COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR No. _____

APPEALS COURT
NO. 2023-P-0310

LAND COURT
NO. 17 MISC 000605

TOWN OF CONCORD,
Plaintiff-Appellee,

v.

NEIL E. RASMUSSEN, ANNA RASMUSSEN, BROOKS S. READ, SUSANNAH KAY, RUSSELL ROBB III, LESLEE ROBB, AND THOMAS WRAY FALWELL, TRUSTEES OF THE PIPPIN TREE LAND TRUST, AND PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Defendants-Appellants.

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TABLE OF CONTENTS

REQUEST FOR DIRECT APPELLATE REVIEW 6

PRIOR PROCEEDINGS 7

STATEMENT OF FACTS 11

ISSUES OF LAW RAISED BY THE APPEAL 19

ARGUMENT 21

I. The Court's Reliance on Circumstantial Evidence and Opinion Testimony to Find That an Unidentified Layout Once Existed But Was Lost Is Contrary to Law and Public Policy, Upending Over 160 Years of Precedent on the Establishment of Public Ways 21

II. The Land Court's Finding of Prescriptive Use Overlooked Necessary Elements of Proof and Wrongly Considered Actions by Abutters as Sufficient to Establish "Public Use." 23

III. The Land Court Erred in Determining That The Discontinuance Under G.L. c. 82 § 32A, Inserted by St. 1924, c. 289, "An Act Relative to the Discontinuance of Certain Ways as Public Ways," Was Not a "Legal Discontinuance." 26

IV. The Land Court Abused Its Discretion in Excluding Evidence of Other § 32A Discontinuances in Concord 30

DIRECT APPELLATE REVIEW IS APPROPRIATE 31

TABLE OF AUTHORITIES

Page(s)

Cases

Boxborough v. Joatham Spring Realty Trust,
356 Mass. 487 (1969) 24, 25

Burage v. Bristol County,
210 Mass. 299 (1911) 30

Burwick v. Mass. Highway Dep't,
57 Mass. App. Ct. 302 (2003) 27, 29

Comm'r of Revenue v. Cargill, Inc.,
429 Mass. 79 (1999) 27

Commonwealth v. Rahim,
441 Mass. 273 (2004) 29

Daley v. Swampscott,
11 Mass. App. Ct. 822 (1981) 24

Fenn v. Middleborough,
7 Mass. App. Ct. 80 (1979) 7, 21, 22, 31

Gower v. Saugus,
315 Mass. 677 (1944) 26

LeClair v. Norwell,
430 Mass. 328 (1999) 26

Loriol v. Keene,
343 Mass. 358 22

McLaughlin v. Marblehead,
68 Mass. App. Ct. 490 (2007) 23

Miguel v. Fairhaven,
2017 WL 3864636 (Foster, J.) (Land Ct.
Aug. 30, 2017) 31

Opinion of the Justices, 313 Mass. 779, 782-
83 (1943) 28

Rivers v. Town of Warwick,
37 Mass. App. Ct. 593 25

Sea Pines Condominium III Ass'n v. Steffens,
61 Mass. App. Ct. 838 (2004) 23

Silverman v. Wedge,
339 Mass. 244 (1959) 29

Stone v. Garcia,
2007 WL 4531550 (Piper, J.) (Land Ct. Dec. 27, 2007) 22

Teague v. Boston,
278 Mass. 305 (1932) 24

United States v. 125.07 Acres of Land,
707 F.2d 11 (1st Cir. 1983) 28

W.D. Cowls, Inc. v. Woicekoski,
7 Mass. App. Ct. 18 (1979) 20, 21, 25

Wallace W. v. Commonwealth,
482 Mass. 789 (2019) 30

White v. Boston,
428 Mass. 250 (1998) 27

White v. Hartigan,
464 Mass. 400 (2013) 23

Statutes

G.L. c. 82, § 32A.....*passim*

G.L. c. 231, § 132.....30

Other Authorities

Mass. R. A. P. 11.....6

REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. A. P. 11, Defendants-Appellants Neil E. Rasmussen, Anna W. Rasmussen, Brooks S. Read, Dr. Susannah Kay, Russell Robb III, Leslee Robb and Thomas Wray Falwell, Esq., Trustees of The Pippin Tree Land Trust, and President And Fellows Of Harvard College ("Harvard") ("Defendants-Appellants") hereby ask the Supreme Judicial Court to hear this case on direct appellate review. As more fully detailed in the body of this application, this case raises novel and significant questions of law relating to both the creation of a public way and, as a matter of first impression, the effect of the discontinuance of the way pursuant to the 1924 edition of G.L. c. 82, § 32A.

The questions of how public roads are created and how public rights in those roads are terminated are of great importance in the Commonwealth, impacting private individuals, planning boards, municipalities, surveyors charged with determining a road's status and conveyancers determining land titles and appurtenant rights. The Land Court's decision disregarded over 160 years of precedent, applying speculative dicta on

a fourth method of creating a public way from Fenn v. Middleborough, 7 Mass. App. Ct. 80 (1979), and effectively rewriting the requirements for establishing a public way by prescription.

In addition, the Land Court interpreted the 1924 version of G.L. c. 82 § 32A to yield a deeply problematic result – a discontinued road requiring a posting that warns the general public against entering while remaining open to the public. That statute has never been directly considered by an appellate court with the benefit of the complete record and historical context provided here. Adjudications pursuant to that 1924 statute took place throughout the Commonwealth from 1924 until 1983 - when the law was stricken, rewritten, and replaced – and the Land Court's decision now calls into question the status of hundreds of roads long considered wholly private based on discontinuances under the 1924 statute.

For these reasons, as more fully detailed below, appellants respectfully ask the Court to accept this case for direct appellate review.

PRIOR PROCEEDINGS

Eighty-five years after petitioning Middlesex County for the "discontinuance of Estabrook Road as a

public way", the Town of Concord filed this action seeking declaratory and injunctive relief against the named Defendants-Appellants on October 24, 2017. The Complaint sought a declaration that the general public had a right to "access and use" a rocky trail through wooded private lands that had been discontinued in 1932, and an injunction prohibiting the defendants from maintaining the gate across the way and from taking any action to deter the general public from using the way. Prior to the commencement of the litigation, the defendants permitted and welcomed light recreational use of the trail that traverses their land, subject to certain posted safety rules and regulations. A gate at the southern end of the trail prohibited vehicular access but a small open side gate facilitated pedestrian access.

In April 2020, concerned with a significant increase in use of the trail by bikers, unmasked walkers and unleashed dogs attracted by posts on social media during the height of the Covid-19 pandemic, the Read/Kay and Rasmussen defendants closed the pedestrian gate on their residential properties and posted a "closed for safety" sign for the 300 yards of trail over their residential properties,

notifying both the Town and abutters. The Town moved for an injunction to reopen the trail, which was entered by the Court, after hearing and a view, on July 23, 2020.

All parties filed motions in limine and the Court entered orders on those motions on November 13, 2020. Among those rulings was an order precluding the defendants from offering evidence of the record status of other roadways in Concord and ten roads in the adjacent Town of Acton that were discontinued pursuant to G.L. c. 82, § 32A (1924 ed.). At trial, defendants/appellants made a written offer of proof outlining in detail the proffered evidence specific to all four roads in Concord that were discontinued under the 1924 version of the statute. Consistent with its earlier ruling, the Court refused to admit the evidence.

The Court took a second view on May 28, 2021, and the trial in this action took place on Zoom over six days between June 1 and June 10, 2021. Prior to the trial, the parties stipulated to the dismissal of original defendants John Baker and Nina I.M. Nielson, owners of the property on the east side of Estabrook

Trail just south of the Concord-Carlisle town line.[1]

The parties filed post-trial briefs on October 4 and October 6, 2021, and the Court heard closing arguments and took the matter under advisement on November 18, 2021.

The Court issued an 85-page decision and judgment on November 23, 2022, and a corrected decision on November 28, 2022. The Court determined that the disputed trail "was laid out as a public way and also became a public way by prescription,[2] and that the 1932 order of the Middlesex County Commissioners adjudicating Estabrook Road to become a private way ended the Town's obligation to maintain Estabrook Road, but did not end the right of the public to access and use Estabrook Road, which the public retains." Addendum ("Add.") at 2. The Court enjoined the defendants "from gating, closing, blocking, or

[1] The parties also stipulated to the dismissal of claims against President and Fellows of Harvard College; however, at a pretrial conference, the Land Court concluded *sua sponte* that Harvard is an indispensable party because it owns a portion of the disputed section, and ordered Harvard to rejoin the case.

[2] Despite its claim that the way had become public by prescription, among other methods, the Town waived any claim to prescriptive rights established after 1932.

otherwise prohibiting or interfering with access to or use of Estabrook Road or any part thereof by the Town or members of the general public." Id. Defendants filed a Notice of Appeal on December 6, 2022, and the case was entered in the Appeals Court on March 16, 2023 (Docket No. 2023-P-0310).

STATEMENT OF FACTS

What is referred to as the Estabrook Woods is not formally defined and includes more than 1,400 acres of contiguous land in the towns of Concord and Carlisle. The Town of Concord owns approximately 115 of those acres, known as the Punkatasset Conservation Land, which is not accessed by the disputed trail. The remainder of Estabrook Woods in Concord is privately owned, including the Rasmussen property and that of the other defendants, various land and conservation trusts, Middlesex School, and roughly 672 acres owned by Harvard. Criss-crossing the woods are a number of footpaths and ancient cart paths, some of which have documented public access, either because they are within the town-owned land open to the public, or because they are subject to a conservation restriction allowing public access.

This case concerns the status of one of those unpaved paths, known as Estabrook Trail. The disputed trail is unpaved and rocky and was discontinued in 1932 pursuant to G.L. c. 82, § 32A (1924 ed.). The disputed/discontinued trail runs from the gate between the Read/Kay and Rasmussen properties north to the Carlisle town line, is approximately one and three-quarters miles long, and is wholly within defendants' private properties ("the Disputed Section").

This case required the Land Court judge and the parties to examine the Colonial history of Concord, and certain aspects of that history are relevant and important to the understanding of the issues on appeal. Following its founding in 1635, a Concord town meeting in 1653 partitioned the Town into three parts: the East, South and North. The area historically known as the "North Quarter," was located north of the Concord and Assabet Rivers, and included some land that is in part of what is now Carlisle. The Estabrook Woods and Estabrook Trail lie within the historic North Quarter.

In the decades following 1653, the Town made specific grants of land in the North Quarter to various individuals, and individual shares of an area

known as "the Twenty Score" were granted to a group of private individuals known as "the Proprietors of the Twenty Score." The Twenty Score included portions of both the disputed and undisputed sections of Estabrook Road.

The Southern 2,550 Feet of the Disputed Section

All parties stipulated that there was no record of a layout for the southernmost 2,550 feet of the discontinued way, between the gate on the Read/Kay and Rasmussen properties and the southern end of Mink Pond. The Land Court determined that this section of the disputed way had been laid out and accepted and that the layout was "lost." Add. at 22, 62-69. But there was no evidence that *any* road layout records in the Town of Concord were "lost". To the contrary, witnesses for both sides testified that they reviewed and found Town layouts which collectively accounted for all of the nearby roadways laid out and accepted in the North Quarter during the relevant time period. Moreover, recorded deeds and probate records from the early 1700s establish that the southernmost 2,550 feet of the Disputed Section was laid out by the Proprietors of the Twenty Score, who were private landowners.

The 1763 Conditional Layout

The northern portion of the Disputed Section, between the southern end of Mink Pond and the current Concord-Carlisle town line, was laid out by Middlesex County in 1763 "on condition that said Petitioners give their land for the road thro' their own land" (the "1763 Conditional Layout"). At the time of the 1763 Conditional Layout, there were no residences along any portion of the Disputed Section (though there were residences to the north, in what soon would become Carlisle). The 1763 layout, which generally follows the present physical location of the northern portion of the trail, runs through land in Carlisle, crosses into Concord, and ends with a call "to a Town Way thro' said David Brown's land." Notably, there was no evidence that any way laid out by public authority ever existed in that location. Instead, there was undisputed documentary evidence of a private way laid out by the Proprietors of the Twenty Score leading to David Brown's land.

Moreover, the 1763 layout was to be approved only on the condition that the petitioners "give their land" for the way. Despite a Town vote requiring that a report be made to Town Meeting if and when the

petitioners gave their land for the way, there was no evidence that the petitioners, or anyone else, gave or were paid for private land for the road, and no such report was submitted to Town Meeting.

Historical Maps

Maps prior to 1830 do not show the Disputed Section. The maps of 1754, 1779, 1794, 1801 and 1819 include no reference to, or depiction of, the disputed portion of Estabrook Road. These include the First District of Carlisle map, the map of the North Quarter of Concord, the Foster District of Carlisle map submitted to the General Court, and the 1794 maps of Concord and Carlisle, both of which were prepared pursuant to Chapter 101 of the Resolves of 1794, which called for "the course of County roads" to be shown on the required maps. Notably, while the 1779 Foster map of Carlisle does not show the Disputed Section, it does show a parallel road (today known as Monument Street) which is tellingly labeled "Road to Concord Meeting House."

In 1830, the Legislature required the Commonwealth's municipalities to commission the drawing of maps. The map of Concord drawn pursuant to the 1830 Resolve was required to depict both public

and private roads and does not distinguish between the two. The Disputed Section is depicted for the first time on these 1830 maps. Thereafter, the Disputed Section appears on some maps between 1830 and 1932. However, and significantly, the Disputed Section is not shown as a road on maps and plans after the 1932 discontinuance, including a 1952 Land Court plan (Land Court Plan 10163B-1), which indicates the end of the paved portion of Estabrook Road is a "dead end" and Land Court Plan 10163F marking "end of public way" at the discontinuance point and depicting an "existing wood post barrier." After 1932, the Town of Concord Public Works Department kept a map on which it recorded the discontinuance of roads by hand notations. That map shows a bar at the location of the gate and notes that the trail was "discontinued 1932."

No Direct Evidence of Public Use

There is no direct evidence of any actual, consistent, uninterrupted and continuous use by the Town or the general public of the Disputed Section, including the southern 2,550 feet for which there is

no layout.[3] While the road appeared on Surveyor of Highway assignments beginning in 1764, such assignments were merely lists and did not suggest that work was actually performed. And, while the road maintenance records include several references to the road over the course of a century, significantly, only one of those references relates to the Disputed Section of the road.[4]

Further, there are no records of even recreational use of the 2,550 feet for which there is no layout, with the exception of a single reference in a letter by Ellen Emerson, Raymond Emerson's aunt, who speaks of entering the "gates of Estabrook" (in the same location of the present gate and discontinuance point). While a few other writings, including those of Concordian Henry David Thoreau, speak of a handful

[3] There was evidence presented of a small mining operation and logging operations conducted by the landowners abutting the road or their agents. There was no direct evidence as to when or for how long these actions took place and no evidence that there was any use by the general public.

[4] The parts of Estabrook Road not in dispute include a well traveled east-west connecting road that was part of a 1699 county layout and a paved portion of the road serving a number of residences. Logically, maintenance would have been performed on these sections.

of recreational walks along other parts of the Disputed Section, as was demonstrated at trial, there were, numerous paths and other access points to the Estabrook Woods and portions of the trail north of the 2,550 feet.

No one resides along the Disputed Section except for the Rasmussens and Read/Kays, and both of their homes are accessed by the paved public road that lies south of the Disputed Section. There is no evidence that anyone ever lived in a home served or accessed by the Disputed Section. Nor was there direct evidence of anyone traveling the length of the Disputed Section on foot, by horse, by wagon or by automobile.

The 1932 Discontinuance

On April 13, 1932, landowners of parcels abutting the Disputed Section, including surveyor Raymond Emerson, appeared before the Concord Road Commissioners and requested that the Commissioners petition the Middlesex County Commissioners to close the road from Emerson's driveway (now the Rasmussens' driveway) to the Carlisle town line as a public way because "the road is now almost impassible and used only by picnickers and is a serious fire hazard." The Concord Road Commissioners agreed. A "petition for

the discontinuance of Estabrook Road as a public way from Raymond Emerson's driveway to the Carlisle line" was signed on June 8, 1932, and submitted to the County Commissioners, along with a survey by Raymond Emerson marking the proposed discontinuance point.

The Town Road Commissioners noted that the road had for a long period ceased to be in general public use and that no residences were served by the portion of the road "sought to be discontinued as a public way." They asked the County Commissioners to "adjudicate that said way shall hereafter be a private way, and that the Town of Concord shall no longer be bound to keep the same in repair, upon condition that the said Town give sufficient notice to warn the public against entering thereon." After public notice, a view, and a hearing at which no one appeared to object "to the discontinuance of a portion of said highway as a public way," the County Commissioners granted the Town's petition on July 9, 1932, "in accordance with Chapter 289 of the Acts of 1924."

ISSUES OF LAW RAISED BY THE APPEAL

- Whether it was error for the Land Court to disregard over 160 years of precedent to establish a public way by circumstantial and opinion evidence and a strained reading of dicta from a 1979 Appeals Court decision.

- Whether it was error for the Land Court to determine that a public way had been established by prescription where there was no direct evidence of use over any twenty-year period and where the judge relied on opinion testimony that was contradicted by undisputed documentary evidence.

- Whether a "discontinuance" of a public way and adjudication as a "private way" by the County Commissioners pursuant to G.L. c. 82 § 32A, inserted by St. 1924, c. 289, "An Act Relative to the Discontinuance of Certain Ways as Public Ways," resulted in a way open to the general public.

- Whether, having determined that G.L. c. 82 § 32A, inserted by St. 1924, c. 289 was ambiguous, the Land Court abused its discretion in excluding evidence of Concord's other § 32A discontinuances, which uniformly resulted in wholly private ways.

These issues were raised and preserved at trial. In addition, defendants made a written offer of proof of Concord's other road discontinuances under the 1924 version of G.L. c. 82, § 32A, which was refused.

ARGUMENT

I. The Court's Reliance on Circumstantial Evidence and Opinion Testimony to Find That an Unidentified Layout Once Existed But Was Lost Is Contrary to Law and Public Policy, Upending Over 160 Years of Precedent on the Establishment of Public Ways.

Every litigant to have successfully proven the existence of a public way in a Massachusetts court has done so by one of three ways: demonstrating a layout according to statute; dedication and acceptance; or prescriptive use. See W.D. Cowls, Inc. v. Woicekoski, 7 Mass. App. Ct. 18, 19 (1979) ("If a road has never been dedicated and accepted, laid out by public authority, or established by prescription, such a road is private."). The Land Court's expansive application of dicta in Fenn v. Middleborough, 7 Mass. App. Ct. 80 (1979), upends this carefully developed common law, presenting a consequential issue of first impression.

The Land Court expanded upon the suggestion in Fenn that it may be possible to establish "on the basis of a factual inference from the evidence taken as a whole that the way[] in question w[as] laid out at some anterior time and that the record thereof has been lost." 7 Mass. App. Ct. at 86. However, the Land Court failed to heed the import of the Appeals

Court's observation that "we have found no case in which the presumption of a layout has been raised on proof falling short of that required to find prescription." Id at 87.

Even if Fenn's suggested option for establishing a public way by proving a "lost layout" is available, the Land Court's confused application of Fenn's dicta requires correction and clarification. Any establishment of a public way by circumstantial evidence requires clear proof. Otherwise, the possibility recognized in Fenn will swallow the following bright-line, centuries old, common law rules: (i) the creation of a public way requires formal and documented municipal action, because "[t]he appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by the use of ambiguous or uncertain language," (quotation and citation omitted) Loriol v. Keene, 343 Mass. 358, 362; and (ii) absent evidence of such action, a claimant must meet the high bar to establish prescription, Stone v. Garcia, 2007 WL 4531550, *13-14 (Piper, J.) (Land Ct. Dec. 27, 2007), *aff'd*, 77 Mass. App. Ct. 1123 (2010) (Rule 23). The requisite proof was absent in this case.

Without clear corrective guidance from this Court, the Land Court's expansive, imprecise, and novel application of Fenn will invite countless cases seeking to establish public ways based on conflicting, speculative evidence, thus threatening the certainty of property rights throughout the Commonwealth.

II. The Land Court's Finding of Prescriptive Use Overlooked Necessary Elements of Proof and Wrongly Considered Actions by Abutters as Sufficient to Establish "Public Use."

Establishing a public way by prescription requires "clear proof" of each of the requisite elements: "the (1) continuous and uninterrupted, (2) open and notorious, and (3) adverse use of another's land (4) for a period of not less than twenty years." White v. Hartigan, 464 Mass. 400, 413 (2013). Because an adverse claimant's actions are in the nature of trespass, they are "construed strictly" against the claimant and in favor of the owner. See Sea Pines Condominium III Ass'n v. Steffens, 61 Mass. App. Ct. 838, 847 (2004) (quotations and citations omitted).

Here, the Town faced the additional burden of establishing corporate action. McLaughlin v. Marblehead, 68 Mass. App. Ct. 490, 499 (2007). Corporate action may be established only by "proof

sufficient to satisfy a trier of fact that the municipality has exercised dominion and control over the land in its corporate capacity through authorized acts of its employees, agents or representatives to conduct or maintain a public use thereon" over the requisite twenty-year period. Daley v. Swampscott, 11 Mass. App. Ct. 822, 827, 829 (1981).

There was no meaningful evidence of such corporate control over the Disputed Section, and certainly not for any continuous twenty-year period. Since the 1847 introduction of the Town Road Commissioner's annual reports, only *one* referred to maintenance on the Disputed Section. Nine records mention minimal expenditures on "Estabrook Road," but the Town's own expert could not opine that they were for maintenance of the Disputed Section. Such sporadic and uncertain evidence has never been enough to establish sufficient corporate action. See Boxborough v. Joatham Spring Realty Trust, 356 Mass. 487, 489-90 (1969) (occasional plowing, scraping of road surface, and periodic "cut[ting] or spray[ing] of the brush" did not establish corporate action).

Moving beyond corporate action, the Land Court wove together thin circumstantial evidence to

establish a narrative of continuous public use despite undisputed documentary evidence to the contrary. For instance, the Land Court adopted the speculative hypothesis, based on the road's location, that "it must have been used" for travel from Carlisle to Concord for worship services, despite direct evidence that other roads were used for that purpose.[5] The Land Court also emphasized a handful of journal entries by pedestrians that largely confirmed the way's deserted condition. "Sporadic use" for "recreational purposes" cannot establish prescription. Rivers v. Town of Warwick, 37 Mass. App. Ct. 593, 597 (1994); see also W.D. Cowls, Inc., 7 Mass. App. Ct. at 20.

The Land Court also treated logging and the operation of a small-scale lime mine as evidence of general public use, but such activities presumably were done or allowed by the landowners, and so were neither adverse nor public in nature. See Joatham Spring Realty Trust, 356 Mass. at 490 (party claiming prescription must distinguish "public use" from "rightful use by those who have permissive right to

[5] A nearby road was labeled and known as "the road to the Concord Meeting House" and the "Road from Concord to Carlisle" on historic maps of the time.

travel over the private way" [quotation and citation omitted]).

Finally, the Land Court failed to identify any twenty consecutive years of alleged use. See Gower v. Saugus, 315 Mass. 677, 681 (1944) ("Most of the evidence as to use of the way is indefinite as to time, so that it is at least doubtful whether the full period of twenty years has been covered.").

III. The Land Court Erred in Determining That The Discontinuance Under G.L. c. 82 § 32A, Inserted by St. 1924, c. 289, "An Act Relative to the Discontinuance of Certain Ways as Public Ways," Was Not a "Legal Discontinuance."

The Land Court disregarded basic tenets of statutory interpretation in determining that the 1932 "Discontinuance"[6] by the County Commissioners under G.L. c. 82, § 32A ("§ 32A"), inserted by St. 1924, c. 289 "An Act Relative to the Discontinuance of Certain Ways as Public Ways," ("the 1924 Act") was not a "legal discontinuance".[7]

"When statutory language is clear and unambiguous

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[6] The County Commissioners referred to their action as a "discontinuance" no fewer than three times in their 1932 order and recorded it within the official index as "Discontinuance of portion."

[7] The Land Court concluded that the 1932 Discontinuance was *not* a "legal discontinuance," but merely a "discontinuance of maintenance." Add. at 77.

it must be construed as written." LeClair v. Norwell, 430 Mass. 328, 335 (1999). The 1924 Act expressly enabled County Commissioners to "adjudicate" that a "public way" "shall thereafter be a private way" and order that "notice to *warn the public against entering*" be posted (emphasis added).[8] As it makes clear sense as written, the Land Court erred in looking beyond the plain text of the statute. White v. Boston, 428 Mass. 250, 253 (1998).

"Where, as here, the language of the statute is clear, it is the function of the judiciary to apply it, not amend it." See Comm'r of Revenue v. Cargill, Inc., 429 Mass. 79, 82 (1999). The Land Court's imputation of continued general public access to the Disputed Section is at odds with § 32A's requirement "to warn the public against entering." See Burwick v. Mass. Highway Dep't, 57 Mass. App. Ct. 302, 304 (2003) (placement of a "Do Not Enter" sign "curtailed any legal access" by making the road "inoperative as a public way"). Tellingly, the Land Court's 85-page

[8] The full copy of G.L. c. 82 § 32A, inserted by St. 1924, c. 289, is included at Add. 104. In its margins, it is annotated as "Discontinuance of certain ways as public ways."

decision offers no analysis of this crucial and mandatory warning.

The Land Court also erred in its reliance on *dicta* assessing a later and very different version of § 32A.[9] This led it to conclude that the term "private way" as used in the late 19th and early 20th centuries could mean either of two different things: a wholly private way, created, owned, and controlled by one of more inhabitants;[10] or a way that was private in name only, laid out and built by public authority and providing public access, *i.e.*, a "statutory private way." United States v. 125.07 Acres of Land, 707 F.2d 11, 14 (1st Cir. 1983). The conclusion that the Disputed Section was a "public private way" both before and after the 1932 Discontinuance is untenable.

The Land Court also ignored familiar tools of statutory construction, which call for consideration of the statute's title, its legislative history, its

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[9] The 1924 Act was repealed and replaced with St. 1983, c. 136, which is the current version of G.L. c. 82, § 32A.

[10] See Opinion of the Justices, 313 Mass. 779, 782-83 (1943) (There can be private ways, which are "defined ways for travel, not laid out by public authority or dedicated to public use, that are wholly the subject of private ownership," which are "'open to public use' by license or permission").

contemporaneous interpretation by those charged with its implementation, and the context in which the 1932 Discontinuance was sought. See Commonwealth v. Rahim, 441 Mass. 273, 283-84 (2004). For example, the Land Court emphasized the lack of the word "discontinuance" in the text of § 32A, but ignored that the Act was titled "An Act Relative to the *Discontinuance* of Certain Ways as Public Ways" (emphasis added). See Silverman v. Wedge, 339 Mass. 244, 245 (1959)("The title of an act is to be considered in construing the act.").[11]

As the result, appellants now find themselves in an untenable position, required to comply with a judgment that is at odds with the language of § 32A. If appellants post § 32A's notice, warning the public against entering, they will violate the Judgment which enjoins them from "prohibiting or interfering with access to or use of Estabrook Road" by the general public. Compare Burwick, 57 Mass. App. Ct. at 304. This Court is ever "careful to avoid any construction

[11] The Land Court also erroneously noted that the "petition to the county" did not use the term "discontinuance," Add. at 31, when the petition plainly states: "said way sought to be discontinued as a public way."

of statutory language which leads to an absurd result[] or that otherwise would frustrate the Legislature's intent." Wallace W. v. Commonwealth, 482 Mass. 789, 793 (2019) (quotations and citations omitted).

IV. The Land Court Abused Its Discretion in Excluding Evidence of Other § 32A Discontinuances in Concord.

Having determined that the 1924 Act was ambiguous, the Land Court abused its discretion in excluding evidence of all four of Concord's other § 32A discontinuances. This evidence would have proven that the Town consistently treated discontinuances under the 1924 Act as closing the subject way to the general public. Such construction of statutory language by officials charged with administering it is "strong evidence" of the statute's meaning. Burage v. Bristol County, 210 Mass. 299, 301-02 (1911). Here, the excluded evidence was probative of the Town's consistent understanding. Had it been admitted, the evidence that every other discontinuance under the 1924 Act in Concord has consistently been construed as terminating all general public access rights might well have produced a different outcome in this case. G.L. c. 231, § 132.

DIRECT APPELLATE REVIEW IS APPROPRIATE.

The standard for determining whether a road is public or private and who has rights to travel over it is of critical importance in the Commonwealth. As noted in Fenn, introducing uncertainty as to how public ways are created is a "result not in accord with public policy." 7 Mass. App Ct. at 85-86. Courts should make a searching inquiry and require a sufficient quantum of proof to impute public-way status to streets, in order to avoid such consequences as "[municipal] liability for failure to maintain, the expense of maintenance and snow removal and divisibility of land by ANR plans." Miguel vs. Fairhaven, 2017 WL 3864636, *7 (Foster, J.) (Bristol County Aug. 30, 2017) (citations omitted).

Firm guidance from this Court on the creation and discontinuance of public ways is needed by state agencies, municipalities, attorneys, title examiners, surveyors, and thousands of private property owners throughout the Commonwealth.

Respectfully submitted,

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By their attorneys,

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April 6, 2023

CERTIFICATE OF COMPLIANCE WITH RULE 16(k)

I, Diane C. Tillotson, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 appendix to the briefs); Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

/s/ Diane C. Tillotson
Diane C. Tillotson

CERTIFICATE OF SERVICE

I, Diane C. Tillotson, counsel for Neil E. Rasmussen and Anna Rasmussen, hereby certify that I have served a copy of this Application for Direct Appellate Review by causing it to be delivered by email to the following:

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Dated: April 6, 2023

ADDENDUM

Land Court Documents

1. Judgment..... ADD0001-ADD0004

2. Decision..... ADD0004-ADD0089

3. Docket..... ADD0090-ADD0103

Frequently Cited Statutes

4. St. 1924, c. 289..... ADD0104

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

MISCELLANEOUS CASE
No. 17 MISC 000605 (HPS)

TOWN OF CONCORD,

Plaintiff,

v.

NEIL E. RASMUSSEN, ANNA W. RASMUSSEN, BROOKS S. READ, SUSANNAH KAY, RUSSELL ROBB III, LESLEE ROBB, and THOMAS WRAY FALWELL, TRUSTEES of the PIPPIN TREE LAND TRUST, PRESIDENT and FELLOWS of HARVARD COLLEGE, JOHN K. BAKER, TRUSTEE of the NIELSEN REALTY TRUST, and NINA I.M. NIELSEN, TRUSTEE of the BAKER REALTY TRUST,

Defendants.

JUDGMENT

This action commenced on October 24, 2017 with the filing of a complaint by the town of Concord ("Town") asserting a claim for declaratory judgment pursuant to G. L. c. 231A, and seeking additional injunctive relief, all with respect to claims that Estabrook Road in Concord, from a gate near the driveway of property owned by defendants Neil Rasmussen and Anna Rasmussen ("Rasmussens") at 393 Estabrook Road, north to the Concord – Carlisle town line ("Estabrook Road") is a public way or is otherwise a way to which the public has a right to access and use. The Rasmussens, and defendants Brooks Read and Susannah Kay, (the "Read/Kays") and Russell Robb III, Leslee Robb and Thomas Wray Falwell, as Trustees of the

Pippin Tree Land Trust, ("Trustees") asserted counterclaims for declaratory relief that Estabrook Road is a private way owned by the abutters to the way and for which there is no public right of access.[1]

The case came on for trial by the court (Speicher, J.). In a decision of even date, the court has made findings of fact and rulings of law. In accordance with the court's decision, it is

ORDERED, ADJUDGED, and DECLARED, on Count I of the Complaint, seeking declaratory relief pursuant to G. L. c. 231A, § 1 and G. L. c. 185, § 1(k), and on the Counterclaims of the defendants the Rasmussens, the Read/Kays, and the Trustees, that Estabrook Road was laid out as a public way and also became a public way by prescription, and that the 1932 order of the Middlesex county commissioners adjudicating Estabrook Road to become a private way ended the Town's obligation to maintain Estabrook Road, but did not end the right of the public to access and use Estabrook Road, which the public retains.

It is further

ORDERED and ADJUDGED that the defendants, their agents, employees, invitees, representatives, contractors, others acting in concert with them or having actual knowledge of this Judgment, and their successors in interest, are **PERMANENTLY ENJOINED** from gating, closing, blocking, or otherwise prohibiting or interfering with access to or use of Estabrook Road or any part thereof by the Town or members of the general public.

It is further

ORDERED and ADJUDGED that this Judgment is a full adjudication of all the parties' claims in this case, and all prayers for relief by any party in this action which are not granted in the preceding paragraphs are DENIED.

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[1] Defendants John K. Baker, Trustee of the Nielsen Realty Trust, and Nina I. M. Nielsen, Trustee of the Baker Realty Trust, were dismissed from this action by stipulation prior to trial.

By the Court. (Speicher, J.)

ZPA Attest:

Deborah J. Patterson
Recorder

Dated: November 23, 2022.

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

MISCELLANEOUS CASE
No. 17 MISC 000605 (HPS)

TOWN OF CONCORD,

Plaintiff,

v.

NEIL E. RASMUSSEN, ANNA W. RASMUSSEN, BROOKS S. READ, SUSANNAH KAY, RUSSELL ROBB III, LESLEE ROBB, and THOMAS WRAY FALWELL, TRUSTEES of the PIPPIN TREE LAND TRUST, PRESIDENT and FELLOWS of HARVARD COLLEGE, JOHN K. BAKER, TRUSTEE of the NIELSEN REALTY TRUST, and NINA I.M. NIELSEN, TRUSTEE of the BAKER REALTY TRUST,

Defendants.

CORRECTED DECISION

For most of the last three hundred years, Estabrook Road in Concord has been walked on and ridden on successively by residents of Concord and present-day Carlisle to access the meeting house, market, and commercial center in Concord, for commercial operation of a limestone quarry and lime kiln, for logging, access to orchards, pleasure rides, picnics by the likes of Ralph Waldo Emerson's daughter, nature trips by the likes of Henry David Thoreau, maintenance of telephone utility poles licensed by the town of Concord, and more recently, recreational use by residents of Concord and Carlisle. Notwithstanding the longstanding public usage of Estabrook Road, the owners of land abutting Estabrook Road contend that the road has

never been a public way, and that if it was, it ceased to be so when it was discontinued by Middlesex County in 1932 ("1932 discontinuance order") and became a private way in the ownership of the abutters.

Conflict with some of the abutting landowners over the use of the road by members of the public led to the filing of this action by the town of Concord, alleging that Estabrook Road has been and remains a public way, and that the 1932 discontinuance order ended the Town's obligation to maintain Estabrook Road, but not the public's right to access and use it. Initially, after the filing of this action on October 24, 2017, Estabrook Road remained open to the public. While this action was pending, and about three weeks into the coronavirus pandemic lockdown in Massachusetts, on April 5, 2020, four of the defendants in this case, Neil Rasmussen and Anna Rasmussen, and Brooks Read and Susannah Kay, citing increased usage of Estabrook Road where it abuts their properties, unilaterally locked two gates, thereby closing off a section of Estabrook Road adjacent to their properties, which the Town claimed was public. They posted a sign announcing that this section of Estabrook Road was private and was closed by "order of the County Commissioners." This was apparently a misleading reference to an order of the Middlesex county commissioners, discussed below, that had been made 88 years earlier, in 1932. The unilateral closing of part of Estabrook Road resulted in the Town moving for a preliminary injunction. At the request of the parties, I took a view of Estabrook Road on July 20, 2020 in connection with the motion, and after a hearing, I issued a preliminary injunction on July 23, 2020 enjoining the defendants from interfering with public access to Estabrook Road during the pendency of this case.

Prior to trial, the parties stipulated to the dismissal as defendants of John Baker and Nina I. M. Nielsen, owners of property along the west side of Estabrook Road just south of the

Concord-Carlisle town line, and the parties also agreed to the dismissal of the Town's claims against the President and Fellows of Harvard College. At a pre-trial conference, I concluded that, given its ownership of much of the frontage on the disputed road, Harvard was an indispensable party. I ordered Harvard to rejoin the case and permitted Harvard to conduct discovery. Also prior to trial, the Town stipulated that notwithstanding its claim that Estabrook Road had become a public way by prescription, among other methods, it waived any claim to prescriptive rights established after 1932.

I took another view of Estabrook Road on May 28, 2021. Trial was held before me by videoconference over six days between June 1 and June 10, 2021. The Town presented expert testimony from land surveyor Anthony Richard Vannozzi and historical archaeologist Kristen Heitert, and fact witness Town Clerk Kaari Mai Tari also testified on behalf of the Town. The defendants presented expert testimony from Dr. Brian Donahue, a Brandeis University professor of American Environmental Studies, and from land surveyor Kevin David Arsenault. Defendant Neil Rasmussen also testified as a fact witness for the defendants. One hundred thirty-seven exhibits were admitted into evidence and nineteen chalks were presented and accepted by the court. The parties filed post-trial briefs, requests for rulings of law and requests for findings of fact from October 4 to October 6, 2021. Closing arguments were held before me on November 18, 2021, after which I took this case under advisement.

For the reasons that follow, I find and rule that the Town has carried its burden of establishing that both the northern and southern disputed portions of Estabrook Road were established as a public way, and that the order of the Middlesex county commissioners in 1932 "adjudicating" Estabrook Road to be a private way did not extinguish the right of the public to access and use Estabrook Road.

FACTS

Based on the facts stipulated by the parties, the documentary and testimonial evidence admitted at trial, my view of the subject properties, and my assessment as the trier of fact of the credibility, weight, and inferences reasonably to be drawn from the evidence admitted at trial, I make factual findings as follows:

Description of Estabrook Road Today

1. Estabrook Road is an unpaved road, about thirty feet in width, running from north of the Concord – Carlisle line southerly through the 1400 acres of the Estabrook Woods, for a distance of just under 1.8 miles, to a point where it meets the paved portion of Estabrook Road in Concord near the driveways of the defendants Neil and Anna Rasmussen ("the Rasmussens") and Brooks Read and Susannah Kay ("the Read/Kays").[1] For most of its length, Estabrook Road is bounded on one or both sides by old stone walls; in some locations the walls appear to be in good repair, while in other stretches the walls are not present or are "broken down and pushed aside."[2] The stone walls, mostly dating to the mid-18th century, are "thrown-up" stone walls, built from stones collected from the adjacent pastures and roadbed.[3] The road generally slopes gently downward from north to south, and has been filled in some locations to provide access over low, wet spots.[4]

2. A walk down Estabrook Road from the Carlisle line in the north toward Concord center, which is south of the disputed road, brings one into contact with historic reminders of colonial Massachusetts. Just east of the road where it crosses from Carlisle into Concord

[1] Joint Pretrial Memorandum Statement of Agreed Facts, ("Agreed Facts") at ¶¶ 7-9; Exhibit ("Exh.") 51, Estabrook Woods Trail Map, dated January 28, 2014.
[2] Transcript, Vol. VI ("Tr. VI"), p.76.
[3] Tr. III, pp. 55-56, 61-62. Some stone walls along the westerly side of the southern end of Estabrook Road were added or repaired by the Rasmussens after 1992. Tr. IV, pp. 160-165, 172; Chalk N, Exhibit 51 with Neil Rasmussen's annotations.
[4] Tr. III, p. 48.

are the remains of the stone foundation of an 18th century homestead, known as the Kibby Cellar Hole. Continuing south, just off the road to the west is another 18th century stone house foundation, known as the Estabrook Place, with a stone wall enclosure for animals nearby.[5] Just south of the Estabrook Place on the west side of the road is a limestone quarry, also dating to the 18th century. Nearby on the east side of the road is the lime kiln that was likely used in connection with the quarry. The "dam at David Brown's land," one of the calls in the 1763 Layout of the northern disputed portion of Estabrook Road, is just past the lime kiln on the east side of the road. Below the lime kiln, the Oak Meadow of the colonial era, along the east side of the road, encompassed the area covered by present-day Mink Pond.[6] Continuing south, the road intersects with the Four Rod Way, known today as Legacy Trail,[7] as it passes the location of the Harris farm, which straddled Estabrook Road. Finally, after passing out of the unpaved, disputed portion of Estabrook Road, the Benjamin Clark house, dating at least to 1754, is off the paved portion of Estabrook Road to the west, north of the intersection of Estabrook Road with Barnes Hill Road.[8]

3. For purposes of this case and ease of discussion, Estabrook Road consists of the following sections:

   a. **Disputed Portion:** The disputed portion begins at the Carlisle town boundary in the north and ends at the paved part of Estabrook Road near the Rasmussens' driveway in the south. The entirety of the disputed portion was subject to the 1932

[5] Tr. III, p. 61; see Chalks J and K (LIDAR images showing the animal enclosure as a rectangle).
[6] Tr. II, p. 137; Tr. III, p. 50 ("[Mink Pond] was a meadow up until the 20th Century").
[7] Tr. VI, p. 74-75; see Exh. 52, Estabrook Woods Trail Map dated February 14, 2018 (showing Legacy Trail, formerly Four Rod Way, crossing the Pippin Tree Land Trust parcel from Estabrook Road and connecting to Punkatasset Trail in the east).
[8] Tr. I, p. 61; Chalk A, Annotated Sketch Plan Based On Assessors Maps; View, May 28, 2021. Chalk A is reproduced (although in black and white) as Addendum "A" to this Decision.

discontinuance order.[9] The disputed portion encompasses the northern disputed portion of the road, which was laid out in the 1763 Layout as described in further detail below. It also encompasses the southern disputed portion of the road, which is the area from the southern end of Mink Pond in the north, where the 1763 Layout terminates, to the Rasmussens' driveway in the south where it meets the paved part of the road. There is a gate at this location, currently left open and unlocked pursuant to the preliminary injunction pending in this action.

b. **Undisputed Portion:** The undisputed portion begins at the Rassmussens' driveway in the north where it meets the paved part of the road and ends where the road intersects Barnes Hill Road in the south. The undisputed portion of the road is paved.[10]

Owners of Property Abutting Estabrook Road

4. There are only a few owners along either side of the roughly 1.8-mile long disputed portion of the road.[11]

5. Starting at the north end of the road where it meets the Carlisle town boundary, with the exception of one parcel on the western boundary of the disputed portion of the road at the Carlisle line,[12] there are only two owners of the land along the western boundary of the road, and there are only three owners of land along the eastern boundary of the road.

6. With the exception noted above, starting at the Carlisle line in the north and travelling south, the land on both sides of the road is owned by the President and Fellows of

[9] Exhs. 55–58; Agreed Facts at ¶ 24–33.
[10] Agreed Facts at ¶ 12.
[11] See Chalk A, Annotated Sketch Plan Based On Assessors Maps (showing the defendants' properties: Harvard's property in yellow; the Rasmussens' property in green; the Pippin Tree Land Trust property in purple; and the Read/Kay property in pink); see also Chalk M (showing the Rasmussen property).
[12] The northernmost parcel bounding the west side of Estabrook Road at the Carlisle town boundary is owned by John Baker, Trustee of Nielsen Family Trust, and Nina I. M. Nielsen, Trustee of The Baker Realty Trust, who were dismissed as defendants pursuant to a stipulation of dismissal. Agreed Facts at ¶ 5.

Harvard College ("Harvard") for a distance of 2,795 feet on the west side of the road and 7,243 feet on the east side of the road.[13]

7. Along the western boundary of the road, from the southern boundary of Harvard's property, the rest of the land bounding the disputed portion of the road is owned by the Rasmussens, who own land for a distance of 5,500 feet along the western boundary of the road.[14]

8. Back on the eastern side of the road, the Trustees of the Pippin Tree Land Trust own land south of the Harvard land for a distance of 1,305 feet.[15]

9. South of the Pippin Tree Land Trust property, the Read/Kays own land abutting the road for 790 feet.[16] The gate at the southern terminus of the disputed portion of the road very roughly corresponds to the southern boundaries of both the Rasmussen and Read/Kay properties.[17]

10. The Rasmussens reside in a single-family dwelling near the southern end of their property. From just west of the gate at the southern terminus of the disputed portion of Estabrook Road, the Rasmussens' driveway leaves the paved portion of Estabrook Road in a northwesterly direction, going uphill several hundred feet to the Rasmussen residence. The Rasmussens razed the existing house on the site after they purchased the property in 1992, and moved an historic home built at another location, as well as more than one barn, to the site to fulfill their desire to recreate the look of an 18th century homestead on their property.[18]

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[13] Agreed Facts at ¶ 9.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Tr. I, pp. 61-62; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[18] Tr. IV, pp. 142-143, 158.

11. The Rasmussen property is also improved by a guest house, in which relatives of the Rasmussens reside. The guest house directly abuts Estabrook Road several hundred feet from the gate at the southern end of the disputed portion of the road, although its entrance is on the east side of the building, away from the road. The guest house does not have an entrance facing the road. Starting at the southern end of the guest house, there is a high wooden fence, approximately eight feet in height, along the entire boundary of the road from the guest house, south to the southern terminus of the disputed portion of the road. The fence was erected after the issuance of the preliminary injunction in this case, but before the trial.

12. The Rasmussen property features considerable lawn and landscaped areas on either side of the driveway leading from Estabrook Road to the Rasmussen house, and north of the house to at least the vicinity of the guest house. There are also several accessory buildings on the property north of the house and west of the guest house. Generally, the property north of the vicinity of the guest house and accessory buildings remains heavily wooded to the boundary with the Harvard property to the north. There are several extensive wetlands, including one pond, on the property.[19]

13. The Read/Kays reside in a single-family dwelling on their property, accessed by a driveway from the east side of the paved portion of Estabrook Road, just south of the gate. The Read/Kay dwelling is set back considerably from Estabrook Road at its closest point. Their property is wooded along the boundary of Estabrook Road, and aside from some yard area in the vicinity of the dwelling, the property appears to be heavily wooded.

14. The Pippin Tree Land Trust land, north of the Read/Kay property on the east side of Estabrook Road, is heavily wooded and is unimproved by any structures, at least in the

[19] *Id.*

immediate vicinity of the road.

15. Harvard's land, on both sides of the road, is heavily wooded. There are two extensive wetlands on the Harvard property, including Mink Pond near the southern end of the Harvard property to the east of Estabrook Road.[20]

History of Estabrook Road

The 1763 Layout – Northern Disputed Portion of Estabrook Road

16. The impetus for establishing what became the 1763 Layout of the northern disputed portion of Estabrook Road and its connection at its southern end to an existing "Town Way" appears to have originated with a petition by several landowners from the vicinity who were seeking "a more convenient" way to get to the Concord town center for worship and to get to market. (I do not credit the suggestion by defendants, and Harvard's expert witness, Dr. Brian Donahue, that the petitioners for a new road did not really want a new road, but instead were attempting to put political pressure on Concord to accede to their wishes to separate into the new town of Carlisle.)[21] On February 14, 1760, Benjamin Brown, Samuel Kibby, Zaccheus Green, Nathaniel Taylor, Hugh Smith and others petitioned the Concord selectmen to:

> insert in your warrant for the Next Townemeeting. To See if the Town will grant a Convenient way to accommodate Hugh Smith, Zaccheus Green, Samuel Kibby (and others) to go to the Publick worship and to market or se[e] if there be any way already allowed that will accommodate the persons aforesaid to open the Same as Soon as may be.[22]

17. The northern disputed portion of Estabrook Road was laid out on December 13, 1763 by the Court of General Sessions for the County of Middlesex ("1763 Layout"). As laid out,

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[20] *Id.*
[21] Tr. V, pp. 46-50.
[22] Exh. 7, Petition dated February 14, 1760.

the northern disputed portion of Estabrook Road was two rods (33 feet) wide, commenced in the north "near the House of Nathaniel Taylor, Jr." in present-day Carlisle,[23] and ran in a generally southerly direction, with one change in the originally proposed layout so as not to bisect Captain Jonathan Buttrick's pasture, and continuing "to the Dam at David Brown's Land then as the Road is now trod to a Town Way thro' Said David Brown's Land." [24]

18. The southern terminus of the way laid out by the 1763 Layout was where the way met an already-existing "Town Way." This location was reached through David Brown's land, south of the dam on David Brown's land. This location could be either on David Brown's land or just south of David Brown's land.[25] David Brown's land included the present location of Mink Pond.[26]

19. As just described, the southern terminus of the 1763 Layout is on present-day Estabrook Road approximately just west of the present-day southern end of Mink Pond.[27]

20. I credit the testimony of the town's expert witness, surveyor Anthony R. Vannozzi, that the 1763 Layout, with the change adopted by the Court of General Sessions and by the Concord town meeting to lessen the impact on Jonathan Buttrick's land, corresponds with Estabrook Road as it exists presently from the Concord – Carlisle boundary in the north to its southern terminus about at the southern end of Mink Pond.[28]

21. The 1763 Layout was considered and adopted by the Court of General Sessions for the

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[23] Carlisle was part of Concord until it became a separate town in 1780. Tr. VI, p. 70.
[24] Exh. 18, Court of General Sessions for the County of Middlesex, December 13, 1763 ("1763 Layout"); Tr. I, pp. 67-68; Tr. VI, pp. 78-79.
[25] Tr. I, pp. 102-106.
[26] Agreed Facts at ¶ 23.
[27] See Chalk A, Annotated Sketch Plan Based On Assessors Maps (showing this location as where the present Estabrook Road meets the southern point of Parcel 1439); see also Exh. 51, Estabrook Woods Trail Map dated January 28, 2014 (showing present Estabrook Road and Mink Pond).
[28] Exh. 17, Town Meeting Record dated December 12, 1763; Tr. I, pp. 74, 78, 106-107.

County of Middlesex on December 13, 1763 on the petition of "Zaccheus Green & others Inhabitants of the Town of Concord," and was adopted on the "Condition that the Said Petitioners give the Land for the Road thro' their own Land and on no other."[29]

22. Similarly, approval of the layout by the Concord town meeting the day before, December 12, 1763, with a change in the original route planned for the layout, was conditioned on the proviso "that the Petitioners do give their Land for said way."[30] The original route would have taken the road through Jonathan Buttrick's pasture to a connection at its southern terminus to a "way already laid out," that being Hugh Cargill Road, which is located to the west of the present Estabrook Road.[31]

23. Although Zaccheus Green is the only petitioner to the Court of General Sessions identified by name as petitioning for the layout of the road, it is likely, and I so find, that the other petitioners were other owners of land along the proposed layout who stood to benefit by its adoption.[32] This would include Nathaniel Taylor, Ephraim Minot, Ephraim Brown, Hugh Smith, David Brown, John Brown, Captain Jonathan Buttrick, John Flint, Jr. and James Barrett, as they were also owners of land along the proposed layout.[33] This conclusion is further buttressed by the participation of some of these landowners as petitioners, including Zaccheus Green, Nathaniel Taylor and Hugh Smith, on the original February 14, 1760 petition to the board of selectmen.[34]

24. There is little direct evidence that any of the owners whose land was used for the 1763 Layout were compensated directly for giving the land necessary for the layout. However,

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[29] Exh. 18, 1763 Layout.
[30] Exh. 17, Town Meeting Record dated December 12, 1763.
[31] Tr. II, p. 81; see Chalk F, Estabrook Woods Trail Map dated January 28, 2014 (showing Hugh Cargill Road).
[32] Tr. V, p. 165.
[33] Tr. V, p. 168, 169, as to Capt. Jonathan Buttrick, David Brown and John Brown being landowners in the vicinity of the 1763 Layout. As to Nathaniel Taylor, see Agreed Facts at ¶ 21; as to John Flint, Jr., Ephraim Minot, and James Barrett, see Tr. I, pp. 81-84.
[34] See Exh. 7, Petition dated February 14, 1760.

there is evidence from which it can be inferred, and I so find, that the owners of the land used for the 1763 Layout gave their land for the road:

a. Some of the road as laid out for the 1763 Layout was already being used as a road and would require no compensation or donation.[35]

b. On February 25, 1765, the town authorized payment to John Brown, one of the owners of land abutting the 1763 Layout, "for Making of one Hundred and Twenty five Rods of Stone wall on the new Road in the north part of the Town..."[36] He presumably would not have built a wall along the "new Road" if he had not already agreed that part of his land could be part of that road.

c. There is considerable other evidence that after 1763, the road laid out by the 1763 Layout was treated as a way in existence and was understood to be so by the town and the abutting owners whose land would have to have been given by them for the road.

d. On March 12, 1764, the selectmen of the town of Concord assigned a highway surveyor to inspect and maintain "the way by Benjamin Clarks & so by Harris's to the new way Lately Laid out and the new way as far as the way goes through Capt. Jonathan Buttrick's pasture and northward."[37]

e. The proposed change in the layout later authorized by the Court of General Sessions on December 13, 1763 was the subject of a Concord town meeting warrant authorized on December 7, 1763; the approval of town meeting on December 12, 1763 for the change was requested by Jonathan Buttrick "and

[35] Exh. 18, 1763 Layout. The description of the layout includes portions described as follows: "...up the Hill as the road is now trod..." and "...to a black oak marked the Westerly Side of Said Way a little out of the old Way...." *Id.*
[36] Exh. 125, Records of Concord, Vol. IV, p. 250.
[37] Exh. 115-11, 1764 Surveyors Records; Tr. I, pp. 154-155; see Chalk B, Index of Annual Assignments to Surveyors of Highways.

others." Capt. Buttrick was one of the owners whose land was needed for the 1763 Layout; it was for the benefit of Capt. Buttrick, so as to not bisect his pasture, that the change in layout was suggested.[38]

f. Capt. Jonathan Buttrick's last will and testament, signed on February 5, 1767, just over three years after the 1763 Layout was approved, bequeathed a 24-acre parcel to his son Willard described in part as bounded "easterly…on a County Road." The will was witnessed by, among others, David Brown, another of the owners who would have had to give their land for the road used in the 1763 Layout.[39]

g. A year later, on April 22, 1768, Capt. Buttrick's son Willard, having inherited the land left to him in his father's will, conveyed the same 24-acre parcel to Abel Prescott, and described the parcel in part as "bound easterly on Road lately laid out by the County…"[40]

h. Respectively in 1791 and 1795, David Brown, one of the owners of land along the road as laid out by the 1763 Layout, deeded a 4-acre parcel and then a contiguous 20-acre parcel to Benjamin Clark. The 1791 deed of the 4-acre parcel described the parcel as being bounded "Easterly on the county roade as the wall now stands…." The 1795 deed of the 20-acre parcel described the parcel as being bounded as well "Easterly on the County Road…." and "Southerly on land belonging to Thomas Jones and on land belonging to myself to the bounds first mentioned to the said County road."[41]

i. I find that the references to the "County Road" by Jonathan Buttrick in his will,

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[38] Exh. 16, Town Warrant dated December 7, 1763; Tr. V, pp. 170-171; Exh. 17, Town Meeting Record dated December 12, 1763.
[39] Exh. 88, Will of Jonathan Buttrick dated February 5, 1767; Tr. I, pp. 158-159.
[40] Exh. 95, Deed from Willard Buttrick to Abel Prescott dated April 22, 1768.
[41] Exhs. 104, 103; Tr. II, p. 96-98.

and by Willard Buttrick and David Brown in deeds conveying their properties, are evidence of their giving land for the way and acquiescence to the existence of the way as laid out by the 1763 Layout.

j. Another of the owners whose land had to be given for the 1763 Layout, Hugh Smith, apparently regretted having given the land and later tried to get it back. In 1776, Hugh Smith petitioned the selectmen to place an article on the town warrant as follows:

> To the Selectmen of the town of Concord. Gent be pleased to insert it as an article in your warrant for the next town meeting to see if any two of the Eight men that was present at the time when the Road was Laided out by my House that I said I would give the Land (and make oath to the same) I will yet pay back what I had for said Laid Road and also for swairing said men. Hugh Smith[42]

The selectmen agreed to place Hugh Smith's request on the warrant "respecting his Promise of giving the land contained in the way laid out by the Selectmen by his house some time past...."[43] Based on Hugh Smith's petition and the selectmen's response, I find that that Hugh Smith either represented before witnesses that he would give his land for the road used in the 1763 Layout, or he was paid for his land to be used for that purpose.

The "Town Way" at the Southern Terminus of the 1763 Layout

25. The parties agree that there is no known and identified record of a layout by town meeting, the county commissioners, or other public authority, of Estabrook Road between the southern terminus of the 1763 Layout at about the southern end of Mink Pond, and Barnes Hill Road to the south.[44] The status as a public way of the paved portion of

[42] Exh. 135, Hugh Smith Petition dated 1776.
[43] Exh. 136, Town Meeting Record dated May 16, 1776.
[44] Agreed Facts at ¶ 11.

Estabrook Road between the gate near the Rasmussen and Read/Kay properties and Barnes Hill Road is not in dispute in this action.[45] The parties dispute whether the southern disputed portion of the road, which is the unpaved portion of Estabrook Road between the southern terminus of the 1763 Layout and the gate near the Rasmussen driveway, is the "Town Way" referred to in the 1763 Layout, and if it is, whether it was ever properly laid out as a public way.

26. As is noted above, the way laid out by the 1763 Layout had its southern terminus where it connected to an existing "Town Way." In the route of the 1763 Layout as originally planned, the connection at the southern terminus of the 1763 Layout was described as "thro' Said Buttrick's Pasture to a Way already laid out,"[46] which was Hugh Cargill Road.[47] As altered by the change so as lessen the disturbance to Jonathan Buttrick's pasture,[48] the southern terminus of the 1763 Layout was described as running from "the Dam at David Brown's Land then as the Road is now trod to a Town Way thro' Said David Brown's Land."[49]

27. It is also noted above that the town's highway surveyor records after 1763 assigned a highway surveyor to inspect and maintain "the way by Benjamin Clarks & so by Harris's to the new way Lately Laid out and the new way as far as the way goes through Capt. Jonathan Buttrick's pasture and northward."[50] The "way by Benjamin Clarks & so by Harris's" is the southern portion of Estabrook Road as it exists today, including part of the undisputed paved portion just south of the Rasmussen and Read/Kay properties.

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[45] *Id.* at ¶ 12.
[46] Exh. 18, 1763 Layout.
[47] Tr. II, p. 81.
[48] The original layout would have gone through Jonathan Buttrick's pasture to Hugh Cargill Road; the revised layout would "cut off far less of Jonathan Buttrick's pasture..." and would connect to a different existing road. Tr. II, p. 82, 100.
[49] Exh. 18, 1763 Layout; Tr. II, p. 100. "The exact end point of the 1763 [Layout] is at a town way." Tr. II, p. 131.
[50] Exh. 115-11, 1764 Surveyors Records.

28. Benjamin Clark's house, still standing today, is located along Estabrook Road on the west side of the road just south of the Rasmussen property and is shown in the same location on maps dating from as early as 1754.[51]

29. Highway surveyor assignments predating the 1763 Layout consistently refer to the way by Benjamin Clark's or Benjamin Clark's house, by assigning a highway surveyor to the "way by Benjamin Clark's as far as the way is Laid out."[52]

30. Following the 1763 Layout, the highway surveyor assignments consistently refer to the way "by Benjamin Clark's and so by Harris to the new way lately laid out as far as the way goes through Captain Jonathan Buttrick's pasture northward."[53] Like the 1764 assignment, the 1765 assignment assigns a surveyor to "the way by Benjamin Clark's & so by Harris's to the new way Lately Laid out & [illegible] the new way as far as through Capt. Buttrick's Pasture Northward..."[54] The 1768 highway surveyor assignment assigns a surveyor "so by Benjamin Clark's and so on said way to the North and by side of Buttrick's Pasture."[55] Other records in evidence for later years are consistent with these examples.[56]

31. For years after 1780, the records refer to the Carlisle town line as the northern end of the way, as the far northern part of Concord became the town of Carlisle in 1780.[57] (An earlier separation of part of Concord into the new "district" of Carlisle in 1754 apparently

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[51] Tr. I, 61, 133-135; Tr. VI, p. 69; Exh. 24, 1754 Map of the North Quarter of Concord. Plaintiff's and defendants' expert land surveyors agree that Benjamin Clark's house, at its present location, appears on 1754 map. Tr. II, p. 164; Exh. 42, Land Court Plan No. 10163A dated February 10, 1924 (showing Benjamin Clark House on Estabrook Road).

[52] Tr. I, pp. 135-136; Exh. 115-9, 1762 Surveyors Records; see Exhs. 115-5, 115-6, 115-7, 115-8.

[53] Tr. I, p. 136; Exh. 115-11, 1764 Surveyors Records.

[54] Exh. 115-12, 1765 Surveyors Records.

[55] Exh. 115-15, 1768 Surveyors Records.

[56] Tr. I, pp. 136-142. See generally, Exhs. 115-11 through 115-59. See also, Chalk B, Index of Annual Assignments to Surveyors of Highways.

[57] Tr. I, pp. 142-143; Tr. VI, p. 70; Chalk B, Index of Annual Assignments to Surveyors of Highways. Carlisle was separated from Concord as a separate "district" pursuant to Province Laws, 1779-1780, c. 42. Exh. 21, Province Laws, 1779-1780, c. 42.

did not work out, and it was rescinded in 1756.)[58]

32. The references in the surveyors' records to the way by Benjamin Clark's house "& so by Harris" are references to the Harris farm.

33. The Harris farm resulted from a division by the proprietors of the "Twenty Score," land in the North Quarter of Concord owned in common as a result of grants made by the town meeting in 1653. The disputed portion of Estabrook Road is part of the land included in the North Quarter.[59]

34. Upon the division of the town into a North Quarter (in which Estabrook Road is located), an East Quarter and a South Quarter, the town meeting, on January 8, 1654, required that existing roads be maintained and kept open: "The north quarter are to keepe and maintain all there highways and bridges over the great Rivre in there quarter...and all there heigh ways & bridges are to be maintained for ever by the quarters on whom they are now cast...."[60]

35. The section of Estabrook Road running from present-day Barnes Hill Road, past the Rasmussen driveway to the intersection at present-day Legacy Trail, was a way four rods wide. Although there is some circumstantial evidence in a 1725 deed to John Hunt to suggest that this was a "four Rod way which was laid out by the proprietors of [the] twenty score" at the second division of Concord in the 1720s, I do not find this isolated reference to be sufficient evidence from which to conclude that this portion of Estabrook Road was laid out by the proprietors.[61]

36. Just north of that section, in 1730 or 1731, the proprietors of the North Quarter conveyed

[58] Tr. V, pp. 18-19; Exh. 24, 1754 Map of the North Quarter of Concord.
[59] Agreed Facts at ¶ 15.
[60] Exh. 2, Records of Concord, Vol. I, pp. 163-165.
[61] Exh. 69, Deed from Samuel Hunt to John Hunt dated September 1, 1725.

their interest in common lands in the Twenty Score to Jonathan Harris, noting that part of the land conveyed was "bounded Westerly by a Two Rod Way" and there was a "Two Rod way through the premises leading toward Ephraim Brown's Lott and Thomas Brown's Lott where it is not occupied."[62] This two rod way going through the premises that became the Harris farm was likely, and I so find that it was, part of the road that came to be known as Estabrook Road, running as far north as the Brown property at the southern end of Oak Meadow, later Mink Pond.[63] There is no direct evidence of how this way was laid out, and I do not credit as sufficient evidence of layout by the proprietors a suggestion in the probate records of John Hunt's father Nehemiah Hunt that it was part of "a way that is layd out by Twenty score Proprietors..."[64]

37. The Harris farm was located north of the Benjamin Clark house astride the disputed part of Estabrook Road in the location of the present-day Rasmussen and Read/Kay properties. The Harris farm was just north of Benjamin Clark's house along both sides of Estabrook Road and was south of David Brown's land.[65] Parts of the Harris farm were later deeded to Benjamin Clark and to Jonathan Harris, a descendant of the Jonathan Harris who acquired the farm in 1731.[66]

38. From the reference in the 1763 Layout to its connection to a "Town Way" and from references in deeds and probate documents to its existence [67] I infer and so find that there had been a layout as a way of the portions of Estabrook Road south of the 1763 Layout.

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[62] Exh. 72, Deed from William Wilson et al. to Jonathan Harris dated January 7, 1730 or 1731.
[63] See Tr. I, p. 173 ("...the second Two Rod Way that's described at the end of that description in the 1730 deed is Estabrook Road"); Chalk R, Approximate Location of Jonathan Harris Deed (depicting the Harris farm and the two rod way bisecting the farm).
[64] Exh. 70, Probate Inventory of Nehemiah Hunt dated June 21, 1726.
[65] Tr. I, pp. 173-174; Exhs. 91, 110 (the transcribed version of Exhibit 91, a deed from Mary Harris to Benjamin Clark dated May 30, 1777, misstates the dates of the deed); Tr. I, pp. 170-171). Tr. II, p. 141; see Chalk A, Annotated Sketch Plan Based On Assessors Maps; Tr. I, pp. 161-162.
[66] Exhs. 91, 110.
[67] See, e.g., Exhs. 69, 70.

39. I find as well that the actual records of these layouts have been lost to time. Significantly, while the town possesses records of land divisions in the Quarters into which the town was divided, records of land divisions in the North Quarter, in which Estabrook Road lies, have not been found. The Quarter books, including a "North Quarter" book, contained records of land transactions at least prior to 1731; I credit the town clerk's testimony that this book, which likely would include records of the layout of ways in the North Quarter, including Estabrook Road, once existed but is no longer in the town's possession.[68]

The Location of Estabrook Road

40. The "Town Way" referred to as the final call in the 1763 Layout as connecting to the southerly terminus of the 1763 Layout, was, as I so find, in the same location as the present southern disputed portion of Estabrook Road from Mink Pond in the north to the former location of Harris farm, corresponding to the gate in the vicinity of the Rasmussen and Read/Kay properties, and on to the location of Benjamin Clark's house on the undisputed portion of present-day Estabrook Road. The portion of Estabrook Road laid out by the 1763 Layout is also located in the present location of Estabrook Road from the Carlisle line in the north to the southern end of Mink Pond in the south, where the road connects to "a Town Way." This conclusion is supported by the testimony, which I credit, of the plaintiff's expert, Richard Vannozzi, who opined that, at least from the years 1768 to 1829, as described in the highway surveyors' records, the road from Benjamin Clark's

[68] Tr. IV, pp. 95, 99-100. The town clerk testified, "I'm looking at some land records, there are references to records—to land as described in the North Quarter book, for instance…[a]nd there are no North Quarter records that I've been able to find in those particular references." *Id.* at p. 95; "There is a North Quarter or there was a North Quarter book that would have this land description, and we do not have that in our custody that I've been able to find." *Id.* at p. 99-100. Notwithstanding the exclusion of an exhibit offered to support the town clerk's testimony, I credit her testimony that there are references in town records supporting the existence of a North Quarter book, and that the book is missing and cannot be found.

house in the south to the Carlisle line in the north corresponds to the disputed portion of Estabrook Road (as well as to the undisputed paved portion of the road).[69] David Arsenault, the defendants' expert, testified as well that the Town Way referenced in the 1763 Layout extended from the southern end of Mink Pond to the four rod way near the Harris Farm, which is in the immediate vicinity of the southern end of the present disputed portion of Estabrook Road, "or perhaps it could have run further south," and he agreed, as he depicted on a deposition exhibit, that at least part of the southern disputed portion of Estabrook Road, from the southern terminus of the 1763 Layout, was located along the same route as Mr. Vannozzi opined.[70] I find that the Town Way did indeed run further south, to the vicinity of Benjamin Clark's house along the present route of Estabrook Road.[71] Other evidence supports this conclusion as well. The parties agree that the southern part of what is now called Estabrook Road shows up as early as 1754 on a map of the North Quarter of Concord, where it extends from the road now called Barnes Hill Road, to land of Clark, and at least up to "Blood's Projected Line," which may have been the intended boundary of the ill-fated and short-lived 1754 establishment of Carlisle as a separate town.[72]

41. I also credit Mr. Vannozzi's testimony, and I so find, that the way described in the 1763 Layout corresponds with the existing northern disputed portion of Estabrook Road from

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[69] Tr. I, p. 144.

[70] Tr. VI, pp. 135-137. See Chalk S, Arsenault Deposition Exhibit 7, with David Arsenault's annotations (a deposition exhibit on which Mr. Arsenault drew a rectangle on a map around the Town Way referred to in the 1763 Layout. The rectangle he drew corresponds to the route of the current Estabrook Road, thus confirming his agreement that the existing Town Way referred to in the 1763 Layout was in the same location as the current southern disputed portion of Estabrook Road).

[71] The defendants made an offer of proof that alternative trails existing on the Rasmussen property when the Rasmussens acquired their property in 1992 could as well have been the Town Way beginning at the southern terminus of the 1763 Layout. See Tr. IV, pp. 155-156. Even had this evidence been admitted, there was no evidence offered by the defendants to show that these alternative trails existed in 1763 or earlier, or indeed at any time prior to 1992.

[72] Tr. V, pp. 19-22, 29-30; Exh. 24, 1754 Map of the North Quarter of Concord; Exh. 128, Petition to Rescind Separation of Carlisle dated June 10, 1755.

the Carlisle line to the southern end of Mink Pond.[73] I note that Mr. Arsenault also generally agreed with Mr. Vannozzi's assessment that the calls in the 1763 Layout match the location of the present northern disputed portion of Estabrook Road between the Carlisle line and the southern end of Mink Pond.[74]

Historic Activity and Uses of Land in the Vicinity of Estabrook Road

42. The Kibby Cellar Hole, located a short distance east of Estabrook Road near the current Concord – Carlisle town line, was the location of the home of Samuel and Elizabeth Kibby from as early as 1745, when they married, and eventually their four daughters, and was occupied perhaps as long as until 1810.[75]

43. Samuel Kibby (sometimes spelled Kibbe), a housewright,[76] was one of the petitioners on February 14, 1760 requesting that the selectmen of the town of Concord place on the warrant for the next town meeting their request to "grant a Convenient way to accommodate [the petitioners] to go to the Publick worship and to market or se[e] if there be any way already allowed that will accommodate the Persons afore said or any others that may settle near there abouts and if there to open the same as soon as may be."[77] When Carlisle was carved out of the northern part of Concord in 1780, Kibby, apparently opposed to becoming a resident of the new town, along with some other owners, was given the option to keep his land in Concord despite its location just north of the intended new boundary.[78]

44. Given his participation in petitioning for a "way to accommodate" travel to Concord

[73] Tr. I, p. 74.
[74] Tr. VI, pp. 90-99; Chalk E, 1941-1943 USGS Map.
[75] Tr. III, pp. 62-68.
[76] Tr. III, p. 65.
[77] Exh. 7, Petition dated February 14, 1760.
[78] Exh. 21, Province Laws, 1779-1780, c. 42. Section 7 of the law creating Carlisle gave Kibby and several others the option to stay in Concord. See also, Exh. 32, 1831 Hales Map of Concord (showing a "bump" in the otherwise straight boundary between Concord and Carlisle in the location of the Kibby homestead).

Center, I credit the testimony that the Kibbys, whose property was (and remains) accessible to Estabrook Road by a short trail, were likely to have used Estabrook Road to go to Concord Center to go to meeting and for various other reasons, as Concord was at that time the commercial hub of the area.[79]

45. South of the Kibby Cellar Hole along the Estabrook Road, just off the west side of the road, is another 18th century stone house foundation known as the Estabrook Place. The Estabrook Place consists of the stone foundation of a house, consistent with the size of an average home in the 18th century, and the remains of two stone animal enclosures.[80] The Estabrook Place was occupied as early as the 1740s, but perhaps not until the 1750s or 1760s, by a family that would have used it for residential and farming purposes and would, like the Kibbys, have used the adjacent road to travel into Concord.[81] The Estabrook Place structure was probably abandoned as a residence between 1780 and 1790.[82]

46. South of the Estabrook Place, just off the west side of Estabrook Road, are the remains of a limestone quarry, and just south of the limestone quarry on the east side of the road, is a lime kiln.[83] Today the quarry is a long thin ridge of rock exposed by a deep excavation on both sides, running east to west just off the west side of Estabrook Road.[84] The kiln is just off the east side of the road, just south of the quarry. I credit the testimony of the plaintiff's expert witness, Kristen Heitert, an expert in historical archaeology,[85] that the limestone quarry was likely worked from the 1760s to about 1800, that it would have

[79] Exh. 7, Petition dated February 14, 1760; Tr. III, p. 66.
[80] Chalks A, E; Tr. III, pp. 73-75.
[81] Tr. III, pp. 76-77, 133, 144.
[82] Tr. III, p. 145.
[83] Chalks A, E.
[84] View, May 28, 2021.
[85] Tr. III, 37.

been worked by four to six men at a time, that operation of the kiln required bringing firewood from north of the kiln along Estabrook Road, bringing lime south along the road to the kiln from the quarry, bringing water up the road from the dam just to the south, and bringing the finished product from the kiln into Concord along Estabrook Road.[86]

47. Based on testimony regarding large families living north and south of the eventual Concord-Carlisle boundary, I also credit that Estabrook Road was used by others to travel from the north part of Concord (which became Carlisle in 1780) to Concord center, south of the disputed portions of Estabrook Road, from the mid-18th century to the early 19th century.[87]

48. Estabrook Road continued to be used through the 19th century, and its use was described in writings of Henry David Thoreau and Ralph Waldo Emerson's daughter, Ellen Tucker Emerson.[88] In a June 10,1853 journal entry, Thoreau recalled that he "strolled" past

> "the Easterbrooks Place, the Old Lime Kiln, the Lime Quarries, the Ermine Weasel Woods; also the Oak Meadows, the Cedar Swamp, the Kibbe Place...What shall the whole be called? The old Carlisle road, which runs through the middle of it, is bordered with wild apple pastures...It is a paradise for walkers in the fall...Shall we call it the Easterbrooks Country?"[89]

49. I find that Thoreau's description of a walk on the "old Carlisle road" that is a "paradise for walkers" describes a walk on Estabrook Road through the Estabrook Woods, with many of the same landmarks still evident today, including the lime kiln, the limestone quarry, the Kibby (or Kibbe) place, and Oak Meadow, which is now Mink Pond.

50. Likewise, the letters of Ellen Tucker Emerson describe continued public use of Estabrook

[86] Tr. III, pp. 78-82.
[87] Tr. III, pp. 84-88.
[88] Exh. 118, "The Journal of Henry David Thoreau;" Exh. 119, "The Letters of Ellen Tucker Emerson."
[89] Exh. 118, "The Journal of Henry David Thoreau," p. 238.

Road in 1866 ("When once we entered the gates of Easterbrook the jolting of course became frequent and delightful")[90] and 1886 ("Last Saturday I had an Easterbrook picnic...We went through the lime-kiln field and the boulder-field...").[91]

51. An 1897 travel guide by Edwin M. Bacon describes continued public use of Estabrook Road as follows: "Estabrook Road extends for about four miles between Concord and Carlisle, a good part through the woods, and is one of the favorite summer drives."[92] The guide includes references to the "old lime-quarry" and Buttrick's pasture as features along the road.[93]

52. The journals of William Brewster, an ornithologist and the founder of the Massachusetts Audubon Society, record his trips on Estabrook Road to the lime kiln on a sled in the winter of 1892, and a trip on Estabrook Road to collect bushes in the spring of 1892.[94]

53. There is no suggestion in the writings of Thoreau, Emerson, Bacon or Brewster that they sought or were granted permission by any abutting landowners for their rides or strolls on the Estabrook Road. Ellen Tucker Emerson's journal notes that she went through a gate, but gives no indication that it was locked or restricted entry in any way. It is unlikely that Bacon would have included Estabrook Road in his guide to "Walks and Rides in the Country Round Boston" if access to Estabrook Road was physically or otherwise difficult or restricted.

54. Late 19th century Concord town records establish that the town of Concord paid for maintenance of Estabrook Road and maintained Estabrook Road through the late 19th century. For instance, A. D. Clark was paid $12.20 for "work on Estabrook Road" in

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[90] Exh. 119, "The Letters of Ellen Tucker Emerson" p. 405.
[91] *Id.* at p. 572.
[92] Exh. 120, Edwin M. Bacon, "Walks and Rides in the Country Round Boston" p. 205.
[93] *Id.* at pp. 206-207.
[94] Exh. 121, "Concord Journals and Diaries of William Brewster"; Tr. III, pp. 109-110.

1872.[95]

55. An 1877 Road Commissioners' Report notes: "The Easterbrook road, that had been badly cut up by teaming wood over in the spring, was repaired and graded to the town line."[96] Given the known use of Estabrook Road for logging activities, (see ¶ 57, *infra*) and the reference to the "town line," which had to be a reference to the northern Concord boundary with Carlisle, I find that this entry in particular is a reference to the disputed portion of Estabrook Road, all the way to the northern boundary with Carlisle. This entry indicates, and I so find, that Estabrook Road was being actively used for logging, and that the town understood it to be an obligation of the town to keep the road in repair.

56. In 1888, the road commissioners ordered that road signs ("guide-boards") be placed, including as follows: "from Liberty Street near Mr. Joseph Derby's, by Mr. Cyrus Clark's place, Estabrook Road; from Estabrook Road to Hildreth's Corner, Barnes Hill Road..."[97]

57. An 1890 Road Commissioners' Report discussed the problem of "wood roads," town roads that are seldom used for public travel "except for the cutting of brush," and which cost more to maintain than is justified by the amount of use to which they are put. "They are, it is true, town roads, but many of them are very little better than paths in the grass, or cuts through a woodland. They are Estabrook Road...and several others; and it always happens that, after carting heavy loads of wood and timber over them in the fall and spring, they are left in a condition which is far from satisfactory..."[98] In that year, the town spent $55 to repair Estabrook Road.[99]

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[95] Exh. 122, Annual Report of the Officers of the Town of Concord, p. 7 (Road Commissioners' Report for 1872).
[96] See *id.* at p. 8 (Road Commissioners' Report for 1877).
[97] See *id.* at p. 19 (Road Commissioners' Report for 1888).
[98] See *id.* at p. 21 (Road Commissioners' Report for 1890).
[99] See *id.* at p. 22 (Road Commissioners' Report for 1890).

58. In 1891 the town spent $57 to repair Estabrook Road.[100] By 1895, the town was spending $205 to maintain and repair Estabrook Road.[101] The following year, 1896, the cost of repairing Estabrook Road was $100.[102] The Concord road commissioners continued to expend money to maintain and repair Estabrook Road in subsequent years well into the 20th century.[103] As late as 1930, the town of Concord continued to maintain Estabrook Road in the vicinity of the current Rasmussen and Read/Kay properties, then owned by Raymond Emerson.[104]

59. With the exception of the 1930 entry, which refers to work done on Estabrook Road "toward Mr. Raymond Emerson's," none of the above-referenced entries in the records of the road commissioners specify the exact location of repairs being made on Estabrook Road, and it is apparent from the limited funds committed to repairs in any given year that nothing close to the entire 1.8-mile length of the road was the subject of repairs. Nevertheless, given the road commissioners' expressed frustration with the need to spend funds repairing the "wood roads," including Estabrook Road, I find that at least some of these funds, and likely most of them, given the length of the disputed portion of the road, were expended on the disputed portions of the Estabrook Road, located in the midst of the Estabrook Woods, where logging and cutting of brush continued, and not on the most southern part of the road in the vicinity of Barnes Hill Road, where the road would be less subject to damage from heavy carts hauling timber.

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[100] See *id.* at p. 28 (Road Commissioners' Report for 1891).
[101] See *id.* at p. 33 (Road Commissioners' Report for 1895).
[102] See *id.* at p. 35 (Road Commissioners' Report for 1896).
[103] See *id.* at p. 59 (Road Commissioners' Report for 1915 showing $3.71 spent to repair 2 2/10 miles of Estabrook Road), p. 94 (Road Commissioners' Report for 1917 showing $15.55 spent to repair Estabrook Road).
[104] See *id.* at p. 124 (Road Commissioners' Report for 1930, stating that "Work was in progress at the close of the year on Estabrook Road toward Mr. Raymond Emerson's..."); Exh. 42, Land Court Plan No. 10163A dated February 10, 1924 (showing property of Raymond Emerson); Exh. 44, Plan of Estabrook Road, Concord, Mass. dated May 7, 1932 (same).

60. On October 2, 1899, the Concord board of selectmen voted to allow the installation of telephone lines along Estabrook Road, as follows: "Voted to grant a location for a telephone line to the New England Telephone & Telegraph Co. on the Estabrook Road return Carlisle line to Liberty Street."[105] This allowed the installation of telephone lines within the road layout all the way from the Carlisle town line in the north, along the entire length of Estabrook Road, including the 1763 Layout, the southern disputed portion from the southern end of Mink Pond to the gate near the Rasmussen driveway, and past the Benjamin Clark property on the undisputed portion south of the Rasmussen and Read/Kay properties.

61. It is apparent from the facts shown above, and I so find, that Estabrook Road was used as a public thoroughfare from the vicinity of Liberty Street or Barnes Hill Road through the southern disputed portion of Estabrook Road north to at least the southern end of Oak Meadow, or today's Mink Pond, from at least the 1720s through the 1760s, and from there north along the route of the 1763 Layout to the northernmost reaches of Concord from at least the mid- to late-18th century and into the early 19th century.[106] After Carlisle became a separate town (for the second time) in 1780, the use of Estabrook Road diminished, but still continued for logging, and for other uses by the public, including pleasure drives or walks such as those described by Thoreau, Emerson, Bacon and Brewster through the 19th century and into the 20th century.[107] The road commissioners' reports and the accounts of Thoreau, Emerson and others justify an inference, which I

[105] Exh. 123, Selectmen Grant of Location to NE T&T dated October 2, 1899.
[106] According to Samuel Kibby, Estabrook Road was well-travelled during the late 18th century. See Exh. 124, Petition to the General Court to Separate Concord and Carlisle dated April 3, 1780 (Samuel Kibby and others argue against the separation on the ground that there is already a good road to Concord: "...your Memorialists live in the Remote Southeast Corner of the Proposed Districts on a Good Road to Concord meeting House where there is constant traveling on all occasions as well to meeting and as near or nearer to Concord meeting House, upon a strate line than to the meeting house in the Proposed District...").
[107] Tr. III, pp. 159-160.

draw, that by the mid- to late-19th century the condition of Estabrook Road was challenging for travelers,[108] but it is also a fair inference, which I draw, that the use of the road by members of the public, although diminished from the level of use in the 18th century, continued throughout this period.

The 1932 "Discontinuance" Order[109]

62. As suggested by the road commissioners' report in 1890, (¶ 57, *supra*) by the late 19th century, Estabrook Road, although acknowledged to be a "town road," was damaged annually by logging activities, and was costing more to maintain than the road commissioners thought was justified. Eventually, abutting landowners made efforts to "discontinue" Estabrook Road as a public way, and to cease the town's obligation to maintain it as such. The road was "discontinued" in 1932. While the legal effect of the discontinuance is hotly disputed, the facts pertaining to the discontinuance are not the subject of dispute. They are as follows.

63. On April 13, 1932, attorney Robert Bygrave, representing Raymond Emerson, Russell Robb and Stedman Buttrick, owners of parcels abutting portions of Estabrook Road north of the current gate near the Rasmussen driveway, appeared before the Concord road commissioners and asked that the road commissioners petition the county commissioners to close Estabrook Road from "Raymond Emerson's bungalow" (current Rasmussen driveway) to the Carlisle town line "as a public way [because] the road is now almost impassable and is used only by picknickers and is a serious fire hazard [and because]

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[108] See, e.g., Exh. 118, "The Journal of Henry David Thoreau"; Tr. IV, p. 27 ("...there are countless rocks to jar those who venture there in wagons...").

[109] Although the parties and the court have throughout this litigation used the term "discontinuance" in referring to the 1932 action of the Middlesex county commissioners, that term is used for convenience only, as neither the petition to the road commissioners, the petition to the county, nor indeed the statute under which they acted, used the term "discontinuance."

there are no houses on this stretch of road in Concord."[110]

64. The road commissioners granted the request, and on June 8, 1932, signed a petition for the "closing northerly of Raymond Emerson's to Carlisle line" drafted by Mr. Bygrave, and submitted it to the county commissioners.[111] The petition signed by the road commissioners represented in part:

> "...that Estabrook Road...is a public way, and that common convenience and necessity no longer require that such way shall be maintained in a condition reasonably safe and convenient for travel [from Emerson driveway to Carlisle line]...that said way...has for a long period ceased to be in general public use; that there are no residences served by that portion of said way sought to be discontinued as a public way; and that it would be an inordinate and unreasonable expense upon the said Town of Concord to keep said way in a condition reasonably safe and convenient for travel.
>
> WHEREFORE the said Road Commissioners pray that said way shall hereafter be a private way, and that the Town of Concord shall no longer be bound to keep the same in repair, upon condition that the said Town give sufficient notice to warn the public against entering thereon by the posting of adequate notice or notices where such way enters upon or unites with an existing public way."[112]

65. On June 29, 1932, the Middlesex county commissioners voted to grant the petition, making the following findings:

> "no interested person appearing to object to the discontinuance of a portion of [Estabrook Road] as a public way, said Commissioners found that...common convenience and necessity no longer require [Estabrook Road from Emerson driveway to Carlisle line] to be maintained in a condition safe and convenient for travel, and adjudicate that said way shall hereafter be a private way, and that the town shall no longer be bound to keep the same in repair.
>
> ...
>
> And said Commissioners further provide that in accordance with Chapter 289 of the Acts of 1924 this junction shall take effect

[110] Agreed Facts at ¶ 24; Exh. 56, Minutes of Meeting of the Board of Road Commissioners dated April 13, 1932.
[111] Agreed Facts at ¶¶ 25-27.
[112] Agreed Facts at ¶¶ 29-31; Exh. 55, 1932 Discontinuance Documents.

provided that sufficient notices to warn the public against entering on said way are posted where said road enters upon or unites with the existing public way at said Emerson driveway, and also at the town line between Carlisle and Concord."[113]

66. The Middlesex County Road Record Index has an entry for the year 1932 as follows: "Estabrook Road. Discontinuance of portion."[114]

DISCUSSION

The town of Concord filed this case to settle a dispute with the defendants, all abutters to Estabrook Road, concerning whether the disputed portion of Estabrook Road, from the Carlisle line in the north to the gate near the Rasmussens' driveway in the south, was ever a public way, and if it was, whether, following the 1932 discontinuance order, it remains a way over which the public has rights of access. Specifically, the defendants contend that (1) the southern disputed portion of Estabrook Road, from about the southern end of Mink Pond in the north to the Rasmussens' driveway in the south, never became a public way under any recognized method for establishment of a public way; (2) the 1763 Layout of the northern disputed portion of Estabrook Road was ineffective because there is insufficient evidence that the owners whose land was used for the road were paid; and (3) if any part of the disputed portion of Estabrook Road was established as a public way, it was discontinued and became a private way in 1932, reverting to the ownership and control of the abutting landowners.

The Town counters that (1) the southern disputed portion of Estabrook Road was established as a public way by dedication, prescription, or circumstantial evidence of a statutory layout; (2) the northern disputed section of Estabrook Road, established by the 1763 Layout, was properly laid out pursuant to the statutes in effect at the time or became public by prescription;

[113] Agreed Facts, ¶ 32; Exh. 55, 1932 Discontinuance Documents (showing the record of the road commissioners' vote on the discontinuance petition).
[114] Agreed Facts, ¶ 33. Exh. 57, Minutes of Meeting of the Board of Road Commissioners dated June 8, 1932.

and that (3) the 1932 discontinuance order was merely a discontinuance of the Town's maintenance obligation and did not turn the disputed portion into a wholly private way.

It is well settled in Massachusetts that a public way must be established by one of the following methods: "(1) a laying out by public authority in the manner prescribed by statute (see G. L. c. 82, §§ 1–32); (2) prescription; and (3) prior to 1846, a dedication by the owner to public use, permanent and unequivocal... coupled with an express or implied acceptance by the public." *Fenn v. Town of Middleborough*, 7 Mass. App. Ct. 80, 83–84 (1979). The establishment and existence of a public way can also be proved "on the basis of a factual inference from the evidence taken as a whole that the ways in question were laid out at some anterior time and that the record thereof has been lost." *Id.* at 86, 87.

The party claiming that a way is a public way, here, the town of Concord, bears the burden of proof of asserting that fact at trial. *Witteveld v. City of Haverhill*, 12 Mass. App. Ct. 876, 876 (1981). "Whether land is a public way is a subject of judicial inquiry." *Diamond v. City of Newton*, 55 Mass. App. Ct. 372, 373 (2002). Where there is conflicting evidence whether a way has been laid out as a public way, "resolution of the conflicting evidence is for the judge." *Moncy v. Planning Bd. of Scituate*, 50 Mass. App. Ct. 715, 720 (2001), citing *Martin v. Building Inspector of Freetown*, 38 Mass. App. Ct. 509, 512 (1995).

I. THE NORTHERN DISPUTED PORTION OF ESTABROOK ROAD WAS LAID OUT AS A PUBLIC WAY IN 1763

The Town, as the proponent seeking to prove that the northern disputed portion of Estabrook Road, laid out in the 1763 Layout, was properly laid out by the county, "bears the burden of proof on both the location of the ancient way and its status as a public way." *Domina v. Westfield*, 26 LCR 223, 226 (2018) (Foster, J.), *aff'd 96* Mass. App. Ct. 1102 (2019). The Town has met its burden with respect to both requirements.

A. *The Road as Laid Out by the 1763 Layout Corresponds to the Current Northern Disputed Portion of Estabrook Road from the Carlisle Town Line to the Southern End of Mink Pond*

As is noted in the court's findings of fact, the Town's expert and the defendants' expert agreed that the calls in the 1763 Layout correspond to the northern disputed portion of Estabrook Road as it exists on the ground today, from the Carlisle town line in the north to the vicinity of the southern end of Mink Pond in the south.[115] Indeed, the parties agree that there is no dispute as to the location on the ground of the northern disputed portion of Estabrook Road.[116]

The Town's expert witness, Mr. Vannozzi, matched the calls of the 1763 Layout with the current location of the northern disputed portion of Estabrook Road in Concord.[117] The defendants' expert witness, Mr. Arsenault, did the same.[118] Both parties opined that "[t]he northern section of the discontinued portion of Estabrook Road running southerly from the Carlisle town line is consistent with a portion of the description of the way laid out in 1763 by the Middlesex County Court of General Sessions of the Peace."[119] The parties, through their experts, also arrived at a consensus as to the location of the southern terminus of the 1763 Layout of Estabrook Road.[120]

Mr. Vannozzi definitively identified seven calls located in the present-day town of Concord, going south from the Concord-Carlisle town line. The first of the calls was the meeting point of Assessor's Parcels 1422 and 1531-1 as shown on Chalk A, located approximately at the Concord-Carlisle town line.[121] The next call was identified as the easterly portion of the Poplar

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[115] Findings of Fact, ¶ 40, *supra*; Tr. I, p. 74; Tr. VI, pp. 90-99.
[116] Tr. I, pp. 17-18.
[117] Tr. I, pp. 106–107.
[118] Tr. VI, pp. 88–103.
[119] Agreed Facts at ¶ 10.
[120] Tr. I, pp. 106–107; Tr. VI pp. 78, 98–103; Exh. 51, Estabrook Woods Trail Map dated January 28, 2014; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[121] Tr. I, pp. 80–81; Chalk A, Annotated Sketch Plan Based On Assessors Maps.

Hill lot, which was Assessor's Parcel 1531-1.[122] The next call was along the convergence of Assessor's Parcels 1424 and 1529, where a white oak tree used to exist.[123] The following call was "thro' the gap in Ephraim Minot's Fence," into Captain Jonathan Buttrick's pasture, located approximately where Assessor's Parcels 1529 and 1429 converge, marked as point number three on Chalk A.[124] Next, was the call to Captain Barrett's fence, which is marked as point number four on Chalk A.[125] The following call was at the corner of a stone wall and Nonesuch Meadow, which is at the southeast corner of Assessor's Parcel 1527, and marked as point seven on Chalk A.[126] The southernmost call that Mr. Vannozzi was able to definitively identify was located at the dam at David Brown's land, at the southwest corner of Assessor's Parcel 1431, marked as point nine on Chalk A.[127]

The final call terminates the layout where David Brown's land connects to an existing "Town Way," a point which Mr. Vannozzi testified as having two different possible locations: (1) within David Brown's land south of the dam; or (2) south of David Brown's land south of the dam.[128] Between these two alternatives, Mr. Vannozzi testified that the southern terminus of the 1763 Layout was most likely located "where lot 1439 meets Estabrook Road."[129] This corresponds to the southern end of Mink Pond, which is just off the east side of present-day Estabrook Road.

Mr. Arsenault testified that he agreed with Mr. Vannozzi's interpretation of the calls through the location of David Brown's dam, which Mr. Arsenault believed to be slightly farther

[122] Tr. I pp. 81–82; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[123] Tr. I p. 82; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[124] Tr. I pp. 82–83; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[125] Tr. I p. 84; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[126] Tr. I p. 85; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[127] Tr. I pp. 94–95; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[128] Tr. I pp. 95, 102–103; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[129] Tr. I pp. 106–107; Chalk A, Annotated Sketch Plan Based On Assessors Maps.

south, at around the property line of lot 1432.[130] Mr. Arsenault opined that the southern terminus of the 1763 Layout was located at the south end of Mink Pond, where the southwest corner of lot 1439 meets Estabrook Road and creates a "spur," or T-shaped intersection.[131] I credit the conclusions of both Mr. Vannozzi and Mr. Arsenault that the southern terminus of the 1763 Layout, where it met the existing Town Way, was just west of the southern end of Mink Pond, on the current Estabrook Road.

Given that the parties agree as to the approximate location of the 1763 Layout as it corresponds to the current northern disputed portion of Estabrook Road, I find that the Town has met its burden of locating the current northern disputed portion of the road as laid out by the 1763 Layout.

B. *The 1763 Layout Complied with the Statutory Requirements in Effect in 1763 and with the Condition Imposed by the Court of General Sessions*

The parties agree that the northern disputed portion of Estabrook Road was laid out by the Court of General Sessions for Middlesex County in 1763, following the failure or refusal of the selectmen of the Town of Concord to act on the petitioners' request for the Town to lay out the road. What the parties disagree about is whether a stated condition of the 1763 Layout, that the petitioners for the road give their land to be used for the road, was a condition precedent or a condition subsequent, and whether the condition was satisfied. The defendants argue that in the absence of proof that those whose land was used for the new road were paid, the layout failed due to the failure of the condition and failure to comply with the statutory requirements. The condition upon which the Court of General Sessions adopted the layout was the "Condition that

[130] Tr. VI pp. 88–98; Chalk A, Annotated Sketch Plan Based On Assessors Maps.
[131] Tr. VI pp. 78, 98–103; Exh. 51, Estabrook Woods Trail Map dated January 28, 2014; Chalk A, Annotated Sketch Plan Based On Assessors Maps.

the Said Petitioners give the Land for the Road thro' their own Land and on no other."[132] The defendants argue that (1) a statutory requirement that the owners of land used for the road be paid was not complied with, and (2) the Town has failed to prove that the [mostly unnamed] petitioners gave their land for the road, resulting in the failure of the layout. The defendants are wrong on both counts.

1. *The statute in effect at the time of the 1763 Layout did not require that the owners of the land used for the road be paid*

The genesis of the statutory requirements for the laying out of public ways, today embodied in G. L. c. 82, starts with a Province Law, adopted in the 1693-1694 session of the General Court. Chapter 6 of the Province Laws of 1693-1694, "An Act for Highways," empowered the selectmen of each town to "cause to be laid out, particular and private ways, for such town only, as shall be thought necessary..."

In the 1713-1714 session of the General Court, the 1693-1694 act was amended by "An Act In Addition" to the 1693-1694 law. Chapter 8 of the Acts of 1713-1714 elaborated on the authority of the selectmen to lay out "particular and private ways, between any of the inhabitants or proprietors within their respective towns, as shall be thought necessary, to or for any and every original lot laid out, or to be laid out, in and by any town or proprietors..." Notwithstanding the use of the term "particular and private ways," this statute, using the terminology of the day, governed the laying out of public ways. A "particular and private way" was "public in the sense of providing access... but its latter day descendant is the 'statutory private way,'...a kind of road for which neither town, county, nor Commonwealth bears upkeep responsibility." *United States v. 125.07 Acres of Land, More or Less*, 707 F.2d 11, 14 (1st Cir. 1983). Such roads were public despite the use of the word "private" in the terminology of the day.

[132] Exh. 18, 1763 Layout.

Id. "The *town* road was called 'private' in 1693 to distinguish it from a *county* road [citation omitted; emphasis in original]; today we call it 'public' for all purposes." *Id.* The use of the term "private way" in these older statutes commonly meant ways "laid out by public authority for the use of the public." *Opinion of the Justs.*, 313 Mass. 779, 782 (1943). "Such 'private ways' are private only in name, but are in all other respects public." *Id.*, citing *Denham v. Bristol Cty Comm'rs*, 108 Mass. 202, 208 (1871).

The 1713-1714 statute also, for the first time, added the power of county officials to lay out ways in the absence of action by a town's selectmen:

> That when and so often as the selectmen of any of the towns within this province, shall unreasonably delay or refuse to lay out, or cause to be laid out, any such particular or private ways as aforesaid, to any such original lot or lots as aforesaid, being thereunto desired by one or more of the inhabitants or proprietors of land within their towns respectively, that then, and in such case, her majestie's justices of the peace within the several counties of this province, at any of their general sessions, may, and are hereby impowred, by a committee whom they shall appoint, to lay out, or cause to be laid out, such particular or private ways, within or for such town, or for or between any of the inhabitants thereof, or to or for any such original lot or lots, as aforesaid; so as no damage be done to any particular person, in his land or propriety, without due recompence to be made either by the town, if it be of general benefit, or otherwise by such of the inhabitants as have the benefit of such particular or private way, as shall be ordered by the justices, in their sessions as aforesaid, upon inquiry into the same by a jury to be summoned for that purpose; any law, usage or custom to the contrary notwithstanding.

In 1727, the Act for Highways was amended again, to add a requirement that when a "private or particular way" was laid out by the selectmen of a town, the layout was not to be effective unless the layout was then voted upon favorably by the town meeting. St. 1727, c. 1, § 2. See *Moncy v. Planning Bd. of Scituate*, supra, 50 Mass. App. Ct. at 718 ("[P]assage of the Laws of the Province of 1727 requir[ed] town meeting acceptance of town ways laid out by selectmen"). This amendment, in section 2, also gave town meeting the authority to discontinue "any particular or private way or ways within their respective towns…when it shall appear to

such town or towns that they are unnecessary for the common good; and all such particular or private ways…shall no longer be esteem'd as particular or private ways for such town or towns…"

In the 1736-1737 session of the General Court, the Act for Highways was amended again, to cover a situation that could only arise as a result of the 1726-1727 amendment. Since the 1726-1727 amendment added a requirement that the layout by the selectmen had to be approved by town meeting, the statute did not provide redress for a disappointed petitioner to appeal to the court of general sessions of the county in situations where the selectmen approved a layout but the town meeting failed to approve it. Accordingly, the Act was amended to provide that when a "town shall unreasonably refuse, or delay, to allow and approve of any private way laid out by the selectmen," then aggrieved persons "may have liberty to make their application to the court of general sessions of the peace held for that county in which the way lies…" St. 1736-1737, c. 14.

Accordingly, the 1763 Layout was accomplished under the legislative authority of the 1713-1714 amendment to the Act for Highways, granting the justices of the peace, sitting as the court of general sessions for the county, the right to lay out a way when the selectmen of a town had failed or refused to do so.[133]

Harvard argues that the 1763 Layout failed to comply with the requirements of the applicable statute (which was the 1713-1714 amendment to the Act for Highways). The statute required that the way be laid out "so as no damage be done to any particular person, in his land or propriety, without due recompence to be made either by the town, if it be of general benefit, or

[133] Harvard argues that the 1763 Layout was accomplished under the statutory authority of the 1736-1737 amendment to the Act for Highways. This is incorrect, as the 1736-1737 amendment applied to instances in which the selectmen had approved a way but the town meeting had failed to approve the selectmen's action. The difference is immaterial, as the language requiring that a way shall be approved "so as no damage be done to any particular person…" is identical in the 1713-1714 amendment and the 1736-1737 amendment.

otherwise by such of the inhabitants as have the benefit of such particular or private way..." Presumably to comply with this requirement, the 1763 Layout was approved on the "Condition that the Said Petitioners give the Land for the Road thro' their own Land and on no other."[134]

Later, and stricter, requirements for the layout of a public way under G. L. c. 82, §§ 26 and 27 (since repealed) did not yet apply in 1763. Although the Supreme Judicial Court has since required proof of strict compliance with G. L. c. 82 in order to establish a public way via layout, the version of the law that existed in 1763 did not contain a notice requirement, nor was the public authority laying out the way required to file a plan with the boundaries and measurements of the way in the town clerk's office, nor was the town required to obtain title to the land used for the way by a taking, gift, or purchase. See G. L. c. 82, § 24, as inserted by St. 1918, c. 257, § 209 (requiring that towns move to acquire the land necessary for a public way within a certain time period after the town meeting for accepting the layout in order for the layout to be effectual); St. 1727–28, c. 1, § 2; St. 1713–14, c. 8, § 2; *Loriol v. Keene*, 343 Mass. 358, 360, 361 (1961) (road did not become a public way via town layout where the town did not comply with G. L. c. 82, § 22's notice requirement, nor §23's requirement of filing of a plan with the town clerk, and the town meeting vote did not explain which part of the road was being accepted as a public way); *Harrington v. Harrington*, 42 Mass. 404, 407 (1840) (explaining what actions were necessary for layout prior to the enactment of R. S. 1836, c. 24, which provided several additional procedural requirements); *Hanig v. Town of Sudbury*, 29 LCR 330, 331-332 (2021) (Smith, J.) (road did not become a public way via town layout where the town board of selectmen did not acquire title to the road in 1957 by eminent domain or otherwise, as required by G. L. c. 82, § 24); *Carricorp Indus., Ltd. v. Town of Westport*, 14 LCR 6, 8-9 (2005) (Piper, J.) (road did not become a public way via town layout where the town board of selectmen did not

[134] Exh. 18, 1763 Layout.

acquire title to the road within 120 days after the 1979 town meeting voted to accept the layout, as required by G. L. c. 82, § 24).

Crucially, the only requirements for valid layout under St. 1713–1714, c. 8, § 2 were: (1) the appointment of a committee by the county to lay out the way; (2) the approval of the committee's layout by the county; and (3) a requirement that the layout be accomplished with no damage to landowners whose land was used for the road. St. 1713–1714, c. 8, § 2. The Town presented evidence showing that the requirements were met in this case.[135]

There is ample evidence, and I so find, that the statutory requirements for the laying out of a public (a "particular or private") way were complied with by the Middlesex County Court of General Sessions, and in particular, that the affected landowners gave their land for the road so as to comply with both the statutory requirement that the layout be accomplished so that "no damage be done" and with the condition requiring that the petitioners give their land for the road. The Court of General Sessions manifested its intention to lay out a public way by stating that the layout was for an "open way for the Inhabitants of Said Town of Concord & others."[136] Likewise, the Road was immediately assigned by the town selectmen to highway surveyors for maintenance in 1764.[137] See *United States v. 125.07 Acres of Land, More or Less,*, supra, 707 F.2d at 14.

2. *The condition on the 1763 Layout was a condition precedent, and the Town met its burden of proving the condition was satisfied*

Harvard argues that the 1763 Layout failed to comply with the condition that the land for the road be given by the affected landowners. Also, Harvard argues that this condition was a condition precedent to the layout, such that the layout would be ineffective unless the Town

[135] Exh. 18, 1763 Layout.
[136] Tr. I, p. 79; Exh. 18, 1763 Layout.
[137] Exh. 115-11, 1764 Surveyors Records.

could prove that the condition was achieved. See *Harrington v. Harrington*, supra, 42 Mass. at 408 (conditions contained in the town's vote to accept the layout of the board of selectmen, mandating who must build the road and defend the town against all lawsuits related to the building of the road, were conditions subsequent, which did not delay the effectiveness of the vote, but the condition that the landowner be paid for his land on which the road was to be built was a condition precedent).

Here, the layout stated,

> the further Return of the Said Committee was accepted by the court and order to be recorded to the End the Same may be known & after used for an Open Way on Condition that the said Petitioners give the Land for the Road thro' their own Land and on no others.[138]

I agree with Harvard that this language imposed a condition precedent, but I find that the Town has proven the condition was met.

"A condition precedent defines an event which must occur before a contract becomes effective or before an obligation to perform arises under the contract.... If the condition is not fulfilled, the contract, or the obligations attached to the condition, may not be enforced." *Mass. Mun. Wholesale Elec. Co. v. Town of Danvers*, 411 Mass. 39, 45 (1991) (citations omitted); see *City of Haverhill v. George Brox, Inc.*, 47 Mass. App. Ct. 717, 719 (1999) (there are two types of conditions precedent, one that "involves issues of offer and acceptance which precede and determine the formation of a contract" and one that "arises from the terms of a valid contract and defines an event which must occur before a right or obligation matures under the contract") (citations omitted). By contrast, "'[a] condition subsequent is a condition which relieves a party of the obligation of further performance' under a valid contract." *City of Haverhill v. George Brox, Inc.*, supra, 47 Mass. App. Ct. at 720, quoting *Wood v. Roy Lapidus, Inc.*, 10 Mass. App.

[138] Exh. 18, 1763 Layout.

Ct. 761, 764 n.6 (1980); see *Harrington v. Harrington*, supra, 42 Mass. at 408 ("[t]he effect of a condition subsequent is not to prevent the act to which it is annexed from taking present effect; but it may defeat it afterwards, or be attended with other legal consequences").

"Whether a condition is precedent or subsequent depends on the intent of the parties, to be collected from the nature of the case, and on the order of time in which the intent of the transaction requires the different acts to be performed." *Sears v. Fuller*, 137 Mass. 326, 328 (1884). Accordingly, in *Sears v. Fuller*, the Supreme Judicial Court determined that a town vote to discontinue a way, which stated that "the avenue is hereby discontinued, if the company will hold the town harmless," imposed a condition precedent rather than a condition subsequent, with the result that the failure of the company to first indemnify the town prevented the discontinuance from becoming effective. *Id.* In reaching this conclusion, the court reasoned that, "[a]ccording to the natural order of events, the company should perform its part to the satisfaction of the town before the vote of the town would take effect," because "[t]he town did not intend to discontinue the way without being indemnified against damages." *Id.*

I find that the circumstances here are akin to those in *Sears v. Fuller* and *Harrington v. Harrington*, making the condition that the petitioners give their land a condition precedent. The natural order of the transaction is that the land must be given to the town before the town could construct the way, otherwise the town would be usurping private property for its construction.

Accordingly, the Town was required to show that the condition precedent, that the landowners gave land for Estabrook Road, was met. See *Harrington v. Harrington*, supra, 42 Mass. at 408. The court knows of no authority which states that such evidence must be direct rather than circumstantial, and the Town has presented adequate circumstantial evidence from which the court infers that this condition was met. See *Martin v. Building Inspector of Freetown*,

supra, 38 Mass. App. Ct. at 511 (upholding the finding of a valid layout of a public way where the evidence was 1764 town meeting minutes referencing a 1763 layout by the selectmen and the vote to accept the layout by town meeting, with no direct evidence of the 1763 vote of the selectmen).

As described in more detail in Finding of Fact ¶ 24, supra, I find that the condition for the giving of land for the road was fulfilled. I base this finding on considerable circumstantial evidence that those landowners whose land was necessary for the construction of the road gave their land for the road. First of all, it is likely, and I so find, that at least some of the owners of land necessary for the road were among the unnamed "other" petitioners for the 1763 Layout (only Zaccheus Green "and others" were identified as the petitioners to the Court of General Sessions). Furthermore, as the description in the 1763 Layout makes plain, some of the road was already in existence as a road.[139] There is also ample evidence that soon after 1763, the road was in fact built on the ground, was in use, was being maintained, and that the landowners who would have been expected to be compensated or to have donated their land for the road, acknowledged and accepted its existence and even participated in maintaining it for the benefit of the Town. John Brown, one of those owners, was paid in 1765 for constructing a stone wall "along the new Road in the north part of the Town..."[140] In 1764, the selectmen assigned a highway surveyor to inspect and maintain "the new way Lately Laid out and the new way as far as the way goes through Capt. Jonathan Buttrick's pasture and northward."[141] Although we do not know the identities of all of the petitioners to the Court of General Sessions, we do know that Captain Buttrick, one of the owners affected by the layout, was a petitioner to the town meeting

[139] Exh. 18, 1763 Layout. The description of the layout includes portions described as follows: "...up the Hill as the road is now trod..." and "...to a black oak marked the Westerly Side of Said Way a little out of the old Way...." *Id.*
[140] Exh. 125, Records of Concord, Vol. IV, p. 250.
[141] Exh. 115-11, 1764 Surveyors Records; Tr. I, pp. 154-155; see also, Chalk B, Index of Annual Assignments to Surveyors of Highways.

on December 12, 1763 for approval of the alternate layout as approved by the Court of General Sessions.[142] I find that this is evidence that he gave his land for the road as laid out. In 1767, Captain Buttrick, in his will, witnessed by another owner of land along the road, David Brown, described his property as being bounded "easterly...on a County Road."[143] Just the next year, 1768, Captain Buttrick's son, Willard, conveyed the land he inherited from his father, describing it in part as "bound easterly on a Road lately laid out by the County..."[144] I find the will and the conveyance to be evidence that Captain Buttrick and David Brown gave their land for the road. David Brown also recognized the existence of the road in two deeds of his property in 1791 and 1795, describing the parcels he was conveying as bounded "Easterly on the county roade as the wall now stands...." and "Easterly on the County Road...."[145] Finally, Hugh Smith, in 1776, petitioned the selectmen, apparently seeking to take back the permission he had given for the use of his land for the road, promising, "I will yet pay back what I had for said Laid Road."[146] I find that this is evidence he had given his land for the road, or had actually been paid for it, and was now, thirteen years later, seeking to take back his permission, and was willing to pay back what he had been given for his land used for the road.

Based on the evidence described above, I find that the Town has carried its burden of proving that the northern disputed portion of Estabrook Road was laid out by the 1763 Layout, that the layout was accomplished in compliance with the applicable statute, and that the stated condition that "the said Petitioners give the Land for the Road thro' their own Land" was fulfilled.

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[142] Exh. 16, Town Warrant dated December 7, 1763; Tr. V, pp. 170-171; Exh. 17, Town Meeting Record dated December 12, 1763.
[143] Exh. 88, Will of Jonathan Buttrick dated February 5, 1767; Tr. I, pp. 158-159.
[144] Exh. 95, Deed from Willard Buttrick to Abel Prescott dated April 22, 1768.
[145] Exhs. 104, 103; Tr. II, p. 96-98.
[146] Exh. 135, Hugh Smith Petition dated 1776.

II. THE SOUTHERN DISPUTED PORTION OF ESTABROOK ROAD WAS ESTABLISHED AS A PUBLIC WAY

A. *The Southern Disputed Portion of Estabrook Road Is the Town Way to which the 1763 Layout Connected at its Southern Terminus*

The undisputed evidence places the southern terminus of the 1763 Layout at a location where "the Road is now trod to a Town Way thro' Said David Brown's Land." [147] The defendants dispute whether the Town Way referred to as connecting to the southern terminus of the 1763 Layout is the southern disputed portion of present-day Estabrook Road as it runs from near the southern end of Mink Pond to the gate near the Rasmussen driveway. As described in the Findings of Fact, above, I have found that the "Town Way" to which the 1763 Layout connects at its southern end is indeed the same as the present-day southern disputed portion of Estabrook Road, and this conclusion is supported by the opinions of both the Town's expert and in part by the defendants' expert. Other evidence at trial amply supported the opinion of the Town's expert, Mr. Vannozzi, (and the defendants' expert's concession) that the "Town Way" to which the 1763 Layout connected was the same as the southern disputed portion of present-day Estabrook Road. The road "now trod to a Town Way thro' Said David Brown's Land" in the 1763 Layout was shown to be the same as the "Road by Benjamin Clark's" referenced in the highway surveyors' records from the years 1754 to 1829.[148] The entries for fifty-seven of the years of the surveyors' records contain references to a road by Benjamin Clark's house.[149] The Town's highway surveyors' records from 1757 through 1763 mention a road "laid out" abutting Jonathan Buttrick's land and Benjamin Clark's house.[150] Likewise, a town meeting record from December 12, 1763, the day before the County accepted the 1763 Layout, explains that the

[147] Exh. 18, 1763 Layout; Tr. I, pp. 67-68; Tr. VI, pp. 78-79.
[148] Tr. I, p. 13; see generally Exhs. 115-1–115-59.
[149] Tr. I, pp. 133–137; see generally Exhs. 115-1–115-59.
[150] Tr. I, p. 136; Exhs. 115-4, 115-5, 115-6, 115-7, 115-8, 115-9, 115-10.

alternate layout adopted as the 1763 Layout, connects "to a way already laid out."[151] I credit Mr. Vannozzi's conclusion from this evidence that, prior to 1763, the Town had laid out a public way from at least as far north as the point of the southern terminus of the 1763 Layout, and leading at least as far south as Benjamin Clark's house.[152] From 1764 through 1767, the highway surveyors' records assigned a "new way" as "laid out," which Mr. Vannozzi interpreted as a reference to the 1763 Layout of the northern disputed portion of Estabrook Road.[153] I credit Mr. Vannozzi's conclusion that the language of the records from 1757 through 1763, in conjunction with those from 1764 through 1767, compels the inference that the road by Benjamin Clark's house, a previously laid out town way, was joined with the northern disputed portion of Estabrook Road via the 1763 Layout.[154] Beginning in 1768 through 1829, the surveyors' records no longer explicitly mentioned the "new way" laid out in 1763.[155] Instead, according to Mr. Vannozzi, because these records referenced Buttrick's land, Benjamin Clark's house, and the Concord-Carlisle town line as well as other landmarks along Estabrook Road, the records assigned Estabrook Road as laid out in 1763 and the Road to Benjamin Clark's as one continuous public way.[156] As such, the Town's interpretation of the "Town Way thro' Said David Brown's Land" covers the southern disputed portion of Estabrook Road from the southern end of Mink Pond past the gate near the Rasmussen driveway.

The defendants' expert, Mr. Arsenault, after essentially conceding in his deposition testimony (see Chalk S, containing his notation of the location of this part of the road) that the route of the southern disputed portion of Estabrook Road likely was at least in part the same as

[151] Tr. I, pp. 105–106; Exhs. 17, 18.
[152] Tr. I, pp. 105–106, 133–137, 140–141; Exhs. 115-4–115-10.
[153] Tr. I, pp. 136; Exh. 115-11–115-14.
[154] Tr. I, pp. 131–137, 140–142; Exhs. 115-4–115-14.
[155] Exhs. 115-15–115-59.
[156] Tr. I, pp. 141–144; Exhs. 115-15–115-59.

the route suggested by Mr. Vannozzi, attempted in his trial testimony to suggest that the road, although starting in the north at the southern end of Mink Pond, and ending in the south by Benjamin Clark's house, took a wayward, indirect route to the northeast in between those two points, perhaps running northeast through Mink Pond to "Legacy Trail or the Four Rod Way or it could extend southerly of that."[157] He did agree that the road by Benjamin Clark's house corresponded to a portion of Estabrook Road, but opined that this road to Benjamin Clark's began south of the Rasmussen gate.[158] Under this interpretation, the Town Way mentioned in the 1763 Layout ends north of the Rasmussen gate, and the road to Benjamin Clark's does not begin until after the Rasmussen gate, leaving a small but all-too convenient gap in the disputed area for which the defendants insist no town way or county way exists. I find this conclusion speculative, unlikely and untenable, as the defendants have not demonstrated any other route that likely was used to connect these two nearby points other than the direct route shown through Mr. Vannozzi's testimony. Accordingly, I credit Mr. Vannozzi's testimony that the road "now trod to a Town Way thro' Said David Brown's Land" referred to in the 1763 Layout was indeed the same as the "Road by Benjamin Clark's" referenced in the highway surveyors' records from the years 1757 to 1829, as well as his testimony that this preexisting road connected to the 1763 Layout, and the combined length became one continuous road along the same route as present-day Estabrook Road.

Having determined the location of the Town Way to which the road laid out by the 1763 Layout connected at its southern terminus, it remains to determine whether that Town Way was established by any of the methods recognized in *Fenn v. Town of Middleborough*, supra, 7 Mass. App. Ct. at 83–84. As discussed below, I conclude that the Town has failed to meet its burden of

[157] Tr. VI, pp. 102, 121, 132–137; Chalk S, Arsenault Deposition Exhibit 7, with David Arsenault's annotations.
[158] Tr. VI, pp. 149–151; Chalk S, Arsenault Deposition Exhibit 7, with David Arsenault's annotations.

proving the establishment of a public way under two of these methods, but has met its burden of proving the establishment of the southern disputed portion of Estabrook Road as a public way under the remaining two methods recognized in *Fenn.*

B. *The Town Did Not Carry Its Burden of Proving Direct Evidence of a Layout for the Southern Disputed Portion*

Although there is ample evidence that the 1763 Layout connected at its southern terminus to an existing "Town Way," and I have found that the Town Way referred to was in the location of the present-day southern disputed portion of Estabrook Road, the parties agree that there is no available record of the statutory layout of that section of the road. Specifically, the parties agree that "[t]here is no known and identified record of a layout by a public authority of the central portion of Estabrook Road extending from Barnes Hill Road north to the southern terminus of the 1763 layout."[159]

Proving the existence of a public way, via town layout, requires demonstrating that the statutory requirements of G. L. c. 82, §§ 21–24, or its predecessors, which govern the procedures for layout of town ways, were met. *Martin v. Building Inspector of Freetown*, supra, , 38 Mass. App. Ct. at 511. Accordingly, the Town was required to present evidence of the laying out by the board of selectmen and, if after the 1726-1727 amendment to the Act for Highways, the acceptance of the way by the town meeting. *W. D. Cowls, Inc. v. Woicekoski*, 7 Mass. App. Ct. 18, 20 (1979).

Layout by the selectmen and acceptance by town meeting may be proven with reference to various town documents, such as town meeting warrants or town meeting minutes in which the layout and acceptance are mentioned. *Martin v. Building Inspector of Freetown*, supra,, 38 Mass. App. Ct. at 511, 512; see *Newburyport Redev. Auth. v. Commonwealth,* 9 Mass. App. Ct.

[159] Agreed Facts at ¶ 11.

206, 213–220, 227, 223 (1980) (several ways had been laid out as public ways in compliance with the predecessors of G.L. c. 82, § 21 because there were records of the town board of selectmen voting to lay out the ways and of the town meeting voting to accept the ways, but the remaining ways were not because the parties did not present any such records); *Miguel v. Town of Fairhaven*, 25 LCR 631, 633 (2017) (Foster, J.) ("[a]nyone seeking to demonstrate that the public way was laid out should produce certified copies of both the appropriate town meeting warrant and the minutes or results showing what action was taken on the warrant article").

Here, the Town concedes that there is no record of layout by the board of selectmen or of the acceptance of the layout by town meeting for the southern disputed portion of Estabrook Road.[160] Lacking this crucial evidence, the Town has not met its burden to show that the southern disputed portion of Estabrook Road was laid out by this method as a public way. See *Newburyport Redev. Auth. v. Commonwealth*, supra, 9 Mass. App. Ct. at 227.

C. *The Town Has Not Proved Establishment of a Public Way by Dedication and Acceptance for the Southern Disputed Portion*

The Town argues that the southern disputed portion of Estabrook Road was established as a public way through dedication by the owners to public use, which was then accepted by the public. Specifically, the Town argues that

> [t]he area of Concord where Estabrook Road is located includes a tract of land known as the Twenty Score, which was part of the original land grant to the Town of Concord in 1635, and was divided into individual lots by the North Quarter proprietors of Concord in 1697. The parcels were given to different families, with portions of the Twenty Score held in reserve for common use, and already-existing ways were appointed through it to provide access to the residents. The division of the Twenty Score was accomplished by the proprietors, acting on behalf of the Town. The reservation of ways in the Twenty Score therefore constituted both a dedication to public use by the owners of the land and an acceptance of the ways by public authority.... Estabrook Road, and specifically the southern

[160] *Id.*

portion, was one of the ways reserved in the Twenty Score, based on ancient deeds and other records.[161]

Dedication, as a method for creating a public way, has not been available since 1846. *Longley v. City of Worcester*, 304 Mass. 580, 585 (1939). It was abolished through the passage of St. 1846, c. 203, presumably "to eliminate municipal liability for defects in streets which have not been formally laid out and established in the statutory manner." *Uliasz v. Gillette*, 357 Mass. 96, 104 (1970).

Creating a public way via dedication requires "a permanent and unequivocal dedication by the owner to public use, coupled with an acceptance by the public," both made prior to 1846. See *Sturdy v. Planning Bd. of Hingham*, 32 Mass. App. Ct. 72, 74 (1992) (finding sufficient evidence of dedication and acceptance where there were records of a town meeting in which the town voted to accept the road as a public way and of a subsequent meeting in which the proprietors unanimously agreed to the town's acceptance of the way).

Proof of the owner's dedication requires insight into "the intent of the owner which must be made manifest by his unequivocal declarations or acts to appropriate his land to a public use and to surrender its control to the public." *Longley v. City of Worcester*, supra, 304 Mass. at 586–587. This requirement for clear proof of intent is inconsistent with the Town's argument that dedication can be inferred from the 1697 document detailing the First Division of the Twenty Score, in which proprietors' ways were reserved.[162] Based on the testimony of Harvard's expert witness, Dr. Donahue, an expert on colonial landholdings in Concord, the land abutting these proprietors' ways was privately owned since approximately 1653.[163] I credit Dr. Donahue's testimony that the Twenty Score was a grant of about 360 acres of land from the Town to twenty

[161] Joint Pretrial Memorandum at 4–5.
[162] Exh. 4, First Division of the Twenty Score Records.
[163] Tr. V, pp. 140–143.

private landowners, which transformed this acreage from publicly owned land to exclusively privately owned land.[164] The fact that these proprietors subsequently agreed among themselves in 1697 to divide the land and reserve roads for their own common use falls short of the required "unequivocal declaration" to dedicate their land to public use. See *Longley v. City of Worcester*, supra, 304 Mass. at 586–587.[165] The Town has failed to present any evidence that the proprietors had public use in mind when dividing the land in the Twenty Score, instead of, as Dr. Donahue has suggested, common use by the private landowners. See *Dolan v. Bd. of Appeals of Chatham*, 359 Mass. 699, 701–702 (1971) ("[t]he mere recording of a development plan is insufficient to dedicate to the public a way shown on the plan"); *Uliasz v. Gillette*, supra, 357 Mass. at 104 (evidence that owner recorded his development plan and subsequently conveyed lots by descriptions which referred to the plan did not establish a dedication to public use of the streets shown on the plan).[166]

Similarly, the reference to a Two Rod Way that aligns with some of the southern disputed section of Estabrook Road in the 1730 deed from the Twenty Score proprietors granting land to Jonathan Harris is also insufficient evidence of dedication.[167] There is no language in the 1730 deed that expresses an intent to dedicate this way to public use, much less the requisite unmistakable intent to do so. See *Longley v. City of Worcester*, supra, 304 Mass. at 586–587. Rather, the only information to be gleaned from the 1730 deed to Harris is that an existing Two Rod Way, which could have been public or private, already ran through Harris's land along the western edge of lot 1438, as shown on Chalk A.[168]

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[164] Tr. V, pp. 141–143.
[165] Exh. 4, First Division of the Twenty Score Records; Tr. V pp. 143–145.
[166] Tr. V, pp. 145–149.
[167] Exh. 72, Deed from William Wilson et al. to Jonathan Harris dated January 7, 1730 or 1731.
[168] Tr. II, pp. 156–159; Exh. 72, Deed from William Wilson et al. to Jonathan Harris dated January 7, 1730 or 1731.

Unlike proving dedication, a proponent may prove public acceptance of the dedicated land through express terms or by implication. *Loriol v. Keene*, supra, 343 Mass. at 360. Use by the public has some tendency to imply acceptance, but by itself is insufficient evidence and is not a necessary element. *Hayden v. Stone*, 112 Mass. 346, 350 (1873); *Newburyport Redev. Auth. v. Commonwealth*, supra, 9 Mass. App. Ct. at 227. Here, the Town did not point to any evidence of express acceptance of the dedicated land, such as by a town meeting vote. See *Sturdy v. Planning Bd. of Hingham*, supra, 32 Mass. App. Ct. at 74–75. Instead, the Town contends that such acceptance was implied. Even assuming the Town made the requisite showing for implied acceptance, lacking any clear evidence of dedication to public use by the proprietors, the Town's dedication theory must fail. See *Cushing v. Nelson*, 13 LCR 81, 82 (2005) (Lombardi, J.) (where the record was devoid of evidence both of dedication by the landowners for use of the land as a public way and express acceptance by the town of Hingham, acceptance could not be implied by official town documents that referred to the way and ancient maps that depicted the way). Without evidence of dedication, the "inferential evidence of acceptance alone" cannot prove the establishment of a public way. See *id.*, citing *Fenn v. Town of Middleborough*, supra, 7 Mass. App. Ct. at 84. Accordingly, the Town has not proven dedication or acceptance as a public way of the southern disputed portion of Estabrook Road.

D. *Both the Southern Disputed Portion of Estabrook Road and the Northern Disputed Portion Otherwise Established by the 1763 Layout Were Established as a Public Way by Prescription*[169]

Establishing a public way via prescription requires "showing the continuous, open, notorious, and adverse use of another's land, conducted under a claim of right, for a period of twenty years." *McLaughlin v. Town of Marblehead*, 68 Mass. App. Ct. 490, 499 (2007), citing

[169] With respect to the northern disputed portion of the road, established by the 1763 Layout, this finding serves as an alternative finding to the finding that the northern disputed portion of Estabrook Road was properly laid out as a public way in compliance with the applicable statutory procedure in 1763.

Daley v. Town of Swampscott, 11 Mass. App. Ct. 822, 827 (1981). Furthermore, "where the entity asserting the right to a prescriptive easement is a town, corporate action is required." *Id.* at 499, citing *Daley v. Town of Swampscott*, supra, 11 Mass. App. Ct. at 827–828. Generally, establishment of a public way by prescription may be shown by evidence that members of the community have used the disputed roadway, and that the town has maintained the roadway to provide for such use, continuously for more than twenty years. *Athanasiou v. Bd. of Selectmen of Westhampton*, 92 Mass. App. Ct. 94, 98 (2017). The Town has offered sufficient evidence from which to find continuous and adverse use for the requisite time frame as well as the necessary corporate action by the Town.

1. *The general public used the disputed portion of Estabrook Road openly, notoriously, adversely and continuously for more than twenty years*

The use by the public element required to establish a public way through prescription contemplates use by the general public, and not just by abutters as they might use a private way. As Justice Kass has written, the requirement of "public use" by members of the community "connotes use by the general public." *Carmel v. Baillargeon*, 21 Mass. App. Ct. 426, 429 (1986). Where the use is limited to the individuals who own land along the way, the court may find a private easement by prescription, but cannot find a public way. *Id.* at 430. Accordingly, the Town's contention that families living along the road used Estabrook Road to travel to church, market, and town meeting has no bearing on whether the court will find continuous, open, notorious, and adverse use of the road by the general public. See *id.* at 429, 430.[170]

A presumption of adverse use arises when "the general public used the way as a public right," and this must be proven "by facts which distinguish the use relied on from a rightful use by those who have permissive right to travel over the private way." *Town of Boxborough v.*

[170] Tr. III p. 87.

Joatham Spring Realty Tr., 356 Mass. 487, 490 (1969), quoting *Bullukian v. Inhabitants of Town of Franklin*, 248 Mass. 151, 155 (1924). The "amount, character, and duration of the use of a way by persons who had no lawful right to use it" are factors which may show that such use occurred under a claim of right. *Sprow v. Bos. & A.R. Co.*, 163 Mass. 330, 340 (1895).

For example, in *Daley*, the court upheld the trial judge's finding that the general public had used the disputed land under a "mistaken" claim of right because there was evidence that, for the previous thirty summers or more, about twenty-four people on weekdays and about 150 or 200 people on weekends engaged in activities on the land such as "lying on blankets, sitting in chairs, sitting on the sand ... kicking beach balls around ... (and) general beach activity." *Daley v. Town of Swampscott*, supra, 11 Mass. App. Ct. at 825, 829–830. Likewise, in *Carson v. Brady*, the Supreme Judicial Court held that there was sufficient evidence of continuous and adverse use by the public where: (1) between 1878 and 1918, ice cut from two ponds nearby was transported over the disputed road; (2) garbage had been hauled over the road to two piggeries for twenty-one years; (3) the city maintained a dump nearby for a number of years, hauling the refuse over the road; (4) a "substantial amount of gravel" was transported "practically continuously" over the road for more than forty years; and (5) the road was "considerably damaged by such heavy traffic." 329 Mass. 36, 38–39, 40 (1952).

On the contrary, the Supreme Judicial Court held, in *Gower v. Town of Saugus*, that the evidence was incompatible with public use under a claim of right where the disputed way had been used by mail carriers, workers who came to read gas and water meters, electricians working on telephone poles, police and firefighters on rare occasion, pedestrians and cars on occasion, and people who lived on the side streets. 315 Mass. 677, 681–682 (1944). This evidence was "entirely consistent" with the use of the way "as a private way for the benefit of lot owners in the

development, including, of course, persons and public officers having occasion to see them or to deal with them or with their property." *Id.* at 682. Because this was the "kind of use that would be made of any private way connecting private dwellings with a public road," the general public had not used the road adversely. *Id.;* see *Newburyport Redev. Auth. v. Commonwealth*, supra, 9 Mass. App. Ct. at 227 (evidence that portions of the disputed ways were used by the general public to access businesses did not prove use under a claim of right rather than use "at the invitation or with the permission of the owners").[171]

I find there to be evidence, described as follows, of open, notorious, and adverse use by the general public, for the requisite twenty years or more in several respects, along with sufficient evidence of corporate municipal action, to carry the Town's burden on its prescriptive easement claim.

Use of the road by the public generally. The plaintiff's historical archaeologist, Kristen Heitert, testified, and I credit her testimony, that early settlement patterns in Concord, from the 17th and into the 19th centuries, involved large families that were intermarried, physically dispersed across Concord and the area that later became Carlisle, and did business with one another and maintained other ties over time.[172] Estabrook Road would have been used by families "on both sides of the Concord and Carlisle line as a direct route between Concord and Carlisle centers to--for commercial, family, social, religious and civic purposes."[173] I find that this traffic on Estabrook Road between Concord and the northern area that became Carlisle, after

[171] Adverse use cannot be established if there is evidence that the true owner permitted the general public to use the disputed land. See *Spencer v. Rabidou*, 340 Mass. 91, 93 (1959) (evidence of landowner's permission rebuts presumption of adverse use); *McLaughlin v. Town of* Marblehead, supra, 68 Mass. App. Ct. at 501 (documentation of the town's discussions with the landowners of the way, during which the landowners volunteered to install steps at the end of the way, suggested that any town use of the way was permissive, not adverse). Here, the defendants have not presented evidence that the use of the disputed portion of Estabrook Road was with permission from the true owners.

[172] Tr. III, p. 83.

[173] Tr. III, p. 87.

establishment of the 1763 Layout, would include the entire length of the northern and southern disputed portions of Estabrook Road, from the present Carlisle town line in the north, along the present Estabrook Road, at least as far south as past Benjamin Clark's house in the south. After the separation of Carlisle from Concord in 1780, this traffic, although it might have diminished somewhat as Carlisle drew some to its meeting house, would have continued into the 19th century. Those using the road would include not only those, like the Kibbys, who lived along the route, but also those who were from Carlisle, north of the northern end of Estabrook Road, and were using the road as members of the public to get to Concord center for market and other purposes. Thus, the use of the road was not the type of use that might have been made of any private way, as was rejected by the court in *Gower v. Town of Saugus,* supra, 315 Mass. 677.

Commercial use of the road. Continuous use over a period of thirty to forty years by workers at the limestone quarry and lime kiln also independently establishes the Town's prescriptive easement claim, because it demonstrates adverse use, occurring over the length of the road, and for a sufficient duration of time. See *Boothroyd v. Bogartz*, 68 Mass. App. Ct. 40, 46 (2007), citing *Hoyt v. Kennedy*, 170 Mass. 54, 56–57 (1898) ("[t]o establish a way by prescription, the use must be, not only open, adverse, uninterrupted, peaceable, continuous, and under a claim of right, but must be confined substantially to the same route"). In testimony that I credit, Ms. Heitert testified that the quarry was in operation from the 1760s to approximately 1800.[174] She explained that the work was "extremely labor-intensive," and as a result, required three to six men to work at the lime quarry at a time.[175] According to Heitert, the work would have been performed throughout the duration of the winter months.[176] Crucially, although the lime quarry and lime kiln are "immediately east and adjacent to Estabrook Road between the

[174] Tr. III, p. 79.
[175] Tr. III, p. 78.
[176] Tr. III, p. 82.

Estabrook Place and Mink Pond," an area which is part of the northern disputed portion of the road laid out in 1763, rather than the southern disputed portion of the road, the use of the road in connection with the limestone operation was not limited to the northern portion of the road. After the limestone was excavated from the quarry, it "would then be carted from the quarry pit, loaded on to a cart and taken south along Estabrook Road to the lime kiln."[177] Then, because the workers needed firewood and water for the kiln, "firewood would have come from the woodlands to the north of the lime quarry and the kiln and would have been taken south along Estabrook Road to the kiln," and water was taken south from Sawmill Brook.[178] Lastly, "the finished product would have proceeded south along the road into Concord center or would have ... also been used for the surrounding fields."[179] This final step establishes the requisite use of not only the 1763 Layout portion of the road, but the southern disputed portion as well. See *Boothroyd v. Bogartz*, supra, 68 Mass. App. Ct. at 46, citing *Hoyt v. Kennedy*, supra, 170 Mass. at 56–57 ("[t]o establish a way by prescription, the use must be... confined substantially to the same route").

Ultimately, the regular, seasonal traffic of workers moving "up and down Estabrook Road" while "hauling limestone and wood, tending the kiln and monitoring the burn, and hauling out the finished lime" from the 1760s to 1800 is closer to the factual scenario in *Carson* than in *Gower*. See *Carson v. Brady*, supra, 329 Mass. at 38–39, 40; *Gower v. Town of Saugus,* supra, 315 Mass. at 682. The use of both the northern, 1763 Layout portion of the road, and the southern disputed portion, from the southern end of present Mink Pond, past Benjamin Clark's house and into Concord center, for thirty to forty years by limestone workers throughout the winter months establishes the elements of prescriptive use, which have not been rebutted. See

[177] Tr. III, p. 78.
[178] Tr. III. pp. 78-79.
[179] Tr. III, p. 81.

Spencer v. Rabidou, supra, 340 Mass. at 93 (evidence of landowner's permission rebuts presumption of adverse use); *Sprow v. Bos. & A.R. Co.*, supra, 163 Mass. at 340 (the "amount, character, and duration of the use of a way by persons who had no lawful right to use it" may raise a presumption of adverse use).[180]

The use of Estabrook Road for logging for many years in the 19th century is another commercial use of Estabrook Road that was shown to have (1) occurred over a period of many years and (2) been in the nature of a use by the public. At the time, the Town considered this use to be a use of a town way requiring the expenditure of public funds to support the resulting need to repair the road. Town Road Commissioners' Reports including those in 1877 and 1890 lamented the heavy damage being done as a result of logging activities, to Estabrook Road and other "wood roads" that the reports acknowledged were town ways. The reports discussed this as a continuing problem and continued to authorize the use of public funds to repair the annual damage resulting from "logging" and the "cutting of brush" along Estabrook Road and other roads.[181] As maintenance funds were spent for repair of Estabrook Road in years both before 1877 and considerably after 1890, and as this use would have had to involve substantially the entire disputed portion of the road in order to transport logs to a mill, I find that this adverse use of the entirety of the disputed portion of Estabrook Road was continuous for more than twenty years.

Use of Estabrook Road in the 19th century. Although by 1890 Estabrook Road was "seldom used...except for cutting of brush,"[182] I have found (see Findings of Fact ¶¶ 48–53, supra) that throughout much of the 19th century, Estabrook Road continued to be used by

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[180] Tr. III, p. 165.
[181] See Exh. 122, Annual Report of the Officers of the Town of Concord pp. 8 (Road Commissioners' Report for 1877), 21 (Road Commissioners' Report for 1890).
[182] *Id.* at p. 21 (Road Commissioners' Report for 1890).

members of the public, and I find that the evidence as a whole indicates, and I so find, that this use of Estabrook Road by the public was not sporadic, but rather was conducted openly, notoriously, adversely and continuously for more than twenty years.

The "paradise for walkers" described by Thoreau in 1853 included the whole of Estabrook Road, complete with references to many of the landmarks still present along Estabrook Road, including what is today known as the Kibby Cellar Hole, the limestone quarry, the lime kiln and the Oak Meadow, today's Mink Pond.[183] In 1866 and 1886, Ralph Waldo Emerson's daughter Ellen Tucker Emerson described pleasure rides along Estabrook Road, including going through the "lime-kiln field..."[184] An 1897 travel guide described Estabrook Road "for about four miles between Concord and Carlisle" as "one of the favorite summer drives."[185] An ornithologist described field trips on Estabrook Road in the winter and spring of 1892.[186] Examining this evidence as a whole, I infer, and so find, that from the mid- to late-19th century, Estabrook Road was being used by members of the general public for purposes including nature walks, picnicking and pleasure drives, that this activity occurred openly and notoriously, and without permission for more than twenty years. I specifically find that this activity was not sporadic; that it was in fact frequent enough, accessible enough, well-known enough and easy enough to accomplish that by 1897 Estabrook Road was listed as a "favorite summer drive" in a local travel guide to "Walks and Rides to the Country Round Boston."[187] As Thoreau, Emerson, Bacon and Brewster freely described their access to and use of Estabrook Road over a period spanning nearly half a century, it is a fair inference, which I draw, that many other members of the public who did not record their trips for posterity, were also using

[183] Exh. 118, "The Journal of Henry David Thoreau" p. 238.
[184] Exh. 119, "The Letters of Ellen Tucker Emerson" pp. 405, 572.
[185] Exh. 120, Edwin M. Bacon, "Walks and Rides in the Country Round Boston" p. 205.
[186] Exh. 121, "Concord Journals and Diaries of William Brewster"; Tr. III, pp. 109-110.
[187] Exh. 120, Edwin M. Bacon, "Walks and Rides in the Country Round Boston."

Estabrook Road in similar fashion over this entire period.

2. *The Town of Concord Took Corporate Action with Respect to the Disputed Portion of Estabrook Road.*

As described in the Findings of Fact, supra, there is ample evidence not only that the general public used Estabrook Road openly and notoriously and adversely for the requisite period, but that the Town maintained the road to facilitate its use by the general public. See *Athanasiou v. Bd. of Selectmen of Westhampton*, supra, 92 Mass. App. Ct. at 98. As the evidence demonstrated, the Town was aware of the use of the road, and was especially aware of the damage being done by logging activities, and yet continued to maintain the road through the late 19th century and into the 20th century, as late as 1930.[188] Ultimately, the Town itself participated in the prescriptive use of Estabrook Road, when, in 1899, the selectmen authorized New England Telephone & Telegraph Co. to install telephone utility poles along the entire length of Estabrook Road from the Carlisle town line in the north all the way south to Liberty Street, encompassing the entire disputed length of Estabrook Road.[189] These poles apparently remained in place at least through the 1932 discontinuance order of Estabrook Road by the county commissioners. There is no suggestion that the selectmen sought the permission of any abutting landowners to grant the approval.

E. *The Town Carried Its Burden of Proving Establishment of Estabrook Road as a Public Way by Circumstantial Evidence of a Layout at Some Anterior Time the Records of Which Were Lost*

1. *There was sufficient evidence from which to find that the southern disputed portion of Estabrook Road had been laid out as a public way, although no direct evidence of the layout was produced*

The Town offered the following circumstantial evidence to establish that the southern disputed portion of Estabrook Road was laid out, but that the record of such layout was

[188] See, e.g., Exh. 122, Annual Report of the Officers of the Town of Concord.
[189] Exh. 123, Selectmen Grant of Location to NE T&T dated October 2, 1899.

presumably lost: (1) the road was a primary route to access Concord Center for the inhabitants living in the north quarter of Concord; (2) the road bed still in existence today runs by old homesteads and a limestone quarry and lime kiln, and is lined with stone walls; (3) the road was maintained by the Town; (4) ancient documents, including the 1763 Layout, refer to the southern disputed portion (the "Road by Benjamin Clark's") as a Town Way; (5) the road was featured on maps and other historic records; (6) the Town formally renamed the road in 1889; and (7) the county commissioners voted in 1932 to discontinue the road as a public way.[190]

The Town's argument proceeds from the following dicta in *Fenn*, which left open the opportunity for parties to establish the existence of a public way through circumstantial evidence when direct evidence of a statutory layout was not available:

> We have also considered whether [a finding that a road is a public way] can be sustained...on the basis of a factual inference from the evidence taken as a whole that the ways in question were laid out at some anterior time and that the record thereof has been lost...We do not mean to preclude the possibility of showing that a way is public, as, for example, by means of ancient maps or other records, without showing the means by which the way came to be public...Although we have not found a case in this Commonwealth in which a way has been held public solely on the basis of such evidence, unsupported by evidence from which the way could be found public by adverse use continuous and uninterrupted for the requisite period, we know of no principle which would bar the proving of a public way on such evidence.

Fenn v. Town of Middleborough, supra, 7 Mass. App. Ct. at 87. There is at least one case since *Fenn* in which a public way has been determined to have been established on the basis of circumstantial evidence, without direct proof of statutory layout by the town's selectmen or the county as required by statute. Although the case purported to hold that the road in question was established as a public way by direct evidence of laying out by a public authority, the facts in *Martin v. Building Inspector of Freetown*, supra, 38 Mass. App. Ct. 508, show otherwise.

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[190] Joint Pretrial Memorandum at 5–6.

As discussed above, by 1763, the statutory procedure in effect for laying out of public ways (referred to as "particular or private ways") required the layout to be adopted by a vote of the board of selectmen, and then endorsed by a positive vote of the town meeting. St. 1727, c. 1, § 2; see *Moncy v. Planning Bd. of Scituate*, supra, 50 Mass. App. Ct. at 718 ("[P]assage of the Laws of the Province of 1727 requir[ed] town meeting acceptance of town ways *laid out by selectmen*") (emphasis added). The actual layout was made by the selectmen, and the layout became effective upon vote of the town meeting. *Martin v. Building Inspector of Freetown*, supra, 38 Mass. App. Ct. at 511. In *Martin*, it was asserted that the road in question had been laid out by the Freetown board of selectmen in 1763. *Id.* However, the only evidence offered with respect to the layout by the selectmen was a reference to the 1763 layout in the town warrant for the 1764 town meeting, to the road "lately laid out by the selectmen of Freetown on June 7, 1763." *Id.* There followed a notation that the warrant article was "voted" at the town meeting, presumably indicating acceptance by the town meeting. *Id.* No petition to the selectmen, minutes of the selectmen's meeting, records of votes, or other direct evidence of the actual layout and vote by the selectmen on June 7, 1763 to lay out the road was offered. *Id.* This evidence, accepted by the trial court and the Appeals Court, along with little else other than a 1979 U. S. Geological Survey map on which the ancient road could be traced, was sufficient to establish the layout of the public way in 1763, on the basis of the statutory scheme in effect since 1727. *Id.* Notwithstanding the assertion in *Martin* that the road was proved to be a public way by the "third [*Fenn*] method," this was actually an acceptance of proof of a public way by the fourth *Fenn* method— by circumstantial evidence of the layout of a public way and circumstantial evidence that the layout itself has been lost (or in the case of *Martin*, mere circumstantial evidence of the layout).

In the present case, the circumstantial evidence of the layout of the southern disputed portion of Estabrook Road prior to 1763 is, as I have found, considerably stronger than the circumstantial evidence accepted as sufficient in *Martin*.

We start with the undisputed fact that in 1763, when describing the "alternate" and ultimately chosen layout for the 1763 Layout of the northern portion of Estabrook Road, the county court of general sessions described the southern terminus of the 1763 Layout as connecting to an existing town way: "as the Road is now trod to a Town Way thro' Said David Brown's Land."[191] I have already found, crediting both Mr. Vannozzi's testimony and Mr. Arsenault's admission in deposition testimony (see Chalk S), that the town way referred to connected directly to the southern terminus of the 1763 Layout and is the southern disputed portion of Estabrook Road, running from the southern terminus of the 1763 Layout to the gate near the Rasmussen driveway, in the same location today as it was in 1763.[192] There is also no dispute that just south of the southern end of the disputed section of Estabrook Road lies Benjamin Clark's house, still standing today, and which is shown on maps dating as early as 1754, and which is referred to in town surveyors' records describing "the way by Benjamin Clark's as far as the way is Laid Out."[193] Town records after 1763 continued to refer to the southern disputed portion of Estabrook Road as connecting to the 1763 Layout: "the way by Benjamin Clarks & so by Harris's to the new way Lately Laid out."[194] The references to the road "by Harris" were, I have found, references to the two-rod way and four-rod way that are the southern disputed portion of Estabrook Road.

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[191] Exh. 18, 1763 Layout; Tr. II, p. 100. "The exact end point of the 1763 [Layout] is at a town way." Tr. II, p. 131.
[192] Exhs. 18, 115.
[193] Tr. I, 61, 133-135; Tr. VI, p. 69; Exh. 24, 1754 Map of the North Quarter of Concord; Tr. I, pp. 135-136; Exh. 115-9, 1762 Surveyors Records; see Exhs. 115-5, 115-6, 115-7, 115-8.
[194] Exh. 115-11, 1764 Surveyors Records.

In further support of the conclusion that the southern disputed portion was a public way in existence prior to 1763 is evidence of its physical existence in the early part of the 18th century. The evidence of the physical condition of the disputed portion of the road, which was conducive to travel in comparison to alternate neighboring trails, also weighs in favor of the inference that the southern disputed portion of the road was previously laid out. Contrast *Witteveld v. City of Haverhill*, supra, 12 Mass. App. Ct. at 876 (holding that "[t]here was ample evidence to support the judge's findings that no public way existed in the disputed area" given "the path of the claimed way was overgrown with trees and other vegetation; the precipitous rise and fall in grade which made driving a car over that path improbable; the exceedingly meagre use by the public of the area in dispute during the last seventy-five years; and the absence of Old Road from any current Haverhill maps"). I credit the testimony of the Town's expert, historical archaeologist Heitert, that the neighboring Hugh Cargill Road, running south of the lime kiln, was "extremely steep and extremely rocky, not an ideal place in any respect to be pulling cart loads of raw materials or finished lime back to Lowell Road," whereas "Estabrook Road by comparison is level and passable along its length, with no real impediments to cart travel."[195] Similarly, Ms. Heitert testified that Estabrook Road was "lined continuously on both sides with stone walls, apart from a few segments," was surrounded by "a great deal of topography on both sides," and "winds its way around the flatter sections of the landscape where that's possible."[196] She dated the stone walls to the mid-18th century.[197] She also observed and testified that the Road was "level along its length," and had a "consistent, roughly 30-foot [about two rods] width."[198] I credit her testimony as circumstantial evidence that a public road had been laid out

[195] Tr. IV, pp. 54–55.
[196] Tr. III, pp. 47, 55–56; Chalk I, Topographic Map with Estabrook Road Marked.
[197] Tr. III, pp. 60–62.
[198] Tr. III, p. 56.

south of the 1763 Layout on the southern disputed portion of Estabrook Road. Evidence that the Town assigned the southern disputed portion of Estabrook Road to surveyors for maintenance as early as 1757, as noted in the discussion on the Town's prescription claim, is also relevant evidence from which to infer a layout. *Fenn v. Town of Middleborough*, supra, 7 Mass. App. Ct. at 87.[199] Also relevant to this conclusion is the use of the road by members of the general public from the 18th century through the 19th century as described in the previous section on the prescriptive use of the road.

Finally, the fact that the Town, or the county, in later years, considered Estabrook Road to be a public way, even when making the decision to discontinue it as a public way, while not dispositive, is further evidence from which the court may find, as I do, that the southern disputed portion of Estabrook Road was a public way. The parties agree that Estabrook Road from the Concord-Carlisle town line to Raymond Emerson's driveway, encompassing the northern disputed portion and the southern disputed section of the road, was subject to a discontinuance order by the Middlesex county commissioners acting under G. L. c. 82, § 32A, as inserted by St. 1924, c. 289, in 1932.[200] The 1932 discontinuance order permits the inference that the discontinued portion of Estabrook Road had been established as a public way prior to 1932. See *Witteveld v. City of Haverhill*,, supra, 12 Mass. App. Ct. at 876 ("While the discontinuance...permitted the inference that [the road in question] was a public way, it did not compel that inference."); see also *Rivers v. Town of Warwick*, 37 Mass. App. Ct. 593, 595 (1994) (inference of public way by reason of discontinuance may be permissible depending on facts of case). In *Rivers v. Town of Warwick*, supra, many roads were discontinued by one sweeping order, resolving uncertainty as to their status but with no prior determination that all of them had

[199] See generally Exhs. 115-4–115-59.
[200] Exhs. 55–58; Agreed Facts at ¶ 24–33.

been public ways. 37 Mass. App. Ct. at 595 (application of the inference "makes no sense in the circumstances of this case, where it is clear that the vote of discontinuance applied to large numbers of roads and was intended to resolve the uncertainty as to the legal status of these roads by discontinuing any that might be public ways"). Unlike the facts in *Rivers*, the facts in the present case support the application of the inference. Here, only Estabrook Road was discontinued by the 1932 discontinuance order of the county commissioners. As described in the findings above, the Town had been reluctantly maintaining what it considered to be a seldom used public road for many years, and the likely impetus for the discontinuance was the desire to stop expending funds to maintain a road that town officials had long considered to be a town way and had maintained on that basis. The "negative inference" drawn from the discontinuance of Estabrook Road, that it was being discontinued because it had been a public way, is apt.

2. *There was sufficient evidence from which to find that direct evidence of the layout of the southern disputed portion was lost to time.*

Although it is not at all clear that the fourth method of proving the existence of a public way described in *Fenn* requires actual proof of the loss of the records of the statutory layout of the road, (see *Martin v. Freetown*, supra, in which no such showing was made or required) I have found that the Town has carried its burden if it needs to do so. The two-rod way and the four-rod way by the Harris farm make up the southern disputed portion of Estabrook Road. Although they are of unknown origin, however they were laid out, it was prior to 1730. The two-rod way in particular, going through the Harris farm and north toward the land of Ephraim Brown, also part of Estabrook Road, had to have been laid out prior to 1730, as it was referred to in the 1730 or 1731 deed from the proprietors to Jonathan Harris.[201]

[201] Exh. 72, Deed from William Wilson et al. to Jonathan Harris dated January 7, 1730 or 1731.

Thus, town records of the layout of the two-rod way and the four-rod way that make up the southern disputed portion of Estabrook Road would have been kept in the Quarter books that the town began requiring the proprietors of the North, South, and East Quarters to keep of their land transactions and maintenance of roads beginning in 1654.[202] Records of the layout of the four-rod way and the two-rod way that comprise the southern disputed portion of Estabrook Road would have been kept in the North Quarter book. As I have found, records of land transactions, and likely also records of road layouts prior to 1731, would have been kept in the Quarter books, and I have credited the testimony of the town clerk that the North Quarter book for this period cannot be found.[203] Thus, it is fair to conclude, as I do, that direct evidence of the layout of the southern disputed portion of Estabrook Road has been lost.

III. THE 1932 ORDER OF THE COUNTY COMMISSIONERS CHANGING THE STATUS OF ESTABROOK ROAD TO A "PRIVATE WAY" DID NOT TERMINATE THE PUBLIC'S RIGHT OF ACCESS TO THE ROAD

The parties agree that the entirety of the disputed portion of Estabrook Road, running from the Carlisle town line in the north to Raymond Emerson's driveway (now the Rasmussens' driveway) in the south, was subject to an order in 1932 by the Middlesex county commissioners pursuant to G. L. c. 82, § 32A, as inserted by St. 1924, c. 289 ("the original § 32A"), "adjudicating" its status from "public way" to "private way."[204] The parties disagree as to the legal effect of this change in the status of Estabrook Road on the public's right of access over the disputed portion of Estabrook Road. The Town contends that the public's right of access remained intact because the change of status of the road to "private way" under the original § 32A operated merely as a discontinuance of the Town's obligation of maintenance. The defendants argue that the change in status terminated the public's right of access over the

[202] Exh. 2, Records of Concord, Vol. I, pp. 163-165.
[203] Tr. IV, pp. 95, 99-100.
[204] Exhs. 55–58. Agreed Facts at ¶ 24–33.

disputed portion of the Road, making it a private way owned entirely by the abutters to the way. I find and rule that the Town's interpretation is correct, based on the language of the statute, its legislative history, the statutory scheme of which it is a part, and the considerable case law pertaining to the use of the terms "private way" and "public way." I conclude that following the 1932 discontinuance order changing the status of Estabrook Road to a private way, the only thing that was discontinued was the Town's obligation to maintain the road, and it otherwise continued to be subject to a right of access by the public.

A. The Language of G. L. c. 82, § 32A Is Ambiguous

Under G. L. c. 82, § 32A, inserted by St. 1924, c. 289, county commissioners could decide, at a minimum, that a town was no longer required to maintain a given town way in a condition safe for travelers. G. L. c. 82, § 32A, inserted by St. 1924, c. 289. Its effect on public access is a question of statutory interpretation.

The first step in statutory interpretation is to examine the actual language of the statute at issue. *Int'l Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 853 (1983); see *Bronstein v. Prudential Ins. Co. of Am.*, 390 Mass. 701, 704 (1984) (where the statutory language is clear, it must be given its plain meaning, because "the statutory language is the principal source of insight into legislative purpose"). The language of G. L. c. 82, § 32A has been amended twice since it was enacted in 1924. Compare St. 1924, c. 289, with St. 2006, c. 336, §§ 29, 30, and St. 1983, c. 136. The original § 32A provided

> Upon petition in writing of the board or officers of a town having charge of *a public way*, the county commissioners may, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for travel, *adjudicate that said way shall thereafter be a private way* and that the town shall no longer be bound to keep the same in repair, and thereupon such adjudication shall take effect; provided, that sufficient notice to warn the public against entering thereon is posted where such way enters upon or unites with an existing public way. This section shall not apply to ways in cities.

G. L. c. 82, § 32A, inserted by St. 1924, c. 289 (emphasis added). In 1983, the statute was rewritten by St. 1983, c. 136 ("1983 amendment to § 32A"), to provide in relevant part as follows:

> The board or officers of a city or town having charge of a public way may, after holding a public hearing, notice of which shall be sent by registered mail, return receipt requested, to all property owners abutting an affected road and notice of which shall be published in a newspaper of general circulation in the city or town... upon finding that *a city or town way or public way* has become abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said town way or public way to be maintained in a condition reasonably safe and convenient for travel, shall declare that the city or town shall no longer be bound to keep *such way or public way* in repair and upon filing of such declaration with the city or town clerk such declaration shall take effect, provided that sufficient notice to warn the public against entering thereon is posted at both ends of such way or public way, or portions thereof.

G. L. c. 82, § 32A, as amended through St. 1983, c. 136 (emphasis added). A change in language of particular importance to the instant case is that the original § 32A contemplated that a discontinuance under § 32A transformed a public way into a private way, whereas the 1983 amendment to § 32A did not explicitly contain this distinction, and the term "private way" was removed from the statute. Compare St. 1924, c. 289, with St. 1983, c. 136. In determining whether this change in language streamlined the procedure, or changed substantive rights, we look first to the language of the statute. "When a statute's language is plain and unambiguous, we afford it its ordinary meaning." *Commonwealth v. Keefner,* 461 Mass. 507, 511 (2012). "Where...the language of a statute is clear and unambiguous, it is conclusive as to the intent of the Legislature." *Welch v. Sudbury Youth Soccer Ass'n, Inc.,* 453 Mass. 352, 355 (2009).

The problem here is that the key to understanding the meaning of the original § 32A is to know what was meant by the term "private way" as used in the statute. As is discussed earlier in this decision, the term "private way" as used in statutes has often meant some form of public way, including town ways, county ways, and so-called "statutory private ways," or private ways open

to the public. The term is therefore inherently ambiguous, and investigation beyond the words of the statute is appropriate. See *Opinion of the Justs.*, supra, 313 Mass. at 781–783 ("private ways" in G. L. c. 40, § 6C, could have the following meanings: (1) "ways of a special type laid out by public authority for the use of the public," which "are private only in name, but are in all other respects public," as provided for by G. L. c. 82, §§ 21–32A; (2) "ways opened and dedicated to the public use, which [have] not become public way[s] within the meaning of G. L. c. 84, §§ 23–25"; or (3) "defined ways for travel, not laid out by public authority or dedicated to public use, that are wholly the subject of private ownership, either by reason of the ownership of the land upon which they are laid out by the owner thereof, or by reason of ownership of easements of way over land of another person") (quotations and citations omitted); *Meyer v. Town of Nantucket*, 78 Mass. App. Ct. 385, 390 (2010), quoting *Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 818 (2006) (statute is ambiguous when it "is 'capable of being understood by reasonably well-informed persons in two or more different senses'"). Justice Breyer, writing for the First Circuit Court of Appeals in *United States v. 125.07 Acres of Land, More or Less*, cautioned courts against "making broad public/private distinctions" when interpreting Massachusetts statutes referring to roads, because the terms "public" and "private" each have several different meanings depending on the context. See supra, 707 F.2d at 14. A road may be referred to as "public," as opposed to "private," to indicate that the public has access to the road, or, in the alternative, to "indicate the government has an upkeep obligation." *Id.*, citing *Fenn v Middleborough*, supra, 7 Mass. App. Ct. at 83–84.

Given this ambiguity, an examination of the legislative history, the case law, and the other provisions of the statute is necessary to discern the meaning of "private way" as it is used in St. 1924, c. 289 and deleted from St. 1983, c. 136. See *Int'l Fid. Ins. Co. v. Wilson*, supra, 387

Mass. at 854 (where the text of the statute is "inconclusive," courts must look to extrinsic sources such as preexisting law, analogous statutory material, and relevant case law "to determine the intent of the Legislature" in enacting the statute); *Bd. of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513 (1975), quoting *Indus. Fin. Corp. v. State Tax Comm'n*, 367 Mass. 360, 364 (1975) (intent of the Legislature can be ascertained from the plain meaning of all of a statute's words and the purpose of its enactment).

B. G. L. c. 82, § 32A Was Intended to Serve a Distinct Purpose Different from G. L. c. 82, § 21 and G. L. c. 82, § 30, Both of Which Effected Legal Discontinuances

The prevailing interpretation of the original § 32A is that it afforded county commissioners the ability to cause a "reduction in the status of [town ways or county ways] from public to private, thus eliminating the expense of the town's burden of maintenance, while leaving unimpaired the public's right of access over the road." *Coombs v. Bd. of Selectmen of Deerfield*, 26 Mass. App. Ct. 379, 381 (1988). Although dicta, this passage was cited with approval by the Supreme Judicial Court in discussing the 1983 amendment to § 32A, with no indication that the court drew a distinction between the purpose of the original and the later versions of the statute. "A discontinuance of maintenance under G. L. c. 82, § 32A, merely relieves a municipality of liability for care and maintenance of the road. It, unlike a formal discontinuance by town vote, does not extinguish the right of the public, and abutting landowners, to travel over the road." *Nylander v. Potter*, 423 Mass. 158, 162 n.7 (1996). "Thus, a discontinuance of maintenance of a town way under § 32A would create a 'public access' private way." *Id.*

By way of contrast, a legal discontinuance of a town way or private way by town vote under G. L. c. 82, § 21 extinguishes not only a town's maintenance responsibility, but also the right of the public, and abutting landowners, to travel over the road; hence, it does not leave

intact a "public access" private way. *Id.*, citing *Coombs v. Bd. of Selectmen of Deerfield*, supra, 26 Mass. App. Ct. at 381; see *Newburyport Redev. Auth. v. Commonwealth*, supra, 9 Mass. App. Ct. at 240 (legal discontinuance under § 21 extinguishes public easements of travel); *Baillargeon v. CSX Transportation Corp.*, 463 F. Supp. 3d 76, 84 (D. Mass. 2020) (granting preliminary injunction ordering the removal of barriers blocking access to road where there was evidence that the town discontinued maintenance of the road, but no evidence that the town formally voted to discontinue it as a public way).

Later decisions reached no different conclusions. In *Meudt v. Dus*, the Appeals Court upheld a trial court decision that a 1946 closure of a road by vote of town meeting was not a discontinuance under G. L. c. 82, § 21, and thus, could not have been a full discontinuance of the road's status as a public way. 75 Mass. App. Ct. 1109, at *2 (2009) (Rule 1:28 Decision). Instead, the court agreed that the vote was simply an ending of the town's maintenance of the road, which remained a public way. *Id.* at *2, 3. The court noted that under G. L. c. 82, § 32A, as inserted by St. 1924, c. 289, the county commissioners could "adjudicate a road as 'closed'" but could not discontinue it as a public way. *Id.*; see *Stone v. Garcia*, 15 LCR 640, 642 n.6 (2007) (Piper, J.) (distinguishing between "discontinuance of maintenance" under G. L. c 82, § 32A, and discontinuance by town vote under G. L. c. 82, § 21, only the latter of which "gives ownership of the fee to landowners who abut the road").

A discontinuance under both versions of § 32A should be given the same legal effect, because when looking at the statute in its entirety, it is clear that a legal discontinuance of a town way or private way can only be accomplished through §§ 21 and 30 and that § 32A was solely intended to discontinue a town's maintenance obligations. See *Boss v. Town of Leverett*, 484 Mass. 553, 557 (2020) (courts must "look at the statute in its entirety when determining how a

single section should be construed"); *Chin v. Merriot*, 470 Mass. 527, 532 (2015) (courts must consider "other sections of the statute, and examine the pertinent language in the context of the entire statute" in interpreting an unclear phrase in a statute); *Commonwealth v. Keefner*, 461 Mass. 507, 511 (2012) ("a statute must be interpreted 'as a whole,'" because "it is improper to confine interpretation to the single section to be construed").

The version of G.L. c. 82, § 21 that was operative at the time that § 32A was originally inserted in 1924, was St. 1917, c. 344 pt. 2, § 40, and provided that, "[a] town, at a meeting called for the purpose, may discontinue a town way or private way." G. L. c. 82, § 21, as amended through St. 1917, c. 344 pt. 2, § 40. Likewise, G.L. c. 82, § 30, as amended through St. 1917, c. 344, pt. 2, §§ 51, 52, provides, in relevant part, that "[u]pon the application in writing of a person aggrieved by the refusal of a town to discontinue a town way or private way, the county commissioners may order such way to be discontinued." G. L. c. 82, § 30, as amended through St. 1917, c. 344, pt. 2, §§ 51, 52. Section 32A was added by the Legislature seven years later in 1924. G. L. c. 82, § 32A, inserted by St. 1924, c. 289.

Crucially, the original § 32A does not contain the word "discontinue," but instead refers to adjudicating a public way as private and ceasing town repairs on the way, whereas § 21 explains how a town may "discontinue" a way, and § 30 explains how county commissioners may "discontinue" a way after a town has refused to discontinue a way. Compare St. 1924, c. 289, with St. 1917, c. 344, pt. 2, § 40, and St. 1917, c. 344, pt. 2, §§ 51–52. The differing language strongly suggests that the Legislature intended § 32A to serve a distinctly different function than § 21 and § 30, rather than to have the new section added in 1924 serve as a duplicative means to accomplish the same goal of legal discontinuance. See *MacLaurin v. City of Holyoke*, 475 Mass. 231, 241 (2016), quoting *Commonwealth v. Millican,* 449 Mass. 298, 301

(2007) ("Where 'different words with different meaning' are used in different sections of a statute... 'they cannot be construed interchangeably, but must be construed in relation to one another'").

Likewise, the case law interpreting § 21 establishes that a legal discontinuance of a town way or private way by town vote under § 21 extinguishes not only a town's maintenance responsibility, but also the right of the public, and abutting landowners, to travel over the road. *Nylander v. Potter*, supra, 423 Mass. at 162 n.7; see *Newburyport Redev. Auth. v. Commonwealth*, supra, 9 Mass. App. Ct. at 240 (legal discontinuances under § 21 extinguish public easements of travel). G. L. c. 82, § 30 fits into this statutory scheme by providing an avenue for a disappointed petitioner, turned down by the town, to seek discontinuance by the county commissioners. Accordingly, § 30 empowers county commissioners, upon an aggrieved person's petition, to "discontinue a town way or private way" in the event that there has already been a "refusal of a town" to discontinue such way. See *Halebian v. Berv*, 457 Mass. 620, 629 (2010), quoting *DiFiore v. American Airlines, Inc.*, 454 Mass. 486, 491 (2009) ("Where possible, we construe the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction"); *Mahan v. Town of Rockport*, 287 Mass. 34, 37 (1934) (public ways, once duly laid out, "may be discontinued by vote of the town" under G. L. c. 82, § 21, "and not otherwise"). It would be inconsistent for the Legislature to provide in § 30 that county commissioners can discontinue a town way in the event that the town has already neglected to do so by town vote under § 21, only to provide in § 32A that the county commissioners can discontinue a town way without a prior unsuccessful attempt under § 21. See *Ciani v. MacGrath*, 481 Mass. 174, 179–180 (2019) (where the Legislature repeated the same phrase in two separate clauses in a statute, the phrase applied to both clauses, otherwise the

phrase would be "rendered superfluous," which "runs contrary to the basic tenet of statutory construction that we must strive to give effect to each word of a statute so that no part will be inoperative or superfluous"). The decision not to use the well-understood term "discontinuance" in § 32A must be attributed to a purpose of the Legislature to give that section a different meaning and function than §§ 21 and 30. To conclude otherwise would attribute an intent of the Legislature to add a section, § 32A, despite its redundancy when compared to § 30.

Construing the original § 32A to provide for a legal discontinuance would also be at odds with the Supreme Judicial Court's 1934 decision in *Mahan v. Town of Rockport*, in which the court clarified that, "a public way once duly laid out continues to be such until legally discontinued. A town way may be discontinued by vote of the town and not otherwise." 287 Mass. at 37; see G. L. c. 82, § 21 ("[t]he selectmen or road commissioners of a town... may discontinue a town way or a private way"); *Phillips v. Equity Residential Mgt., LLC*, 478 Mass. 251, 260 (2017) (courts must "interpret the statute as written and in accordance with our previous cases"). Construing § 30 as a backup method for discontinuance after denial by a town is consistent with this conclusion by the Supreme Judicial Court. Construing the original § 32A as allowing a discontinuance, as opposed to a discontinuance of maintenance obligations, is not.

In close relation to G. L. c. 82, § 32A, G. L. c. 84 pertains to municipal liability for injuries caused by defects in town ways, explains what a town must do to repair and maintain its ways, and explains what a town may do with respect to maintaining and repairing private ways. G. L. c. 84. At the time of the 1932 discontinuance order with respect to Estabrook Road under § 32A, and still to this day, G. L. c. 84, § 1 provided that town ways "shall be kept in repair at the expense of the town in which they are situated, so that they may be reasonably safe and convenient for travelers." G. L. c. 84, § 1, as amended through St. 1917, c. 344, pt. 4, § 1.

Notably, G. L. c. 82, § 32A and G. L. c. 84, § 1 as originally enacted and in their current versions, contain significant identical language, as both refer to towns maintaining town ways so as to be "reasonably safe and convenient for travel." Compare G. L. c. 82, § 32A, inserted by St. 1924, c. 289, with G. L. c. 84, § 1, as amended through St. 1917, c. 344, pt. 4, § 1. It makes sense to read the original § 32A as providing a vehicle for towns to avoid the maintenance responsibilities described in G. L. c. 84, § 1, where the road in question is seldom used, rather than to read it as providing for legal discontinuance of such ways. See *Chandler v. Cty. Comm'rs of Nantucket Cty.*, 437 Mass. 430, 436 (2002) ("A term appearing in different portions of a statute is to be given one consistent meaning"); *Yeretsky v. City of Attleboro*, 424 Mass. 315, 319 (1997), quoting *Bd. of Educ. v. Assessor of Worcester*, supra, 368 Mass. at 513–514 ("two or more statutes that relate to the same subject matter should be construed together 'so as to constitute a harmonious whole consistent with the legislative purpose'").

C. The 1983 Amendment to G. L. c. 82, § 32A Implemented Procedural But Not Substantive Changes

The legislative history of G. L. c. 82 provides further support for the conclusion that the 1983 amendment to § 32A provided a clarification and change in procedure from the original version, St. 1924, c. 289, but not a change with respect to its legal effect as a discontinuance of maintenance obligations only. See *Anawan Ins. Agency, Inc. v. Div. of Ins.*, 76 Mass. App. Ct. 447, 452–453 (2010), aff'd, 459 Mass. 592 (2011) ("Generally, and especially where the language of the applicable statute is clear and unambiguous, there is a presumption that a subsequent amendment indicates a legislative intention that the meaning of the statute changes," but the legislative history, case law, or other evidence may rebut that presumption) (citations omitted); *Lincoln Pharmacy of Milford, Inc. v. Comm'r of Div. of Unemployment Assistance*, 74 Mass. App. Ct. 428, 436 (2009), quoting *DiMarzo v. American Mut. Ins. Co.*, 389 Mass. 85, 103

(1983) ("It is not unusual for the Legislature to amend a statute 'simply to clarify its meaning'"); *Coombs v. Bd. of Selectmen of Deerfield*, supra, 26 Mass. App. Ct. at 381, 384 (discontinuances under G. L. c. 82, § 32A as originally enacted and as amended by St. 1983, c. 136 both served as mere discontinuances of maintenance obligations, even though the procedure was altered by the amendment). The 1983 amendment to § 32A was primarily intended to provide clarity and uniformity as to the process for both towns, and, for the first time, cities, to obtain a discontinuance of maintenance obligations, given the changes the Legislature made and given the title of the amendment, "An Act Further Regulating the Procedures for Abandoning Certain Municipal Ways." See *Charles I. Hosmer, Inc. v. Commonwealth*, 302 Mass. 495, 501 (1939) ("[t]he title to a statute may be considered in determining its construction"); *Coombs v. Bd. of Selectmen of Deerfield*, supra, 26 Mass. App. Ct. at 381–382, 383 (1983 amendment to G. L. c. 82, § 32A provided several substantive changes including "broadening the bill to include ways in cities as well as towns" and vesting the authority to discontinue maintenance on a public way in the town or city instead of the county commissioners, but the legal effect of a discontinuance under both versions was the same). There is evidence that St. 1983, c. 136 was interpreted exactly as such during the lead-up to its enactment. For example, a letter from the Massachusetts Municipal Association to the Governor's Legislative Office urging Governor Michael Dukakis to sign 1983 House Bill No. 6019,[205] later enacted as St. 1983, c. 136, stated, "[t]his legislation simplifies and makes more efficient the procedure by which a city or town can free itself from the responsibility for maintaining unused public ways."[206] Likewise, a letter from the Massachusetts Association of Conservation Commissions to Governor Dukakis encouraged his endorsement on the basis that 1983 House Bill No. 6019 "would permit towns to be relieved of

[205] 1983 House Bill No. 6019 is identical to St. 1983, c. 136 except that the bill refers only to towns while the statute refers to both cities and towns.
[206] Town of Concord's Posttrial Appendix, Attachment L.

the responsibility of maintaining certain town roads without having received the approval of County Commissioners" and that "it has been the experience of many towns that the intervention of County Commissioners on this matter has 'infused' politics in land use decisions where politics are unnecessary."[207] In sum, these letters compel the conclusion that St. 1983, c. 136 merely streamlined the process for cities and towns to effect a discontinuance of maintenance obligations but was identical in terms of its legal effect to the original version of G. L. c. 82, § 32A as inserted by St. 1924, c. 289.

Ultimately, the Legislature required a subsequent amendment in 2006 to effectuate its goal because the 1983 amendment to § 32A left a significant hole in the statutory scheme by shifting power from the county commissioners to the cities or towns to discontinue maintenance of city and town ways but neglecting to provide at all for the discontinuance of maintenance on county highways. See G. L. c. 82, § 32A, as amended through St. 2006, c. 336, §§ 29–30 (allowing cities and towns to discontinue maintenance on city and town ways and allowing county commissioners to discontinue maintenance on county highways); *Coombs v. Bd. of Selectmen of Deerfield*, supra, 26 Mass. App. Ct. at 384 (noting that under the 1983 amendment to § 32A, cities and towns had "no direct way of discontinuing maintenance of little used segments of ancient county highways within their borders—a result that could be achieved under the earlier § 32A through the procedure of petitioning the county commissioners"). Furthermore, the Legislature adopted a slew of other amendments to the chapter through St. 2006, c. 336, §§ 8–30, which made uniform the procedures for cities, towns and counties to effect a "relocation, specific repair, discontinuance, and discontinuance of maintenance" of various types of ways. See St. 2006, c. 336, §§ 8–30; *Chandler v. Cty. Comm'rs of Nantucket Cty.*, supra, 437 Mass. at 438 ("Few statutes in our Commonwealth can claim as extensive a heritage" as G. L. c. 82,

[207] Town of Concord's Posttrial Appendix, Attachment M.

because "[t]he roots of G.L. c. 82 reach back in an unbroken line spanning over 360 years"); *Harding v. Inhabitants of Medway*, supra, 51 Mass. at 469–471 (noting that the predecessor to G. L. c. 82 distinguished between town or private ways and county highways, including by providing a separate process for how a person aggrieved was to obtain damages for actions of the public authority depending on whether the subject road was a town or private way on the one hand, or a county highway on the other); *Jones v. Inhabitants of Andover*, 26 Mass. 146, 156–57 (1829) (under the predecessor of G. L. c. 82 then in effect, there were "palpab[ly]" different procedural avenues for laying out a "public highway or county road" versus laying out a "town or private way"). These amendments to G. L. c. 82 in 1983 and 2006 served as clarifications and procedural updates, which preserved the substantive effect of prior versions of the sections. *Chandler v. Cty. Comm'rs of Nantucket Cty.*, supra, 437 Mass. at 438 (the purpose of G. L. c. 82 and its predecessors, "to facilitate safe and convenient travel through the construction of roadways where these are necessary," has remained constant over hundreds of years); *DiMarzo v. American Mut. Ins. Co.*, supra, 389 Mass. at 102–103 ("Often the Legislature may amend a statute simply to clarify its meaning," rather than to change its meaning, and that "[t]he extent to which an amendment may properly be used to aid in the interpretation of the original statute turns on circumstances"); *City of Newburyport v. Woodman*, 79 Mass. App. Ct. 84, 91 (2011) (where "major" changes were made by amendment to G. L. c. 61A, § 14, including changing the definition of "bona fide offer," extending by one year the period during which sale or conversion of agricultural or horticultural land was restricted, deleting a provision stating that "discontinuance of the use of ... land for agricultural or horticultural purpose shall not be deemed a conversion" of land that triggered § 14's appraisal provisions, and creating a new appraisal mechanism, the amendment was not a clarification of the Legislature's original intent).

Delving further into the legislative history of G. L. c. § 32A, inserted by St. 1924, c. 289, reveals that § 32A had its origin in 1924 House Bill No. 1519, accompanied by a failed companion bill, 1924 House Bill No. 429. Compare 1924 House Bill No. 1519, with 1924 House Bill No. 429. Specifically, the failed companion bill, 1924 House Bill No. 429, was entitled, "An Act providing for the establishing of Limited Public Ways in Cities and Towns" and sought to amend G. L. c. 84 by inserting a new section, § 22A, which would have read,

> Towns in the case of town ways and the county commissioners of county in the case of town or county ways, may in the manner provided for the discontinuance of town or county ways, determine that public necessity and convenience no longer require the maintenance of the way as town way or county way and that *such way shall thereafter be a limited public way*. A limited public way established hereunder shall not be chargeable upon town or county as highway, town way or public way and shall be posted as a limited public way where it enters upon or unites with an existing way; and while so maintained and posted as a limited public way, the town or county shall not be liable for defects therein as in the case of public ways, nor shall the town or county be required to keep the same in repair or responsible for travel thereon. Nothing in this section shall prevent any such limited public way from later being laid out as a public way or highway.

1924 House Bill No. 429 (emphasis added).

The failure of this companion bill to pass likely indicates a judgement that the clarification provided by the bill was unnecessary, as the law was already settled as to which "private ways" a town was responsible for maintaining. See *Harvey Payne, Inc. v. Slate Co.*, 345 Mass. 488, 492–493 (1963) (declining to "regard as significant the failure of the Legislature to pass a bill clarifying" the meaning of an ambiguity in a statute because the ambiguity was readily resolvable by referencing the structure of the statutory provision and reading its surrounding sections).

The Supreme Judicial Court, in *Opinion of the Justs.*, supra, discussed several ways in which a way may be considered private. 313 Mass. at 781–783. First, the court clarified that the

term "private way," as it is used in G. L. c. 82, §§ 21–32A, connotes a way which was laid out by public authority for the use of the public, in which case it was legally public, and therefore "private only in name." *Id.* at 782; see G. L. c. 82, §§ 21–32A (explaining procedures for laying out private ways and discontinuing private ways). This type of way is referred to as a "statutory private way." *Opinion of the Justs.*, supra, 313 Mass. at 784. Since at least as far back as the enactment of the Province Laws for the years 1693–1694 and 1713–1714, towns, through their boards of selectmen, have been empowered to lay out town ways and statutory private ways. St. 1713–14, c. 8, § 1; St. 1693–94, c. 6, § 4; *Moncy v. Planning Bd. of Scituate*, supra, 50 Mass. App. Ct. at 719. The aforementioned Province Laws were codified by the Revised Statutes of 1836, c. 24, §§ 66–69. R. S. 1836, c. 24, §§ 66–69; *Moncy v. Planning Bd. of Scituate*, supra, 50 Mass. App. Ct. at 719–720. Both the town ways and the statutory private ways created pursuant to these statutes "were public in the sense that the public had a right of access." *Opinion of the Justs.*, supra, 313 Mass. at 782–783; *Denham v. Bristol Cty. Comm'rs*, supra, 108 Mass. at 204; *Moncy v. Planning Bd. of Scituate*, supra, 50 Mass. App. Ct. at 719–720; see *Casagrande v. Town Clerk of Harvard*, 377 Mass. 703, 703 n. 2 (1979) (under G. L. c. 82, §§ 21, "[a] statutory private way is a way laid out and accepted by town officials 'for the use of one or more of the inhabitants....'"); *Davis v. Smith*, 130 Mass. 113, 114 (1881) ("Town ways and private ways laid out under the provisions of our statutes are public ways"); *United States v. 125.07 Acres of Land, More or Less*, supra, 707 F.2d at 14 (ways laid out by town officials for the benefit of the inhabitants under St. 1713–1714, c. 8, § 1 are now known as statutory private ways). The laying out of a statutory private way creates a public easement or right of passage, which "is exactly the same as it is in all other ways laid out by public authority." *Denham v. Bristol Cty. Comm'rs*, supra, 108 Mass. at 204.

Secondly, "private way" could refer to a way which was "opened and dedicated to the public use" but not legally public because it was never laid out by the town. *Opinion of the Justs.*, supra, 313 Mass. at 782; see G. L. c. 84, §§ 23–25 (towns will only be liable for injuries caused by defects in roads which have not been laid out, but are "opened and dedicated to the public use," if the town fails to close off such a road where it connects with a public way to protect the public safety, or where there is a defective railing or no railing on such a road which a town has repaired in the previous six years).[208]

Thirdly, a "private way" could be wholly private, meaning that it was neither laid out by public authority nor dedicated to public use. *Opinion of the Justs.*, supra, 313 Mass. at 783; *W. D. Cowls, Inc. v. Woicekoski*, supra, 7 Mass. App. Ct. at 19–20; *United States v. 125.07 Acres of Land, More or Less*, supra, 707 F.2d at 14. This third type of private way is "open to use by others only with the owner's license or permission," which can be revoked at will. *W. D. Cowls, Inc. v. Woicekoski*, supra, 7 Mass. App. Ct. at 19–20; *United States v. 125.07 Acres of Land, More or Less*, supra, 707 F.2d at 14.

Distinct legal consequences have traditionally accompanied these different types of private ways. See *Opinion of the Justs.*, supra, 313 Mass. at 784–785 (towns are not required to repair or maintain private ways but are permitted to use public money to repair or maintain the first two varieties of private ways). Under G. L. c. 84, §§ 1, 15, and 22, towns are responsible and liable for maintaining only the ways which have been established as public ways (1) by dedication by the owner prior to 1846; (2) by layout by a public authority pursuant to G. L. c. 82, §§ 1–32; (3) or by prescription. *Commonwealth v. Coupe*, 128 Mass. 63, 65, 69 (1880); *Fenn v. Town of Middleborough*, supra, 7 Mass. App. Ct. at 83–84; see G. L. c. 84, §§ 23–25 (providing

[208] Note that G. L. c. 84, §§ 23–25 have not been amended since they were originally inserted by St. 1917, c. 344, pt. 2, § 69, St. 1917, c. 344, pt. 2, § 70, and St. 1917, c. 344, pt. 4, § 30, respectfully.

two exceptions to the general rule in *Fenn* that towns will be not liable for injuries caused by defects in roads which have not been laid out, but are "opened and dedicated to the public use," where the town fails to close off such a road where it connects with a public way to protect the public safety, or where there is a defective railing or no railing on such a road which a town has repaired in the previous six years). Even though statutory private ways, by definition, have been laid out, they are exempted from a town's maintenance responsibilities because the controlling statutes "make clear that whether a road is public or private for upkeep purposes depends, not just upon whether it was laid out, but upon why it was laid out." *United States v. 125.07 Acres of Land, More or Less*, supra, 707 F.2d at 14. Accordingly, the Supreme Judicial Court, in *Casagrande*, held that statutory private ways are not "public ways" or "maintained and used as a public way" by towns for the purpose of the subdivision control law, G. L. c. 41, §§ 81L, 81M, even though they are public in terms of providing a right of access. *Casagrande v. Town Clerk of Harvard*, supra, 377 Mass. at 706–707; see *Moncy v. Planning Bd. of Scituate*, supra, 50 Mass. App. Ct. at 720–721 (same); see also G. L. c. 82, § 21 (selectmen or road commissioners of a town "may lay out, relocate or alter... private ways"); *Opinion of the Justs.*, supra, 313 Mass. at 784 (towns do not have a duty under G. L. c. 84, § 1 to maintain statutory private ways); *United States v. 125.07 Acres of Land, More or Less*, supra, 707 F.2d at 14 (same). This conclusion followed from the fact that the Legislature has, "by various statutes, continued to differentiate between statutory private ways and public ways," as shown by its repeated reference to the former as "town ways" and the latter as "private ways." *Casagrande v. Town Clerk of Harvard*, supra, 377 Mass. at 707. Specifically, towns are permitted to repair statutory private ways when asked to do so by an individual under G. L. c. 84, §§ 12–14, but under G. L. c. 84, § 1, towns have an affirmative duty to maintain town ways with public funds. G. L. c. 84, §§ 1, 12–14;

Casagrande v. Town Clerk of Harvard, supra, 377 Mass. at 704 n.2; *Opinion of the Justs.*, supra, 313 Mass. at 784. Likewise, G. L. c. 84, § 6 imposes a duty on towns to treat freshly tarred public ways by covering them with sand, gravel, or peastone, and G. L. c. 84, § 17 details town liability for injuries caused by snow and ice on public ways. G. L. c. 84, §§ 6, 17; see *Casagrande v. Town Clerk of Harvard*, supra, 377 Mass. at 707 (listing G. L. c. 84, §§ 6, 17 and many other statutes as evidence that the legislature has distinguished between public ways and statutory private ways).

Given that statutory private ways are public in the sense that they are included in a town layout and the public has a right of access over them, but private in the sense that they need not be maintained by the town under G. L. c. 84, § 1, the reference to adjudicating a way as a private way and discontinuing maintenance thereon in the original G. L. c. 82, § 32A contemplated the transformation of a public way into a statutory private way. See *Opinion of the Justs.*, supra, 313 Mass. at 784–785 (there is "no sound distinction" between town ways and statutory private ways for travel and transportation purposes, but towns are not obligated to maintain statutory private ways); *Coombs v. Bd. of Selectmen of Deerfield*, supra, 26 Mass. App. Ct. at 381 (the original § 32A provided for a "reduction in the status" of a town way "from public to private," creating a statutory private way, which had the effect of "eliminating the expense of the town's burden of maintenance, while leaving unimpaired the public's right of access over the road"). The fact that a town may legally discontinue a "private way" under G. L. c. 82, § 21 provides further support for the proposition that the term "private way" as used in G. L. c. 82, § 32A, inserted by St. 1924, c. 289, did not connote a discontinued way that was wholly private, rather than a statutory private way, which was private for maintenance purposes only. See *Phillips v. Equity Residential Mgt., LLC*, supra, 478 Mass. at 257–258, quoting *Commonwealth v. Hanson H.*, 464 Mass. 807,

810 (2013) (in interpreting an ambiguous statute, courts must "look to the language of the entire statute, not just a single sentence, and attempt to interpret all of its terms 'harmoniously to effectuate the intent of the Legislature,'" and refrain interpreting a statute "so as to render any portion of it meaningless"); *Schulze v. Town of Huntington*, 24 Mass. App. Ct. 416, 419 (1987) (G. L. c. 82, § 21, and its predecessors "have always authorized towns to discontinue either public ways or private ways"); *Commonwealth v. Correia*, 17 Mass. App. Ct. 233, 235 (1983), quoting *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369 (1977) (when determining the meaning of an ambiguous term in a statute, courts "use 'sources presumably known to the statute's enactors, such as their use in other legal contexts'"). As such, a discontinuance under G. L. c. 82, § 21, which contemplates the legal discontinuance of a public way or private way, would be necessary to fully discontinue a way which had been adjudicated as private under the original version of G. L. c. 82, § 32A, inserted by St. 1924, c. 289. Given that the disputed portion of Estabrook Road was merely adjudicated as a private way under G. L. c. 82, § 32A, inserted by St. 1924, c. 289, but not discontinued under G. L. c. 82, § 21, the right of public access over that portion of Estabrook Road remains intact today.

CONCLUSION

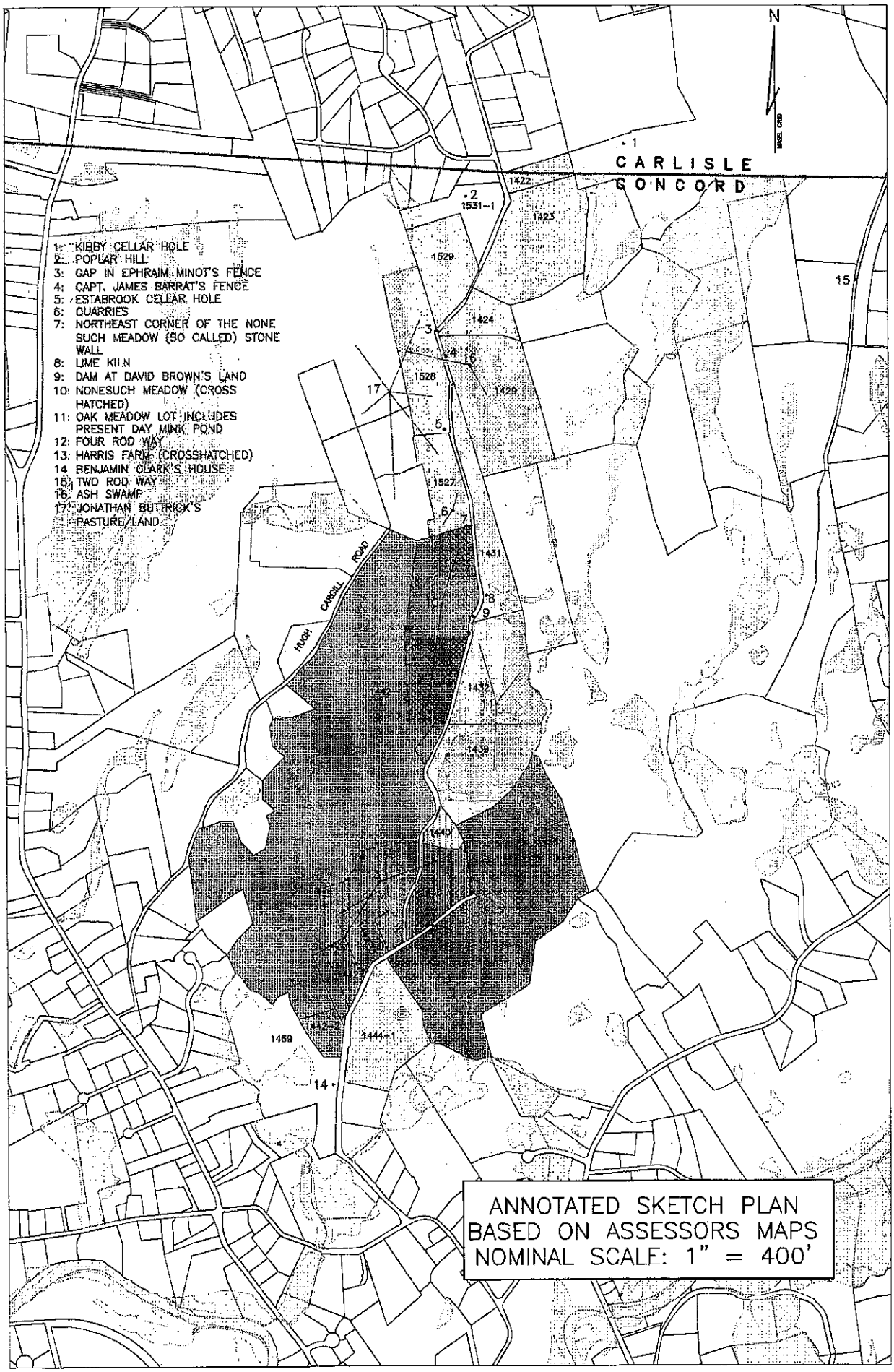
For the reasons stated above, I find and rule that (1) the layout proposed by the committee and approved by the Middlesex County Court of General Sessions of the Peace in 1763 successfully established a public way in accordance with the statutory procedure in effect at the time, which corresponds to the northern disputed section of Estabrook Road as it exists today, from the Carlisle town line in the north, to the road where it is adjacent to the south end of Mink Pond in the south, and that this section of Estabrook Road was also established as a public way by prescription, (2) the southern disputed portion of Estabrook Road, from the southern terminus

of the road established by the 1763 Layout in the north, along the current Estabrook Road to where the road meets the paved portion of Estabrook Road near the gate near the Rasmussens' and Read/Kays' driveways in the south, was established as a public way by prescription and by circumstantial evidence of a statutory layout; and (3) the legal effect of the 1932 discontinuance order of Estabrook Road from the Concord-Carlisle town line to Raymond Emerson's driveway was to transform it from a public way to a statutory private way, over which the public's right to access and use the portion of the way that was adjudicated as private was not extinguished.

Judgment will enter accordingly.

Howard P. Speicher
Justice

Dated: November 23, 2022


N
MASS. GRID
CARLISLE
CONCORD
1: KIBBY CELLAR HOLE
2: POPLAR HILL
3: GAP IN EPHRAIM MINOT'S FENCE
4: CAPT. JAMES BARRAT'S FENCE
5: ESTABROOK CELLAR HOLE
6: QUARRIES
7: NORTHEAST CORNER OF THE NONE SUCH MEADOW (SO CALLED) STONE WALL
8: LIME KILN
9: DAM AT DAVID BROWN'S LAND
10: NONESUCH MEADOW (CROSS HATCHED)
11: OAK MEADOW LOT INCLUDES PRESENT DAY MINK POND
12: FOUR ROD WAY
13: HARRIS FARM (CROSSHATCHED)
14: BENJAMIN CLARK'S HOUSE
15: TWO ROD WAY
16: ASH SWAMP
17: JONATHAN BUTTRICK'S PASTURE LAND
CARGILL ROAD
HUGH
1422
1531-1
1423
1529
1424
1528
1429
1527
1431
1432
1439
1449
1444-2
1444-1
1469
ANNOTATED SKETCH PLAN
BASED ON ASSESSORS MAPS
NOMINAL SCALE: 1" = 400'

17 MISC 000605 Town of Concord v. Rasmussen, Neil E. , et al. SPEICHER

- Case Type:
- Miscellaneous
- Case Status:
- Closed
- File Date
- 10/24/2017
- DCM Track:
-
- Initiating Action:
- EQA - Equitable Action Involving Any Right, Title or Interest in Land, G.L. Chapter 185, § 1 (k)
- Status Date:
- 10/24/2017
- Case Judge:
- Speicher, Hon. Howard P.
- Next Event:
-
-

Property Information

Estabrook Road
Concord

All Information | Party | Event | Docket | Financial | Receipt | Disposition

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Baker, John K.
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More Party Information

Events

Date	Session	Location	Type	Event Judge	Result
12/19/2017 10:30 AM	J. Speicher		Case Management Conference	Speicher, Hon. Howard P.	Rescheduled
01/31/2018 10:30 AM	J. Speicher	Courtroom 1102 - Eleventh Floor	Case Management Conference	Speicher, Hon. Howard P.	Case Management Conference held
04/27/2018 11:00 AM	J. Speicher	Courtroom 401 - Fourth Floor	Motion for Judgment	Speicher, Hon. Howard P.	Not held
02/05/2019 10:30 AM	J. Speicher	Courtroom 1102 - Eleventh Floor	Motion	Speicher, Hon. Howard P.	Taken under advisement.
03/25/2020 11:00 AM	J. Speicher	Courtroom 1102 - Eleventh Floor	Status Conference	Speicher, Hon. Howard P.	Continued
05/14/2020 11:30 AM	J. Speicher	Courtroom 403 - Fourth Floor	Telephone Conference Call	Speicher, Hon. Howard P.	Held
07/20/2020 09:00 AM	J. Speicher	Off Site	View	Speicher, Hon. Howard P.	Held
07/20/2020 01:00 PM	J. Speicher	Courtroom 401 - Fourth Floor	Motion	Speicher, Hon. Howard P.	Held via video
09/10/2020 02:00 PM	J. Speicher	Courtroom 401 - Fourth Floor	Pre-Trial Conference	Speicher, Hon. Howard P.	Held via video
11/10/2020 10:00 AM	J. Speicher	Courtroom 1101 - Eleventh Floor	Motion in Limine	Speicher, Hon. Howard P.	Held via video
12/22/2020 10:00 AM	J. Speicher	Courtroom 403 - Fourth Floor	Status Conference	Speicher, Hon. Howard P.	Held via video

Date	Session	Location	Type	Event Judge	Result
02/23/2021 09:30 AM	J. Speicher	Courtroom 1101 - Eleventh Floor	Trial	Speicher, Hon. Howard P.	Rescheduled
02/24/2021 09:30 AM	J. Speicher	Courtroom 401 - Fourth Floor	Trial	Speicher, Hon. Howard P.	Rescheduled
02/25/2021 09:30 AM	J. Speicher	Courtroom 401 - Fourth Floor	Trial	Speicher, Hon. Howard P.	Rescheduled
03/02/2021 09:30 AM	J. Speicher	Courtroom 1101 - Eleventh Floor	Trial	Speicher, Hon. Howard P.	Rescheduled
03/03/2021 09:30 AM	J. Speicher	Courtroom 401 - Fourth Floor	Trial	Speicher, Hon. Howard P.	Rescheduled
03/04/2021 09:30 AM	J. Speicher	Courtroom 401 - Fourth Floor	Trial	Speicher, Hon. Howard P.	Rescheduled
05/28/2021 10:00 AM	J. Speicher	Off Site	View	Speicher, Hon. Howard P.	Held in person
06/01/2021 09:30 AM	J. Speicher	Courtroom 404 - Fourth Floor	Trial	Speicher, Hon. Howard P.	Held - First Day of Trial
06/02/2021 09:30 AM	J. Speicher	Courtroom 1102 - Eleventh Floor	Trial	Speicher, Hon. Howard P.	Held via video
06/03/2021 09:30 AM	J. Speicher	Courtroom 1102 - Eleventh Floor	Trial	Speicher, Hon. Howard P.	Held via video
06/08/2021 09:30 AM	J. Speicher	Courtroom 1102 - Eleventh Floor	Trial	Speicher, Hon. Howard P.	Held via video
06/09/2021 09:30 AM	J. Speicher	Courtroom 1102 - Eleventh Floor	Trial	Speicher, Hon. Howard P.	Held via video
06/10/2021 09:30 AM	J. Speicher	Courtroom 1102 - Eleventh Floor	Trial	Speicher, Hon. Howard P.	Held - Trial Ends
11/18/2021 02:00 PM	J. Speicher	Courtroom 1101 - Eleventh Floor	Hearing	Speicher, Hon. Howard P.	Held via video

Docket Information

Docket Date	*Docket Text*	Amount Owed	*Image Avail.*
10/24/2017	Complaint filed.		Image
10/24/2017	Case assigned to the Average Track per Land Court Standing Order 1:04.		
10/24/2017	Land Court miscellaneous filing fee Receipt: 375913 Date: 10/24/2017	$240.00	
10/24/2017	Land Court surcharge Receipt: 375913 Date: 10/24/2017	$15.00	
10/24/2017	Land Court summons Receipt: 375913 Date: 10/24/2017	$50.00	
10/24/2017	Uniform Counsel Certificate for Civil Cases filed by Plaintiff.		
10/30/2017	The case has been assigned to the A Track. Notice sent.		
10/30/2017	Event Scheduled Judge: Speicher, Hon. Howard P. Event: Case Management Conference Date: 12/19/2017 Time: 10:30 AM (Notice Sent to Kevin D. Batt, Esq.) Judge: Speicher, Hon. Howard P.		
11/30/2017	Joint Motion to Reschedule Case Management Conference filed and Allowed.		
11/30/2017	Event Resulted Judge: Speicher, Hon. Howard P. The following event: Case Management Conference scheduled for 12/19/2017 10:30 AM has been resulted as follows: Result: Event Rescheduled per request of the parties. Judge: Speicher, Hon. Howard P. Judge: Speicher, Hon. Howard P.		

Docket Date	Docket Text	Amount Owed	Image Avail.
11/30/2017	Event Scheduled Judge: Speicher, Hon. Howard P. Event: Case Management Conference Date: 01/31/2018 Time: 10:30 AM Judge: Speicher, Hon. Howard P.		
12/14/2017	Summons returned to Court with service on Brooks S. Read, Dr. Susannah Kaye, Russell Robb, III Trustee of the Pippin Tree Land Trust, Leslie Robb Trustee of the Pippin Tree Land Trust, Thomas Wray Falwell Trustee of the Pippin Tree Land Trust, John K. Baker Trustee of the Neilsen Realty Trust, Nina I.M. Neilsen Trustee of the Baker Realty Trust filed.		
12/14/2017	(2) Affidavits of Service of Complaint,filed.		
12/18/2017	Answer,Affirmative Defenses and Counterclaiom of Brooks S. Read,Susannah Kay,M.D. Russell Robb III,Leslie Robb and Thomas Wray Falwell Trustees of the Pippin Tree Land Trust,John K. Baker,Trustee of Nielsen Realty Trust and Nina I.M. Nielsen,Trustee of the Baker Realty Trust,filed.		
12/18/2017	Answer and Affirmative Defenses to the Plaintiff's Complaint and Counterclaim of Neil E. Rasmussen and Anna Rasmussen,filed.		
12/22/2017	Answer of Defendant President and Fellows of Harvard College to plaintiff's Complaint filed.		
01/25/2018	Assented to Motion to Amend Case Caption,filed.		
01/25/2018	Joint Statement for Case Management Conference,filed.		
01/31/2018	Case Management Conference Held Judge: Speicher, Hon. Howard P. The following event: Case Management Conference scheduled for 01/31/2018 10:30 AM has been resulted as follows: Result: Case management conference held. Early intervention event held. Attorneys Allison, Batt, Hill, Ford, Smith, Goodheart, King, and O'Neill appeared. Without objection, court directed parties to mandatory alternative dispute resolution screening; appropriate order to issue. Discovery to close February 28, 2019. Judge: Speicher, Hon. Howard P.		
01/31/2018	Alternative Dispute Resolution: Early Intervention Event held. Judge: Speicher, Hon. Howard P.		
01/31/2018	ADR referral to REBA Dispute Resolution, Inc. issued. Judge: Speicher, Hon. Howard P.		
02/02/2018	Scheduled Judge: Speicher, Hon. Howard P. Event: Motion for Judgment Date: 04/27/2018 Time: 11:00 AM		
02/02/2018	Post-Case Management Confernce Order, issued. (Copies Sent to Attorneys Kevin D. Batt, Melissa Cook Allison, Andrew W. Fowler, Michael J. O'Neill, Gregor I. McGregor, Olympia Bowker, Lisa C. Goodheart, William M. Hill, Scott C. Ford and Julianna I. Smith) Judge: Speicher, Hon. Howard P.		
02/05/2018	Town of Concord's Answer and Affirmative Defenses to Defendants Neil and Anna W. Rasmussen's Counterclaim,filed.		
02/05/2018	Town of Concord's Answer and Affirmative Defenses to theCounterclaim by Brooks R. Read;Susannah Kay;Russell Robb III,Leslee Robb and Thomas Wray Falwell, Trustees of the Pippin Tree Land Trust;John K. Baker,Trustee of the Nielsen Realty Trust; and Nina I.M. Nielsen,Trustee of the Baker Realty Trust,filed.		
04/05/2018	Joint Status Report on Mediation Screening,filed.		
04/27/2018	Event Resulted Judge: Speicher, Hon. Howard P. The following event: Motion for Judgment scheduled for 04/27/2018 11:00 AM has been resulted as follows: Result: Event not held.		
07/24/2018	Appearance of Robert Nislick, Esq. for Russell Robb, III Trustee of the Pippin Tree Land Trust, Dr. Susannah Kaye, Brooks S. Read, Leslie Robb Trustee of the Pippin Tree Land Trust, Thomas Wray Falwell Trustee of the Pippin Tree Land Trust, filed		
08/06/2018	Appearance of Diane C Tillotson, Esq. for Neil E. Rasmussen, filed		Image
08/06/2018	Notice of Withdrawal of Appearance, filed.		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
08/08/2018	Report to Court Re: Mediation Screening Session,filed.		
08/08/2018	Withdrawal of Appearance as Attorneys for Brooks S. Read, Susannah Kaye, M.D., Russell Robb III, Leslie Robb and Thomas Wray Falwell, Trustees of the Pippin Tree Land Trust, filed.		Image
08/13/2018	Appearance of Francisco Alejandro Parra, Esq. for John K. Baker Trustee of the Neilsen Realty Trust, Nina I.M. Neilsen Trustee of the Baker Realty Trust, filed		Image
08/15/2018	Withdrawal of Appearance as Attorneys for John K. Baker, Trustee of the Nielsen Realty Trust and Nina I.M. Nielsen, Trustee of the Baker Realty Trust,filed.		Image
09/28/2018	Joint Report on Mediation and Motion for Modification of the Scheduling Order,filed.		
10/11/2018	Joint Report on Mediation and Motion for Modification of the Scheduling Order,Allowed. Discovery to close June 28, 2019;dispositive motions,if any,to be filed by July 26, 2019.		
11/30/2018	Joint Motion to Dismiss Claims,filed.		
11/30/2018	Stipulation of Dismissal of Certain Claims,filed.		
12/17/2018	Defendants' Motion for Discovery Orders,filed.		
12/17/2018	Scheduled Judge: Speicher, Hon. Howard P. Event: Motion for Discovery Orders Date: 02/05/2019 Time: 10:30 AM		
12/17/2018	Defendants' Brief in support of Motion for Discovery Orders,filed.		
12/17/2018	Appendix,filed.		
01/28/2019	Defendant Neil E. Rasmussen's Motion to Compel the Town of Concord to provide Answers to Interrogatories, filed.		
01/28/2019	Memorandum in support of Defendant Neil E.Rasmussen's Motion to Compel Answers to Interrogatories, filed.		
02/04/2019	Plaintiff Town of Concord's Response in Opposition to Defendants' Motion for Discovery Orders,filed.		
02/04/2019	Plaintiff Town of Concord's Opposition to Defendant Neil E. Rasmussen's Motion to Compel Answers to Interrogatories, filed.		
02/05/2019	Event Resulted: Motion scheduled on: Hearing held on motions for discovery orders and for further answers to interrogatories. Attorneys Allison, Anderson, Tillotson, and Goodheart appeared. Following parties' arguments, the Court took the motions under advisement.		
02/08/2019	Order on Discovery Motions, Issued. (Copies Sent to Attorneys Kevin D. Batt, Melissa Cook Allison, Austin Paganelli Anderson, Francisco Alejandro Parra, Robert Nislick, Lisa C. Goodheart, Diane C. Tillotson, Michael P. Moore)		Image
04/16/2019	Joint Motion for Approval of Stipulation of Dismissal without prejudice of all claims against President and Fellows of Harvard College,filed		
04/22/2019	Joint Motion for Approval of Stipulation of Dismissal without prejudice of all claims against President and Fellows of Harvard College, Allowed.		
04/22/2019	Stipulation of Dismissal without prejudice of all claims against President and Fellows of Harvard College,filed		
05/29/2019	Joint Motion for Modification of the Scheduling Order, filed and Allowed.		
10/31/2019	Assented to Motion to Modify Scheduling Order, filed and Allowed.		Image
11/27/2019	Stipulation of Dismissal of the Town of Concord's Post-1932 Prescription Claim,filed.		Image
02/28/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Status Conference Date: 03/25/2020 Time: 11:00 AM		
03/23/2020	Event Resulted: Status Conference scheduled on: 03/25/2020 11:00 AM Has been: Continued Hon. Howard P. Speicher, Presiding		
05/04/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Telephone Conference Call Date: 05/14/2020 Time: 11:30 AM		
05/14/2020	Status conference held by telephone. Attorneys Melissa Allison, Robert Nislick, Diane Tillotson, and Vanessa Arslenian appeared by telephone. Parties reported to court about self-help closing of Estabrook Trail instituted by defendants. In the absence of any motion for injunctive relief, the court declined to make any order regarding self-help measures taken by defendants. Pretrial conference to		

Docket Date	Docket Text	Amount Owed	Image Avail.
	be scheduled at a future date. Parties advised by court of uncertainty of scheduling of trial given current court closings due to coronavirus pandemic.		
07/06/2020	Plaintiff Town of Concord's Motion for Preliminary Injunction,filed.		Image
07/06/2020	Plaintiff Town of Concord's Memorandum in support of Motion for Preliminary Injunction,filed.		Image
07/08/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Motion for Preliminary Injunction Date: 07/20/2020 Time: 01:00 PM		
07/16/2020	Appearance of Tyler E Chapman, Esq. for Dr. Susannah Kaye, Leslie Robb Trustee of the Pippin Tree Land Trust, Russell Robb, III Trustee of the Pippin Tree Land Trust, Brooks S. Read, filed		Image
07/16/2020	Appearance of Howard Cooper, Esq. for Dr. Susannah Kaye, Leslie Robb Trustee of the Pippin Tree Land Trust, Russell Robb, III Trustee of the Pippin Tree Land Trust, Brooks S. Read, filed		Image
07/20/2020	View taken of the locus. Attorneys Diane Tillotson, Robert Nislick, Howard Cooper, Allison Webb, and Kevin Batt appeared.		
07/20/2020	Hearing held on plaintiff's motion for preliminary injunction by Zoom video conference. Attorneys Allison Webb, Kevin Batt, Diane Tilloston, Patrick Moore, Robert Nislick, Tyler Chapman, and Howard Cooper appeared by video conference. Motion taken under advisement. Counsel to confer and thereafter request a pretrial conference date from the Court.		
07/21/2020	Motion to Strike Paragraphs 6-14 of the Affidavit of Kristen Heitert, filed.		Image
07/21/2020	Defendants Anna and Neil Rasmussen's Motion to extend the tracking order,filed.		Image
07/21/2020	Defendants Anna and Neil Rasmussen's Memorandum in Opposition to the Town of Concord's Motion for a Preliminary Injunction,filed.		Image
07/21/2020	Affidavit of Neil E. Rasmussen in Opposition to the Town's Motion for a Preliminary Injunction,filed.		Image
07/21/2020	Affidavit of Kevin Arsenault,filed.		Image
07/21/2020	Affidavit of Diane C. Tillotson,filed.		
07/23/2020	Order on Plaintiff's Motion for Preliminary Injunction, Issued. (Copy Emailed to Attorneys Melissa Allison, Robert Nislick, Howard Cooper, Tyler Chapman, Diane Tillotson, M. Patrick Moore) Judge: Speicher, Hon. Howard P.		
08/06/2020	Scheduled Judge: Speicher, Hon. Howard P Event: Pre-Trial Conference Date: 09/10/2020 Time: 02:00 PM Notice sent electronically.		
09/03/2020	Joint Pre-Trial Memorandum filed.		Image
09/10/2020	Pretrial conference held by videoconference. Attorneys Diane Tillotson, Ryan McManus, Howard Cooper, Matthew Furman, Robert Nislick, Vanessa Arslanian, Kevin Batt, and Melissa Allison appeared by videoconference. Attorney Lisa Goodheart appeared for former defendant Harvard College. Court considered arguments with respect to the effect, if any, proposed evidence would have on Harvard College's ownership interest in portions of the Estabrook Trail, notwithstanding agreement between the Town of Concord and Harvard that the town would not seek rulings affecting Harvard's property interests. Court concluded that given the intertwining interests in the trail, Harvard is an indispensable party, and accordingly, the court ORDERED Harvard to rejoin case as an indispensable party. All motions in limine to be filed by October 20, 2020. Oppositions to motions in limine to be filed by November 4, 2020. Hearing on motions in limine to be held November 10, 2020 at 10:00 A.M. Trial to be held over the following days: February 23, 2021, February 24, 2021, February 25, 2021, March 2, 2021, March 3, 2021, March 4, 2021. Given Harvard's late re-entry into the case, court will consider reasonable requests by Harvard with respect to discovery and trial date at hearing on motions in limine.		
09/10/2020	Appearance of Ryan McManus, Esq. for Neil E. Rasmussen, filed		Image
09/11/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Motion in Limine Date: 11/10/2020 Time: 10:00 AM		
09/11/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 02/23/2021 Time: 09:30 AM		

Docket Date	Docket Text	Amount Owed	Image Avail.
09/11/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 02/24/2021 Time: 09:30 AM		
09/11/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 02/25/2021 Time: 09:30 AM		
09/11/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 03/02/2021 Time: 09:30 AM		
09/11/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 03/03/2021 Time: 09:30 AM		
09/11/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 03/04/2021 Time: 09:30 AM		
09/15/2020	Appearance of Matthew S Furman, Esq. for Dr. Susannah Kaye, Leslie Robb Trustee of the Pippin Tree Land Trust, Russell Robb, III Trustee of the Pippin Tree Land Trust, Brooks S. Read, filed		Image
10/20/2020	Town's Motion In Limine to Exclude Expert Testimony Concerning Estabrook Road's Status as "Private" or "Public" and Corresponding Access Rights,filed.		Image
10/20/2020	Plaintiff Town of Concord's Motion in Limine to Exclude Evidence Post-Dating the 1932 Discontinuance of Estabrook Road Pursuant to G.L. c. 82, § 32A,filed		Image
10/20/2020	Plaintiff Town of Concord's Motion In Limine to Exclude Evidence and Expert Testimony Concerning Other Discontinued Roads,filed.		Image
10/20/2020	Defendants' Motion in Limine to (i) Deem Certain Statements by Plaintiff's Rule 30(B)(6) Designee Admitted at Trial and (ii) Preclude Plaintiff from Offering Any Contrary Evidence,filed		Image
10/20/2020	Defendants' Motion in Limine to Exclude Surveyors of Highways Records,filed.		Image
10/20/2020	Defendants' Motion in Limine to Preclude Plaintiff from Offering Circumstantial Evidence of a Statutory Layout Unless and Until it Makes a Prima Facie Showing of Town Layout Records Being Lost,filed		Image
10/20/2020	Neil and Anna Rasmussens' Motion In Limine to Exclude the Testimony of the Town's Expert Witness, Kristen Heitert,filed.		Image
10/20/2020	Affidavit of Diane C. Tillotson,filed		Image
10/22/2020	Defendant President and Fellows of Harvard College's confirmation of Re-entry into Case and Request for Leave to pursue limited written discovery and other Trial Preparation Opportunities,filed.		Image
10/22/2020	Notice of Appearances (Lisa C. Goodheart and Gwen Nolan King) for the Defendant, President and Fellows of Harvard College,filed.		Image
10/28/2020	Defendant President and Fellows of Harvard College's confirmation of Re-entry into Case and Request for Leave to pursue limited written discovery and other Trial Preparation Opportunities, Request to pursue limited written discovery as described on pages 4 and 5 herein is Allowed.		Image
11/04/2020	Defendants' Opposition to the Town's Motion in Limine to exclude Evidence Post-Dating 1932, filed.		Image
11/04/2020	Town's Preliminary Response to Harvard College's Request for Leave to pursue Limited Written Discovery and other Trial preparation opportuntiies,filed.		Image
11/04/2020	Town's Opposition to Defendants' Motion in Limine to preclude Circumstantial Evidence, filed.		Image
11/04/2020	Defendants' Opposition/Response to the Town's Motion in Limine to exclude expert Testimony concerning Estabrook Road's status as "Private" or "Public" and Corresponding Access Rights,filed		Image
11/04/2020	Defendants' Opposition to Plaintiff Town of Concord's Motion in Limine to exclude Evidence and Expert Testimony concerning other roads,filed.		Image
11/04/2020	Town's Opposition to Defendants' Motion in Limine to exclude Surveyors of Highway Records,filed.		Image
11/04/2020	Town of Concord's Opposition to Defendants' Motion in Limine regarding certain statements by Town's Rule 30(B(6) designee and to preclude "Contrary" Evidence,filed.		Image
11/04/2020	Town of Concord's Opposition to Rasmussens' Motion in Limine to exclude the Testimony of the Town's Expert witness Kristen Heitert,filed.		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
11/04/2020	Affidavit of Melissa Allison in support of Plaintiff's Opposition to Defendants' Motion in Limine to exclude expert Testimony of Kristen Heitert, filed.		Image
11/09/2020	Letter, filed.		Image
11/10/2020	Hearing held by videoconference on plaintiff's three motions in limine, defendants' four motions in limine, and court conducted a status hearing on defendant President and Fellows of Harvard College's conduct of limited written discovery and on status of former defendants Nina Neilson and John Baker. Attorneys Melissa Allison, Kevin Batt, Austin Anderson, Howard Cooper, Robert Nislick, Diane Tillotson, Ryan McManus, Gwen King, and Francisco Alex Parra appeared. The court heard arguments from counsel on the following seven motions: 1) Defendants' Motion in Limine to Preclude Plaintiff from Offering Circumstantial Evidence of a Statutory Layout Unless and Until it Makes a Prima Facie Showing of Town Layout Records Being Lost; 2) Defendants' Motion in Limine to (i) Deem Certain Statements by Plaintiff's Rule 30(b)(6) Designee Admitted at Trial and (ii) Preclude Plaintiff from Offering Any Contrary Evidence; 3) Defendants' Motion in Limine to Exclude Surveyors of Highways Records; 4) Defendants' Neil and Anna Rasmussens' Motion In Limine to Exclude the Testimony of the Town's Expert Witness, Kristen Heitert; 5) Plaintiff Town of Concord's Motion in Limine to Exclude Evidence Post-Dating the 1932 Discontinuance of Estabrook Road Pursuant to G.L. c. 82, § 32A; 6) Plaintiff Town of Concord's Motion In Limine to Exclude Evidence and Expert Testimony Concerning Other Discontinued Roads; and 7) Plaintiff Town's Motion In Limine to Exclude Expert Testimony Concerning Estabrook Road's Status as "Private" or "Public" and Corresponding Access Rights. Following arguments, the court took the seven motions in limine under advisement, with a separate order to issue. In addition, the court instructed Harvard College to proceed with its intended written discovery provided that such discovery is accomplished in a timely manner so as not to interfere with the scheduled dates of trial. Former defendants Nina Neilson and John Baker, after a colloquy between the court and former defendants' counsel, will not be required to re-enter the case, based on their representation that they and the Town of Concord have entered into a private restriction agreement. Counsel were further advised that the trial, as presently scheduled, will be held by videoconference due to Covid-19 pandemic, unless otherwise ordered.		
11/13/2020	Order on Motions in Limine, issued. (Copies emailed to Attorneys Melissa Cook Allison, Kevin D. Batt, Austin P. Anderson, Diane C. Tillotson, M. Patrick Moore, Banessa A. Arslanian, Robert Nislick, Howard Cooper, Matthew Furman, Lisa C. Goodheart, Gwen Nolan King, and F. Alex Parra) Judge: Speicher, Hon. Howard P.		Image
11/13/2020	Defendants Supplemental Response to Plaintiff Town of Concord's Motion in Limine to exclude evidence and expert Testimony concerning other Roads,filed		
12/11/2020	Scheduled Judge: Speicher, Hon. Howard P. Event: Status Conference Date: 12/22/2020 Time: 10:00 AM Zoom Notice sent.		
12/22/2020	Status conference held by videoconference. Attorneys Diane Tillotson, Howard Cooper, Matthew Furman, Robert Nislick, Vanessa Arslanian, Gwen King, and Melissa Allison appeared by videoconference. After hearing from the parties on defendants' request for a continuance, the trial is rescheduled for the following dates: June 1-3, 2021 and June 8-10, 2021. Trial to be held by videoconference from 9:30 A.M. to 4:00 P.M. each day. View to be taken on May 28, 2020 at 10:00 A.M. Parties advised to request status conference prior to seeking any modification or enforcement with respect to preliminary injunction prior to trial.		
01/22/2021	Scheduled Judge: Speicher, Hon. Howard P. Event: View Date: 05/28/2021 Time: 10:00 AM		
01/22/2021	Event Resulted: Trial scheduled on: 02/23/2021 09:30 AM Has been: Rescheduled Hon. Howard P. Speicher, Presiding		
01/22/2021	Event Resulted: Trial scheduled on: 02/24/2021 09:30 AM Has been: Rescheduled Hon. Howard P. Speicher, Presiding		
01/22/2021	Event Resulted: Trial scheduled on: 02/25/2021 09:30 AM Has been: Rescheduled Hon. Howard P. Speicher, Presiding		
01/22/2021	Event Resulted: Trial scheduled on: 03/02/2021 09:30 AM Has been: Rescheduled Hon. Howard P. Speicher, Presiding		
01/22/2021	Event Resulted: Trial scheduled on: 03/03/2021 09:30 AM		

Docket Date	Docket Text	Amount Owed	Image Avail.
	Has been: Rescheduled Hon. Howard P. Speicher, Presiding		
01/22/2021	Event Resulted: Trial scheduled on: 03/04/2021 09:30 AM Has been: Rescheduled Hon. Howard P. Speicher, Presiding		
01/22/2021	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 06/01/2021 Time: 09:30 AM		
01/22/2021	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 06/02/2021 Time: 09:30 AM		
01/22/2021	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 06/03/2021 Time: 09:30 AM		
01/22/2021	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 06/08/2021 Time: 09:30 AM		
01/22/2021	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 06/09/2021 Time: 09:30 AM		
01/22/2021	Scheduled Judge: Speicher, Hon. Howard P. Event: Trial Date: 06/10/2021 Time: 09:30 AM		
04/01/2021	Procedural Order for Conduct of Trial by Videoconference, issued. (Copies emailed to Attorneys Kevin Batt, Melissa Allison, Diane Tillotson, Michael Moore, Jr., Ryan McManus, Robert Nislick, Tyler Chapman, Howard Cooper, Matthew Furman, Lisa Goodheart, Gwen King, and Francisco Parra) Judge: Speicher, Hon. Howard P.		Image
05/25/2021	Defendants' Proposed Plan for Court's View-May 28, 2021 at 10am,filed.		Image
05/26/2021	Town's Response regarding Defendants' Proposed Plan for Court's View,filed.		Image
05/26/2021	Defendant President and Fellows of Harvard College's Supplement to the Joint Pre-trial Memorandum, filed.		Image
05/28/2021	View taken in and around Estabrook Road in the Town of Concord and nearby area in close proximity to the Concord/Carlisle town lines. Attorneys Melissa Allison, Austin Anderson, Kevin Batt, Dianne Tillotson, Matthew Furman, Howard Cooper, and Gwen Nolan King appeared.		
06/01/2021	Day one of trial held by videoconference. Attorneys Melissa Allison, Austin Anderson, Kevin Batt, Dianne Tillotson, Matthew Furman, Robert Nislick, Howard Cooper, Lisa Goodheart, and Gwen Nolan King appeared. Court Reporter Pamela St. Amand sworn to transcribe the testimony and proceedings. Following openings and the taking of evidence, trial adjourned to June 2, 2021 at 9:30 A.M.		
06/02/2021	Day two of trial held by videoconference. Attorneys Melissa Allison, Austin Anderson, Kevin Batt, Dianne Tillotson, Matthew Furman, Robert Nislick, Howard Cooper, Lisa Goodheart, and Gwen Nolan King appeared. Court Reporter Pamela St. Amand, previously sworn, continued to transcribe the testimony and proceedings. Following the taking of evidence, trial adjourned to June 3, 2021 at 9:30 A.M.		
06/03/2021	Day three of trial held by videoconference. Attorneys Melissa Allison, Austin Anderson, Kevin Batt, Dianne Tillotson, Patrick Moore, Lisa Goodheart, and Gwen Nolan King appeared. Court Reporter Pamela St. Amand, previously sworn, continued to transcribe the testimony and proceedings. Following the taking of evidence, the trial is adjourned to June 8, 2021 at 9:30 A.M.		
06/07/2021	Defendants' Motion to exclude the testimony of Kaari Tari and Accompanying chalk,filed.		
06/08/2021	Day four of trial held by videoconference. Attorneys Melissa Allison, Austin Anderson, Kevin Batt, Matthew Furman, Dianne Tillotson, Howard Cooper, Vanessa Arslanian, Patrick Moore, Lisa Goodheart and Gwen Nolan King appeared. Court Reporter Pamela St. Amand, previously sworn, continued to transcribe the testimony and proceedings. Defendants' motion for involuntary dismissal filed pursuant to Rule 41(b) is DENIED on the basis that there is sufficient evidence on the issue of establishment of the public way to warrant decision on the merits. Following defendant Harvard College's opening argument and the further taking of evidence, the trial is adjourned to June 9, 2021 at 9:30 A.M.		

Docket Date	Docket Text	Amount Owed	Image Avail.
06/09/2021	Day five of trial held by videoconference. Attorneys Melissa Allison, Austin Anderson, Kevin Batt, Matthew Furman, Dianne Tillotson, Vanessa Arslanian, Patrick Moore, Howard Cooper, Lisa Goodheart and Gwen Nolan King appeared. Court Reporter Pamela St. Amand, previously sworn, continued to transcribe the testimony and proceedings. Following the further taking of evidence, the trial is adjourned to June 10, 2021 at 9:30 A.M.		
06/10/2021	Day six of trial held by videoconference. Attorneys Melissa Allison, Austin Anderson, Kevin Batt, Dianne Tillotson, Vanessa Arslanian, Howard Cooper, Lisa Goodheart, and Gwen Nolan King appeared. Court Reporter Pamela St. Amand, previously sworn, continued to transcribe the testimony and proceedings. Defendants' request to admit evidence of discontinuance of roads other than Estabrook Road, treated as a motion for reconsideration of the ruling in the court's November 11, 2020 Order on Motions in Limine excluding evidence regarding other discontinued roads, is DENIED, on the basis that defendants have not presented new facts or identified errors of law or a change of law as required for reconsideration, and further, the motion is markedly untimely and is denied for that reason as well as a matter of the court's discretion, with the court noting that the motion for reconsideration is presented eight months after the court's ruling on the motions in limine and on the last day of a six-day trial. Defendants' renewed request for involuntary dismissal is DENIED. Defendants' motion to admit Chalk E and Chalk A into evidence is taken under advisement. At the close of the taking of evidence, the court suspended the trial. Post-trial briefs, including requests for findings of fact and requests for rulings of law, if any, to be filed and served within sixty (60) days following notification of the receipt of the transcript by the Court. Counsel to address the legal issue and legal effect of the 1932 discontinuance with their respective post-trial submissions. Court to schedule closing arguments after receipt of transcript and post-trial submissions.		
06/10/2021	Defendants' Offer of Proof regarding the Town of Concord's Discontinuances of Ways pursuant to G.L.c. 82 sec 32A ("The 1924 Act"),filed.		Image
08/02/2021	Transcript of June 1, 2021 June 2, 2021 June 3, 2021 June 8, 2021 June 9, 2021 and June 10, 2021 before Hon. Howard P. Speicher. All briefs and/or memoranda should be submitted to the Court on or before 10/04/2021.		
10/04/2021	The Read-Kays and the Robbs' Post-Trial Brief,filed.		Image
10/04/2021	Town of Concord's Proposed Findings of Fact,filed.		Image
10/04/2021	Plaintiff Town of Concord's Post-Trial Brief and Proposed Rulings of Law,filed.		
10/05/2021	Scheduled Judge: Speicher, Hon. Howard P. Event: CLOSING ARGUMENTS (IN PERSON) Date: 11/18/2021 Time: 02:00 PM		
10/05/2021	President and Fellows of Harvard College's Post-Trial Brief and Proposed Conclusions of Law,filed.		
10/06/2021	Defendants Neil and Anna Rasmussens' Post-Trial Memorandum and Proposed Rulings of Law,filed.		
10/06/2021	Appendix to Defendants Neil and Anna Rasmussens' Post-Trial Memorandum and Proposed Rulings of Law,filed.		
10/06/2021	Defendants' Joint Proposed Findings of Fact,filed.		Image
11/18/2021	Event Resulted: Hearing scheduled on: 11/18/2021 02:00 PM Has been: Held via video Hon. Howard P. Speicher, Presiding		
12/16/2021	Transcript of Closing Arguments held on November 18, 2021 has been received.		
08/02/2022	Notice of Withdrawal of Gwen Nolan King for the Defendant, President and Fellows of Harvard College,filed.		Image
11/23/2022	Decision issued. (Copies emailed to Attorneys Austin Anderson, Kevin Batt, Melissa Allison, Ryan McManus, Michael Moore, Diane Tillotson, Matthew Furman, Tyler Chapman, Howard Cooper, Robert Nislick, Lisa Goodheart, and Francisco Parra) [Typographical errors found, please see Corrected Decision] Judge: Speicher, Hon. Howard P.		Image
11/23/2022	Corrected Decision issued. (Copies emailed to Attorneys Austin Anderson, Kevin Batt, Melissa Allison, Ryan McManus, Michael Moore, Diane Tillotson, Matthew Furman, Tyler Chapman, Howard Cooper, Robert Nislick, Lisa Goodheart, and Francisco Parra) [Typographical errors found in original] Judge: Speicher, Hon. Howard P.		Image
11/23/2022	Judgment after trial entered. (Copies emailed to Attorneys Austin Anderson, Kevin Batt, Melissa Allison, Ryan McManus, Michael Moore, Diane Tillotson, Matthew Furman, Tyler Chapman, Howard Cooper, Robert Nislick, Lisa Goodheart, and Francisco Parra)		Image

Docket Date	Docket Text	Amount Owed	Image Avail.
	Judge: Speicher, Hon. Howard P.		
12/06/2022	Notice of Appeal by Neil E. Rasmussen, Anna Rusmussen, Brooks S. Read, Dr. Susannah Kaye, Russell Robb, III Trustee of the Pippin Tree Land Trust, Leslie Robb Trustee of the Pippin Tree Land Trust, President and Trustee of Harvard College to the Appeals Court filed.		Image
01/09/2023	Withdrawal of Michael P Moore, Jr., Esq. for Neil E. Rasmussen, Anna Rusmussen, filed		Image
03/03/2023	Notice of Assembly of Record on Appeal sent to the Clerk of the Appeals Court.		
03/03/2023	Notice of Assembly of Record on Appeal sent to all counsel of record.		

Financial Summary

Cost Type	Amount Owed	Amount Paid	Amount Dismissed	Amount Outstanding
Cost	$305.00	$305.00	$0.00	$0.00
Total Total	Total $305.00	Total $305.00	Total $0.00	Total $0.00

Receipts

Receipt Number	Receipt Date	Received From	Payment Amount
375913	10/24/2017	Batt, Esq., Kevin D	$305.00
Total	Total	Total	Total $305.00

Case Disposition

Disposition	Date	Case Judge
Judgment after trial entered.	11/23/2022	Speicher, Hon. Howard P.

charge of institutions established and maintained by the United States government for the care and treatment of persons who have been in the military or naval service of the United States and are suffering from mental disease, and may at any time revoke any such license. Licenses granted hereunder shall expire with the last day of the year in which they are issued, but may be renewed. The department may fix reasonable fees for said licenses and renewals thereof. *Approved April 23, 1924.*

insane veterans, etc.

Expiration and renewal of licenses.

Fees.

AN ACT AUTHORIZING THE BOSTON ELEVATED RAILWAY COMPANY TO ISSUE ADDITIONAL BONDS, COUPON NOTES OR OTHER EVIDENCES OF INDEBTEDNESS. *Chap.*288

Be it enacted, etc., as follows:

In addition to the bonds, coupon notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof which the Boston Elevated Railway Company may lawfully issue for capital purposes, it may, in the manner and to such extent as the department of public utilities after a public hearing may approve, issue bonds, coupon notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof to an amount not exceeding in the aggregate two million two hundred and thirty-two thousand four hundred and seventy-seven dollars; provided, however, that the amount of additional bonds, coupon notes or other evidences of indebtedness authorized hereby shall not in any event exceed the amount paid in in cash to the treasury of the West End Street Railway Company in addition to the par value of the stock of said company as premiums on the stock issued by said company subsequent to the enactment of chapter four hundred and sixty-two of the acts of eighteen hundred and ninety-four. *Approved April 24, 1924.*

Boston Elevated Railway Company may issue additional bonds, coupon notes, etc.

Proviso.

AN ACT RELATIVE TO THE DISCONTINUANCE OF CERTAIN WAYS AS PUBLIC WAYS. *Chap.*289

Be it enacted, etc., as follows:

Chapter eighty-two of the General Laws is hereby amended by inserting after section thirty-two the following new section: — *Section 32A.* Upon petition in writing of the board or officers of a town having charge of a public way, the county commissioners may, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for travel, adjudicate that said way shall thereafter be a private way and that the town shall no longer be bound to keep the same in repair, and thereupon such adjudication shall take effect; provided, that sufficient notice to warn the public against entering thereon is posted where such way enters upon or unites with an existing public way. This section shall not apply to ways in cities.

Approved April 24, 1924.

G. L. 82, new section after § 32.

Discontinuance of certain ways as public ways.

Proviso.

Not applicable to ways in cities.