

CERTIFICATE OF HIGHWAY MILEAGE
YEAR ENDING FEBRUARY 10, 2013

Received
FEB 25 2013
Policy, Planning & Intermodal
Development Division

Fill out form, make and file copy with the Town Clerk, and mail ORIGINAL, before February 20, 2013 to:
Vermont Agency of Transportation, Division of Policy, Planning and Intermodal Development,
One National Life Drive, Montpelier, VT 05633.

We, the members of the legislative body of **WAITSFIELD** in **WASHINGTON** County
on an oath state that the mileage of highways, according to Vermont Statutes Annotated, Title 19, Section 305,
added 1985, is as follows:

PART I - CHANGES TOTALS - Please fill in and calculate totals.

Town Highways	Previous Mileage	Added Mileage	Subtracted Mileage	Total	Scenic Highways
Class 1	0.000				0.000
Class 2	9.450				0.000
Class 3	20.22				0.000
State Highway	7.826				0.000
Total	37.496				0.000
* Class 1 Lane	0.000				0.000
* Class 4	6.19		-0.45	5.74	
* Legal Trail	0.60				
* Unidentified Corridor	0.00				

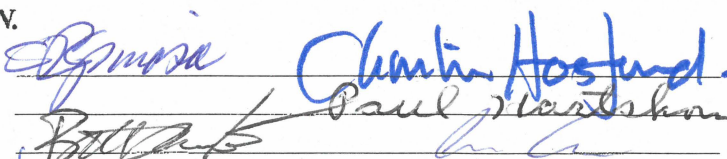
* Mileage for Class 1 Lane, Class 4, Legal Trail, and Unidentified Corridor classifications are NOT included in total.

PART II - INFORMATION AND DESCRIPTION OF CHANGES SHOWN ABOVE.

- NEW HIGHWAYS:** Please attach Selectmen's "Certificate of Completion and Opening".
- DISCONTINUED:** Please attach SIGNED copy of proceedings (minutes of meeting).
- RECLASSIFIED/REMEASURED:** Please attach SIGNED copy of proceedings (minutes of meeting).
Result of Wash. Superior Court decision #147-3-08Wncv 11/30/2010 that determined the TH had not been legally established.
- SCENIC HIGHWAYS:** Please attach a copy of order designating/discontinuing Scenic Highways.

IF THERE ARE NO CHANGES IN MILEAGE: Check box and sign below. []

PART III - SIGNATURES - PLEASE SIGN.

Selectmen/ Aldermen/ Trustees Signatures: 

T/C/V Clerk Signature:  Date Filed: 2-11-13

Please sign ORIGINAL and return it for Transportation signature.

AGENCY OF TRANSPORTATION APPROVAL: Signed copy will be returned to T/C/V Clerk.

APPROVED:  DATE: 2/27/2013
Representative, Agency of Transportation
Johnathan Croft

Vermont Statutes Annotated

19 V.S.A. § 305. Measurement and inspection

§ 305. Measurement and inspection

(a) After reasonable notice to the selectboard, a representative of the agency may measure and inspect the class 1, 2, and 3 town highways in each town to verify the accuracy of the records on file with the agency. Upon request, the selectboard or their designee shall be permitted to accompany the representative of the agency during the measurement and inspection. The agency shall notify the town when any highway, or portion of a highway, does not meet the standards for its assigned class. If the town fails, within one year, to restore the highway or portion of the highway to the accepted standard, or to reclassify, or to discontinue, or develop an acceptable schedule for restoring to the accepted standards, the agency for purposes of apportionment under section 306 of this title shall deduct the affected mileage from that assigned to the town for the particular class of the road in question.

(b) Annually, on or before February 10, the selectboard shall file with the town clerk a sworn statement of the description and measurements of all class 1, 2, 3, and 4 town highways and trails then in existence, including any special designation such as a throughway or scenic highway. When class 1, 2, 3, or 4 town highways, trails, or unidentified corridors are accepted, discontinued, or reclassified, a copy of the proceedings shall be filed in the town clerk's office and a copy shall be forwarded to the agency.

(c) All class 1, 2, 3, and 4 town highways and trails shall appear on the town highway maps by July 1, 2015.

(d) At least 45 days prior to first including a town highway or trail that is not clearly observable by physical evidence of its use as a highway or trail and that is legally established prior to February 10, 2006 in the sworn statement required under subsection (b) of this section, the legislative body of the municipality shall provide written notice and an opportunity to be heard at a duly warned meeting of the legislative body to persons owning lands through which a highway or trail passes or abuts.

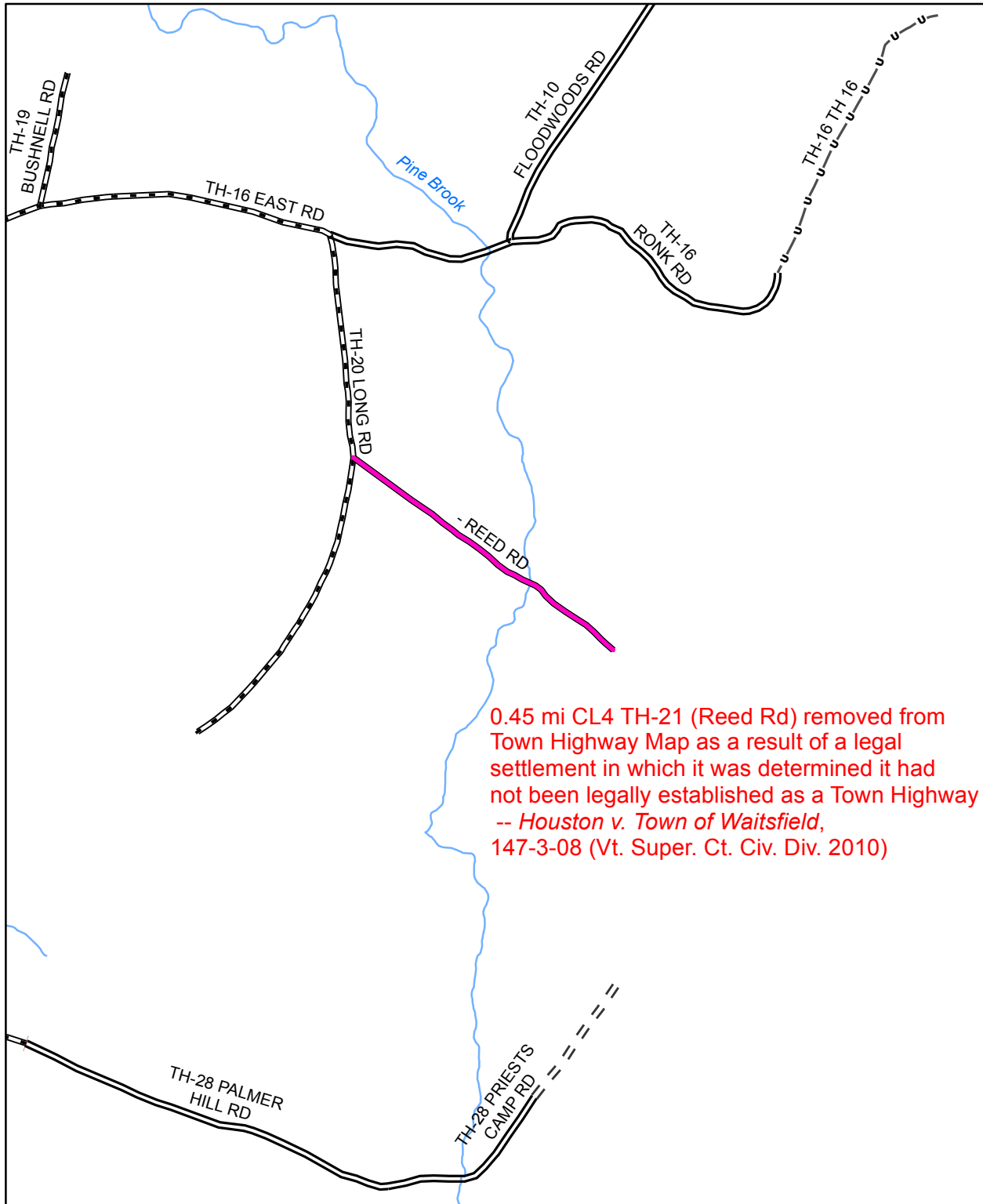
(e) The agency shall not accept any change in mileage until the records required to be filed in the town clerk's office by this section are received by the agency. A request by a municipality to the agency for a change in mileage shall include a description of the affected highway or trail, a copy of any surveys of the affected highway or trail, minutes of meetings at which the legislative body took action with respect to the changes, and a current town highway map with the requested deletions and additions sketched on it. A survey shall not be required for class 4 town highways that are legally established prior to February 10, 2006. All records filed with the agency are subject to verification in accordance with subsection (a) of this section.

(f) The selectboard of any town who are aggrieved by a finding of the agency concerning the measurement, description, or classification of a town highway may appeal to the transportation board by filing a notice of appeal with the executive secretary of the transportation board.

(g) The agency shall provide each town with a map of all of the highways in that town together with the mileage of each class 1, 2, 3, and 4 highway, as well as each trail, and such other information as the agency deems appropriate.

Excerpt of 19 V.S.A. § 305 - *Measurement and inspection* from Vermont Statutes Online located at – <http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=19&Chapter=003&Section=00305>

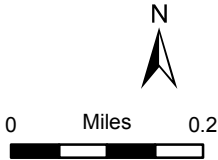
12/27/2012



0.45 mi CL4 TH-21 (Reed Rd) removed from Town Highway Map as a result of a legal settlement in which it was determined it had not been legally established as a Town Highway -- *Houston v. Town of Waitfield*, 147-3-08 (Vt. Super. Ct. Civ. Div. 2010)

**Mileage Certificate Change 2013
WAITSFIELD**

Mapping Unit
Division of Policy and Planning
Vermont Agency of Transportation -- February 2013



VERMONT SUPERIOR COURT
WASHINGTON UNIT
CIVIL DIVISION

VT SUPERIOR COURT
WASHINGTON UNIT

81

2010 NOV 30 A 10:09

VIRGINIA HOUSTON and
JEAN DAMON

FILED

v.

DOCKET NO.: 147-3-08 Wncv

TOWN OF WAITSFIELD

FINDINGS OF FACT and CONCLUSIONS OF LAW on
ISSUES RELATED TO THE STATUS OF REED ROAD AS A PUBLIC OR
PRIVATE ROAD

This is a dispute between two abutting landowners and the Town of Waitsfield over the status of a dirt road which is known as the Reed Road or Town Highway 21. The Town claims that Reed Road is a public road. The two landowners claim that it has always been a private lane across farm land. The status of the road matters because the Town seeks to locate a municipal well at the end of the road.

FINDINGS OF FACT

The Reed Road is a rough track passable by farm tractor, logging truck, or a four-wheel drive vehicle. It is located in Waitsfield, east of Route 100 and the Mad River and just west of the range of steep hills which separates Waitsfield and Northfield. As it exists today, the Reed Road is about a half mile long. It runs from Long Road (an unpaved public road) southeast to Pine Brook where it ends abruptly at the fieldstone abutment for a long-vanished bridge. It is lined by stone walls on each side. It is about 50 feet wide or approximately 3 rods.

The land to the north of the Reed Road is owned by Jean Damon who acquired it from her father Rowland Richards, Jr. in 1992 when he divided his farm land among his four adult children. To the south and to the east across Pine Brook lies the property of Virginia Houston who bought a large, irregularly-shaped parcel from Kenneth Austin in 1987. The land around the Reed Road is pasture and woodlot. Mr. Richards continues to raise cattle on his daughter's fields. Ms. Houston's property is used for logging and some recreational use.

In elevation, Reed Road descends gradually towards Pine Brook. The portion of Reed Road close to the brook as well as Ms. Houston's adjoining property is the site of a natural aquifer. Both the Town and Ms. Houston have drilled test wells which show the

presence of a substantial flow of spring water. This water source lies at the heart of the parties' dispute.

Reed Road has been in existence for approximately two hundred years. It appears on maps of Waitsfield as early as the Edmund Rice map of 1816. This map shows the original division of the town into lots. Lot 77 – the location of Ms. Damon's property – includes a dead-end road which is almost certainly an early depiction of the Reed Road. The same dead-end road appears on the 1858 map of Washington County and the 1873 entry for Waitsfield in the Beer's Atlas. These maps show both public and private roads. The appearance of the road on early maps proves only that the road existed as a feature of the local geography. It does not resolve the legal question of whether the road was private or public.

During the nineteenth century, several families (including the Reed family) lived on the southeastern side of Pine Brook (across the brook from the modern end of Reed Road.) A bridge was constructed over the brook at the southeastern end of the Reed Road. There is no evidence in the record about who constructed the bridge or whether it was a municipal project. These families used the bridge and Reed Road to travel into Waitsfield. Because of the steep hills to the southeast, there was no other road or way into this area. The bridge was washed out in the flood of 1927 and reconstructed. Again, there is no evidence that the town rebuilt the bridge. In 1933 the last home lying beyond Pine Brook burned. It was not replaced. The bridge was destroyed for a second time in the hurricane of 1938. It was not rebuilt.

The land on either side of the Reed Road (northwest of Pine Brook) was farmed during the nineteenth and twentieth centuries. Richard Bisbee, author of the authoritative history of the town of Waitsfield, was born in 1929 and grew up in the vicinity of Reed Road. He testified with absolute credibility that during his lifetime Reed Road has never been maintained by the town and that any grading or other repairs were made as needed by the abutting farmers and landowners.

There is evidence that between 1843 and 1853 there was a public road on the southeast side of Pine Brook. This road was a pent road (a public road closed by gates to enclose livestock). It ran from a portion of the Reed Road on the southeast side of the brook (now long-abandoned) and connected the homes of Franklin Reed and E.W. Tucker. It was formally opened through the recording of a survey in 1843 and formally discontinued in 1853. The surveyor Glenn Towne provided credible evidence that this pent road was a spur or side road which branched off the Reed Road.

The town introduced evidence that an additional public road – 250 feet in length – was opened in 1848 in order to connect the Reed Road with the unnamed pent road. As the evidence developed, however, it became clear that this "connector road" actually reached the property of Sam Long, one of a pair of brothers who emigrated from Ireland and settled in Waitsfield in the 1840's. Both Richard Bisbee and Glenn Towne testified credibly that Sam Long never owned property near the Reed Road. Instead, Sam Long

had a home almost a mile south of the Reed Road, close to a different bridge over Pine Brook. The existence of the "connector road" is irrelevant to the issues in this case.

Around 1900 the town of Waitsfield numbered all of its roads. Reed Road was designated Town Highway 21. Commencing in 1931, Waitsfield and other Vermont towns have submitted annual mileage maps to the state highway department. Reed Road appears on these maps. The maps contain no information about when or in what manner Reed Road may have become a public road.

It is uncontested that Reed Road was never surveyed or formally opened as a public road by the Waitsfield selectboard.

There is no significant evidence that any landowner took steps to dedicate a portion of his or her land to public use as a road. In 1996, Ms. Houston signed a road maintenance agreement with the Town. The agreement includes an acknowledgment that "TH 21 (Reed Road) is a Class 4 town highway which the Town does not presently maintain, but over which the Select Board has legal control." This agreement was a condition for obtaining a permit for certain improvements which Ms. Houston wished to make to the roadway. In a previous decision of this court, the court determined that this agreement was a binding admission which resolved the issue of the status of the road against Ms. Houston and in favor of the town. The court granted a motion for summary judgment against Ms. Houston for this reason. No such ruling was entered against Ms. Damon who has never signed a similar agreement.

With respect to Ms. Damon and her predecessors in interest, the evidence of dedication was limited to the use of the term "Town Highway 21" in a request for subdivision approval in 1992 when he described the boundaries of the property he wished to convey to his daughter Jean.

The evidence with respect to acceptance of the Reed Road as a public road by the Town is the Town's inclusion of Town Highway 21 on various lists of town roads. There is no evidence of maintenance or the expenditure of public funds for the Reed Road at any time.

No account of the history of Reed Road is complete without a summary of the recent legal decisions by the Vermont Supreme Court – both arising from the discovery of the spring on the property. In the early 1990's, Ms. Houston sought zoning approval for a commercial well on her property. The Waitsfield Zoning Board of Adjustment rejected her application for a permitted or conditional use. She appealed the denial of her claim that the extraction of water was an "agricultural" use and therefore permitted as of right. The Vermont Supreme Court ruled that the extraction of water was not an agricultural use. *Houston v. Town of Waitsfield*, 162 Vt. 476 (1994). Ms. Houston has not pursued her claim for a conditional use permit. She continues to plan for the day when she can develop the aquifer for commercial purposes.

More recently, the Town obtained a permit from the Agency of Natural Resources to drill two test wells within the claimed three-rod right of way of Reed Road. Ms. Houston and Ms. Damon filed a declaratory action in this court seeking a ruling that no drilling was permissible without condemnation. The Superior Court did not rule on the status of Reed Road. Instead, it granted summary judgment to the Town on the ground that the statute related to municipal water supply construction permitted the drilling of the test wells *prior* to any condemnation. In the absence of an injunction, the Town had already drilled the test wells, and the Vermont Supreme Court dismissed the appeal as moot. *Houston v. Town of Waitsfield*, 183 Vt. 543 (2007).

In recent years, the Town has taken steps to plan and obtain permitting for a municipal water system. The proposed system starts at the Reed Road aquifer where the Town wishes to build the well house. Water will be pumped through lines laid under the Reed Road to a storage tank and then distributed to households and business located in the town center. One obstacle to the plan has been the Town's failure to condemn or otherwise obtain legal access to the Reed Road site.

The Town has commenced a related condemnation proceeding. Because the isolation zone required for the well is larger than the three-rod right of way the Town claims in the Road, the Selectboard voted to condemn the additional area and offered compensation to Ms. Houston and Ms. Damon. The compensation was rejected. This condemnation proceeding does not include the condemnation of the Reed Road itself because the Town claims that condemnation is unnecessary for an existing public road.

CONCLUSIONS OF LAW

Vermont law has long recognized the importance of formal creation of public roads.

When a road is laid through the lands of one of our citizens, it is necessary that he should be enabled to know when his dominion over the soil ceases, when he is no longer at liberty to keep it enclosed; and on the other hand every individual in the community should be able to ascertain when a road becomes a public highway, so that he has an undoubted right to travel thereon, and may call on the town to remunerate him for any damage he may sustain in consequence of the insufficiency or want of repair of such road; and the towns should know when their liability to make good such damages first arises.

Patchin v. Doolittle, 3 Vt. 457, 592 (1831). 19 V.S.A. § 1(12) describes four ways by which a public highway comes into existence. Two are irrelevant: roads built over public lands and roads "as may be from time to time laid out by the agency or town." The other two methods of the creation of a public road which are at issue in this case are: "in the manner prescribed by statute" and through dedication and acceptance.

I. Creation of the road by statute

The parties agree that there is no evidence of creation of the Reed Road through the three statutory steps required after 1824: recording of a survey, "laying out" by action of the selectboard, and issuance of a certificate of opening. Laws of Vermont, 1824, Ch. LIII, No. 1, § 1; *Austin v. Town of Middlesex*, 186 Vt. 629 (2009).

Instead, the Town argues that the Reed Road was created before the enactment of the survey and recording provisions and is exempt from the 1824 statutory requirements.

As the plaintiffs point out, the requirement of a recorded survey and official acceptance of public roads also appears in an earlier statute enacted in 1781, one year before the charter issued for the Town in 1782. The early statute provided:

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

An Act to Settle and Establish All Highways that are Laid Out in this State," Laws of Vermont 1785-1792, XII State Papers of Vermont XII, ed. John A. Williams (Montpelier: Secretary of State, 1965), 11-12. The Town has always been subject to laws requiring survey and acceptance. In the case of Reed Road, it has followed neither the 1781 nor the 1824 statutes.

In the absence of any compliance with the long-standing requirements of survey and "laying out," the court concludes that Reed Road was never established as a public road through the statutory process.

II. Creation of the road by dedication and acceptance

Because many public roads have come into existence without benefit of a survey, Vermont law also provides for a less formal method of creation through dedication and acceptance. "Dedication" is the act of the landowner who must in some way grant or cede dominion over the road to the town. "Acceptance" is the reciprocal action of the town which must then treat the road as its own through active use, maintenance, and repair. In this case, there is scant evidence of either.

There is unmistakable evidence that the Reed Road has existed as a feature of the landscape through much of the last two centuries. It appears on old maps.¹ It included a

¹ The appearance of a road on old maps is evidence of location, but necessarily of official existence. See *Austin v. Town of Middlesex*, 186 Vt. 629, 630, fn1 (2009) ("It seems unlikely that [old maps] would be reliable evidence to establish the [official creation of a road.]" The same principle limits the reliability of

bridge with stone abutments and provided access to a handful of households lying on the far side of Pine Brook. By the turn of the last century it had a second name (Town Highway 21) and by the 1930's it began to appear in the Town's road report sent each year to the Highway Department in Montpelier. These facts are not disputed, but they are insufficient to establish either dedication or acceptance.

There is no significant evidence of dedication of the road by any landowner. Richard Bisbee, both an historian and a long-time resident, recalled the opposite – that during the early and middle years of the 20th century, his father and the other neighbors believed that the road was a private lane. For this reason, they maintained it themselves, adding gravel and grading it with their own equipment.

The Town points to some uncertainty about the location of the property line between the Damon and Houston parcels as evidence of dedication. The argument runs this way: Since Damon's surveyor Harold Marsh located the boundary at the stone wall on the south side of the road (across the road from the Damon fields) and since Ms. Houston and her predecessors used the road for decades without an easement, Ms. Damon and her father before her must have believed that the road was public.

The difficulty with the argument is that it seeks to turn an ambiguity over the location of the boundary line between two neighbors into an intentional dedication to public use. One neighbor's use of another's property for access may give rise to an easement, but it does not create a public road. Dedication requires a more concrete expression of intent than just the decision over time to allow access to a neighbor. The stronger evidence, moreover, is that the actual boundary runs down the middle of the road. The road appears to lie on both properties. This is now the position of both plaintiffs, and it is supported by the highly credible evidence of the Towne survey.

The Town also points to Ms. Houston's agreement with the Town that the Reed Road is a Class IV public highway. She entered into this agreement when she was seeking a permit to haul water away from the property for sale. In a previous ruling, this court determined that Ms. Houston is bound by her admission. After hearing the evidence, the court can only conclude that Ms. Houston admitted something which was not true. She may have believed that Reed Road was a public road or – as she contends now – this was a concession required by the Town as a condition of her permit to make improvements. Her statement that Reed Road is an *existing* Class IV public road is different from the prospective, voluntary dedication of private land for future public use which is required for a "dedication." Since her statement is also contrary to the great bulk of record evidence, the court rejects it as an evidentiary basis for finding dedication.²

old maps to prove acceptance of the road. The maps show only that the road existed at various point in time. They are not themselves proof of governmental action or intent.

² The court's decision does not answer the question about the effect of the grant of partial summary judgment against Ms. Houston. Since the admission appears to be contrary to the facts as developed at trial, the court is inclined to alter the existing order granting the motion for summary judgment as against Ms. Houston. No final judgment against Ms. Houston or any party has yet issued. The court recognizes that this is not an issue addressed by the parties and will set a short hearing on the question.

There is also no evidence of acceptance of the road by the town. There is no evidence of maintenance or repair at any time. Prior to the water project, the only action known to be taken by the town concerning Reed Road is giving it a name (TH 21) and including it on an annual list of town roads. "Acceptance" requires a more robust exercise of municipal dominion.

The use of a road for public travel, however extensive it may be is not, standing alone, sufficient to show an acceptance of it as a highway, and an adoption of it as such. Neither is a mere consent of the town authorities to such use, or their knowledge that one travelling thereon supposes it to be a highway. But such acceptance and adoption may be inferred from evidence that the town acting through the proper officials has voluntarily assumed the burden of maintaining the road and keeping it in repair, and where it is found that labor or money has been expended and repairs made thereon the conclusion is justified that the town has recognized the public character of the road and that it is a highway.

Town of Springfield v. Newton, 115 Vt. 39, 44-45 (1947)(citations omitted). The only evidence of maintenance came from the landowners who testified that they or their forbears maintained the road themselves.

CONCLUSION


The court concludes that Reed Road was never made a public road, either by conformity with the statutory requirements or through dedication and acceptance.

The court now reduces to writing the prior injunction that no construction shall commence on the Reed Road unless the property is taken through condemnation or some other agreement with the plaintiffs.

Before issuing a final judgment order, the court will set a hearing concerning the status of Ms. Houston's claims and any other issues concerning the scope of the final order.

Dated:

11/30/10


Geoffrey Crawford,
Superior Court Judge