

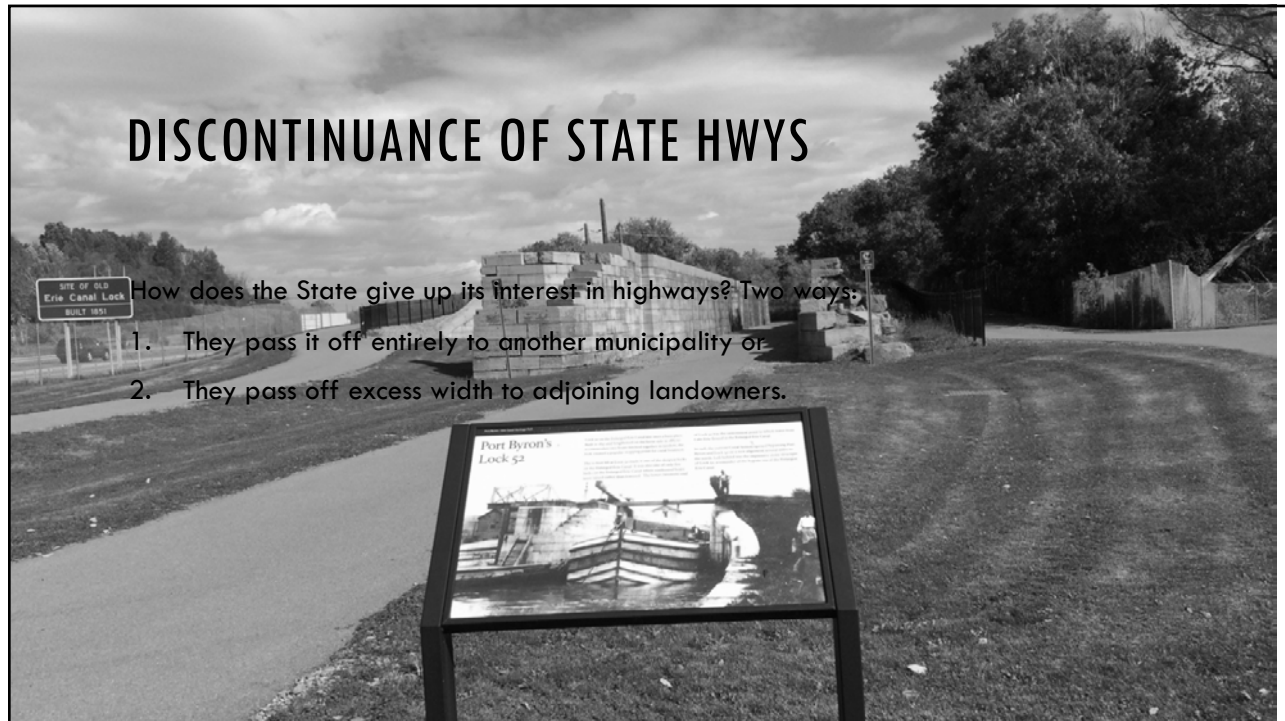
HIGHWAY (ROAD) ABANDONMENT

TERMINATION OF HIGHWAYS

Distinction between Discontinuance and Abandonment

Discontinuance: Formal Termination of the Public Highway

Abandonment: Termination of the Public Highway from non-use



DISCONTINUANCE OF STATE HWYS

How does the State give up its interest in highways? Two ways:

1. They pass it off entirely to another municipality or
2. They pass off excess width to adjoining landowners.

DISCONTINUANCE OF STATE HWYS

§ 10. General powers and duties of the commissioner of transportation relating to highways

The commissioner of transportation shall:

32. Have power, upon the request of a county, city, town or village, whenever such commissioner deems an existing state highway or portion thereof lying within such municipality to be no longer needed or useful to the state highway systems, to enter into an agreement with the appropriate authorities of such municipality to abandon by an official order to such municipality such highway or portion thereof.

Upon the filing of certified copies of such official order... the state shall cease to maintain such highway or portion thereof and all the rights and obligations of the state therein shall be turned over and surrendered to such municipality and such highway or portion thereof shall thereafter be maintained as a part of the highway or road system of such municipality....

DISCONTINUANCE OF STATE HWYS

§ 62. Improvement of alignment and of dangerous conditions on repair work

... upon the completion and acceptance of a section of highway constructed on a new location acquired to accomplish the improvement of alignment or of dangerous condition..., the commissioner of transportation shall make an official order discontinuing the maintenance by the state of such section of highway on old location....as it had been maintained by the state as a part of the state highway system before the improvement of alignment or of dangerous conditions. If such section of highway or part thereof is located in an incorporated village, such section...shall be maintained thereafter by the village where such section is located...

DISCONTINUANCE OF STATE HWYS

§ 65. Lands may be sold or leased; disposition of proceeds

...The governing body may, where it has acquired lands by purchase or condemnation as a right-of-way for a state highway, with the consent of the commissioner of transportation, sell, convey, grant or lease to the owner or owners of property adjoining the same, so much thereof as may be unnecessary for such highway purposes, provided the strip of land retained for such highway purposes is not less than sixty feet in width, and provided such sale, conveyance, grant or lease will give said adjoining owner or owners of land a frontage immediately in front of their respective premises upon the new highway and right-of-way when completed.
....

DISCONTINUANCE OF STATE HWYS

§ 345-a. Abandonment and transfer of state highways

The abandonment or transfer of any state highway to a county, town, city or village shall be deemed a transfer of all right, title and interest of the state of New York to and in such highway to such county, town, city or village respectively unless expressly provided to the contrary.

DISCONTINUANCE OF STATE HWYS

In *County of Rockland v. EklecCo.*, 2 AD3d 569 (2nd Dept 2003) the County claimed fee ownership of an abandoned State Highway.

Old Route 59 A was originally a dirt path used by Native Americans and early settlers and was taken over in the early 1800's by the Rockland Turnpike Company and developed as a toll road.

In 1894 the roadway was adopted by the County, which then became a State Highway in 1912 where it remained under State jurisdiction until 1960. A realignment of the State Highway resulted in a discontinuance of the disputed roadway as a State Highway.

From 1960 to 1996 the roadway was maintained by the Town of Clarkson.

In 1997 the Town quit-claimed its interest to EklecCo. for use as a system of roads to access Palisades Shopping Center.

DISCONTINUANCE OF STATE HWYS

The County claimed the Town was not the rightful owner of the roadbed, and upon abandonment of use, the fee reverted to the County.

Court held: the County was not the owner because the Rockland Turnpike Company never acquired a fee interest in the land.

The 1894 adoption of the road by the County was not a fee acquisition because the Turnpike Company's 1809 Charter granted it only the power to purchase and hold real property "as shall be necessary to fulfill the end and intent of the corporation hereby created and made and to no other use, intent or purpose whatsoever."

The County's claim was also inconsistent with the general rule that the public acquires only an easement in the highways and the fee remains in the **landowner**.

Begs the question: Who is the landowner now? Heirs of the landowners the Turnpike Co. acquired their easement from, good luck finding them today.

DISCONTINUANCE OF COUNTY ROADS

Charleston Town Road off State Route 30A



DISCONTINUANCE OF COUNTY RDS

How does the County give up its interest in highways? Two ways:

1. They pass it off to another municipality (Town or Village) or
2. They pass off to adjoining landowners.

MUST AMEND THE COUNTY MAP because the MAP CONTROLS

DISCONTINUANCE OF COUNTY RDS

§ 115-a. Abandonment of unused portions of town highways on county road system

What has to happen?

- 1) deviation of a county road from the path of a town road or a town road w/in a village
- 2) upon a recommendation from the county superintendent, AND
- 3) a resolution by the board of supervisors AND
- 4) written agreement with the town or village board OR approval from the state commissioner of transportation
- 5) County may abandon to the town or village that portion of former town or village highway for maintenance AND
- 6) modify the county road map

DISCONTINUANCE OF COUNTY RDS

Procedure to amend the County Map found at:

- § 115-b. Removal of road or part of road from county road system

The road does not “revert” to the Town, Village or City for maintenance until the County Map is amended.

DISCONTINUANCE OF COUNTY RDS

The County has to give 30 days notice to the municipality that they are now responsible for the former County Rd.

- § 115-c. Notice to municipalities where county roads are abandoned or revert to such municipalities

DISCONTINUANCE OF COUNTY RDS

§ 118-a. Abandoning of parts of county highways

Example of the Hwy Law describing a method or procedure for discontinuance but calling it an abandonment

DISCONTINUANCE OF COUNTY RDS

Highway Law §118-a FIRST PARAGRAPH →EXTRA WIDTH TO ADJOINERS

... sections of the old road ...which are of no further use for highway purposes to said county, the board of supervisors of said county in which said land is situated, upon the recommendation of the county superintendent of highways, may abandon to the abutting owner parts of the old roadwhich are of no further use for highway purposes, providing the road after such abandonment shall not be less than three rods in width, and the chairman of the board of supervisors of said county is... authorized to execute ... a quitclaim deed or deeds of the land so abandoned and to deliver the same to the abutting owner or owners ...

DISCONTINUANCE OF COUNTY RDS

High Law §118-a: SECOND PARAGRAPH → HWYS INHERITED FROM STATE TO ADJOINERS

....to abandon to the abutting owner or owners of such section of such road which is of no further use for highway purposes, and the chairman of the board of supervisors of said county is hereby authorized to execute and acknowledge in the name of the county, and affix the seal of the county to a quit claim deed or deeds of the lands so abandoned, and to deliver the same to the abutting owner or owners for such consideration and upon such terms and conditions as the board of supervisors of said county shall deem proper.

DISCONTINUANCE OF COUNTY RDS

High Law §118-a: LAST PARAGRAPH → EXTRA WIDTH if not to adjoiners, to be made into picnic areas, parking and/or rest stops

....may establish parking areas on land which would ordinarily be abandoned by the highway department, due to new right-of-ways, or widening, straightening, extending, draining, paving or otherwise improving highways. The superintendent may also place upon said parking areas suitable picnic tables and facilities for the traveling public. The area so developed by the superintendent of highways shall be used for parking and resting purposes primarily and shall not be developed for or as a public park.

DISCONTINUANCE OF COUNTY RDS

§ 131-b. County highways and bridges

1. A board of supervisors may, when satisfied that it is for the interest of the county, lay out, construct, open, alter or discontinue a county highway therein, or cause the same to be done, and construct, repair or abandon a county bridge therein, or cause the same to be done when the board shall deem that the interest of the county will be promoted thereby....

DISCONTINUANCE OF TOWN HWYS

How do Towns discontinue highways?

Up to 1000 feet of the end of a Town highway can be discontinued when:

- 1) a landowner(s) requests it be discontinued and
- 2) the Town Superintendent decides that the portion requested to be discontinued is **“unnecessary”** for highway purposes and
- 3) Order is entered in the Town Clerk’s office
- High Law §207-Discontinuance of highway

DISCONTINUANCE OF TOWN HWYS

In *Matter of Hargett v. Town of Ticonderoga*, 25AD3d981 (3rd Dept 2003) the Petitioner applied under Hwy law §207 to have 805 feet of the paved portion of Bullrock road discontinued.

The Town Highway Superintendent denied the application and an Article 78 proceeding was brought challenging his decision.

The Court held “by the plain language of the statute, even if all elements are established, it is still discretionary with the Highway Superintendent whether or not discontinue its use as a public highway.”

Because Petitioner could not prove she owned both sides of the highway, she failed to satisfy the first element for discontinuance and therefore the judgment and order were affirmed.

DISCONTINUANCE OF TOWN HWYS

Once the Order containing a written description of the road is filed the road is discontinued for highway purposes

- High Law §208-Description to be recorded

DISCONTINUANCE OF TOWN HWYS

Upon the request of the County Superintendent, Town Roads running through forest lands that do not provide access to any property and not necessary to connect existing town, county or state highways, to be *abandoned and discontinued* for public purposes may be discontinued upon a resolution of the Town Board.

- High Law §211-a - Abandonment of certain town highways

DISCONTINUANCE OF TOWN HWYS

Upon the request of the County Superintendent or Town Superintendent, Town Roads ...running through school district lands not necessary for ingress to or egress from any privately or publicly owned lands, and not necessary to connect existing town, county or state highways, to be *abandoned and discontinued* for public purposes...

- Highway Law §211-b. Abandonment of certain town highways in school districts

DISCONTINUANCE OF TOWN HWYS

Town Highways through wholly owned and occupied state lands “may be abandoned or the use thereof as a highway discontinued with the consent and approval of the state authority having jurisdiction or control over such lands...”

- High Law §212. Changing location of highways over certain lands owned and occupied by the state

DISCONTINUANCE OF TOWN HWYS

Towns can also convey their interest in lands **acquired** by purchase, condemnation or as a gift for highway improvements that they no longer need to the adjoining landowners.

- High Law § 212-a. Abandoning of parts of town highways

DISCONTINUANCE OF TOWN HWYS

General Method of Discontinuance:

- 1) Upon a written application
- 2) With consent of the Town Board
- 3) Filing the Order discontinuing the road in the Town Clerk's office with a release from the landowners for all damages
- High Law §171(2) –Highways by dedication

DISCONTINUANCE OF TOWN HWYS

Under what circumstances can the Town discontinue a highway?

“When the highway has become useless since it was laid out.”

What does useless mean?

It means practically useless, not absolutely useless. *In re Matter of Trask*, 45 Misc 244 (Sup. Ct. Montgomery Co., 1904)

DISCONTINUANCE OF VILLAGE STREETS

Village Law § 6-612. Street improvement or acceptance

The board of trustees may by resolution provide for laying out, altering, widening, narrowing, discontinuing or accepting the dedication of a street in the village.

DISCONTINUANCE OF VILLAGE STREETS

There is no statutory standard for when the board of trustees may discontinue a street.

Recent cases in the second department have applied a “useless test” applied to the discontinuance of Town Highways

DISCONTINUANCE OF VILLAGE STREETS

In *Bass Building Corp. v. Village of Pomona*, 142 A.D.2d 657(2d Dep't 1988), the Village Board of Trustees employed a "useless test" to justify the discontinuance of the last 200 foot stretch of a road that continued on into the neighboring town of Wesley Hills where the road was known as Beatrice Road.

The Second Dept. reversed the decision because:

- The record reveals that Pomona did not establish, or even attempt to establish at its public hearing, that the discontinued portion of Hidden Valley Drive had become useless as a right-of-way to the general public.

DISCONTINUANCE OF VILLAGE STREETS

Baker v. Village of Elmsford, 70 A.D.3d 181(2d Dep't 2009)

- The "useless" test has been strictly construed, perhaps given the applicable *publicum juris* trust, so that generally, if a street affords a means of ingress or egress and is used as such to any degree more than a mere token use, the street is not deemed to be useless
- Since the street in question was used when other streets flooded, it was not deemed "useless"

DISCONTINUANCE OF VILLAGE STREETS

Factors to consider when determining uselessness:

- Market values
- Fire protection
- Law enforcement
- Water
- Sanitation
- Other environmental factors
- *Baker, Supra*

DISCONTINUANCE: CONCLUSION

When a highway is being discontinued by statute, all the steps must be strictly followed, if not, then the attempted discontinuance will fail.



ABANDONMENT

Cook/Given Road, Town of Russell
St. Lawrence County

ABANDONMENT

Abandonment of a public highway occurs as the result of nonuse or disuse of the public highway for the requisite period of time

A determination of whether an abandonment has occurred is a question of fact.



Highway Maintenance at its finest.

ABANDONMENT

High Law § 205. Highways abandoned

1. Every highway that shall not have been opened and worked within six years from the time it shall have been dedicated to the use of the public, or laid out, shall cease to be a highway; but the period during which any action or proceeding shall have been, or shall be pending in regard to any such highway, shall form no part of such six years; and every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway, and every public right of way that shall not have been used for said period shall be deemed abandoned as a right-of-way.

The town superintendent with the written consent of a majority of the town board shall file, and cause to be recorded in the town clerk's office of the town a written description, signed by him, and by said town board of each highway and public right-of-way so abandoned, and the same shall thereupon be discontinued.

ABANDONMENT

Filing the certificate is merely an administrative and ministerial act and not determinative of whether an abandonment has occurred. *Daetsch v. Taber*, 149 A.D.2d 864 (3d Dep't, 1989)

If the facts do not exist to support the certificate of abandonment, the certificate of abandonment is void for a want of jurisdiction. *People v. Marlette*, 94 AD 592 (3d Dep't, 1904)

ABANDONMENT

Abandonment is automatic upon the expiration of 6 years of nonuse by the public. *People v. Marlette*, 94 AD 592 (3d Dep't, 1904) "It ceases to be a highway by virtue of the law, and not because of any act which the commissioner may perform under the law."

Furthermore, the road was deemed abandoned by operation of law, not by the filing of a certificate of abandonment. *Abess v Rowland*, 13 AD3d 790 (3d Dep't 2004)

ABANDONMENT

The filing of the certificate is deemed a ministerial act not determinative of whether the town highway was abandoned.

In *Passeri v. Brody*, 199 A.D.3d 1260 (3rd Dept, 2021) the Plaintiff sought to amend her complaint to allege the road to her house was public because there was no proof that the Town Highway Superintendent had filed the certificate of abandonment (but there was some proof of a resolution existing) and whether that intended abandonment was absolute or qualified. The Court allowed the amendment seemingly ignoring the factual basis upon which abandonment by operation of law occurs: 6 years of non-use and non-maintenance, because amendment to a complaint only requires some merit to the potential new claim and a later determination on the merits of the claim to decide whether the road was still public.

ABANDONMENT

In *Matter of Fernandez v. Town of Benson*, 196 A.D.3d 1019 (3rd Dept. 2021) the road had not been maintained or used very much for decades, but a certificate of abandonment was never filed. When Plaintiff started demanding that the Town maintain the road, the Town Hwy Super filed the certificate.

Plaintiff sued the Town to compel maintenance of the road, for a determination that the road was not abandoned and to claim the Town violated the Equal Protection clause under the US constitution by not maintaining the road like other dead-end town roads with only one house on it.

The App. Div. 3rd Dept. acknowledged that the certificate of abandonment is ministerial act and that the abandonment occurs by operation of law and is a question of fact and did not grant summary judgment to either party.

ABANDONMENT

Only easements for highway purposes can be abandoned pursuant to this section.
Town of Clarkson v. Brent 60 AD2d 627 (2d Dep't 1977)

Where the municipality owns the fee, they continue to own the fee even if the public highway upon that land ceases to be used by the traveling public or is never used by the traveling public. *Romanoff v Village of Scarsdale*, 50 A.D.3d 763(2d Dep't 2008)

ABANDONMENT

Where a road has been laid out pursuant to statute, the failure to occupy the full width of the right of way is not deemed an abandonment of the unused width. *Schillawski v State*, 9 N.Y.2d 235 (1961).

The problem is that *Schillawski* was in regard to a State Highway, not a Town Highway and was not a highway created by use. There can be no abandonment of any part of a State Highway, so that was the correct answer. That holding regarding abandonment of width has been misconstrued by Courts dealing with town highways.

In *Hoffman v. Town of Shandaken*, 147 A.D.3d 1275 (3rd Dept 2017) the Court held that the Town had a 3 Rod wide user highway because there can be no abandonment of the width stated in a statute for creating highways citing to *Schillawski*.

ABANDONMENT

user highways: created by public use and public maintenance, they can be lost by the reverse set of facts, a lack of use and a lack of maintenance

In *Ciarelli v. Lynch*, 69 AD3d 1008 (3d Dep't 2010) there was a lack of public maintenance but never a lack of public use so the road remained public

ABANDONMENT

The burden of proof of abandonment is on the party asserting it. *Smigel v. Town of Rensselaerville*, 283 AD2d 863 (3d Dep't 2001).

The legal presumption "once a highway, always a highway" is a difficult standard to overcome

Even more difficult in the last 10 years

Rationale: Eminent Domain is costly for Towns, so better to let them re-claim old highways.

ABANDONMENT

Obstructions in the Public Way:

Cannot extinguish the Public's Easement for highway purposes *Smith v. Sandy Creek*, 12 Misc. 2d 916 (Sup Ct. Tompkins Co. 1958)

"if pedestrians use a part of the width of a highway, although the remainder is obstructed and unusable, there is no abandonment of the way." *Id.*

Where obstructions do not absolutely preclude use, there can still be a finding of abandonment, *Faigle v. Macumber*, 169 A.D.2d 914 (3d Dep't 1991).

ABANDONMENT

In *Smigel v. Town of Rensselaerville* 283 A.D.2d 863 (3d dept 2001); and *Ciarelli v. Lynch*, 69 AD3d 1008 (3d Dep't 2010)

the barricades at the opening to the road were insufficient to thwart public use, and the road was not deemed abandoned.

ABANDONMENT

Lansing Turnpike aka Horey Road
Ciarelli v. Lynch, 69 AD3d 1008 (3d Dep't 2010)



ABANDONMENT

Lansing Turnpike, Schoharie Co.
Ciarelli v. Lynch, 69 AD3d 1008 (3d Dep't 2010)



ABANDONMENT

West Galway Road, Saratoga County
Curtis v. Galway, 50 A.D.3d 1370 (3d Dep't 2008)



ABANDONMENT

Village Streets may also be abandoned pursuant to High Law §205(1) despite it being in Article 8 of the Highway Law pertaining to Town Highways

- *Marchand v. State Dep't Environmental Conservation*, 84 AD3d 808 (2d Dep't 2011)
- *Excelsior Brick Co. v. Village of Haverstraw* 142 NY 146 (1894)

ABANDONMENT

Conclusion:

Highway Abandonment is a case by case determination based on the facts regarding the extent of the public use and the frequency of the public maintenance.

Determining Abandonment of a road is A CONCLUSION OF LAW

A surveyor that marks a road "ABANDONDED" is expressing an opinion based upon physical evidence of the poor condition of the road and visible lack of use

MISINTERPRETED AS A LEGAL CONCLUSION → leads to problems when the client and lawyers rely on the label of "abandoned" as a legal conclusion rather than an adjective regarding the condition of the road.

ABANDONMENT: OTHER RECENT CASES

Dandomar Co. LLC v. Town of Pleasant Val. Town Bd. 142 A.D.3d 681 (2nd Dept 2016)

Dashnaw v. Town of Peru, 51 Misc 3d 1221 (A) (Sup. Ct Clinton Co, 2016)

No-Dents Props., Inc. v. Commissioner of the Town of Hemstead Dept of Highways, 138 A.D.3d 702 (2nd Dept 2016)

Matter of Town of N. Elba v. NYS DEC, 160 A.D.3d 74 (3rd Dept 2018)

QUALIFIED ABANDONMENT

High Law §205(2)

Really a discontinuance statute

Determination by the Town Superintendent that:

- 1) for 2 years less no more than 2 cars per day have used the road
- 2) that the qualified abandonment will not cause injustice or hardship to the adjoining owners

QUALIFIED ABANDONMENT

Then

- 3) notice to landowners and a public hearing
- 4) filing of a certificate with the Town Clerk describing the hwy of the qualified abandonment

QUALIFIED ABANDONMENT

What is the effect of a qualified abandonment?

- 1) the road is no longer worked at the public expense
- 2) it does not cease to be a public highway or public easement
- 3) the town, nor the adjoiners have to repair it
- 4) no one shall obstruct it, but an adjoiner can fence it but must provide a gate in the middle of the road of at least 10 feet wide which shall not be locked



RIGHTS OF ADJOINING LANDOWNERS

Vrooman House
Schoharie County

RIGHTS OF ADJOINING LANDOWNERS

Depends on the Public's Interest in the Highway

“It is well settled that when lands described in a conveyance are bounded by a street, highway or road, the conveyance is deemed to pass title to the center of the abutting roadway unless the conveyance reflects an intent of the grantor to limit the grant to the edge of the road.”

• *Bashaw v. Clark* 267 AD2d 681 (3d Dep't 1999)

RIGHTS OF ADJOINING LANDOWNERS

using a highway as a member of the traveling public does not create in a private person a private easement of access → no adverse rights can be acquired against the public or the owner of the underlying fee because while the public had the right to use the road, the owner of the roadbed had no opportunity to resist a private use.

Where a road is qualified abandoned, the public can use the road because the public's easement is not extinguished when a road is qualified abandoned.

RIGHTS OF ADJOINING LANDOWNERS

"A private easement of way may not be expressly or impliedly created by grant over purported streets where the ownership of the land in the streets and of all easement rights therein is vested in a third person or in a municipality not a party to a grant. Rather, such an easement arises only when it is shown that ownership of the land and the bed of the street were once the property of a common grantor."

* *Kent v. Dutton*, 122 AD2d 558 (4th Dep't 1986)

RIGHTS OF ADJOINING LANDOWNERS

The private right to access property from a public highway merely based on contiguity with the highway is destroyed when the public highway is destroyed.

* *Goldrich v. Franklin Gardens Corp.*, 115 NYS2d 72 (Sup Ct. NY Co. 1952) rev'd 282 AD 698 (2d Dep't 1953)

That is why damages are paid to the adjoiners and releases obtained in the statutory framework for highway discontinuances.

The certificate of abandonment must be challenged within 1 year of its filing, but if the road was abandoned by operation of law long ago...you snooze you loose access.

RIGHTS OF ADJOINING LANDOWNERS

In *Waldron v. Wagner Hill Ltd.* 292 AD2d 770 (4th Dept 2002) "There is no common law right of access over the entire highway even if that highway is subsequently abandoned....the plaintiffs admit they have access to their land from that portion of Wagner Hill Road not abandoned by the Town of Bath."

In *Owen v. BLC Fly Fishers*, 262 AD2d 922 (3rd Dept 1999) "It is not at all clear from the this record that in 1843, when title to the that portion of the parties property was purportedly divided, the then owner of plaintiffs' present properties did not have other legal access thereto." (no common grantor established)

RIGHTS OF ADJOINING LANDOWNERS

Once the road is abandoned, the private uses are typically considered hostile to the landowner and after 10 years might vest as a private prescriptive right.

The private uses of the roadway have to meet the standard of open, notorious, continuous, uninterrupted, under a claim of right and adverse to the rights of the owner for 10 years.

If the road is abandoned by both public and private use, there may be no right of way for the adjacent land owners.

RIGHTS OF ADJOINING LANDOWNERS

In *Tonkiwa Ltd v. Trusedell*, 155 A.D.3d 1479 (3rd Dept, 2017)

The Plaintiffs admitted that the Defendants had a right of way over the old abandoned public road that ran between their properties that had been laid out by statute (180 of the Hwy Law).

They also admitted Defendants' right of way was 49.5 feet wide.

The real contention seemed to be over whether there was an obligation to share in maintenance and about the gates on the road.

THE END

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