

**CERTIFICATE OF HIGHWAY MILEAGE  
YEAR ENDING FEBRUARY 10, 2015**

Fill out form, make and file copy with the Town Clerk, and mail ORIGINAL, before February 20, 2015 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 WARREN 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	20.220				0.000
Class 3	23.94				0.000
State Highway	6.348				0.000
<b>Total</b>	<b>50.508</b>				<b>0.000</b>
* Class 1 Lane	0.000				
* Class 4	8.41				0.000
* Legal Trail	0.00				
* 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).
- SCENIC HIGHWAYS:** Please attach a copy of order designating/discontinuing Scenic Highways.

*Pis Note: update on geometry for TH-55 in Warren.  
ALL Info has been Sent to Jonathan Craft.*

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

**PART III - SIGNATURES - PLEASE SIGN.**

Selectmen/ Aldermen/ Trustees Signatures:

*[Handwritten signatures]*

T/C/V Clerk Signature:

*[Handwritten signature]*

Date Filed:

*1/28/15*

Please sign ORIGINAL and return it for Transportation signature.

**AGENCY OF TRANSPORTATION APPROVAL:**

Signed copy will be returned to T/C/V Clerk.

APPROVED:

*[Handwritten signature]*  
Representative, Agency of Transportation

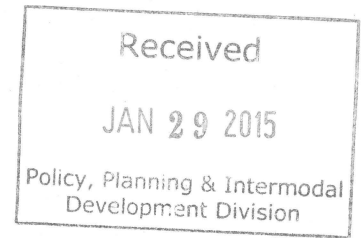
DATE:

*1/29/2015*

Jonathan Craft

## 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>

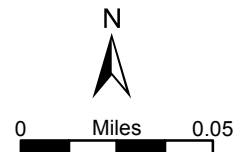
January 2015

New corrected map of TH-55  
Original incorrect map of TH-55  
(Map of the remaining portions of TH-55 unchanged)  
No net mileage change to TH-55



### Mileage Certificate Map Change 2015 WARREN

Mapping Unit  
Division of Policy and Planning  
Vermont Agency of Transportation -- April 24, 2015



## Alley, Kerry

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**From:** Croft, Johnathan  
**Sent:** Friday, December 05, 2014 11:59 AM  
**To:** 'Cindi Jones'  
**Cc:** Moulton, Sara; Alley, Kerry  
**Subject:** RE: TH 55  
**Attachments:** Warren\_Cert\_1970.pdf; Warren\_TH-55-Inventory\_1970.pdf

Good morning Cindy,

We are working through the court order and also the documentation that we have regarding TH-55 in Warren. On an initial look, it appears that our current geometry on the map shows the lower loop which I think is in error and TH-55 should have been mapped onto the upper loop. This matches the court decision and some of the paper documentation that we have. The mileage matches closer to the 0.52 miles and also matches the 1970 inventory that was performed. If this is the case, we would need concurrence from the Selectboard and we will make the adjustments to the road centerline data and the Town Highway Map.

Please find attached the 1970 Mileage Certificate from Warren and associated documentation, and the Road Inventory Form for TH-55 from April of 1970. Based on review of this, the notations for "Future Road" at mile 0.18 and mile 0.27 seem to be the lower loop and were not part of TH-55. We are continuing to look at this and will send along more detailed maps of what we have currently in the system and what we think should be mapped.

Earlier copies of the Town Highway Maps for Warren can be found on-line at the following link:

[ftp://vtransmaps.vermont.gov/Maps/TownMapSeries/Washington\\_Co/WARREN/](ftp://vtransmaps.vermont.gov/Maps/TownMapSeries/Washington_Co/WARREN/)

Please let me know if you have any questions or comments regarding this information, or mapping in general.

Johnathan Croft  
VTrans Mapping Section  
(802) 828-2600

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**From:** Cindi Jones [<mailto:cjones@warrenvt.org>]  
**Sent:** Friday, December 05, 2014 10:09 AM  
**To:** Croft, Johnathan  
**Subject:** TH 55

Hi Jonathan,

Thanks for taking the time to talk to me about TH 55. Attached is information that might help you as well. At any cost we need to add the Sugarwood Woods upper circle since the court case established that as a town road.

The lower circle is the questionable one at this point.

Cindi

**ROAD INVENTORY FORM**

VERMONT DEPARTMENT OF HIGHWAYS  
HIGHWAY PLANNING DIVISION  
MAPPING AND ROAD INVENTORY SECTION

PARTY CHIEF PC/DABOT  
RECORDER \_\_\_\_\_  
TOWN OFFICIAL \_\_\_\_\_  
TITLE \_\_\_\_\_

TOWN WARREN  
COUNTY WASHINGTON HWY. DIST. NO. 6 T-55  
ROAD SYSTEM & NO. SUGARBUSH WOODS  
SHEET NO. 1 OF 2 DATE 4/26/70

SURFACE TYPE & WIDTH	SHOULDER TYPE & WIDTH		SIDEWALK TYPE & WIDTH		DITCHES	CONDITION	ROAD CLASS	IMPROVEMENT		REMARKS	
	LT.	RT.	LT.	RT.				TYPE NEEDED	COST		
									PER MILE		PER SECTION
										035 SD	
										120 FT 034 SD SUGARBUSH WOODS	
										028 90RT	
										FUTURE RD 007	
										FUTURE ROAD 020 SD	
										SD 018	
										SD 015 90RT	
										010 SD	
										FUTURE ROAD 008	
										SA 6 000 SA 6	

\* C-CONSTRUCTION: R-RESURFACING

South Family Part.

006-002-000  
26.1 A

DSB Management  
006-002-200  
1.0 A

Eardensohn  
006-001-900  
14 A

307-000  
Brdmley 307

See Map 4  
005-007-000

Intio Corp.  
006-200-100

Circle only  
#228

Bren  
006-001-500  
1.2 A 1964

Adams  
006-001-400  
1.0 A 1964

Kenny  
006-001-300  
1.0 A 1964

Kapp & Rudofsky  
006-001-200  
1.0 A 1965

Byrne  
006-001-600  
1.0 A 1965

Fried  
006-001-100  
1.0 A 1965

Canning/  
Bosonsworth  
006-001-000  
2.0 A

006-000-600  
1.7 A  
Mamnoon

Mansfield  
006-000-400  
21.7 A

From Bottom  
of German  
Flats up  
1387.04 Feet  
To Tel Pole  
#10

Steinberger  
006-001-700  
1.1 A 1977

1965

Wheelhouse 1  
006-000-700  
2.3 A

From Bottom  
of German  
Flats and  
around the  
Circle =

1972  
Bodell  
006-001-800  
2.6 A

Panos  
006-000-901  
1.0 A

006-000-300  
1.0 A  
N.H.C. Ltd.

2589.02 Feet

1965  
Giometti  
006-000-900  
1.0 A  
1.8 A(C)

1970  
Barefoot  
006-000-800  
1.0 A

006-000-200  
0.25 A  
Martin

Two Road Signs  
Lower Circle - Sugarbush  
Woods RD

Club  
Sugarbush  
314

See Condo Map 2

Sugarbush  
Inn Corp.

Summit Ventures NE

005-008-300  
48 A(S)

Upper Signs  
Say Sugarbush  
Woods Circle

284.78

Sugarbush Holdings LLC  
005-008-200  
5.0 A

See Condo Map 2

Hengsteler  
005-007-900  
0.5 A

005-007-700  
17.16 A

PARCEL 12  
Summit Ventures NE

Bennet  
005-006-9  
1.2 A

SUGARBUSH

Club  
Sugarbush  
314

ACCESS

0.5 A

Starling  
Ridge  
318

Johannes  
005-006-5  
1.0 A

318-000

See Condo Map 2

Cindi Jones

**From:** "J. Paul Giuliani" <jpglaw@adelphia.net>  
**To:** "Kim Crosby/Selectboard Asst" <selectboard@warrenvt.org>  
**Sent:** Monday, June 27, 2005 2:28 PM  
**Subject:** Sugarbush Woods Road

Can you tell me if Sugarbush Woods Circle was in existence when the Selectmen opened Sugarbush Woods Road for public travel in 1968? It's obvious that in 1968 a 0.50 mile stretch of Town Highway 55 was accepted as a public road. Measuring a half mile along Sugarbush Woods Road westerly and northerly of German Flats Road establishes the limits of the Selectmen's action. It seems to me that the first inquiry should be in determining the length of Sugarbush Woods Road, including the length of the roadway as it doubles back after the point where Sugarbush Woods Circle branches off to the north. If the measurement is 0.50 mile, the 1968 action clearly did not encompass Sugarbush Woods Circle. If the measurement is less than 0.50 mile, then a case could be made that both Sugarbush Woods Circle and Sugarbush Woods Road are included in the 1968 action.

If you look at the January 28, 1968 Certificate of Highway Mileage, the new highway is described as "Sugarbush woods road no. 55 length 0.5 mi." No mention is made of Sugarbush Woods Circle. Do we know if Sugarbush Woods Circle was in existence in 1968? What sort of development had occurred on the Circle by that date? Was the Circle spur something that evolved later to accomodate the access needs of people building northerly of Sugarbush Woods Road after 1968?

The January 26, 1968 Certificate of Completion and Opening describes the 0.50 portion of Town Highway 55 beginning at Route 6 (German Flats Road) and ending "(circle) Dead End". Does this mean that the dead end is the Sugarbush Woods Road circle, or does it mean that Town Highway 55 dead ends -at the point where Sugarbush Woods Circle branches off from Sugarbush Woods Road, or does it mean that the length of Sugarbush Woods Circle is taken into consideration in determining the point of the dead end?

Knowing the physical status of Sugarbush Woods Circle in 1968 would be a valuable piece of information. For instance, if no houses had been built on the Circle by 1968, it wouldn't make much sense for the Selectmen to assume the responsibility of maintaining a public highway that didn't serve much purpose. Maybe the Listers' cards can provide some information as to what was built when on Sugarbush Woods Circle.

Incidentally, the fact that the Town plow traverses Sugarbush Woods Circle is not dispositive of the issue of whether or not it is a town road. Something more than convenience for the plow operator is needed in order to establish a town highway. There has to be some level of formal action on the part of the Selectman. Just because the school bus turns around in someone's dooryard doesn't turn a private driveway into a town road.

There is one other line of inquiry that can be saved for a later day, if needed. It would be interesting to know if the Selectmen acted on their own motion, or as the result of a petition, in setting out Town Highway 55. That analysis involves looking at pre-January 1968 minutes. Let's hold up on that exercise.

J. Paul Giuliani  
 McKee, Giuliani & Cleveland  
 P. O. Box 1455  
 Montpelier, VT 05601-1455  
 802-223-3479  
 802-223-0247(f)

5,280 ft = 1 mile  
 2,640 = 1/2 mile  
 150

6/27/2005

*This is what Paul Gillies has*

# CERTIFICATE OF HIGHWAY MILEAGE

## FOR YEAR ENDING FEBRUARY 10, 1968

Fill out in triplicate and file with your Town Clerk on or before February 10, 1968

(Note sections of Vermont Statutes Annotated on reverse side of this sheet)

We, the Selectmen of the town of Warren, on oath state that we have carefully measured all the traveled highways in this town and find that the total mileage of traveled highways according to Title 19, V.S.A. Sec. 15, amended 1961, Act No. 28, not including pent roads and trails, in this town for the year ending February 10, 1968, is as follows:

	MILEAGE IN TOWN (Outside of villages incorporated for highways)			MILEAGE IN VILLAGE (Incorporated for highways)			Total All Systems
	WARREN						
	Town Highways	State Aid Highways	State Highways	Town Highways	State Aid Highways	State Highways	
PREVIOUS MILEAGE as shown March 15, 1967	29.65	16.920	6.348				52.918
HIGHWAYS ADDED Since March 15, 1967, ac- cording to statute. Explain under paragraph 1 below.	0.47 3.68						
SUB-TOTAL	33.80						
HIGHWAYS SUBTRACTED Since March 15, 1967. Those becoming untraveled, discon- tinued, legal trails or pent roads. Explain under para- graphs 2 and 3 below.							
TOTAL TRAVELED HIGHWAYS Feb. 10, 1968.	33.80	16.920	6.348				

1. We hereby certify that the following new highways, as substantiated by the attached "Selectmen's Certificate of Completion", have been added since March 15, 1967:

*Sugarbush Village road no. 54 length 1.4 miles*  
*Sugarbush road no. 55 length 0.5 mi*  
*road no. 56 length 0.15 mi*  
*road no. 57 length 0.15*  
*Roxbury rd no. 38 length 0.80 the rest of this road is not plowed*

2. We hereby certify that the following highways have been discontinued, or changed to trails or pent roads according to statute, since March 15, 1967, as substantiated by the attached copy of the proceedings:

*Road 41 has been thrown up*

3. We hereby certify that the following roads have become untraveled since March 15, 1967: *none*

*Belkox rd no. 10 should be 1.00 instead of 0.75*  
*Chy. rd no. 53 should be 1.55 instead of 1.09*

SELECTMEN: *Peter L. Street*  
*Loren Fuller*

At Warren in the county of Washington  
 the 26 day of January, 1968 personally appeared *Peter L. Street*  
*Loren Fuller*  
 Selectmen of Warren  
 and made oath to the truth of the foregoing affidavit by them subscribed.

Before me,  
*Emma R. Ford*  
 Notary Public  
 (Write official title, as Notary Public)

(Town Clerk should fill out following and mail one white and one yellow copy to the Commissioner of Highways, Montpelier, Vermont, on or before March 15th.)

I, *Emma R. Ford*, Clerk of the Town of Warren  
 hereby certify that the foregoing is a true copy of record of the certificate of the Selectmen of Warren  
 relating to highway mileage, filed and recorded at this office January 26th, 1968

Attest *Emma R. Ford*  
 Town Clerk



CERTIFICATE OF COMPLETION AND OPENING OF A HIGHWAY FOR PUBLIC TRAVEL

Emma R. Ford Town Clerk of the Town of Warren, Vermont

Pursuant to Title 19, V.S.A., Section 15, as amended, this is to certify that the following described section(s) of highway in the Town of Warren, Route Number: 54, 55, 56, 57, COMPLETED AND OPEN FOR PUBLIC TRAVEL, on January 26, 1968.

Table with columns: ROUTE No, Description of Right-of-Way, Beginning, ENDING, Mi. LENGTH. Rows include Sugar Bush Village Area (Parking Lot), Dead End, and Parallel to Mad River.

and as shown on a Highway Map of the Town of Warren dated Jan. 8, 1968, and filed in Book 29 on Page 52 of the Records of the Town of Warren by the Town Clerk of said Town of Warren, incorporated herein by reference and attested to on said map by said Town Clerk.

Dated at Warren, County of Washington, and State of Vermont, this 26th day of January, A.D. 1968

Emed Peter L. Strait of Warren Loren Fuller Selectmen (Attorneys) (Trustees)

and the Mayor of the City of

Warren, Vermont January 26th, 1968

The above is a true copy of description of section(s) of highway, COMPLETED AND OPENED FOR PUBLIC TRAVEL, recorded in Book 29 on Page 52 of Land Records Records of the Town of Warren on the 26th day of January, 1968 at 4 o'clock P.M.

Attest: Emma R. Ford Town Clerk of Warren, Vermont

Bren v. Eardensohn, No. 320-5-05 Wncv (Teachout, J., Jan. 22, 2007)

[The text of this Vermont trial court opinion is unofficial. It has been reformatted from the original. The accuracy of the text and the accompanying data included in the Vermont trial court opinion database is not guaranteed.]

**STATE OF VERMONT  
WASHINGTON COUNTY**

<b>ROBERTA S. BREN,</b>	)	
<b>Plaintiff,</b>	)	<b>Washington Superior Court</b>
	)	<b>Docket No. 320-5-05 Wncv</b>
<b>v.</b>	)	
	)	
<b>VICTORIA GADD EARDENSOHN</b>	)	
<b>and PAUL EARDENSOHN, et al.</b>	)	
<b>Defendants.</b>	)	

**DECISION**

**Declaratory Judgment on Location and Width of Town Highway 55  
Cross-Motions for Summary Judgment**

In an earlier summary judgment Decision filed April 11, 2006, the court (Judge Toor presiding) concluded that Town Highway 55 is a public road. The court ruled that the undisputed facts were not sufficient to show a statutory dedication to public use, 19 V.S.A. §§ 708-717, but overwhelmingly showed a common law implied dedication. This decision arises from the second round of summary judgment motions addressing the location and width of Town Highway 55.<sup>1</sup>

Defendants Eardensohn and the Town of Warren argue that the location of the centerline of the traveled part of the road as it currently appears on the ground determines both location and width of the easement. Plaintiff Bren argues principally that the survey reflecting how the road was originally laid out controls both location and width of the easement. For the following reasons, the court concludes that the original survey determines both location and width. Therefore, Plaintiff's motion for summary judgment is granted, and Defendants' is denied.

There is no genuine dispute that Town Highway 55 was originally laid out in a 1963 survey by John Roth in the course of a subdivision by L. Damon Gadd. Gadd retained

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<sup>1</sup> There is some dispute about whether the defendants other than the Eardensohns and the Town of Warren must be served with copies of the parties' summary judgment filings. All of the other defendants appear to have been served with the summons and complaint, which requested declaratory relief on ownership and location of the road. Not one has filed an answer or otherwise made an appearance in this case; consequently, they are in default. Pleadings and other papers need not "be made on parties in default for failure to appear." V.R.C.P. 5(a).

ownership of the fee to the land to be used for the road, which the Eardensohns now own. The Roth survey reflects the location and width of the road as coextensive with the land retained by Gadd for that purpose. More detailed facts are available in the April 11, 2006 decision. There is no dispute that the traveled part of the road has migrated slightly over the years but remains completely within the easement boundaries laid out in the Roth survey. No evidence suggests that any of the Town's road-related work has ever encroached on Bren's abutting property.

Defendants' argument that Town Highway 55 extends 1½ rods to either side of the centerline of the traveled part of the road in its current, migrated location reflects confusion over the distinction between the common law of implied dedication and the case law interpreting 19 V.S.A. § 32, which establishes the "assumed" width of highways when the actual width cannot otherwise be ascertained. To understand the distinction, and how the law of implied dedication and § 32 apply in this case, it is helpful to examine how the legislature's amendment in 1985 to the precursor of § 32 changed its interpretation in the case law.

In 1957, the legislature originally enacted 19 V.S.A. § 36. Section 36 was an "evidentiary method of proving the boundaries of a public highway otherwise incapable of ascertainment from public records." *Town of Dorset v. Fausett*, 133 Vt. 476, 479 (1975). If the boundaries could not be ascertained, the statute created the "presumption that an existing highway was originally laid out as a three-rod road and that the center line of the traveled portion as it now exists is the center line of the highway as originally laid out." *Id.* In *Fausett*, the Supreme Court concluded that the presumption was rebuttable by a showing of "evidence of movement." *Id.* at 480. If the party opposing the presumption could show that the centerline of travel in fact had moved from its original location, then the presumption would disappear, and the court would have to find the location based on all the evidence.

In 1985, the legislature amended 19 V.S.A. § 36 and recodified it at 19 V.S.A. § 32. Section 32 now reads:

A roadway width of one and one half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined.

19 V.S.A. § 32.

In *Town of Ludlow v. Watson*, 153 Vt. 437 (1990), the Vermont Supreme Court determined that *Fausett's* pre-amendment interpretation of § 36 conflicts with the amended language now appearing at 19 V.S.A. § 32. "[T]he new version of the statute recognizes the inevitable fact that the precise location of roadways shifts over time. Thus, the presumption of a three-rod road applies whether or not the traveled way has changed over time." *Watson*, 153 Vt. at 441. Under the amended statute, evidence of movement no longer defeats the presumption. The presumption now functions to shift the burden of proving the true boundaries onto the party claiming that they differ from the statutorily presumed boundaries. *Watson*, 153 Vt. at 442. Consistent with both the plain pre-amendment and amended statutory language, nothing in either *Fausett* or *Watson* suggests that any sort of presumption arises at all except where the highway

boundaries cannot otherwise be determined. If the highway boundaries can be determined otherwise, 19 V.S.A. § 32 simply does not apply.

The Court addressed more complicated facts in the recent *Town of South Hero v. Wood*, 2006 VT 28. In *Wood*, the Town had been maintaining a shoreline road for a long time. Over the years, as the shore eroded, the road migrated inland over the property of the abutting landowners. In 2000, the Town notified the abutting landowners that a project related to the road would encroach even further onto their property. At that point, the landowners objected to any further encroachment, and the Town filed a declaratory judgment action as to the location and boundaries of the road. The trial court found that the landowners' "long acquiescence" to the Town's maintenance of the continually migrating road showed an implied dedication of the landowners' property to the public use of their property for a highway in its continually migrating location up to the time of the 2000 dispute. Because the boundaries could not otherwise be determined, the court applied 19 V.S.A. § 32 to fix the boundaries of the easement at 1½ rods from the centerline of the traveled part of the road as it appeared on the ground in 2000 when the period of implied dedication ended. See *Wood*, 2006 VT 28, ¶¶ 2–7. The Vermont Supreme Court affirmed, rejecting both the landowners' and the Town's arguments on appeal.

The landowners argued on appeal that they adequately rebutted the presumed width of the easement under 19 V.S.A. § 32 by showing that they did not intend to dedicate their property to a public use beyond the traveled portion of the road. That is, they did not intend the easement to extend further onto their property than the traveled part of the road did. The court rejected this argument on the facts and the law. As for the law, the Court ruled that "because the dedication was based in part on the public's long use of the land as a road, the scope of the dedication necessarily included the public's interest in the right-of-way, in addition to the portion actually traveled." *Wood*, 2006 VT 28, ¶ 16.

The Town argued that the trial court erred in fixing the road at its location at the time when the period of implied dedication ended. Rather, the Town argued that "it is entitled to a three-rod right-of-way centered at the centerline of the existing traveled way—*wherever it may be*—because 19 V.S.A. § 32 applies 'whether or not the traveled way has changed over time.'" *Wood*, 2006 VT 28, ¶ 17 (emphasis added). The Supreme Court squarely rejected this argument because it would create a perpetual "rolling easement" by operation of 19 V.S.A. § 32. As the Supreme Court ruled, the easement arises by operation of the implied dedication, not 19 V.S.A. § 32. *Wood*, 2006 VT 28, ¶ 18.

Thus, while § 32 will fix the easement's width at 1½ rods from the centerline of the traveled part of the road, absent proof of different boundaries, when the dedication is complete, only a subsequent dedication will move those boundaries again; they become fixed at the time of the implied dedication. Notwithstanding § 32, a migrating centerline without a new dedication does not alter the scope of the established easement. The implied dedication issue (method of creation) and the § 32 width issue (location of road boundaries) are separate issues; § 32 cannot be turned into a device that automatically moves an easement. *Wood* does not change the interpretation of § 32 evident in *Watson*.

The Town and the Eardensohns now make two arguments in support of their claim that the easement for Town Highway 55 extends 1½ rods to either side of the existing centerline of the traveled portion of the road. In their June 30, 2006 filing, Defendants plainly claim that the originally laid out boundaries of the easement appearing in the Roth survey are “irrelevant” because under 19 V.S.A. § 32 the boundaries must be determined exclusively in relation to the existing centerline of the travel part of the road. That is, Defendants claim entitlement to the same sort of “rolling easement” rejected in *Wood*. The court rejects this argument for the same reasons it was rejected in *Wood*. In this case, it is particularly clear that the boundaries can be determined, and thus § 32 does not apply at all.

In their October 6, 2006 filing, Defendants argue that because the centerline of the traveled part of the road shifted in the mid-1990’s without Bren’s objection, Bren necessarily has acquiesced to a change to the boundaries of the easement, extending 1½ rods to either side of the migrating centerline, amounting to an implied dedication.<sup>2</sup> The rejected “rolling easement” theory is again at work as Defendants in this argument continue to attempt to use 19 V.S.A. § 32 to create an easement rather than to supply a presumed width.

The court concluded in the earlier summary judgment decision that Town Highway 55 is a public highway by implied dedication and acceptance. Because the parties had not raised the issues, however, the court did not identify the timing of that dedication or otherwise fix location and width. The undisputed evidence in this case uniformly supports one implied dedication, in the location in which the road was originally laid out, which appears on the Roth survey, and which is coextensive with the land retained by L. Damon Gadd to be used for that purpose. In the April 11, 2006 decision, the court noted that TH 55 was included in the Town’s 1968 certificate of highway mileage, and the Town has exclusively maintained it and included it on town highway maps without objections since the early 1970’s.

Defendants have come forward with no evidence suggesting that the easement moved to a different location by rededication other than the allegation that Bren has “long acquiesced” to the migrated centerline of the traveled portion of the road. However, while the centerline of the traveled portion of the road has migrated, it has done so exclusively within the original surveyed boundaries of the easement, and no evidence shows a new dedication altering the original boundaries. Defendants essentially argue that the migration of a centerline proves acquiescence to changed easement boundaries, by operation of 19 V.S.A. § 32. This is the “rolling easement” theory, which the court again rejects. In this case, unlike those cited above, the original boundaries are ascertainable; § 32 does not apply at all, and, in any event, will not be permitted to operate so as to create a new easement.

Aside from the rolling easement theory, Defendants argue that the Roth survey should not control the location and width of the road for two reasons: “First it would render superfluous the statutory method for establishing a public road by survey by elevating a private survey to the status of a statutorily sanctioned survey. Second, it would deny the public’s right of involvement in the process.” Defendants’ Response at 5 (filed Oct. 6, 2006). The Roth survey reflects the location and width of the road, but it did not “establish” the road as public. Regardless of the

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<sup>2</sup> The June 30, 2006 filing was submitted on behalf of the Eardensohns and the Town of Warren; the October 6, 2006 filing was submitted on behalf of the Eardensohns without the Town’s participation.

Roth survey, the road was established as public by implied dedication and acceptance, which is a legally valid and long-accepted alternative to the statutory process. The Town, not Plaintiff Bren, has had statutory discretion all along to formally survey Town Highway 55 "to verify the location and width of the existing right-of-way, easement, or fee title and to determine the extent of the interest of the public in the title." 19 V.S.A. § 33(b). For whatever reason, it has not chosen to do so. If it had, it would not have been entitled to limit the survey to the centerline of the existing traveled way and a presumed width of 1½ rods to either side of the centerline unless a survey based on "all available evidence" failed to reveal the "location or limits, or both, of the right-of-way, easement or fee title" to the road. 19 V.S.A. § 33(b), (c).

With regard to involvement of the public, the abutting landowners and the Town were named as parties in this case and served. They have had the same notice and opportunity to participate as is provided in 19 V.S.A. § 33(b) when a town undertakes a survey of a road. The Town itself has participated in the suit. Defendants have not suggested that any necessary parties are absent. As a result, the "public" has not missed the opportunity to be involved in the determination of these issues.

The court concludes that the location and width of the easement for Town Highway 55 exist as they appear on the Roth survey.

### ORDER

For the foregoing reasons,

1. Defendants Eardensohn and the Town's summary judgment motion is *denied*;
2. Plaintiff Bren's summary judgment motion is *granted*; and
3. Attorney Kolitch shall submit a proposed judgment order, and Defendants shall have five days to file objections to its terms.

Dated at Montpelier, Vermont this 22<sup>nd</sup> day of January 2007.

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Mary Miles Teachout  
Superior Court Judge

STATE OF VERMONT  
WASHINGTON COUNTY

MCKEE GIULIANI & CLEVELAND, P.C.  
P.O. BOX 2470 WASHINGTON VT 05677  
FROM: *Michael A. McKee*  
PLEASE DELIVER THE FOLLOWING TO:  
*Christine Jones*  
BY: *Christine Jones*  
EXCLUDING THE TIME

Roberta S. Bren,  
Plaintiff,

v.

Victoria Gadd Eardensohn, et al.,  
Defendants.

SUPERIOR COURT  
Docket No

RULING ON MOTION FOR SUMMARY JUDGMENT

This is a declaratory judgment action relating to a road in the Town of Warren identified on the official town highway map as Town Highway 55. It is also known as Sugarbush Woods Road. Sugarbush Woods Road extends into a residential subdivision from German Flats Road, and ends in a loop; the loop itself is known as Sugarbush Woods Circle Road.<sup>1</sup> Plaintiff owns the two lots surrounded by the Sugarbush Woods Circle Road loop. Defendants include the Town of Warren and owners of real property accessed by T.H. 55. A central issue in this case is whether T.H. 55 is a private road or a public road. Defendants Eardensohn have filed a summary judgment motion, which the Town joins, arguing that the road is a public highway.<sup>2</sup>

I. Undisputed Facts

In 1963, L. Damon Gadd subdivided land of his near German Flats Road. The subdivision is accessed exclusively from German Flats Road by the road now known as T.H. 55. At the time of subdivision, Damon Gadd retained ownership of the fee to the strip of land used for T.H. 55. John Roth did surveying and other work related to the subdivision; no evidence suggests that he held any ownership interest in the subdivision land at any time relevant to this

<sup>1</sup> For ease of reference, the court will refer to the disputed road as Town Highway 55 or T.H. 55 unless the circumstances require otherwise.

<sup>2</sup> Defendants Eardensohn and the Town will be referred to collectively as "Defendants"; other named defendants have not participated in the briefing related to this motion.

case. Defendants Victoria Gadd Eardensohn and Paul Eardensohn now own four lots in the subdivision as well as the fee to the land used for T.H. 55.

Town Highway 55 appears on a 1968 certificate of highway mileage. The certificate is a certification by the selectboard of the total mileage of traveled highways in the town by type (town highways, State aid highways, and State highways) in compliance with what at the time was 19 V.S.A. § 15, and now is 19 V.S.A. § 305. Town Highway 55 is listed in a section of the certificate indicating that it is a new highway, added since March 15, 1967, "as substantiated by the attached 'Selectman's Certificate of Completion.'" The certificate of completion, also in the record, certifies that Town Highway 55 was "completed and open for public travel" on January 26, 1968.

Town Highway 55 appears on all of the official Town of Warren highway maps in the record. The first is from 1973; Defendants claim to have been unable to locate the official maps from 1970-1972. It also appears on the town highway maps of 1974, 1977, 1979, 1980, 1989, 2000, 2001, and 2003. Town highway maps from other years subsequent to the subdivision are not in the record; there is no suggestion in the evidence or argument that T.H. 55 is likely to not appear on any of them.

Town Highway 55 has been maintained by the Town at least since the early 1970s. Maintenance over the years has included plowing, grading, and ditching. The Town's road foreman during that entire period, Wayne Kathan, either performed that maintenance himself, or instructed others to do so. Kathan states in his affidavit that he has maintained T.H. 55 in the same manner as the Town's other Class 3 roads, but does not elaborate. According to Plaintiff Bren, evidently never a year-round resident, the maintenance of which she is aware has been minimal for much of this period of time, particularly on the loop section of the road during



winters. Plowing, particularly, has improved over the years, however. Over the last nine years, according to Bren, the Town has plowed around the entire loop section.

The court discerns no genuine dispute of fact regarding maintenance of the road. Kathan's testimony demonstrates that the Town maintained the road to some extent over the relevant period. Bren's testimony suggests that the Town did not plow or otherwise maintain the road sufficiently for year-round access across the entire period, but has done so for the last nine years. No evidence suggests that the road has ever been plowed or otherwise maintained by anyone other than the Town, or that anyone has ever objected to the Town maintaining the road.

Plaintiff also asserts that she and her family, from 1971 through the early 1990s, occasionally called the Town to request plowing or other maintenance, and they were told each time that the Town was not responsible for the road. Plaintiff does not, however, explain who was contacted, or provide any other details about those communications. Road foreman Kathan, who was responsible for maintenance during that period, never received such a call.

## II Analysis

A public highway may be established either by a statutory process or by common law dedication and acceptance. Okemo Mountain, Inc. v. Town of Ludlow, 164 Vt. 447, 454 (1995). Defendants argue that T.H. 55 was established as a public road by the statutory process available at 19 V.S.A. §§ 708-717. They also argue that, in any event, the evidence demonstrates establishment by common law dedication and acceptance. Plaintiff argues that the record is insufficient to support a conclusion that T.H. 55 was validly established by the statutory process. Plaintiff also argues that the evidence does not suggest either a dedication or an acceptance.

#### A. The Statutory Process

Proceedings to establish a public road begin with a petition by a town's residents, or the selectboard itself. 19 V.S.A. § 708(a). Notice then is provided to interested persons and the public, and a hearing is held. *Id.* § 709. Members of the selectboard must examine "the premises." *Id.* On a selectboard finding that the "public good, necessity and convenience of the inhabitants of the municipality require the highway to be laid out," the highway is surveyed and its boundaries marked. *Id.* § 710. The selectboard's "return," including its findings and the survey, among other things, then is recorded with the town clerk. *Id.* § 711. Damages are paid to those entitled, and the owners of "lands taken" then must vacate within the required time. *Id.* §§ 712-713. Finally, the selectboard takes possession of the land. *Id.* § 714. This procedure is "wholly statutory and the method prescribed must be substantially complied with or the proceedings will be void." *In re Bill*, 168 Vt. 439, 442 (1998) (quoting *In re Mattison*, 120 Vt. 459, 462 (1958)).

Defendants have not produced any direct evidence of a petition to establish T.H. 55, the related notice and hearing, the ensuing findings of the selectboard, the official survey, or the statutorily required monuments marking the highway's boundaries. Nevertheless, Defendants would have the court infer that this process was undertaken based exclusively on the existence of the certificate of highway mileage and the certificate of completion and opening, in conjunction with a 1970 letter from L. Damon Gadd. The Gadd letter suggests that the selectboard had inspected the road, and Gadd would convey title to the Town once a survey was complete. No such deed has been produced. Defendants suggest that a flood that destroyed many Town records must have destroyed those that it now is unable to locate. Defendants have presented

scant evidence, however, suggesting any likelihood that the "missing" records ever actually existed.

On this record, the court cannot conclude that the Town established T.H. 55 as a public road in substantial compliance with statutory requirements.

#### B. Dedication and Acceptance

The other means of establishing a public road is by dedication and acceptance. Dedication is the "setting apart of land for public use, and it may be express or implied." Middlebury College v. Central Power Corp., 101 Vt. 325, 339 (1928). It is an example of equitable estoppel. "The offer by the owner is the representation, and the use by the public [the acceptance] makes the estoppel complete." Id. In this case, there is no express historical dedication or acceptance. The issue is whether the circumstances clearly imply dedication and acceptance.

Dedication "may be shown by the owner's writings, affirmative acts, acquiescence in public use, or some combination thereof, so long as the owner's intent to dedicate clearly appears." Druke v. Town of Newfane, 137 Vt. 571, 574 (1979). With regard to a road, "[t]he allowance by the owner of repairs at public expense is a circumstance strongly tending to show such an intention." Town of Springfield v. Newton, 115 Vt. 39, 44 (1947). Other "potent factors" include the following: "[t]he character of the property, the location of the road or street, the amount of travel, the nature of the use of the public, the rights asserted by the public, the knowledge of the owner, and like circumstances." Gore v. Blanchard, 96 Vt. 234, 240 (1922).

The long history of maintenance by the Town strongly supports Defendants' contention that Damon Gadd intended to dedicate T.H. 55 to use as a public road. Regardless of how much maintenance the Town actually provided at different times, no evidence suggests that T.H. 55

has ever been maintained by anyone other than the Town. There also is no evidence of any objection by Damon Gadd to the Town's maintenance of the road, or to the Town placing the road on its official town highway maps and designating it as open for public travel in its official records. The character of the road also is important. It provides ordinary ingress to and egress from a residential subdivision. No evidence suggests any provisions for or other inclination toward the private maintenance of the road from the time of the subdivision to present. Moreover, no evidence suggests any inclination to allow only private use of the road, such as a gate or a sign. Even Plaintiff and her family, in calling on the Town for needed maintenance, evidently assumed that it was a public road.

Plaintiff offers no significant evidence suggesting a lack of intent of Damon Gadd to dedicate T.H. 55 to a public use. Surveyor John Roth testified that in laying out the road, he recalls no specific intention to dedicate it to public use. He does not testify that Gadd specifically intended to keep it private, either, however. The question is what inference the circumstances support, not whether Gadd actually voiced the intent to dedicate. Also, Plaintiff makes much of the fact that the fee to the land underneath the road was never conveyed to the Town. However, that is irrelevant. "A common-law dedication, unlike a more formal statutory dedication, does not pass fee simple; rather, it passes an easement to use the property in a manner consistent with the dedication." Town of Newfane v. Walker, 161 Vt. 222, 226 (1993). "Use, not ownership, is the crux of dedication." Id.

Moreover, if there was any question whatsoever about Damon Gadd's intent, it should no longer matter. At some point—it is not clear in the record when—Defendants Victoria Gadd Eardensohn and Paul Eardensohn acquired title to the fee to the strip of land underneath the road. By defending this case as they are, they confirm an unmistakable intent to dedicate. The court

concludes that the record amply demonstrates that T.H. 55 has been dedicated for use as a public road.

Any argument that the Town has never accepted the dedication would be unconvincing. Acceptance, like dedication, is a question of intent. "Highways cannot be forced upon a town . . ." Gardner v. Town of Ludlow, 135 Vt. 87, 90 (1977). As was the case in Gardner, any effort at showing that the Town did not accept Gadd's dedication confronts a great impediment: "the Town not only admits such acceptance but raises it in defense against plaintiff's action." Id. This is not a case where some circumstances support acceptance, and others do not. The Town held out on official records from 1968 that the road is a public highway, has exclusively maintained it at least from the early 1970's, and has included it on official town highway maps. The sole evidence to the contrary is the nonspecific allegation that someone on behalf of the Town rejected Plaintiff's requests for specific maintenance. That evidence does not diminish the fact the maintenance has been provided exclusively by the Town for an extended period of time. The Town's conduct since the late 1960s has been uniformly consistent with acceptance.

### C. Conclusion

The court is unable to conclude that T.H. 55 was established as a public road by the statutory process. However, the court concludes that T.H. 55 was established as a public road by common law dedication and acceptance. The motion for summary judgment therefore is granted.

However, based upon the relief sought in the complaint, it is unclear whether this ruling concludes this case, or other claims remain to be resolved. A status conference will be scheduled to clarify that question.



Town of Warren, VT



Parcel Map (default)