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ROADS REVISITED
Creation and Termination of Highways in New Hampshire – An Update

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I. INTRODUCTION

"Go south on Grandview for .3 miles, right onto Ridgewood, sharp left after .2 miles, go straight another .3 miles, right onto Heidi for 1.1 miles, right onto Knox for .2 miles, last building on the left." It is tempting to describe navigation through New Hampshire highway law in terms equally as lurching as the directions between the Bow Municipal Building and the fire station. After all, it is a subject where a road not having the status of a "publicly approved street" still can mean the public at large has the full right to use the road, where a road "discontinued subject to gates and bars" does not mean the road is discontinued, and where a "dedication" sometimes means an acceptance has occurred and sometimes not.

Yet, at the same time, one finds consistency. The passage of 20 years has had a remarkable hold on both the General Court and Supreme Court. Public use of a road for 20 years may prove the creation of a highway under no less than four distinct theories, all of which still may be viable today.

This article updates a version previously published in the March 1990 issue of the *New Hampshire Bar Journal*. Much has changed since then. The Supreme Court has issued several important decisions and a few municipalities are, or soon will be, without any large tracts of developable land. One result of this continued development is the increased interest in so-called back lots, lots accessed only by paper streets.

Determining the legal status of a road, how it was created, and whether it was discontinued can have enormous consequences on property owners. Yet, while the outside landscape changes at a frenetic pace, the answer to a difficult problem may lie quietly inside a municipal file that has not been viewed for a hundred years.

A. Scope

As with the 1990 version, this article will define the various words used to identify highways. It then will describe the methods by which municipal highways may be created and discontinued. Finally, the article will describe the consequences of discontinuing highways, and will discuss the often-misunderstood maxim that abutters of discontinued highways take title to the "middle of the road."

Many related topics are beyond the scope of this article. Those topics include Class I, II, III and III-a highways (state highways), damages upon the laying-out or discontinuance of highways, scenic roads, emergency lanes, utilities, boating access highways, and rights of way for lumber removal.[1]

B. Definitions

What distinguishes a "way" from a "road," a "road" from a "street," a "street" from a "highway?" While only approximate and sometimes overlapping definitions exist, the following have the support of treatises and case law. These terms sometimes will be used interchangeably in this article to reflect the usage employed by the New Hampshire Supreme Court and the New Hampshire General Court.

1. Way

A way represents the broadest term used to describe a strip of land over which one or more individuals may pass. All highways are ways, but not all ways are highways. The term "way" is generic, "referring to many things besides roads."[2] A way may be either public or private.[3] Under the New Hampshire motor vehicle laws, "way" includes a wide array of public and privately owned areas available for public use, including parking lots maintained primarily for the benefit of paying customers.[4]

2. Road

The term "road" is "of greater significance than the term `way.'"[5] A road may be public or private. "If a road is free and common to all citizens, then it is a public road."[6] The New Hampshire Supreme Court once interpreted the word road in a deed reservation to mean a public highway.[7] A "town

road" is defined by statute as a Class V highway.[8] A class V highway is a municipally maintained public road.[9]

3. Street

A street often is characterized as a public road located in a town or city.[10] A public road located outside a town or city would simply be labelled a road. In other words, a street is a town or city road.[11] While a road may be public or private, the term street should only apply to public roads located in cities or towns.

4. Highway

In lay terms, "highway" describes a multi-lane thoroughfare. In the law, the definition is more humble: "[i]f a way is one over which the public has a general right of passage, it is, in legal contemplation, a highway . . . ."[12] Once established, travelers have the right to do all acts reasonably incident to the viatic use of a highway, absent a valid discontinuance.[13]

A road can become a highway by four methods: being laid out according to statute (RSA 230 for state highways, RSA 231 for municipal highways), conveyance as such to a municipality, dedication and acceptance, and use for public travel for 20 years prior to January 1, 1968.[14] Once established, only a formal discontinuance can terminate the public's right to travel on a highway.[15] If a bridge is serviced by a highway (versus a private road), then the bridge is considered part of the highway.[16] If a bridge services a private road, then the bridge is private.[17]

5. Legislative Body vs. Governing Body

Municipalities have the power to enact laws, often known as ordinances, and to enforce laws. Sometimes the same body does both, sometimes not. In many towns the legislative body is the town meeting. Zoning ordinances are adopted and amended at town meeting and budgets are approved at town meeting. The board of selectmen, on the other hand, handles the day-to-day operations of the town, and some of that responsibility is delegated further to a town manager. In cities, both the legislative and enforcement (or "executive") functions are vested in the city council. There are variations to both forms of government - some cities operate under a board of mayor and aldermen - but the principal is the same.[18]

The distinction between the legislative and governing functions in municipalities is important in road matters, and sometimes the line shifts. For example, until June 22, 1993, dedicated roads in towns could be accepted only at town meeting. Now that power may be delegated to the board of selectmen.[19]

Many cases dealing with road issues come before the Supreme Court from towns, so they refer to "town meeting" when addressing the legislative function. Except where directly relating to the facts of a specific case or where there is a quote from a case, the terms "legislative body" and "governing body" will be used to make clear the reference applies both to cities and towns.[20]

6. Definitions Contained in Zoning Ordinances

Sometimes the Supreme Court is asked to review cases interpreting definitions contained in zoning ordinances. The definitions found in these cases should be viewed in the context of what was before the Court.

For example, in one case the Court held that a road discontinued subject to gates and bars did not constitute a "public right of way" in an ordinance requiring buildings to border a public right of way for at least 200 feet.[21] On its face, this would seem to contradict the Court's long-standing position that the public has the right to travel over roads discontinued subject to gates and bars.[22] (The phrase "subject to gates and bars" is not defined by statute, but generally means the owner of the affected land may erect a gate or bar across the discontinued road. The public still has the right to use the road, but they must open and close as they pass.) However, the Court looked to another section of the ordinance defining a right of way as including all "town. . .highways."[23] The Court then looked to the predecessor to RSA 231:45 which provided (and still provides) that "[s]uch a discontinued highway shall not have the status of a publicly approved street." The Court finally concluded the road in question was not a "public right of way" under the town's zoning ordinance.

Similarly, in another case the zoning ordinance in question defined "right of way" as including "all city, state, and federal highways and the land on either side of same as covered by statutes to determine the width of the right of way."[24] The ordinance did not define "highway," so the Court looked to RSA 229:1 which defines a highway as including a "road which has been 'dedicated to the public use and accepted by the city or town' in which the road is located."[25] The Court therefore concluded "right of way" in the town's zoning ordinance essentially meant a Class V road, a definition far more restrictive than the common legal definition of right of way.[26]

"Street" in a zoning ordinance requiring lots to front on a street before a building permit may issue may mean a road suitable for travel by emergency vehicles.[27] This requirement probably means the road is either Class V (town maintained) or privately maintained but built to town specifications.[28] Class IV, V or VI highways which are discontinued and made subject to gates and bars are not publicly approved streets for zoning purposes.[29]

II. HIGHWAY CLASSIFICATIONS

New Hampshire highways fall into seven classifications.[30] Classes I through III are state maintained highways. Class III-a are boating access highways. Classes IV through VI are municipal highways. This article addresses municipal highways only, particularly Class V and Class VI highways.

The distinction between Class V and Class VI highways is particularly important to developers and municipalities. Frontage on a Class VI highway may not satisfy zoning requirements, whereas frontage on a Class V probably does.[31] Building on a lot accessible only by a Class VI highway is prohibited, except under certain circumstances.[32] Towns only have the duty to maintain Class V highways.[33]

A. Class IV

Class IV highways consist of all highways situated within the compact sections of cities or towns.[34]

B. Class V

Class V highways consist of all other local, traveled highways which the municipality has the duty to maintain regularly.[35] This does not necessarily mean commencement of travel and maintenance alone *establishes* Class V status today, but both must exist for a road to *continue* its Class V status. "Traveled" may mean use by loggers, hunters and fishermen only.[36]

Municipalities do not inherit the responsibility to maintain a highway merely because it is traveled, thus making all traveled highways Class V highways. Rather, a Class V highway must be traveled and maintained regularly.[37]

C. Class VI

All other public ways, including highways discontinued and made subject to gates and bars, and highways the municipality has not maintained in a suitable condition for travel for five successive years, constitute Class VI highways.[38] The public has the right to pass over Class VI highways.[39] Mere classification of a highway as Class VI by the New Hampshire Department of Transportation is not definitive.[40]

The General Court enacted uniform provisions for Class VI roads in 1999.[41] As of August 9, 1999, all Class VI highways, no matter how created, are subject to gates and bars.

D. Reclassification

Changing the classification of a highway from Class V to Class VI or from Class VI to Class V involves many principles discussed later in this article, such as the layout process, dedication and acceptance, and discontinuance. The techniques a town may use to reclassify a highway will be addressed here briefly, but the reader should refer to the appropriate section of this article for more information.

A highway may be reclassified from Class V to Class VI either by vote of the legislative body to discontinue the road subject to gates and bars[42] or by the town's failure to maintain and repair the road in suitable condition for travel thereon for five successive years or more.[43] Three citizens or taxpayers can avert the latter method by notifying the town of the road's inadequacies within the five-year period. The town then must begin repairing the road within 24 hours and continue the work with reasonable dispatch, failing which it exposes itself to liability for personal injury or property damage proximately caused by the insufficiency identified in the notice.[44] A municipality does not have the power to arbitrarily stop maintaining a highway. To relinquish responsibility for maintaining a highway under RSA 229:5, VII, the highway must be rarely traveled.[45]

"Maintain" as applied to this statute means "to keep in a state of repair . . ., to preserve from decline."[46] Snowplowing alone does not constitute maintenance.[47] Other work, such as repaving or patching, must be performed.[48]

The effect of RSA 229:5,VII appears to trump other factors that might otherwise lead a court to conclude a highway is Class V versus Class VI. In one case a road had not been maintained by the town for at least 14 years, yet the New Hampshire Department of Transportation records listed the road as Class V, the town had not notified the Department of Transportation of the alleged (by the town) change to Class VI status, the town received money from the state to aid in the highway's maintenance, and the "Official Town Map" signed by the town's board of selectmen in February 1990, 14 years after the town stopped maintaining the road, indicated the road was a Class V highway. The Court also found "reasonably diligent inquiry would not have disclosed that [the road] was a Class VI highway." Despite these facts, the Court did not interfere with an agreement by the parties that the road was Class VI.[49]

A highway may be reclassified from Class VI to Class V either by layout or by legislative vote.[50] Additionally, "[a]ny public highway which at one time lapsed to Class VI status due to five-years' non-maintenance, as set forth in RSA 229:5, VII, but which subsequently has been regularly maintained and repaired by the town on more than a seasonal basis and in suitable condition for year-round travel thereon for at least five successive years without being declared an emergency lane pursuant to RSA 231:59-a, shall be deemed a Class V highway."[51]

In 1988, the New Hampshire Supreme Court stated that "[r]eclassification, however, does not terminate the public's right to travel on a highway, and a town meeting vote is therefore not necessary to effect a reclassification. Indeed, the legislature has never established a formal procedure for reclassifying highways, leaving towns free to responds as they see fit. . . ."[52] Although it is true the General Court had not to that point enacted a statute specifically dealing with "reclassification," towns could, in practice, reclassify highways using the techniques discussed above, with the exception of the power of towns to reclassify any Class VI highway as a Class V or Class IV highway by vote of the town pursuant to RSA 231:22-a. This statute was enacted in 1990, perhaps in response to the *Glick* case cited above. Also, notwithstanding the Court's statement, a Class V highway may be discontinued subject to gates and bars, and thus reclassified to a Class VI highway, only by "vote of the town."[53]

Although Class I and II highways are beyond the scope of this article, it should be noted that a highway may be re-

classified as a Class V or VI highway under RSA 230:55-62. In short, the portion of a Class I or II highway discontinued by the state becomes a Class V or VI highway unless the municipality notifies the state within 60 days that there is no "occasion for the use of such portion for town highway purposes."[54] Abutters receive the same type of notice as is required for laying out highways.[55]

III. CREATION OF HIGHWAYS

Determining the method by which a particular highway was created is crucial in determining ownership rights in the underlying land both before and after discontinuance. Each method has its own evidentiary requirements.

A. Laying Out

1. Generally

RSA 229:1 provides that highways include roads "laid out in the mode prescribed therefor by statute." "Laid out" means the municipality formally planned the location of the road. The power to lay out roads includes the power to convert private roads already in existence into public highways.[56] A highway already established by being laid out may be widened by a new layout, by dedication and acceptance, or by prescription.[57]

Laying out highways requires municipalities to compensate affected property owners.[58] No compensation is required, however, when a road has already been dedicated to public use, such as by being shown on a recorded plan or by being referenced in deeds.[59] A "return" on file in the municipality's clerk's office represents the key record evidencing the existence of a laid out highway.[60] No taking of land can occur without the return.[61] Therefore, no laying out of a highway can occur without the return. The governing body of a city or town may lay out a highway.[62]

2. Procedure

The selectmen may lay out a highway only upon petition.[63] A purported highway laid out without a petition is invalid.[64] The petition must state a public need for the highway.[65] Individuals, as well as municipalities, may authorize a laying out petition.[66]

The selectmen must give the petitioner and each owner of land over which the proposed highway may pass at least 14 days' prior notice of a public hearing to address the petition, although no hearing need be held if the selectmen "are clearly of the opinion that such petition ought not to be granted."[67] An aggrieved petitioner may appeal to the Superior Court at this point.[68]

The selectmen have great latitude in determining the final location of the highway, and a petition need not contain intermediate courses and endpoints.[69] If the petition contains intermediate courses, the selectmen may disregard them.[70] A highway need not be laid out as a straight line where the petition merely describes the proposed highway as running between two points.[71] Likewise, a laid-out highway which fails to terminate at the point specified in the petition may still be valid.[72] The highway as laid-out need only be "substantially in conformity" with the petition.[73]

If the selectmen approve the proposed lay out, they must assess the damages sustained by each owner of land or other property taken for the road.[74] The New Hampshire constitution requires any property taken by eminent domain be applied "to public uses."[75] Taking property for roads using the laying out process is a form of eminent domain.[76] However, even if the proposed road will particularly benefit a private business, such as a supermarket, "whenever property is taken for a highway, it is for the public use, notwithstanding that the highway may greatly benefit a private party."[77]

The municipality may not use any property taken for a highway until it has tendered all damage payments.[78] A road actually constructed on courses other than those described in the return is not a legal highway.[79]

3. "Occasion"

The selectmen may lay out a road only if there is "occasion" for doing so.[80] The Supreme Court has used different terms over the years to describe what constitutes "occasion," so it recently re-stated the test as follows:

> Determining whether occasion exists is a two-step process. The first step is to balance the public interest in the layout against the rights of the affected landowner. If the rights of the affected landowner outweigh the public interest in the layout, the layout is not justified and there is no occasion for it. If, however, the public interest justifies the taking of the land without the landowner's consent, the second step is to balance the public interest in the layout against the burden it imposes upon the town. If the balancing required by the second step favors the public interest, occasion for the layout exists.[81]

B. Conveyance

A highway may be created by conveyance to a municipality of a fee interest or an easement. The conveyance must satisfy all the formalities set forth in RSA 477 for conveyances of realty, and formal acceptance also is required.[82] A town may delegate to the governing body the power to accept a deed.[83]

C. Dedication and Acceptance

1. Dedication

a) Generally

Dedication may be broadly defined as "the devotion of land to a public use by an unequivocal act of the owner of the fee manifesting an intention that it shall be accepted and used presently or in the future for such public use."[84] The owner of dedicated property generally may reserve "...no rights incompatible with the full enjoyment of a public use

thereof."[85] For example, recording a plan and conveying lots in accordance with the plan constitutes "an unequivocal intention to dedicate the streets to public use."[86]

In most cases, dedication of a street gives the public the immediate right of passage over the street. The reason for this conclusion requires an analysis of the distinction between public acceptance to *use* a dedicated street versus acceptance to *maintain* a street, and is addressed in detail in Section III,C,2, *infra*. Dedication alone does not burden the municipality with the duty of maintenance unless the municipality accepts the dedication.[87]

Unlike a conveyance in fee, the owner of dedicated property retains ownership of the fee under the dedicated land. However, "[a]n offer of dedication is not inconsistent with an intent to convey a fee out to the center line" of the road.[88] In other words, a property owner may dedicate a portion of his land for use by the travelling public and, by conveying lots abutting the dedicated road, convey the fee underneath the road to the center line of the road. This concept is addressed in more detail in Section V, *infra*.

The term dedication is often expressed as an "offer to dedicate."[89] Phrasing the concept in this manner draws an analogy to contract law whereby offers must be accepted before a binding relationship arises between offeror and offeree. "Once the offer [of dedication] is accepted the dedication becomes complete and irrevocable"[90] In fact, this method of creating a highway could simply be called "dedication" which is made up of the offer to dedicate and the public's acceptance of the offer.[91]

The law of dedication as it relates to the creation of highways in New Hampshire follows an errant history. The law today more closely resembles that of 170 years ago than 70 years ago. The reason lies in the passage of a statute in 1842 which eliminated the ability of towns to accept dedicated roads "...unless the same [had] been used by the public for a term of time not less than 20 years...."[92] Prior to 1843 and since 1945, a town could accept a road less than 20 years following dedication.[93] This resurrection of the pre-1843 law necessitates an examination of the cases decided during that time.

b) History

i) Pre-1843

In 1844 the New Hampshire Supreme Court announced that prior to the passage of Revised Statutes 53 (7) in late 1842, the Court had settled the doctrine that a property owner could dedicate a road to public use and thereby create a public highway.[94] Dedication required the express word or act of the owner.[95] For example, fencing a road in a manner suitable for a Class V highway and permitting the public to use it might constitute a dedication.[96] Granting the public a license to use the way for a limited period of time did not amount to a dedication.[97] In addition, only an owner could dedicate a road, not a lessee or licensee.[98]

The property owner is required to allow the entire public the use of the dedicated area. "There is no dedication to a public use if only a limited portion of the public may enjoy it."[99] For example, the creation of a way connecting two lots owned by the same person which passed over a third lot owned by that person did not constitute an intention to dedicate the way to the public.[100] A covenant in a deed stating that title would revert if a building were ever constructed on certain land did not amount to a dedication or the conveyance of any use right to the public.[101]

Courts considered the length of time the property owner tolerated public use of his or her land as an important factor in determining whether or not a dedication had occurred. The distinction between dedication and acceptance became muddled at times because courts sometimes found that the dedication and acceptance occurred at the same time and not as discrete events.[102] The New Hampshire Supreme Court did not adopt a bright line rule in defining dedication. It found any attempt to do so difficult and absurd.[103] "[T]he strength of the evidence depends much more upon the attending circumstances than on the length of time."[104] Thus, the passage of 17 years provided sufficient evidence of dedication in one case while two years did not in another.[105] The Court did, however, state that a finding of 20 years' continuous use by the public constituted conclusive evidence of a dedication.[106] Although unlikely, such a finding still may be conclusive evidence of acceptance today.[107]

ii) Post-1842

In 1842 the New Hampshire legislature decided to substitute "a definite and simple rule for one that was uncertain and perplexing."[108] Revised Statutes 53 (7) provided that a public highway could be created in only two ways, by laying out or by 20 years' use. Revised Statutes 53 (7) had the effect of discontinuing all purportedly dedicated and accepted highways that the public had not yet used for 20 years.[109] The statute required 20 years use even if there had been use before 1842 which would have shown a legal highway under the law then existing.[110] Presumably the years of public use before 1842 could be carried forward beyond 1842 and counted toward the 20 year requirement.[111] The statute had no effect on highways that had already attained public status, except highways allegedly created under a claim of dedication and acceptance following less than 20 years use.[112] The statute also had no effect on private rights, only public.[113]

iii) Post 1945

In 1945, the New Hampshire legislature passed the immediate predecessor to the current statute governing creation of highways.[114] That statute included dedication and acceptance as a method for creating highways for the first time since 1842. Thus, the nineteenth-century cases defining and interpreting dedication and acceptance became relevant once again, and remain so today.

c) Filing Subdivision or Site Plan with Planning Board or Registry of Deeds.

Filing a subdivision plan with the registry of deeds and conveying lots in accordance with the plan constitutes dedication of the streets shown on the plan.[115] In fact, merely filing a subdivision plan with a planning board constitutes an offer by the owner to dedicate the streets shown on the plan.[116] The New Hampshire Supreme Court expanded this rule to include site plans.[117]

2. Acceptance

The distinction between acceptance of a road for purposes of giving the pubic the right to use a road versus acceptance which imposes on a municipality the duty to maintain a road can be confusing. The Supreme Court recognized this confusion and tackled the issue in the seminal case of *Harrington v. Manchester*.[118] For purposes of this discussion, the terms "acceptance-for-use" and "acceptance-for-maintenance" will be used.

a) Acceptance-for-Use

As stated earlier, recording a plan and conveying lots in accordance with the plan constitutes an unequivocal intention to dedicate the streets shown on the plan to public use.[119] Once so dedicated, and assuming no other facts exist indicating the owner does not unequivocally manifest an intention "to abandon his property and dedicate it to public use," the public then has the immediate right to take the street for public use.[120] At this stage, the public would have no right to use the dedicated street for public use; the public still needs to accept the street.

If the public right of passage over the street would be beneficial to the public, public acceptance will be presumed in the absence of some burdensome condition imposed by the donor.[121] In the *Harrington* case, the public right of passage was beneficial because it relieved the municipality of the obligation to pay damages to the abutters should the municipality formally create a highway at a later date through the lay out process, which is what happened in that case. In most cases, therefore, dedication of a street immediately gives the public the right of passage over the street.

b) Acceptance-for-Maintenance

Acceptance is a discrete event.[122] Once a municipality accepts a dedicated road it assumes responsibility to maintain the road.[123] The need for a separate, distinct act of acceptance by municipalities is clear: "...it would be a great hardship upon towns if an individual could lay out a way upon his own land, throw it open to the public, and then oblige the town to charge themselves with the maintenance and repairs of it."[124]

A municipality ordinarily accepts a dedicated road by town meeting vote or by affirmative action of the board of mayor and aldermen or city council. A court may deem a road accepted if the municipality repairs the road or if the public uses the road for 20 years, coupled with municipal maintenance.

i) By Local Legislative Action

A municipality may accept a dedicated road by town meeting vote or its equivalent.[125] The legislature created this power in 1945 when it re-introduced dedication and acceptance as a mode of creating a highway.[126] Although the Supreme Court stated the purpose of the 1945 amendment was "to enable municipalities to accept dedicated streets with only a formal vote," the Court did not say this was the exclusive manner in which municipalities could accept dedicated streets.[127] In fact, at least one case after 1945 acknowledged 20 years' public use could constitute acceptance[128] and another acknowledged some threshold of public use, without reference to the need for it to continue for 20 years, could constitute acceptance.[129]

Planning boards do not have the power to accept roads.[130] Planning Board approval of a subdivision plot does not constitute acceptance by the municipality of any street shown on the plot.[131]

A municipality may accept a street that corresponds to one shown on the municipality's official map or on a subdivision street plat approved by a planning board with platting jurisdiction.[132] A municipality also may accept a street that received the legal status of a public street prior to the planning board obtaining platting jurisdiction.[133]

Municipalities may accept streets not shown on the official map or on approved plans as long as the ability to do so appears in an "ordinance or other measure."[134] The "ordinance or other measure" must be submitted to the planning board for its approval. If the planning board approves the ordinance, then the ordinance becomes effective upon an affirmative vote of a majority "of the entire membership of the local legislative body." If the planning board disapproves the ordinance, then the ordinance requires a two-thirds vote.[135]

A municipality with the town meeting form of government may delegate to the board of selectmen (or other governing body) the authority to accept dedicated streets.[136] Only municipalities which have conferred upon a planning board platting jurisdiction in accordance with RSA 674:35 may delegate this power.[137] If such a delegation of authority is made, a board of selectmen may vote to accept any dedicated street only if the street corresponds in its location and lines with a street shown on a subdivision plat or site plan approved by the planning board, or on the municipality's official map, or on a street plat made and adopted by the planning board.[138] The board of selectmen must hold a public hearing on the proposed acceptance prior to taking action.[139]

If the selectmen accept a road, they must act in concert. "[T]he several acts of one selectman in one year and the act of another selectman in another year [cannot] be coupled together so as to show an acceptance by a majority of the board in either year."[140] Selectmen also may accept a road by

laying it out.[141] For cities, the city council or board of mayor and aldermen must accept the dedicated road.[142] Practitioners should obtain copies of minutes to establish acceptance. Do not rely on the word of a clerk.

RSA 231:51 gives the governing body of municipalities (versus the legislative body) the power to release a street from all public servitude unless the street is opened, built, or used for public travel within 20 years from dedication. Being "opened, built or used for public travel" means either the street is formally accepted by vote of the legislative body or a use commences which may ripen into acceptance.[143] Failure to accept such streets, lanes or alleys "deprives the public of any independent right it has in the road," provided the local governing body so votes.[144] Private rights, such as implied easements, remain unaffected.[145]

ii) By Municipal Repair of Road

Under common law, the selectmen could accept a road by authorizing its repair, erecting signs or by "any other official act of recognition."[146] In addition, towns could accept a road by voting to raise money for its repair or by performing "any other act recognizing an obligation to repair."[147] Road repair as evidence of acceptance fell victim to the imposition of the 20-year rule in 1842; however, evidence of road repair may be relevant again today following the re-codification of dedication and acceptance in 1945.

iii) By 20 Years' Use

While public use of a dedicated road for less than 20 years may establish acceptance, 20 years' public use "may furnish conclusive evidence of acceptance."[148] Before 1913, "an offer of dedication created a permanently vested right in the town to accept [a dedicated] street."[149] Between 1913 and July 16, 1989, a road could be accepted only if it was opened, built or used for public travel within 20 years of dedication.[150] Beginning July 16, 1989, the power to accept a road *may* be terminated after 20 years by vote of the governing body of the municipality.[151]

Use of a road that ultimately may ripen into acceptance may commence, therefore, in the 19th year following dedication and arguably need not continue for 20 years. One reason this is possible is the Supreme Court's rulings that the "20 years prior to January 1, 1968" language in RSA 229:1 applies to prescription only (*see* Section D, below). If the language applied to all types of uses, whether prescriptive or the type that historically ripened into acceptance, then acceptance by use would not be valid today, unless the use began 20 years before January 1, 1968. Under the current version of RSA 231:51, if a use commences, say, in the 21st year following dedication, that use still may ripen into acceptance, but the governing body of a municipality may terminate the power of acceptance prior to that point.

Occasional use is insufficient to constitute public acceptance of a dedicated way. For example, occasional, seasonal use of a paved path to the ocean is insufficient for public acceptance, especially where abutters, tenants, friends and neighbors make up most of the use.[152] Limited use of land by neighboring owners without express permission does not constitute public acceptance.[153]

Public use of a road for 20 years also may create a presumption that the municipality laid out the road and is obligated to maintain it.[154] This theory is distinct from the 20 years that may furnish conclusive evidence of acceptance or the 20 years required for prescription (see Section D, below) or even the 20 years required for custom (see Section E, below).[155] No recent cases have re-stated this theory.

D. Prescription

1. Establishment

The creation of a highway through prescription is codified at RSA 229:1.[156] RSA 229:1 requires use by the public for 20 years prior to January 1, 1968. This does not mean the elements for prescription must have been present between December 31, 1947 and December 31, 1967, but that they existed for some 20-year period ending prior to January 1, 1968.[157]

To establish a highway by prescription, the proponent must prove by a "balance of the probabilities" that the general public used the way in question continuously, without interruption and under a claim of right for 20 years without the permission of the owner.[158] These facts give rise to a conclusive presumption that the highway was at some previous time established by proper authority.[159] Once a plaintiff makes out a *prima facie* case of prescriptive use by the public, the burden shifts to the other party to prove the public use was permitted.[160]

The threshold for determining "public travel" is fairly low. Generally, use by the public, even if scant, without any limitation expressly or implicitly imposed by the landowners, will constitute public travel.[161] "Public" means all the public.[162] Frequent use by members of the general public (versus abutters) in the winter and summer to reach a pond for recreational purposes and to patronize a grocery store once located on one of the roads in question was found to be sufficient public use of the roads.[163] On the other hand, old photographs from the 1800's which the plaintiff claimed showed public use of a bridge and adjoining roadway and records purportedly showing the town had allocated money to repair the bridge in 1873 and 1875 failed to support an inference that the public used the roadway and bridge for a continuous 20-year period and that such use was adverse.[164]

The color of title claim once failed where the way in question lay in front of the challenged landowner's store and people generally used the strip as a place to leave their horses before going into the store.[165] In that case, the Supreme Court held the landowner impliedly invited the customers to use the strip.

Prescription may be asserted even where a highway already exists. For example, a party may claim that a highway is actually wider than the laid out width, the extra width being established through prescription.[166] Intermittent use of a road, such as during haying season only, may be sufficient to establish prescriptive rights where the use is characteristic of the road claimed.[167]

2. Extent of Rights Created

"A highway established by prescription is not as a matter of law restricted in width to the track of actual travel."[168] Inquiry must be made into the amount of land taken for safety, convenience and maintenance of the highway.[169] It may turn out more land is needed on one side of the highway than on the other; therefore, the center line of the area actually traveled upon may not be the true center line of the highway.[170] Fences and walls, however, are strong evidence of the limits of the public's rights.[171]

3. Alteration or Extinguishment

Once a highway is created by prescription, the public's use rights cannot be taken away or altered through the laying-out procedure without a town meeting vote and, in some circumstances, court consent.[172]

E. Custom - an alternative theory

An alternative theory to adverse possession is custom. At least one treatise has claimed New Hampshire is the only state that still recognizes this doctrine as it relates to the creation of rights in roads.[173] "[A] custom is 'a usage which obtains the force of law, and is, in truth, the binding law within a particular district, or at a particular place of the persons and things which it concerns.'"[174]

Custom is similar to prescription in that 20 years' use is sufficient to support a finding of customary rights, as long as the use is "unexplained and uncontradicted."[175] Custom differs from prescription in that the owner of the land against which a claim of customary rights is claimed must have permitted the use in question, even though the use is adverse to the landowner's absolute right to dominion over the land.[176] In addition, rights created by custom vest in all the members of the community rather than in the specific individual users.[177] A claim of customary rights may be a creative alternative to prescription, especially where the landowner raises the permissive use defense.

IV. DISCONTINUANCE OF HIGHWAYS

Once established, a highway is presumed to exist until discontinued.[178] Only a formal discontinuance by town meeting vote can legally terminate the public's right to travel on any public way.[179] "When a highway is legally discontinued, the public right of passage ceases, the duty of the town to keep it in repair no longer exists, and the owner has his land again, free from the incumbrance."[180] "No owner of land shall, without the owner's written consent, be deprived of access over [a discontinued] highway, at such owner's own risk."[181]

Non-use or abandonment of a road by the public for 20 years does not constitute discontinuance of a highway.[182] Likewise, one cannot acquire a private interest in a highway by adverse possession.[183]

The party asserting discontinuance has the burden of proving the discontinuance by clear and satisfactory evidence.[184] The best evidence of discontinuance is the official record of the municipality.[185] If gaps exist in municipal records due to fires and the like, the proponent may introduce circumstantial evidence such as deed recitals, actual use of the road and other municipal records which describe the apparent status of the road.[186]

Succeeding at trial with such evidence appears to be a difficult task. In one case the Supreme Court upheld a master's finding that the proponent failed to prove the discontinuance of a road despite producing deeds referring to the road as discontinued and a town report referring to the road as a private way.[187] A town vote to "close" a road may not constitute discontinuance and termination of the public's right of travel.[188]

A municipality may discontinue a road subject to gates and bars.[189] A road discontinued subject to gates and bars is still a public highway, but the municipality is not responsible for its maintenance.[190] From the standpoint of development of adjacent land, a road discontinued subject to gates and bars may not satisfy zoning ordinance frontage requirements.[191]

Any person aggrieved by a vote to discontinue a highway may appeal to the superior court within six months after the vote.[192] The procedure is similar to that for appeals of the laying out of Class V and VI roads. Non-abutters may have standing to appeal and receive damages.[193]

Until 1978, the New Hampshire Supreme Court did not require municipalities to compensate an abutter of a discontinued road if the abutter retained access to a highway.[194] Later, the Court modified the rule by requiring the abutter to have "reasonable" access. "[W]hat might be considered a merely inconvenient or circuitous alternate means of access for one landowner might be an unreasonable alternative for another."[195] In other words, a court must evaluate reasonableness with reference to the existing use of the land.[196]

When voting to discontinue a road, the language used at town meeting will be liberally construed to effectuate the assembly's purpose.[197] "Town meetings do not consistently express their purposes with legal precision."[198] Therefore, it is important to look at not only the language of warrant articles but the bigger picture of what the town was trying to do with those articles. For example, in one recent case the warrant article authorized the town to "relocate" a road and for the town to give a quit-claim deed to the "old" portion to the affected property owner.[199] Under the facts of that case, those actions constituted discontinuance. However, in another case,

the Court found a vote to "close" a road did not constitute discontinuance, even where no gates and bars had ever been placed on the road.[200] A vote to discontinue a road absolutely under RSA 231:43 and to discontinue subject to gates and bars under RSA 231:45 likely will be interpreted as a vote to discontinue subject to gates and bars.[201]

Difficulties may arise where a municipality attempts to discontinue a highway created by conveyance. A mere vote to discontinue likely does not suffice to revert ownership to the abutters. Municipalities should vote both to discontinue the public's right of passage and to authorize the execution of a deed to transfer title to the underlying fee to the abutters. Abutters should obtain deeds or easements, whatever the case may be, to ensure clear title.

V. OWNERSHIP-TO-MIDDLE-OF-ROAD DOCTRINE

New Hampshire courts recognize the presumption that "...conveyance of property bounded by a street or highway normally conveys title to the center of the boundary street...."[202] This presumption exists whether or not the deed description references a plan.[203] The presumption also exists where the deed does not specifically reference the road as a boundary but refers to a recorded plan showing the road as a boundary.[204] "In such a case the grantor adopts and incorporates the map as a part of the deed, and the boundaries set forth on the map should be construed as if written in the deed."[205]

The presumption that a grantor of property bounded by a highway intends to convey title to the center of the highway is based on several underlying presumptions. One is that the owners of property adjoining the highway originally furnished the land for the right of way in equal proportions.[206] Another is that an owner selling land bounded by a highway does not intend to retain the narrow strip of land that constitutes the road, and therefore intends to sell to the center line of the highway.[207] A third presumption is that "...it [is] not the intention of the grantee to accept a deed which should give him none of the usual rights...in the soil of the highway, and which may have the effect to leave his premises inaccessible in case the rights of the public in the road should be surrendered."[208] New Hampshire courts also base the presumption on the supposition that a grantor will not retain a strip of land with little value which will serve to decrease the value of the land conveyed:

> It is improbable that a man will insist on an exception, the only and certain effect of which must be to materially diminish the salable value of his land, when he is to gain nothing by it. It is improbable that two men have understandingly entered into a bargain which contains a stipulation plainly and clearly to the disadvantage of both. *A priori*, they would not be likely to do such a thing; therefore, *a posteriori*, it is not likely they have done it. The language of their deed is to be read in the light of this improbability.[209]

Although "strong and controlling,"[210] parties may rebut the presumption of ownership to the middle of abutting streets by showing a "clear and unequivocal declaration of a contrary intent in the deed."[211] *Duchesnaye v. Silva*[212] represents a failed attempt to rebut the presumption. The Court held that language in a deed stating the conveyance was ". . . subject to any and all rights the [city] may have . . . for street purposes' is not a clear and unequivocal declaration . . ." that the grantor did not intend to convey to the middle of the abutting street.[213] Quite the contrary, such language confirmed the fact that the access street had been offered for dedication.[214] Language such as "bounding upon," "bounding on," "by" or "along" all mean the same thing, namely, a presumption of ownership to the middle of the described street.[215] Mere reference to a lot number shown on a plan containing streets is sufficient to invoke the presumption of ownership to the middle of the road.[216]

Several cases illustrate successful rebuttals of the middle-of-the-road presumption. A deed from a developer's successor conveying two lots and containing a right-of-way over the abutting road and also reserving the right to discontinue construction of the road is sufficient to rebut the presumption that the developer conveyed title to the center line of the road.[217] In fact, merely including an express easement over abutting roads does not appear to include title to any portion of the roads.[218]

The presumption does not apply where a town discontinues a road owned on both sides by the same person and where a subsequent deed by that person contains the description "easterly by the highway."[219] Such a description contains no portion of the road. The Court in *Avery v. Rancloes*[220] faced a situation where one person (Felton) owned both sides of a road at the time the town voted for its discontinuance. "When it did so, full ownership of the road reverted to Felton."[221] Felton's successor (Anderson) conveyed a portion of the land which ran "easterly by the [discontinued] highway" to Chappel. Many years later, Anderson conveyed the remainder of the original Felton tract to Rancloes. The Court held that Chappel could not own to the middle of the discontinued road "because there was no street or road, legally."[222] The Court interpreted "easterly by the highway" not to include any portion of the discontinued road.

A deed describing a parcel as "bounded on the east by land of" an abutter where a previously discontinued road lies between the two parcels conveys the entire road.[223] A deed purporting to convey a parcel and the road running across it but reserving to the public the use of the road conveys title to the road, subject to rights of the public.[224] If parties can determine that a grantor owns the entire fee under an abutting road but not the land on the other side of the road, a deed conveying "to the side of" the road conveys the entire width of the road.

The rule that lot owners own to the middle of abutting roads also applies where lots are conveyed with reference to a plan.[225] Conveying lots abutting streets shown on a referenced

plan create an implied easement over at least the street providing the main access.[226]

The existence of a road on a recorded plan does not guarantee the owner of an abutting lot owns to the middle of the road.[227] In *Gagnon v. Moreau*,[228] the defendant conveyed a lot to the plaintiff by a deed referencing a recorded plan showing the lot as abutting Mulvanity Street. The deed also described the lot as running northerly along the easterly line of Mulvanity Street a distance of 60 feet. The plaintiff asserted that by conveying the parcel with reference to the plan, the defendant covenanted that he possessed an implied easement over the street that he then conveyed to the plaintiff. However, the defendant's predecessor, the party who recorded the plan, had no title to or interest in the northern portion of Mulvanity Street abutting the lot. The Court held that ". . .[w]here the grantor does not own the land adjoining the boundary of the lot conveyed, no implied easement can arise by estoppel. Such an easement arises only to the extent that the grantor owns the land adjoining the boundary, and no further."[229]

Property bounded by a stream is treated the same way as property bounded by a highway, namely, there is a presumption the owner of the land owns to the middle of the stream.[230] On the other hand, where a highway is abutted by private land on one side and public waters (such as the Atlantic Ocean) on the other, the owner of the private land is presumed to own all the land under the highway, absent a clearly expressed intent to the contrary.[231]

VI. CONCLUSION

When discussing highway law, using the analogy of a road as representing the passage of time is quite tempting. In fact, it is irresistible.

As the people of New Hampshire, through their legislature and as interpreted by their Supreme Court, have walked the road of time, they have maintained a remarkably consistent view toward highways. Yes, there was the revolution of 1842 and the counter-revolution of 1945, but those events represent isolated bumps in an otherwise fairly smooth journey. Certainly some roads could use some repairs and perhaps others should be closed altogether. Hopefully this article sheds some light on how the roads currently are arranged.

ENDNOTES

1. For an excellent discussion of many of these topics, see A Hard Road to Travel, Local Government Center, Inc. (2004).
2. *Kister v. Reeser*, 98 Pa. 1,4 (1881).
3. 1 Elliott and Elliott, *The Law of Roads and Streets*, 3rd. edition, at 1 (Bobbs-Merrill 1911).
4. RSA 259:125.
5. *Herzog v. Grosso*, 249 P.2d 869, 874 (Cal.App. 1952).
6. *State v. Tardiff*, 117 N.H. 53, 56 (1977).
7. *Morgan v. Palmer*, 48 N.H. 336 (1869).
8. RSA 229:5, VI.
9. RSA 229:5.
10. Elliott and Elliott at 11.
11. *Muesig v. Harz*, 283 Ill.App. 115 (1936).
12. Elliott and Elliott at 4.
13. *Marrone v. Town of Hampton*, 123 N.H. 729, 734 (1983).
14. RSA 229:1.
15. *Glick v. Ossipee*, 130 N.H. 643, 646 (1988); *Marrone*, 123 N.H. at 784.
16. *Blagbrough v. Wilton*, 145 N.H. 118 (2000); RSA 229:1.
17. *Blagbrough*, 145 N.H. 118.
18. *See e.g.*, RSA 47:13 ("The executive powers of the city and the administration of police, except where vested in the mayor, shall be exercised by the mayor and aldermen; and they shall have the powers, and do and perform all the duties, which the selectmen of towns have, and are authorized or required to do and perform in regard to their towns, unless it is otherwise provided by law.")
19. RSA 674:40-a.
20. *See also* the definitions set forth at RSA 672:6 ("Local Governing Body") and RSA 672:8 ("Local Legislative Body").
21. *Metzger v. Brentwood*, 115 N.H. 287 (1975).
22. *Stevens v. Goshen*, 141 N.H. 219 (1996).
23. *Metzger*, 115 N.H. at 291.
24. *Morin v. Somersworth*, 131 N.H. 253, 255 (1988).
25. *Morin*, 131 N.H. 253.
26. The ordinance required 200 feet of frontage on a "public right of way," but the Court's analysis flowed from its interpretation of the phrase "right of way."
27. *Trottier v. City of Lebanon*, 117 N.H. 148 (1977).
28. In *Trottier*, the Lebanon Zoning Board of Adjustment determined that "street" meant a Class V highway or better. The Court did not explicitly adopt this interpretation and instead focused on the rationale behind the street frontage requirement, concluding it was to insure a dwelling may be reached by emergency vehicles. A privately maintained road built to town specifications presumably provides the same clear access.
29. RSA 231:45; *Glick*, 130 N.H. at 646.
30. *See, generally*, RSA 229:5.
31. *See Trottier*, 117 N.H. 148.
32. RSA 674:41, I(c).
33. RSA 229:5,VI; *Glick*, 130 N.H. 643.
34. RSA 229:5, IV, V.
35. RSA 229:5, VI; *Glick*, 130 N.H. at 646.
36. *Glick*, 130 N.H. 643.
37. *Id.*
38. RSA 229:5, VII; *see Glick*, 130 N.H. 643.
39. *Glick*, 130 N.H. at 646.
40. *Cf. Glick*, 130 N.H. at 644.
41. RSA 231:21-a.
42. RSA 229:5,VII; RSA 231:45.
43. RSA 229:5,VII; *Stevens v. Goshen*, 141 N.H. 219.
44. RSA 231:91.
45. *Glick*, 130 N.H. at 648.
46. *Catalano v. Town of Windham*, 133 N.H. 504, 511 (1990).
47. *Id.*
48. *Catalano*, 133 N.H. at 511-512. In *Glick*, 130 N.H. 643, the town repaired the roadbed in question on one occasion within the previous five years in response to emergency flooding. The parties agreed that repair would not be used to support a finding at trial that the town had been maintaining the road regularly, so the Court never addressed whether this level of repair constituted "maintenance" under RSA 229:5,VII.
49. *Turco v. Barnstead*, 136 N.H. 256 (1992). The Court never had the opportunity to address whether these facts would lead it to conclude the road was Class V or VI because the parties stipulated the road was Class VI. One can assume the plaintiff made this stipulation due to the lack of maintenance for five successive years under RSA 229:5, VII, so perhaps the failure of the town to alter its records and notify the state was excused. Still, it would have been interesting to see how the Supreme Court would have handled the issue.

50. RSA 231:22-a.

51. RSA 229:5,VI.

52. *Glick*, 130 N.H. at 647.

53. See RSA 231:45.

54. RSA 230:56.

55. *Id. See also* Section III, A, 2, infra.

56. *Locke Development Corporation v. Town of Barnstead*, 115 N.H. 642 (1975); RSA 231:28-31.

57. *Stevens v. Nashua*, 46 N.H. 192, 195 (1865).

58. *See, e.g.*, RSA 231:15; *Edgecomb Steel Co. v. State*, 100 N.H. 480 (1957).

59. *Harrington v. Manchester*, 76 N.H. 347 (1912).

60. *State v. Dover*, 10 N.H. 394 (1839); RSA 231:16.

61. *Edgecomb Steel*, 100 N.H. at 485.

62. *See* RSA 231:7, RSA 47:13; *Waisman v. Manchester*, 96 N.H. 50 (1949).

63. RSA 231:8; *Wiggin v. Exeter*, 13 N.H. 304 (1942).

64. *State v. Town of Rye*, 35 N.H. 368 (1857).

65. *Caouette v. Town of New Ipswich*, 125 N.H. 547, 553 (1984); RSA 231:8.

66. *See, e.g., Waisman*, 96 N.H. 50.

67. RSA 231:9.

68. RSA 231:34-39.

69. *Spaulding v. Groton*, 68 N.H. 77 (1894).

70. RSA 231:12.

71. *Wiggin*, 13 N.H. 304.

72. *Spaulding*, 68 N.H. 77.

73. *Spaulding*, 68 N.H. at 82; *Raymond v. Griffin*, 23 N.H. 340, 345 (1851).

74. RSA 231:15.

75. New Hampshire Constitution, Part I, Article 12; *Rodgers Development Company v. Tilton*, 147 N.H. 57, 62 (2001)

76. *Cf. Rodgers*, 147 N.H. 57.

77. *Rodgers*, 147 N.H. at 62 (cites omitted).

78. RSA 231:17. Contrast this with the "take now, pay later" approach in eminent domain proceedings. *See* RSA 498-A:5(I).

79. *Spaulding*, 68 N.H. 77.

80. RSA 231:8.

81. *Rodgers*, 147 N.H. at 59-60.

82. *See State v. Atherton*, 16 N.H. 203 (1844).

83. RSA 41:14-a.

84. Note, *Public Ownership of Land Through Dedication*, 75 Har. L. Rev. 1406 (1962) (quoting 3 American Law of Property sec. 12.132 (Cosner edition 1952)).

85. 2 *Thompson on Real Property*, sec. 369 at 431-32 (1980 replacement volume).

86. *Harrington*, 76 N.H. at 349.

87. *See Harrington*, 76 N.H. 347.

88. *Duchesnaye v. Silva*, 118 N.H. 728, 732-33 (1978).

89. *See, e.g., Polizzo v. Hampton*, 126 N.H. 398, 401 (1985).

90. 2 *Thompson* at 437.

91. *See, e.g., Duchesnaye*, 118 N.H. at 731, which describes the failure of the city to accept an offer of dedication as a "failure of dedication."

92. New Hampshire Revised Statutes of 1842, Chapter 53, Section 7; *Walker v. Manchester*, 58 N.H. 438, 440 (1878). On December 23, 1842, the New Hampshire legislature enacted a re-codification of the state's laws, called the Revised Statutes. The re-codification included the 20-year use requirement discussed in this section. Although the new law was presumably in effect during the last eight days of 1842, this discussion refers to the pre-December 23, 1842 law as "pre-1843" and the post-December 23, 1842 law as "post-1842" for convenience.

93. *See, e.g., State v. Atherton*, 16 N.H. at 210; *Perrotto v. Claremont*, 101 N.H. 267, 270 (1958).

94. *Atherton*, 16 N.H. at 208.

95. *Id.* at 209; *Watson v. Nashua*, 85 N.H. 192, 200 (1931).

96. *Atherton*, 16 N.H. at 209.

97. *Id.* at 208; *see also Watson*, 85 N.H. at 200.

98. *Atherton*, 16 N.H. at 208.

99. 2 *Thompson* at 434.

100. *Barker v. Clark*, 4 N.H. 380 (1828).

101. *Watson*, 85 N.H. at 195.

102. See *Atherton*, 16 N.H. at 209-10.

103. *Pritchard v. Atkinson*, 4 N.H. 9, 14 (1827).

104. *Id.* at 15.

105. *Pritchard*, 4 N.H. 9 (17 years); *State v. New-Boston*, 11 N.H. 407 (1840) (2 years).

106. *Atherton*, 16 N.H. at 209.

107. *See Id.* at 210.

108. *State v. Morse*, 50 N.H. 9, 16 (1870).

109. *Atherton*, 16 N.H. at 213; *Morse*, 50 N.H. at 16.

110. *Morse*, 50 N.H. 9.

111. *Compare State v. New-Boston*, 11 N.H. at 410-11 ("And if a road be again required over the same ground by the public convenience [after discontinuing], the mode prescribed by the statute must again be pursued...." This case involved possible claims to an old turnpike corporation's charter).

112. *Atherton*, 16 N.H. at 213.

113. *Morse*, 50 N.H. at 16.

114. Chapter 188:1, Laws of 1945.

115. *Young v. Prendiville*, 112 N.H. 190 (1972).

116. *Polizzo*, 126 N.H. at 401.

117. *See Morin*, 131 N.H. 253.

118. 76 N.H. 347 (1912). The court noted "...a failure to distinguish between what is necessary to vest the right of passage in the public and what is necessary to constitute an acceptance such as will render the city or municipality responsible for the construction and maintenance of the streets." *Id.* At 349.

119. *Harrington*, 76 N.H. at 349.

120. *Id.*

121. *Id.*

122. *Polizzo*, 126 N.H. at 401.

123. *Id.*

124. *Atherton*, 16 N.H. at 210-11.

125. *Polizzo*, 126 N.H. 398; *Perrotto*, 101 N.H. 267.

126. *Polizzo*, 126 N.H. at 403.

127. *See Polizzo*, 126 N.H. 398.

128. *McInnis v. Hampton*, 112 N.H. 57 (1972).

129. *Young v. Prendiville*, 112 N.H. 190 (1972).

130. RSA 674:9, 38; *Polizzo*, 126 N.H. at 403.

131. RSA 674:38.

132. RSA 674:40, I(b).

133. RSA 674:40, I(a).

134. RSA 674:40, III.

135. *Id.*

136. RSA 674:40-a, I.

137. Id.

138. RSA 674:40-a, II.

139. RSA 674:40-a, III.

140. *Atherton*, 16 N.H. at 213.

141. *Hopkins v. Crombie*, 4 N.H. 520 (1829).

142. *See, e.g., Perrotto*, 101 N.H. at 268.

143. *Polizzo*, 126 N.H. at 402-403.

144. *Duchesnaye*, 118 N.H. at 733.

145. *Id.*

146. *Atherton*, 16 N.H. at 210.

147. *Id.*

148. *Atherton*, 16 N.H. at 209-10; *see also Stevens*, 46 N.H. at 199. This twenty-year rule is referenced in *McInnis v. Hampton*, 112 N.H. 57 at 60 (1972), a case

where the plaintiff failed to prove dedication or acceptance ("[s]imilarly, the record does not compel a finding that the town dedicated the lot to public use which the public accepted by use for more than twenty years.").

149. *Polizzo*, 126 N.H. at 402, citing *Harrington*, 76 N.H. 347.

150. *Polizzo*, 126 N.H. at 402.

151. RSA 231:51.

152. *Young*, 112 N.H. 190.

153. *McInnis*, 112 N.H. 57.

154. Stevens, 46 N.H. at 198; *Morse*, 50 N.H. 9.

155. One gets the feeling the number "twenty" has special meaning for the Court and legislature as both have applied it in various ways over the past 200 years in coming to the same conclusion, namely, that a highway is public.

156. *Blagbrough*, 145 N.H. at 122; *Catalano*, 133 N.H. 504.

157. *Mahoney v. Canterbury*, 150 N.H. 148 (2003).

158. *Catalano*, 133 N.H. at 509-510; *Wason v. Nashua*, 85 N.H. 192, 198 (1931).

159. *Id.*; quoted in *Catalano*, 133 N.H. at 509.

160. *Mahoney*, 150 N.H. at 151.

161. *See Morse*, 50 N.H. at 17; *see also Glick*, 130 N.H. 643 ("traveled" for purposes of defining Class V highway may consist of use by loggers, hunters and fishermen).

162. *See Pritchard*, 4 N.H. at 14.

163. *Catalano*, 133 N.H 504.

164. *Blagbrough*, 145 N.H. 118.

165. *Wason*, 85 N.H. 192.

166 *Hoban v. Bucklin*, 88 N.H. 73, 80 (1936).

167 *Ellison v. Fellows*, 121 N.H. 978 (1981).

168 *Hoban*, 88 N.H. at 79.

169. *Id.* at 80.

170. *Id.*

171. *Id.*

172. *Williams v. Babcock*, 116 N.H. 819 (1976), 121 N.H. 185 (1981) (appeal after remand).

173. 2 *Thompson* at sec. 330.

174. *Knowles v. Dow*, 22 N.H. 387, 404 (1851).

175. *Id.* at 409.

176. *Id.*

177. 53 U. Chi. L. Rev. 739, 740.

178. *Davenhall v. Cameron*, 116 N.H. 695, 696 (1976).

179. *Glick*, 130 N.H. at 647 (citing and clarifying *Marrone*, 123 N.H. 729). A municipality's authority to discontinue roads derives from RSA 231:43.

180. *State v. New-Boston*, 11 N.H. at 410; RSA 231:50 (towns not obligated to maintain discontinued roads).

181. RSA 231:43,III.

182. *Davenhall*, 116 N.H. at 696.

183. *Id.*

184. *Davenhall*, 116 N.H. at 697.

185. *Id.*

186. *Id.*

187. *Davenhall*, 116 N.H. 695.

188. *Vachon v. New Durham*, 131 N.H. 623 (1989).

189. RSA 231:45.

190. *King v. Town of Lyme*, 126 N.H. 279, 283 (1985); RSA 229:5, VII.

191. *See e.g., Metzger*, 115 N.H. 287.

192. RSA 231:48.

193. *Concord's Petition*, 50 N.H. 530 (1871).

194. *Wolfe v. Windham*, 114 N.H. 695 (1974).

195. *State v. Shanahan*, 118 N.H. 525, 527 (1978).

196. *Orcutt v. Richmond*, 128 N.H. 552, 554 (1986).

197. *Neville v. Highfields Farm*, 144 N.H. 419, 427 (1999).

198. *Id.*

199. *Neville*, 144 N.H. 419.

200. *Vachon*, 131 N.H. 623.

201. *See, e.g., Stevens v. Goshen*, 141 N.H. 219.

202. *Duchesnaye*, 118 N.H. at 732. For purposes of this discussion, the terms highway, street and road are used interchangeably to reflect the Courts' usage.

203. *See e.g., Duchesnaye*, 118 N.H. 728 (recorded subdivision plan); *Luneau v. MacDonald*, 103 N.H. 273 (1961) (no plan).

204. *Duchesnaye*, 118 N.H. at 732; *see also Harrington*, 76 N.H. 347.

205. *Duchesnaye*, 118 N.H. at 732.

206. *Avery v. Rancloes*, 123 N.H. 233, 236 (1983).

207. *Id.*

208. *Luneau*, 103 N.H. at 277 (quoting *Woodman v. Spencer*, 54 N.H. 507, 511 (1874)).

209. *Woodman*, 54 N.H. at 512.

210. *See Luneau*, 103 N.H. 273.

211. *Duchesnaye*, 118 N.H. at 732.

212. 118 N.H. 728 (1978).

213. *Duchesnaye*, 118 N.H. at 732.

214. *Id.*

215. *Woodman*, 54 N.H. at 511.

216. *Duchesnaye* 118 N.H. at 732.

217. *Davis v. Lemire*, 122 N.H. 749, 750 (1982); *compare Harrington*, 76 N.H. 347 (stating and following the general rule that a developer who conveys lots with deeds referencing the developer's recorded subdivision plan also conveys to purchasers of lots abutting streets created by the subdivision the fee in the soil to the center of the street or streets upon which each lot abuts).

218. *See Catalano*, 133 N.H. 504. The roads in question were shown on two subdivision plans dating from 1908 and 1919. The lots abutting the roads were sold individually and most of the deeds included express easements over the roads. The issue of ownership in the roads does not appear to have been brought before the Court for a decision, although the Court states quite emphatically the lot owners did not own the roads. "There is no evidence, however, that the land over which the roads themselves passed was ever sold by the original developers of the subdivision to the lot owners or others or dedicated to the town. Hence, this land does not appear to belong to the lot owners, the plaintiffs in this suit." *Id.* at 507. The Court did not cite any New Hampshire cases concerning the ownership issue and did not address the middle-of-the-road doctrine.

219. *Avery*, 123 N.H. 233.

220. 123 N.H. 233 (1983).

221. *Avery*, 123 N.H. at 237.

222. *Id.*

223. *Thompson v. Major*, 58 N.H. 242 (1878).

224. *Richardson v. Palmer*, 38 N.H. 212 (1859).

225. *Harrington*, 76 N.H. 347 (no indication whether or not plan recorded).

226. *See Duchesnaye* 118 N.H. at 733.

227. Cf. *Gagnon v. Moreau*, 107 N.H. 507 (1967).

228. 107 N.H. 507 (1967).

229. *Id.* at 510. The Court did not state the reason the defendant's predecessor in title had no ownership interest in the northerly portion of the street. The trial court made that finding, which the Supreme Court accepted without discussion.

230. *Sheris v. Morton*, 111 N.H. 66, 71 (1971); *Luneau*, 103 N.H. at 276.

231. *Sheris v. Morton*, 111 N.H 66.

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