the landowner may not be required to move his buildings or fences until compensation for damages is paid.<sup>22</sup>

Unless the affected landowner appeals the selectmen's order, and provided the town has paid or tendered the damages awarded to the effected landowner, at any time after the time fixed in the selectmen's order for removing buildings, fences and trees, the selectmen may cause any obstructions remaining within the highway to be removed and may open the lands for working and travel.<sup>23</sup> Once the highway construction has been completed and the highway is opened for public use, the selectmen are required to certify the same and cause their certificate of completion to be recorded in the town clerk's office.<sup>24</sup> In addition, within six days thereof, a copy of said certificate is required to be

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<sup>14</sup> Id.

<sup>15</sup> Id. § 709

<sup>16</sup> Id. § 710.

<sup>17</sup> Id. § 711.

<sup>18</sup> Id. § 711.

<sup>19</sup> Id. § 712.

<sup>20</sup> Id. § 713.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id. § 714.

<sup>24</sup> Id. § 715.

delivered to each landowner whose lands have been taken by the highway.<sup>25</sup> The recording of the certificate of completion marks the acceptance and official opening of the highway.<sup>26</sup>

### B. Issues Raised Under Statutory Proceedings

As noted above, the selectmen are empowered to lay out highways in accordance with the statutory procedures set forth in Title 19. In fact, it has been held that because the procedure for laying out a highway is controlled by statute the method prescribed in the statute must be substantially complied with or the proceedings will be deemed void.<sup>27</sup>

This general rule is in accord with an earlier case which held that the failure of the petitioners to use the statutory phrase "laying out" in their petition for the establishment of a highway was insufficient to invalidate the proceeding where an equivalent expression (open) used in the petition was effective to indicate that the purpose, as a whole, was to lay out a highway.<sup>28</sup> Likewise, it has been held that the statutory requirement that a new survey be made upon the petition to lay out a highway is complied with when a copy of the recorded survey is referenced and adopted in the selectmen's order.<sup>29</sup> It has also been stated that in a proceeding to lay out a highway, the description of the proposed highway is sufficient if, by following the courses and distances contained therein, its location can be ascertained.<sup>30</sup>

Another case generally in accord, although decided before the rule of substantial compliance was judicially established in Petition of Mattison, has held that the selectmen's omission to state, in their order laying out a highway, a time for the removal of fences, timber, wood or trees from the highway area and to return to the town clerk's office a copy of the petition for filing did not negate the validity of the selectmen's order as such acts are merely ministerial acts which occur wholly subsequent to the laying out of the highway and thus, are not essential ingredients in the act of laying out the highway.<sup>31</sup> On the other hand, a court, generally in accord with the later decided Petition of Mattison, has held that the notice required by the statute to be sent to landowners and others whose interest land may be affected is essential and the failure to provide the notice required fatally flawed the proceedings.<sup>32</sup> It is likely that a court, in applying the Petition of Mattison rule, would determine that the statutory procedures had not been "substantially complied with" where the selectmen fail to provide the prescribed notice to affected landowners and the general public. However, it has been held that a landowner, affected by the petition to lay out a highway and entitled to receive the notice required by statute but who did not receive it, by his personal appearance at the hearing in the question of the need for the highway, waived the right to subsequently challenge the proceedings to lay out the highway for want of receipt of such notice.<sup>33</sup> Nevertheless, a landowner's appearance at a hearing on damages

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<sup>25</sup> Id. § 716.

<sup>26</sup> Id. § 715.

<sup>27</sup> Petition of Mattison, 144 A.2d 778, 120 Vt. 459 (1958).

<sup>28</sup> Winooski L. & W.P. Co. v. Town of Colchester, 57 Vt. 538 (1885).

<sup>29</sup> Id.

<sup>30</sup> Robinson v. Winch, 28 A. 884, 66 Vt. 110 (1894).

<sup>31</sup> Kidder v. Jennison, 21 Vt. 108 (1849).

<sup>32</sup> Walbridge v. Cabot, 30 A. 805, 67 Vt. 114.

<sup>33</sup> Robinson v. Winch, *supra*.



has been held not to be a waiver of his right to be notified of the original hearing on the question of the necessity for the highway in the first instance.<sup>34</sup>

Clearly, the threshold question which must be addressed in a proceeding to lay out a highway is necessity. The statute authorizing the selectmen to lay out a highway provides that, after examining the premises and hearing all interested parties, the selectmen may only lay out a highway if they determine that "the public good, necessity and convenience of the inhabitants of the municipality require the highway to be laid out..."<sup>35</sup> In connection with the condemnation of lands for the purpose of laying out a highway, the term "necessity is defined by statute to 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".<sup>36</sup> The necessity which must be shown then is two fold: first, the necessity for the new highway itself and second, the necessity that certain specified lands are required upon which to construct the new highway.<sup>37</sup> The argument that the "necessity" required for laying out a highway is an "absolute necessity" has been rejected.<sup>38</sup> In construing the language of the statute, the court found that the term necessity "did 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>39</sup> Finally, it has consistently been held that, based upon all the evidence available, whether such necessity exists is a question of fact.<sup>40</sup>

In determining the necessity for laying out a highway, the statutory procedure is designed to assure that all factors bearing on the issue may be raised and considered.<sup>41</sup> Although a highway generally may not be laid out for the sole benefit of an individual,<sup>42</sup> it is not improper for individual advantages, such as practicality and convenience, to be considered.<sup>43</sup> With respect to pent roads, it has been said that such roads are properly laid out as public highway even though such roads are laid out for an individual's special convenience and that the public can have no beneficial use of the road because it leads nowhere.<sup>44</sup> In addition, it has been held that although the ornamentation and improvement of the grounds of a public building, standing alone, do not constitute sufficient necessity for the establishment of a highway, such factors may be taken into consideration.<sup>45</sup> Finally, in determining the reasonable necessity for laying out a highway, public safety is considered a critical element.<sup>46</sup>

In other matters, courts have consistently held that the statutes empowering public officials to lay out highways grant such officials broad discretion in determining not only

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<sup>34</sup> Barber v. Vinton, 73 A. 881, 82 Vt. 327 (1909).

<sup>35</sup> 19 V.S.A. § 710.

<sup>36</sup> 19 V.S.A. § 501 (1).

<sup>37</sup> State Transportation Board v. May, 403 A.2d 267, 137 Vt. 320 (1979).

<sup>38</sup> Cersosimo v. Town of Townshend, 431 A.2d 496, 139 Vt. 594 (1981).

<sup>39</sup> Id.; State Transportation Board v. May, supra.

<sup>40</sup> Pillsbury v. Town of Wheelock, 290 A.2d 42, 130 Vt. 242 (1972).

<sup>41</sup> See: 19 V.S.A. §§ 501 et seq. and 701 et seq. See also: 39A C.J.S. Highways, § 27 (1976).

<sup>42</sup> See: 39A C.J.S. Highways § 26 (1976).

<sup>43</sup> Pillsbury v. Wheelock, supra.

<sup>44</sup> Brock v. Town of Barnet, 57 Vt. 172 (1884).

<sup>45</sup> Woodstock v. Gallup, 28 Vt. 587 (1856).

<sup>46</sup> State Transportation Board v. May, supra.

what lands may be reasonably necessary upon which to locate a highway but also the route which the highway will follow.<sup>47</sup> Additionally, it has been held that since the statute requires each highway to be three rods wide,<sup>48</sup> highways established pursuant to such statutory procedures must be three rods in width<sup>49</sup> and any highway laid out to less than this statutory width is illegal.<sup>50</sup> However, this general rule is subject to the condition that no other record of the highway in question which establishes the width of the highway right of way to be other than three rods wide is on record.<sup>51</sup> Along this same line, it is important to note that whenever the original survey made at the time a highway was laid out was not properly recorded, or, the records of such survey have not been preserved, or, if the termini and boundaries cannot be determined, the highway right of way will, by statute, be assumed to exist for a width of one and one half rods on either side of the centerline of the then existing travelled way.<sup>52</sup> This statutory presumption, however, is not conclusive and may be rebutted by competent evidence which, for example, establishes that the travelled portion of the highway has shifted and therefore the existing centerline is not the centerline utilized in originally establishing the highway.<sup>53</sup>

In the event the original survey made at the time a highway was laid out has not been properly recorded, or the record of such survey has not been preserved, or if the termini and boundaries of a highway cannot be determined, the public officials responsible for such a highway may, in effect, re-establish or lay out the highway by causing the existing road to be resurveyed and a record of such survey to be filed with the clerk of each town in which the resurveyed highway is situated.<sup>54</sup> The obvious purpose of this statute is to fairly and finally determine the extent and location of an established road when it cannot otherwise be established. Since the rights of the public and abutting land owners may be impacted, whenever the boundaries as described in the original survey cannot be determined and a resurvey is ordered, notice of such resurvey is required as to be given in accordance with the same statutory procedures required when a new highway is to be laid out.<sup>55</sup> The statute also provides that any person owning or interested in lands through or along which a highway is resurveyed is dissatisfied with the resurvey or award of damages such person may appeal.<sup>56</sup> Interestingly, although landowners and voters may petition the selectmen to lay out a highway in the first instance, it appears under this statutory scheme that individuals may not petition the selectmen to resurvey an existing highway for the purposes of clarifying the boundaries and extent of a highway even though no record of the original survey was properly made, or preserved, or for which the boundaries and termini are incapable of being determined.

Numerous cases have addressed the issues raised upon the resurvey of an existing highway. It has been determined that the statute only authorizes the public officials to resurvey an existing highway and, in the event no original survey was ever created, the

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<sup>47</sup> *Id.*; *State Highway Board v. Coburn*, 219 A.2d 582, 125 Vt. 513 (1966).

<sup>48</sup> 19 V.S.A. § 702.

<sup>49</sup> *Whitcomb v. Town of Springfield*, 189 A.2d 550, 123 Vt. 395 (1963).

<sup>50</sup> *Bridgman v. Town of Hardwick*, 31 A. 33, 67 Vt. 132 (1895)

<sup>51</sup> 19 V.S.A. § 702.

<sup>52</sup> 19 V.S.A. § 32.

<sup>53</sup> *Town of Dorset v. Fausett*, 346 A.2d 200, 133 Vt. 476 (1975).

<sup>54</sup> 19 V.S.A. § 33.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* § 34.

public officials are without jurisdiction to order a resurvey of an existing highway.<sup>57</sup> In order for the selectmen to have jurisdiction to order a resurvey, one of the three factors set forth in the statute must be established in the record.<sup>58</sup> Thus, there are only three instances which may form the basis of an order by public officials to resurvey an existing highway: (a) if the survey has not been properly recorded, (b) if the record has not been preserved, or (c) if the terminations and boundaries cannot be ascertained.<sup>59</sup> It has also been held that the notice required by the statute to be given to landowners affected by the resurvey is essential to jurisdiction and thus, absent the proper notification, the acts of the selectmen are void.<sup>60</sup>

Upon the completion of the resurvey, the issue of damages to the abutting landowners is required to be addressed in accordance with the condemnation procedures which apply to the laying out of new highways. Once the resurvey has been recorded in the town clerk's office, the lands within the highway limit lines are deemed to be a highway and the effected landowners are entitled to compensation.<sup>61</sup> However, it should be noted that by statute no person may acquire any right or interest to lands lying within the highway limit lines regardless of how long adversely possessed against the interest of the state or municipality.<sup>62</sup> Thus, it has been held that abutters who have occupied land and built structures within the highway limit lines are not entitled to compensation upon the widening of the highway to the established highway limit lines.<sup>63</sup>

The final issue raised under the statutes which provide for the laying out of highways is the question of when a highway so laid out is deemed to be legally established and opened. By statute, the selectmen are required to file a certificate with the town clerk to the effect that the highway is completed and opened for the use of the public.<sup>64</sup> Upon the recording of the certificate by the town clerk, the highway is deemed opened and accepted.<sup>65</sup> Cases interpreting this statutory procedure have uniformly held that, notwithstanding that a highway had been laid out by the selectmen and used by the travelling public for a substantial period of time, such a highway did not, absent the filing and recording of the selectmen's certificate, become a public highway unless it was otherwise recognized as such by some unequivocal act of the town.<sup>66</sup> In addition, it has been held that it may not be presumed that the certificate of completion was filed and recorded in the town clerk's office.<sup>67</sup> Thus, whether a road is legally established and opened under this statute is generally a question of law.<sup>68</sup>

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<sup>57</sup> *Trudeau v. Town of Sheldon*, 20 A. 161, 62 Vt. 198 (1890).

<sup>58</sup> *Town of Berkshire v. Nelson & Hall Co.*, 105 A. 28, 92 Vt. 440 (1918).

<sup>59</sup> *Culver v. Town of Fair Haven*, 31 A. 144, 67 Vt. 163 (1894).

<sup>60</sup> *Berkshire v. Nelson & Hall Co.*, *supra*.

<sup>61</sup> *LaFarrier v. Hardy*, 28 A. 1030; 66 Vt. 200 (1894).

<sup>62</sup> 19 V.S.A. § 1102; *Bailey v. Town of Cabot*, 197 A.2d 783, 124 Vt. 153 (1963); *Hogaboon v. Town of Highgate*, 55 Vt. 412 (1883).

<sup>63</sup> *Pidgeon v. Vermont State Transportation Board*, 522 A. 2d 244, 148 Ct. 578 (1987); *Bailey v. Town of Cabot*, *supra*; *Hogaboon v. Town of Highgate*, *supra*.

<sup>64</sup> 19 V.S.A. § 715.

<sup>65</sup> *Id.*

<sup>66</sup> *Blodgett v. Town of Royalton*, 14 Vt. 288 (1842); *Bacon v. Boston & Maine R.R.*, 76 A. 128, 83 Vt. 421 (1910).

<sup>67</sup> *Bacon v. Boston & Maine R.R.*, *supra*.

<sup>68</sup> *Young v. Wheelock*, 18 Vt. 493 (1846).

### 3. ESTABLISHMENT BY DEDICATION AND ACCEPTANCE

In addition to those highways which have been established by the action of public officials pursuant to a grant of statutory authority to lay out highways for the public good and convenience,<sup>1</sup> Vermont also recognizes as highways those roads which have been constructed for public travel over lands which have been conveyed, either in fee or by way of easement, to the public authorities and those roads which have been dedicated to public use and which have been accepted by the municipality within which such roads are located.<sup>2</sup> In effect, this statute establishes that roads which have been either expressly dedicated to the public, or for which such dedication can be implied by the acts of the landowner, are public highways provided, in both cases, the public officials responsible for such roads have accepted the same.<sup>3</sup>

In addition to the express and implied dedication of lands to the public for highway use, most other states also recognize that an easement for public highway purposes may be established over lands used for highway purposes by way of prescription, provided all of the necessary elements of prescription can be established and the public authorities recognize and exercise control over said highway.<sup>4</sup> In Vermont, however, it has been decided that because the public cannot take an easement over the lands of another by grant, the legal theory of prescription, which is based upon the fiction of a "lost" grant, in its strict sense, cannot provide the legal basis upon which the public may acquire an easement for highway purposes.<sup>5</sup> Nevertheless, it is clear, regardless of whether the legal theory is based upon prescription or implied dedication and acceptance, that it is the adverse possession, use and acceptance by the public authorities which establishes the user highway in Vermont.<sup>6</sup>

A dedication, whether express or implied, is a setting aside of private lands by the owner thereof for the public use.<sup>7</sup> In the case of an express dedication, there is a conveyance, which may be of either the fee or an easement interest, from the private owner to the public officials.<sup>8</sup> The express dedication of lands for public highway does not a public highway unless and until the public authorities accept it as such.<sup>9</sup> However, it is important to note that a municipality cannot be forced to accept the dedication of any lands for highway purposes.<sup>10</sup>

The conveyance establishes the extent and location of the lands so dedicated and the record of the public's interest. Section 702 of Title 19 of the Vermont Statutes Annotated

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<sup>1</sup> See section II (2) above for a discussion of highways establish pursuant to statute.

<sup>2</sup> 19 V.S.A. § 1 (12).

<sup>3</sup> *Town of Springfield v. Newton*, 50 A. 2d 605, 115 Vt. 39 (1947).

<sup>4</sup> 39 Am.Jur. 2d, Highways, Streets and Bridges, § 25 (1968).

<sup>5</sup> *Gore v. Blanchard*, 118 A. 888, 96 Vt. 234 (1922).

<sup>6</sup> *Demer v. City of Montpelier*, 141 A. 2d 676, 120 Vt. 380 (1958); *Town of Springfield v. Newton*, 50 A. 2d 605, 115 Vt. 39 (1947); *Gore v. Blanchard*, supra; *Way v. Fellows*, 100 A. 682, 91 Vt. 326 (1917); *Tower v. Town of Rutland*, 56 Vt. 28 (1884); *Whitney v. Town of Essex*, 42 Vt. 520 (1870).

<sup>7</sup> *Town of Springfield v. Newton*, supra; *Gore v. Blanchard*; supra.

<sup>8</sup> 19 V.S.A. § 1 (12).

<sup>9</sup> *Way v. Fellows*, supra; See also: 23 Am. Jur. 2d, Dedication§ 6 (1968).

<sup>10</sup> *Bacon v. Boston & Maine R.R.* 76 A. 128, 83 Vt. 421 (1910); *Tower v. Town of Rutland*, supra.

provides that highway rights of way shall be three rods wide unless otherwise properly recorded. Thus, the record of an express dedication and acceptance of lands for highway purposes, of either a greater or lesser width than the three rod rule set forth in the statute, would fit within the exception as a width "otherwise properly recorded" and thus would control and be determinative as to the nature and extent of the public's interest.

An implied dedication need not (and usually is not) evidenced by any written conveyance. Thus, the landowner's intention to dedicate his land to public use, which is the essential element, must be established by evidence of the conduct of the landowner which unequivocally demonstrates that the landowner's purpose is to create a right in the public to use his land for public purposes.<sup>11</sup> Factors which may be considered in establishing a landowner's intent to dedicate lands to public use include long acquiescence in the use by the public<sup>12</sup> allowing repairs to be made at public expense<sup>13</sup> references to the highway are in the chain of title and whether the road is listed on the state highway map.<sup>14</sup> However, in determining whether there is an implied dedication, use alone does not control and the attending circumstances such as character of the property, location of the road, amount of travel, nature of the public use, knowledge of such use by the owner and the rights asserted by the public must all be considered.<sup>15</sup> On the other hand, the mere failure to fence property bordering a public highway is insufficient to constitute a dedication of land to public use.<sup>16</sup> Accordingly, absent a clear intention to the contrary, it must be assumed that the interest acquired by the public based upon an implied dedication is that of an easement for highway purposes.<sup>17</sup>

It must be remembered, however, that neither intensive adverse use by the public nor acts of the landowner evidencing a clear intent to dedicate the land to public use is effective to establish a public highway if the public authorities refuse to sanction the adoption by accepting the dedication through some affirmative action on their part.<sup>18</sup> It has been stated that neither extensive public use nor consent to such use by public officials standing alone is sufficient to show an acceptance and adoption by public officials.<sup>19</sup> But acceptance and adoption may be inferred when the town, acting through the proper officials, voluntarily assumed the burden of maintenance and repair and expended public funds and resources.<sup>20</sup> Regardless of the amount of public time, money, materials and labor which may be expended on a highway, if such efforts were not authorized by the proper public officials, such unauthorized acts do not constitute acceptance and adoption by the public and therefore no public highway exists.<sup>21</sup> Ultimately, the existence of a highway is a mixed question of law and fact.<sup>22</sup>

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<sup>11</sup> *Town of Springfield v. Newton*, supra; *Gore v. Blanchard*, supra.

<sup>12</sup> *Gore v. Blanchard*, supra; *Way v. Fellows*, supra.

<sup>13</sup> *Town of Springfield v. Newton*, supra.

<sup>14</sup> *Gardner v. Town of Ludlow*, 369 A.2d 1382, 135 Vt. 87(1977).

<sup>15</sup> *Gore v. Blanchard*, supra.

<sup>16</sup> *Morse v. Ranno*, 32 Vt. 600 (1860).

<sup>17</sup> See: *Abell v. Central Vermont Ry., Inc.*, 102 A.2d 847, 118 Vt. 189 (1954).

<sup>18</sup> *Boston & M.R.R. v. Daniel*, 290 F. 916 (1923); *Way v. Fellows*, supra; *Tower v. Town of Rutland*, supra.

<sup>19</sup> *Gardner v. Town of Ludlow*, supra; *Town of Springfield v. Newton*, supra.

<sup>20</sup> *Id.*

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

<sup>22</sup> *Town of Springfield v. Newton*, supra.

One remaining issue is how wide the public's easement for highway purpose is in the case of highways established by implied dedication and public acceptance. Early cases addressing the issue uniformly held that the public's easement for highway purposes in highways created by use is limited to the extent of the actual use and occupation, or by other marks and boundaries, such as fences, which indicate the extent of the public's claim.<sup>23</sup> However, section 702 of Title 19 of the Vermont Statutes Annotated provides that, unless there is a proper record of a contrary width, the right of way for every highway in Vermont shall be three rods. Since the extent of user highways, by definition, would not be of record, is one to presume that the earlier cases which limited the public easement to the extent of the use have no further validity? Similarly, section 32 of Title 19 of the Vermont Statutes Annotated assumes a road way width of one and one half rods on either side of the centerline of the existing traveled way whenever the original survey was not properly recorded, or the records preserved or if the terminations and boundaries cannot be determined. What application, if any, this statute has to user roads for which no original surveys or records ever existed is an open question. However, in the case of highways created by implied dedication and acceptance, an argumkent could be made that both statutes authorized the taking of land without just compensation in violation of fourteenth amendment to the United States Constitution.

#### IV. DISCONTINUANCE

##### 1. GENERALLY

The maxim, "once a highway, always a highway" summarizes the presumption in most states that a highway once established continues as such until it is discontinued by the direct action of the public authorities or is abandoned by the public through nonuse<sup>24</sup> Although most states adhere to the rule that a public highway's existence may be terminated through abandonment or nonuse,<sup>25</sup> Vermont statutes do not recognize abandonment as a method of extinguishing a public highway, requiring instead that the termination of a public highway be accomplished through formal action of the appropriate public authorities.<sup>26</sup> In addition, by statute in Vermont, the public's interest in a highway cannot be destroyed by the acts of abutters who possess and occupy the public highway easement area, regardless of how long such possession and use may be maintained.<sup>27</sup>

Accordingly, the formal discontinuance of a highway is considered a governmental function which may be exercised by the state or delegated to its municipalities.<sup>28</sup> Thus, where a statute sets forth the procedure to be followed in discontinuing a highway, that procedure is the exclusive method by which public use of a highway may be

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<sup>23</sup> *Gore v. Blanchard*, supra; *Morse v. Ranno*, supra.

<sup>24</sup> 39 A. Jur. 2d, *Highways, Streets and Bridges*, § 139 (1968).

<sup>25</sup> *Id.* § 138.

<sup>26</sup> *Capitol Candy Co. v. Savard*, 369 A.2d 1363, 135 Vt. 14 (1976); See: 19 V.S.A. § 771.

<sup>27</sup> 19 V.S.A. § 1102; *Pidgeon v. Vermont State Transportation Board*, 522 A. 2d 244, 148 Vt. 578 (1987); *Bailey v. Town of Cabot*, 197 A. 2d 783, 124 Vt. 153 (1963), *Hogaboon v. Town of Highgate*, 55 Vt. 412 (1883).

<sup>28</sup> Cf. *Stalbird v. Town of Washington*, 172 A. 623, 106 Vt. 213 (1934); See: 39A C.J.S, *Highways* § 113 (a) (1976).

discontinued<sup>29</sup> and the such procedures must be substantially complied with or the proceedings will be void.<sup>30</sup>

## 2. DISCONTINUANCE BY STATUTORY PROCEDURES

### A. Summary of Statutory Proceedings

The statutory procedure required for the discontinuance of a highway is substantially the same as that required to lay out a highway.<sup>31</sup> Either persons desiring to have a highway discontinued petition the selectmen to initiate the proceedings or the selectmen initiate the proceedings in their own motion.<sup>32</sup> Promptly thereafter the selectmen must examine the highway to be discontinued and give notice to all interested persons that a hearing will be held.<sup>33</sup> After examining the premises and hearing all interested parties on the question of the public good, necessity and convergence which may inure to the benefit of the inhabitants wherein the subject highway is located, the selectmen may decide to discontinue the highway.<sup>34</sup> The statute requires that the decision to discontinue the highway be in writing and set forth a complete description of the highway to be discontinued.<sup>35</sup> Within sixty days of the examination and hearing on the petition to discontinue a highway, the selectmen are required to return the original petition, a report of their findings, proof of service of the notice of hearing on all affected parties, the written decision to discontinue the highway and the description of the highway to be discontinued to the town clerk's office, which shall be recorded by the clerk.<sup>36</sup> The statutory procedure also requires the selectmen to notify the commissioner of forests, parks and recreation whenever they file a petition to discontinue a highway with the town clerk.<sup>37</sup> With respect to any highway which is proposed to be discontinued, the selectmen on their own initiative, or the commissioner of forests, parks and recreation with the approval of the selectmen, may designate the proposed discontinued highway as a trail, in which case the public right of way shall remain the same width.<sup>38</sup>

### B. Issues Raised Under Statutory Procedures.

The statutory procedures for discontinuing a highway require a hearing and the consideration of the same issues of public good, necessity and convenience which are raised when a highway is being laid out. In the case of discontinuance, the expense in maintaining a road that has been washed out, not repaired and only occasionally used is a proper factor to be considered.<sup>39</sup> Notwithstanding the requirement that notice of a hearing to discontinue a highway is required to be given to all persons owning or having an interest in the lands abutting a highway proposed to be discontinued, it has been held that persons occupying lands within the highway limits pursuant to a license which had expired prior to

<sup>29</sup> Capitol Candy Company v. Savard, supra.

<sup>30</sup> Petition of Mattison, 144 A.2d 778, 120 Vt. 459 (1958).

<sup>31</sup> 19 V.S.A. § 771; See section II (2)(a) above.

<sup>32</sup> Id. § 708.

<sup>33</sup> Id. § 709.

<sup>34</sup> Id. § 710.

<sup>35</sup> Id. § 710.

<sup>36</sup> Id. § 711.

<sup>37</sup> Id. § 775.

<sup>38</sup> Id. § 775.

<sup>39</sup> Cf. Whitcomb v. Town of Springfield, 189 A.2d 550, 123 Vt. 395 (1963).

the initiation of the proceedings to discontinue the highway had no legitimate interest in the lands to be discontinued and, therefore, were not entitled to notice of the town's proceedings to discontinue the highway.<sup>40</sup>

The alteration of a highway generally refers to a change in the course thereof and therefore necessarily involves to some extent the establishment of a new highway and the discontinuance of the portion of old highway no longer needed for highway purposes.<sup>41</sup> An early case has stated that if the alteration of a road by straightening makes any portion of the former roadway unnecessary, the unused portion of the old roadway is discontinued, by operation of law, upon the opening of the new road and the public's right to travel upon the former roadway is extinguished.<sup>42</sup> However, based upon the current statutory requirements and more recent cases, it must be concluded that any alteration of the location of a highway which will result in a portion of the former road being deemed unnecessary for highway purposes, must not only comply with the procedures for authorizing such alteration, but must also provide for the discontinuance of such section of highway in accordance with the statutory procedures in order to legally discontinue the unused portion of the highway.<sup>43</sup>

It has uniformly been held that the reclassification of a town highway to a trail is not an alteration for which a hearing on damages is required, but more in the nature of a discontinuance of a highway for which no hearing on the issue of damages is needed or required.<sup>44</sup> The reasoning is that since there is no acquisition or taking of lands beyond the existing highway limits, the abutting landowners, rather than being damaged, have been enriched by the reduction of the extent of the easement for highway purposes.<sup>45</sup> It has been held that abutting landowners are not entitled to compensation for the loss of the right of public maintenance of the highway occasioned by its reclassification to a trail, because the right to such maintenance was held by all the public and was not personal to the abutting landowners.<sup>46</sup> In addition, the consideration of the cost of maintaining a highway as a town road versus as a trail is a proper factor to be considered.<sup>47</sup> Finally, it is likely that the reduction of a town highway to the status of a trail does not entitle the abutters to damages for loss of access on the theory that a trail is not a highway, because, although not a highway, a trail still maintains a public right of way for access.<sup>48</sup> It should be noted, however, that the selectmen in reclassifying town highways may not do so arbitrarily.<sup>49</sup>

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<sup>40</sup> Murray v. Webster, 186 A. 2d 89, 123 Vt. 194 (1962).

<sup>41</sup> 39A C.J.S. Highways, § 96; The term alteration is used above to refer to a change in location and not with respect to leveling, change of grade or repairs which are subject to the separate procedures of 19 V.S.A. § 923.

<sup>42</sup> Closson v. Hamblet, 27 Vt. 728 (1855).

<sup>43</sup> Capitol Candy Co. v. Savard, supra; Petition of Mattison, supra.

<sup>44</sup> Whitcomb v. Springfield, supra; Perrin v. Town of Berlin, 415 A. 2d 221, 138 Vt. 306 (1980).

<sup>45</sup> Id.

<sup>46</sup> Perrin v. Town of Berlin, supra.

<sup>47</sup> Whitcomb v. Town of Springfield, supra.

<sup>48</sup> Cf. Perrin v. Town of Berlin, supra. Since Perrin was decided, the definition of a trail was amended to provide that a trail is not a highway although it is a public right of way (19 V.S.A. § 301 (8)).

<sup>49</sup> Catlin v. Town of Hartland, 409 A.2d 596, 138 Vt. 1 (1979); Gilbert v. Brookfield, 356 A. 2d 524, 134 Vt. 251 (1976).



To a large degree the statute controls the disposition of the public's interest in former highways which have been discontinued. With respect to highways which have been discontinued by statutory proceedings and have not been designated as trails, the statute provides that the right of way shall belong to the owners of the adjoining lands.<sup>50</sup> If the right of way is located between the lands of two different owners, it is required to be returned to the lots from which it originally derived but if said lots cannot be determined, the right of way is required to be divided between the adjoining owners.<sup>51</sup> The exact nature of the interest reconveyed will depend upon whether the public held the fee to the bed of the roadway or only an easement for highway purposes. The extent of the public's interest in highways laid out pursuant to statutory condemnation or acquired by the public by express dedication and acceptance may either be in fee or by way of an easement. Therefore, the public records must be researched to determine whether the fee or only an easement was taken by the public at the time the highway was established. However, absent a clear indication that the public took its interest in fee, it must be presumed that the public had only an easement for highway purposes.<sup>52</sup> Furthermore, it is presumed that the owner of lands adjoining a public highway owns to the centerline of the highway absent clear evidence to the contrary.<sup>53</sup> Thus, regardless of the extent of the public's interest in the highway right of way, upon discontinuance whatever interest the public held is extinguished and title reverts in accordance with the statute and case law interpreting the same.

The statute also addresses two situations where lands have been appropriated for public highway use but, for whatever reason, the project is either discontinued<sup>54</sup> or abandoned.<sup>55</sup> If a public highway is laid out and damages are awarded the owners of the land acquired but the highway is legally discontinued before being worked or opened, the damages which were awarded (minus actual damages prior to discontinuance) must be returned to the town. Upon the return of the damages awarded, title to lands acquired for the discontinued project is returned to the original owner or assigns.<sup>56</sup> Similarly, when land has been acquired by the state, either in fee or under a perpetual leasehold, and the land is not subsequently improved, the state may not sell or dispose of such land for six years unless it first offers to reconvey it to the party from whom it was acquired at the price paid by the state plus six percent per year from the date of acquisition.<sup>57</sup>

Finally, the statute provides that the selectmen, may discontinue a lumber road when in their judgment it is necessary<sup>58</sup> and may discontinue any portions of the old county highways laid out by superior court commissioners as the public good requires.<sup>59</sup>

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<sup>50</sup> 19 V.S.A. § 775.

<sup>51</sup> 19 V.S.A. § 775; Murray v. Webster, supra.

<sup>52</sup> Abell v. Central Vermon Ry., Inc., 102 A. 2d 847, 118 Vt. 189 (1954).

<sup>53</sup> Murray v. Webster, supra; Kennedy v. Robinson, 160 A. 170, 104 Vt. 374 (1932).

<sup>54</sup> 19 V.S.A. § 776.

<sup>55</sup> Id. § 31.

<sup>56</sup> Id. § 776.

<sup>57</sup> Id. § 31.

<sup>58</sup> Id. § 959.

<sup>59</sup> Id. § 773.