

## Ruminations

### Sleeping Roads

We were two fathers, waiting for our kids to finish a birthday party, standing by the road, kicking pebbles. He said, “You know, that is a town road,” and following his nod I looked at a field that did not show it had ever known a road over it. “Except,” he added, “they haven’t thrown it up *on paper*.”

He knew that roads, once laid out, never fade away, never are abandoned by neglect or non-use or lose their official character, even if nothing of them remains except a musty record in a book in the town clerk’s office. With highways, what was once is forever, unless formally discontinued with notice, a view, hearing, and written decision by the selectboard, and even then a simple misunderstanding about the origin of the highway can result in ineffective discontinuance.<sup>1</sup> Roads survive as legal ideas until people get their throwing up right.

The trouble is knowing what roads there are, and where they lie. Dozens of forgotten public roads cross every Vermont town. They never appeared on any map, official or otherwise. Their surveys sleep in the town vault, awaiting the prince’s kiss to bring them back to life, often to the horror of those who own the land over which these roads are believed to cross. Learning this news can be a rude awakening, akin to discovering your house was built over a fault line. Listen, you can almost hear the sounds of distant snowmobiles, ATVs, and eventually even cars and trucks, lumbering and shifting up what you thought was your driveway, across your lawn, maybe even through your house, the booming of heavy bass marking the beat of your disappointment. What once seemed all yours is now a *via dolorosa*.

## **The Infrastructure of Infrastructure**

The written survey of the first road in town explained that the new road began on the east side of the “old road.” Where did that come from?

Of course there were such roads. Even before towns were settled, or attracted sufficient numbers of families to justify organizing as a town, most towns were not devoid of travelers. People did not wander through forest and field without a reason. They went to a neighbor’s dwelling, or the river or pond, or a neighboring village in another town, and they traveled over routes that were established before they arrived, by native Americans, pioneers, and wanderers. Paths became trails; trails were widened and became roads. Sometimes, after many years of use, such highways actually became public roads, by act of the selectmen.

In 1781, Vermont law first required highways to be laid out after a mandatory survey, “by the Compass,” requiring all highways previously laid out to be surveyed within two years or lose their status as legal roads.<sup>2</sup> Many towns began compiling road records in a Road Survey Book. Other towns just threaded road layouts into the land records or town meeting minute books, often without a sense of continuity or regard for future researchers. Roads began and ended at points well known to the town and the landowners, but today those places are difficult to impossible to recreate, without lasting monuments. Barns, dwellings, and pastures did not last.

Over the first decades of the town’s life, the highway book grew, listing dozens of roads laid out by selectmen, usually at the request of a landowner who needed to cross someone else’s property to reach his own. Maintenance at that time was the

responsibility of the landowner, so town officials felt no fiscal concern in laying out roads serving a single landowner and calling them public roads. If you wanted a road, you just had to ask.

Things that have no useful purpose get lost easily. Those with memories of them die, and they are forgotten. Early roads, if they were built, were widened trails. Once no longer used, the forests crowded back into the void; where the road used to be was obliterated by frost, rain, a grader or plow, or structures. Squint all you like, the road as it used to be is gone from view and eventually from memory itself.

### **Archeology**

Then somebody opens the road book and starts plotting. A local historian, a surveyor, maybe a lawyer, discovers the thread of a survey. In neat rows, by crabbed handwriting, the metes and bounds describe a road running from one house to the bar gate of another. Identifying those properties is not simple.

The process of finding lost roads begins and ends with the records. First you assemble your resources. Look at Beers' *Atlases* (1869-1878) and Walling's county maps (1856-1859).<sup>3</sup> Review the town history, learn the monuments—watercourses, the meeting house, mountains, gulfs, and other features of the landscape that sometimes make their way into descriptions—and, most importantly, find the records of the proprietors, including the plot plan for the first lots in the town, showing how the town was first subdivided into hundred-acre lots, from which all future subdivisions descend. Aerial photographs can help locate patterns of land use and the traces roads leave on the

surface of the earth you can only see from high above. A good software program for plotting roads and deed descriptions is invaluable.<sup>4</sup>

The next step is the absolute title search, starting with a known landowner, either from present tax maps or one of the older maps, and plunging backwards into the confusing world of shifting boundaries, back to the sovereign. This must be done for a variety of parcels, including those at both ends of the purported highway. Land records are valuable when roads are used as boundaries for sales of property, but more often silent on the roads that run across the parcels.

The tools for this work are different from those of land surveyors in the field. These researchers own no transit, compass or expensive GPS unit. Their art is more akin to that of detectives, who piece together clues from the available, sometimes conflicting, evidence of road surveys, deeds, division maps, local histories, and topography. Along with the willingness to take the time to figure out the mystery, the work requires a necessary caution and care with detail, a sense of intuition, and a good deal of luck.

The work has its hazards. The mold from old books makes you sneeze. Your eyes grow bloodshot; your head rings with the migraine of history. There are a thousand false leads, rampant misunderstandings, and endless backpedaling to find where you lost track. You begin to have an opinion about whether the town clerk elected in 1783 deserves reelection, in the hope that the next clerk will have a better handwriting style. Some ink fades. Is that an 11 or a 4 whose crossbar has disappeared? Knowing when to quit for the day, before you lose focus, is a practiced art.

The work also has its rewards. Staring at a tax map, trying to understand where a particular parcel might have sat, there comes a crystallizing moment when you begin to

connect the lines and see the original division lots reappear. You turn a page and there is the key survey or deed, the clue that makes a connection to something else. There are moments where it all makes sense. You dare to hope that what is lost can be found, with sufficient certainty to confirm or relieve the landowner's worst fears that something public crosses this land.

### **A Small Question of Taking**

Today, when the town or state decides to run a highway across your land, the first question is compensation. Article 2 is pretty firm about that. The taking of private property for public use requires compensation in money or its equivalent.<sup>5</sup> But what happens when the town announces it intends to develop the public road that runs through your property, that nobody has traveled for several centuries?

Towns will argue they have already paid for the easement. In many cases, compensation was not paid. In 1787, the legislature exempted towns from paying damages to owners of unimproved, unenclosed lands for public roads laid over them, and that law remained in place until after 1824.<sup>6</sup> Allowance lands were reserved in each division lot for highways, for the express purpose of avoiding compensation. An act from 1800 allowed towns to convey allowance lands or old roads to landowners in lieu of damages.<sup>7</sup> This practice ended in 1825, when only money damages would suffice for highway takings.<sup>8</sup>

Not that anybody is going to succeed by claiming that the town never paid for the right to cross land over which the highway is laid, if the road can be located with any

precision. The trouble is, even if a road once crossed the land, if you cannot locate it today, it is not as if the town could claim a route across your property *somewhere*.

If easements are defined by use, what is the use of a highway surveyed but unused? And if there are damages for overburdening an easement, what are the chances of compensation? The law requires a hearing prior to the altering of a highway, and gives as an example of alteration the widening of a road from one to two lanes.<sup>9</sup> Whether an alteration from no lane at all to a usable highway represents a compensable taking is an unsettled, but fascinating question.

There is a golden rule in town highway maintenance: “Stay on the public right-of-way.” Knowing where it ends is everything to the road crew. Beyond that line, any work begins to look like a taking.

### **The Battle Joined**

The clash between towns and landowners over ancient public roads has spilled over into the legislative and judicial arenas. Title companies, lenders, and all lawyers who perform title research are, or ought to be, concerned about the subsequent discovery of an old road across what was formerly believed to be private land (or worse, through the living room). Such encumbrances have a radical impact on the value of real estate, and forgiveness may not be forthcoming from affected landowners.

Lawsuits are becoming more common, and many more are predicted, if a legislative solution is not found. Towns will not easily give up public rights; landowners, stung by the unfairness of the sudden appearance of a road, will necessarily feel violated and misused.

The traces of human movement over the land alone cannot settle a controversy. Thoreau was surprised, when he first moved to his cabin on Walden Pond, how quickly his steps would create a path, after only a few trips over the same route.<sup>10</sup> Farm roads, lumber roads, and shortcuts from one field to another are rarely public roads. But there is that survey from the eighteenth century, staring you in the face, and someone claims it runs over your land. What can you do?

The first responsibility ought to belong to the town, to locate the road on the land. This may be a formidable evidentiary burden, given the imprecision of the survey records, the changing location of magnetic north, and the imperfections of the men who trudged the hills with a compass and a chain, calculating courses and distances along a given route, and then placing them on the record in the clerk's office.<sup>11</sup>

Precision in listing metes and bounds is not the same as proving where a road begins or ends. Early surveyors and town officials expected that the roads they laid out would be used, and the track on the earth would serve as the embodiment of the survey. The survey was intended only to guide the road builders, the road serving as the best evidence of the intent of the selectmen. Where good evidence of a road is lacking, attempts to jockey the description to fit where a road should have gone carry untoward risks.

A few years ago I tried an experiment. I obtained copies of all road surveys for a town from settlement to the present and plotted them all. Comparing them to the most current town highway map, I discovered more than half of the roads extant in town had no surveys and half of all the roads ever surveyed were missing from the map.

Dedication and acceptance—the town’s willingness to maintain a road and the landowner’s acquiescence to the improvements—will take care of the roads that lack a survey, although the width of the right-of-way may remain unclear.<sup>12</sup> But what about those roads nobody remembers? Only the difficulty of placing those phantom roads on the map prevents them from becoming next week’s town hall news, and a major headache for a landowner.

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<sup>1</sup> In re Bill, 168 Vt. 439, 724 A.2d 444 (1998).

<sup>2</sup> “An Act to Settle and Establish All Highways that are Laid Out in this State,” XII STATE PAPERS OF VERMONT 11-12.

<sup>3</sup> F.W. BEERS, ATLAS OF BENNINGTON COUNTY (1869); ATLAS OF CHITTENDEN COUNTY (1869); ATLAS OF RUTLAND COUNTY (1869); ATLAS OF WINDHAM COUNTY (1869); ATLAS OF WINDSOR COUNTY (1869); ATLAS OF FRANKLIN AND GRAND ISLE COUNTIES (1871); ATLAS OF ADDISON COUNTY (1871); ATLAS OF WASHINGTON COUNTY, VERMONT (1873); ATLAS OF CALEDONIA COUNTY (1875); ATLAS OF ORANGE COUNTY (1877); ATLAS OF LAMOILLE AND ORLEANS COUNTIES (1878). Henry Francis Walling, Map of Bennington County, Vermont (1856); Map of Orange County, Vermont (1856); Map of the Counties of Orleans, Lamoille and Essex, Vermont (1859). Hosea Doton produced a Windsor County map in 1855. The Walling and Doton maps are wall-sized, but are available for reviewing and copying in the Vermont Historical Society Library. A picture of Doton’s map is at <http://www.carto.com/maps/0109149-6.jpg>.

<sup>4</sup> Mapdraw, a program produced by Informatik, Inc., has a downloadable free trial version at <http://www.informatik.com/mapdraw.html>.

<sup>5</sup> VT.CONST., ART. 2.

<sup>6</sup> “An Act directing the laying out of highways,” March 9, 1787, XIV STATE PAPERS OF VERMONT 325-327; LAWS OF VERMONT 1824, 429.

<sup>7</sup> “An act in addition to an act, An act for laying out, making repairing, and clearing highways,” November 7, 1800, LAWS OF 1800, 15-16.

<sup>8</sup> No. 11 (1825), 22-23.

<sup>9</sup> VT. STAT. ANN. tit. 19, §§ 701(1) & 708. Discontinuances require hearings, but compensation is not appropriate to affected landowners. Perrin v. Town of Berlin, 138 Vt. 306, 307, 415 A.2d 221, 222 (1980).

<sup>10</sup> HENRY DAVID THOREAU, WALDEN chap. 18 (1854): “I had not lived there a week before my feet wore a path from my door to the pond-side; and though it is five or six years since I trod it, it is still quite distinct. It is true, I fear, that others may have fallen into it, and so helped to keep it open. The surface of the earth is soft and impressible by the feet of men; and so with the paths which the mind travels. How worn and dusty, then, must be the highways of the world, how deep the ruts of tradition and conformity!” Available at <http://eserver.org/thoreau/walden18.html>.

<sup>11</sup> The marvel is how well most road surveys fit over existing town roads. In spite of rough tools and rough terrain, early surveyors were usually precise.

<sup>12</sup> Springfield v. Newton, 115 Vt. 39, 50 A.2d 805 (1947).