

CREEK ROAD ALTERNATIVE ANALYSIS

Town of Middlebury, Vermont

Research Notes

9/19/19

Summary of relevant correspondence and Vermont Statutes.

1. **Mark Sperry opinion letter - 11-09-79 (specific to Charles Ave)**
 - a. Mark Sperry's opinion from 1979 letter to the town manager indicates that Town has a legal obligation to maintain Class 1, 2, and 3 roads safe to travel and open to the public.
 - i. Reference to 19 V.S.A. 931 – “to keep good and sufficient repair at all seasons of the year of its class 1, 2, and 3 highways”. Section 931 appears to have been rescinded in the current Vermont Statutes Online
 - ii. Reference to 19 V.S.A. 1331 – Discussion of “unsafe to travel”. Chapter 13 and Section 1331 appears to have been rescinded in the current Vermont Statutes Online.
 - b. Sperry indicates that the Select Board could discontinue a roadway, continue the roadway as a trail or continue it as a bicycle trail. Sperry references Section 19 V.S.A. 531 as setting out the process for discontinuing a roadway. Section 531 appears to have been rescinded in the current Vermont Statutes Online. The current reference appears to be Chapter 7.
2. **Benjamin Putnam email 6-13-19**
 - a. 19 V.S.A. 717(c) “A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way.”
 - b. Private Drive to Perrin's
 - i. No known legal prohibition of Town constructing a private drive in a private ROW.
 - ii. Town risks criticism for creating a benefit for a private landowner. Could be argued that it is the most cost effective solution. Further rationalization if it is part of a “settlement agreement” in the event that an affected property owner contests the Creek Road discontinuance.
 - iii. Cautions against town being responsible for on-going maintenance of a private drive.
 - iv. Establishment of a private right-of-way to Perrin's would need to be purchased or donated – Condemnation isn't an option.
 - c. Alternative approaches include:
 - i. New road as a public road.
 - ii. New road as a public road then discontinued.
3. **Vermont Statutes - Title 19: Highways (excerpts)**
 - a. **§ 301. Definitions**
 - i. "Discontinued highway" means a previously designated class 1, 2, 3, or 4 town highway as to which, through the process of discontinuance, all rights have been reconveyed to the adjoining landowners.

- ii. **"Pent road"** is any town highway which, by written allowance of the selectmen, is enclosed and occupied by the adjoining landowner with unlocked stiles, gates, and bars in such places as the selectmen designate.
 - iii. **"Trail"** means a public right-of-way which is not a highway and which:
 - (A) previously was a designated town highway having the same width as the designated town highway, or a lesser width if so designated; or
 - (B) a new public right-of-way laid out as a trail by the selectmen for the purpose of providing access to abutting properties or for recreational use.
- b. **§ 302. Classification of town highways**
- i. **Class 3** town highways:
 - (A) Class 3 town highways are all traveled town highways other than class 1 or 2 highways. The selectmen, after conference with a representative of the Agency shall determine which highways are class 3 town highways.
 - (B) The minimum standards for class 3 highways are a highway negotiable under normal conditions all seasons of the year by a standard manufactured pleasure car. This would include but not be limited to sufficient surface and base, adequate drainage, and sufficient width capable to provide winter maintenance, except that based on safety considerations for the traveling public and municipal employees, the selectboard shall, by rule adopted under 24 V.S.A. chapter 59, and after following the process for providing notice and hearing in section 709 of this title, have authority to determine whether a class 3 highway, or section of highway, should be plowed and made negotiable during the winter. However, a property owner aggrieved by a decision of the selectboard may appeal to the transportation board pursuant to subdivision 5(d)(9) of this title.
 - (C) A highway not meeting these standards may be reclassified as a provisional class 3 highway if within five years of the determination, it will meet all class 3 highway standards.
 - ii. **Class 4** town highways are all town highways that are not class 1, 2, or 3 town highways or unidentified corridors. The selectboard shall determine which highways are class 4 town highways.
 - iii. **Trails** shall not be considered highways and the town shall not be responsible for any maintenance including culverts and bridges.
- c. **§ 304. Duties of selectmen**
- (a) It shall be the **duty and responsibility** of the selectboard of the town to, or acting as a Board, it shall have the authority to:
 - (1) **see that town highways and bridges are properly laid out, constructed, maintained, altered, widened, vacated, discontinued, and operated, when the safety of the public requires, in accordance with the provisions of this title;**
 - (2) take any action consistent with the provisions of law, including determinations made pursuant to subdivision 302(a)(3)(B) or subsection 310(a) of this title, which are necessary for or incidental to the proper
 - (5) grant permission to enclose **pent roads and trails** by the owner of the land during any part of the year, by erecting stiles, unlocked gates, and bars in the places designated and to make regulations governing the use of pent roads and trails and to establish penalties not to exceed \$50.00, for

noncompliance. Permission shall be in writing and recorded in the town Clerk's office;

(9) change the course of a stream, pursuant to chapter 9 of this title;

(10) erect embankment on stream, pursuant to chapter 9 of this title;

(11) construct a watercourse, drain, or ditch from a highway across lands of any person, pursuant to chapter 9 of this title;

(12) **lay out, alter, classify, and discontinue town highways, pursuant to chapter 7 of this title;**

- d. **19 V.S.A. 305 (j) The legislative body may designate a specific highway or portion thereof proposed to be discontinued as a trail, in which case the right-of-way shall be continued at the width provided for in section 702 of this title.** A designation of a highway or portion thereof as a trail under the provisions of this section shall be in writing, setting forth a complete description of the highway or portion thereof so designated. For all highways not designated as a trail and discontinued pursuant to this section, title to the rights-of-way shall belong to the owners of the abutting lands. If the right-of-way is located between the lands of two different owners, it shall be returned to the lots to which it originally belonged, if they can be determined; if not, it shall be equally divided between the owners of the lands on each side. The legislative body shall return a report of its actions to the town clerk's office and the agency of transportation.
- e. **§ 310. Highways, bridges and trails**
- (a) **A town shall keep its class 1, 2, and 3 highways and bridges in good and sufficient repair during all seasons of the year,** except that based on safety considerations for the traveling public and municipal employees, the selectboard shall, by rule adopted under 24 V.S.A. chapter 59, and after following the process for providing notice and hearing in section 709 of this title, have authority to determine whether a class 2 or 3 highway, or section of highway, should be plowed and made negotiable during the winter. A property owner aggrieved by a decision of the selectboard may appeal to the transportation board pursuant to subdivision 5(d)(9) of this title.
- (b) **Class 4 highways may be maintained to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town,** or may be reclassified using the same procedures as for laying out highways and meeting the standards set forth in section 302 of this title.
- (c) **A town shall not be liable for construction, maintenance, repair, or safety of trails.**
- f. **19 V.S.A. 701(4) "Discontinued"** means a previously designated town highway which through the process of discontinuance all public rights are reconveyed to the adjoining landowners."
- g. **19 V.S.A. § 703. Widening of highways** - If the width of a highway as laid out is less than the law or the **public convenience requires, the selectmen may widen the highway accordingly.** Persons whose lands are taken or are damaged shall be entitled to compensation. (Added 1985, No. 269 (Adj. Sess.), § 1.)
- h. **19 V.S.A. 708(a) Petition** "...A person who is a landowner in a town, desiring to have an unidentified corridor which passes through or abuts his or her land **discontinued** or altered, may apply in writing to the selectboard for that purpose. **The selectboard may also initiate these proceedings on its own motion.**"
- i. **19 V.S.A. 709. Notice and Hearing** - "The selectmen shall promptly appoint a time and date both for examining the premises and hearing the persons interested, and give 30

days' notice to the petitioners, and to persons owning or interested in lands through which the highway may pass or abut, of the time when they will inspect the site and receive testimony. They shall also give notice to any municipal planning commission in the town, post a copy of the notice in the office of the town clerk, and cause a notice to be published in a local newspaper of general circulation in the area not less than ten days before the time set for the hearing. The notice shall be given by certified mail sent to the official residence of the person(s) required to be notified. (Added 1985, No. 269 (Adj. Sess.), § 1.)”

- j. **19 V.S.A. 710. Survey or Order of Discontinuance** – “After examining the premises and hearing any interested parties, and if the selectmen judge that the public good, necessity, and convenience of the inhabitants of the municipality require the highway to be laid out, altered, or reclassified as claimed in the petition, they shall cause the highway to be surveyed in accordance with the provisions of section 33 of this title if the highway right-of-way cannot be determined and shall place suitable monuments to properly mark the bounds of the survey. **If they decide to discontinue a highway, the discontinuance shall be in writing setting forth a completed description of the highway.** (Added 1985, No. 269 (Adj. Sess.), § 1; amended 1993, No. 195 (Adj. Sess.), § 4.)
- k. **19 V.S.A. 717(b)** “A town or county highway that has not been kept passable for use by the general public for motorized travel at the expense of the municipality for a period of **30 or more consecutive years** following a final determination to discontinue the highway shall be presumed to have been effectively discontinued.”
- l. **19 V.S.A. Subchapter 7: Discontinuance Of Highways**
 - i. **§ 771. Procedure**
 - (a) The legislative body of a municipality **may discontinue a town highway after following the procedures of sections 708-711** of this title. The authority of the legislative body under this subsection shall extend to any town highway, regardless of whether the highway was originally laid out by the town, the former county court, the supreme court, a committee of the general assembly, a turnpike company, or was established in any other manner now or formerly authorized by law.
 - (b) Notwithstanding subsection (a) of this section, the legislative body shall not discontinue a **class 1 or class 2 town highway** without the prior approval of the secretary of transportation.
 - ii. **§ 772. Service Of Petition; Costs** - When a petition is made to the Superior or Supreme Court to discontinue a highway laid out by Commissioners appointed by either of the Courts, which has not been built agreeably to the orders of the Court, the petition shall be served on one or more of the original petitioners for the laying of the highway, as well as on one or more of the selectmen of the town or towns through which the highway is laid, or the petition, on motion, shall be dismissed. If Commissioners are appointed and report adversely to the request of the petition, the original petitioners shall, in the discretion of the Court, be entitled to costs. (Added 1985, No. 269 (Adj. Sess.), § 1.)
 - iii. **§ 775. Title to Discontinued Highway - The selectmen shall notify the Commissioner of Forests, Parks and Recreation when they have filed a petition to discontinue a highway under this subchapter. The selectmen may designate the proposed discontinued highway as a trail, in which case the right-of-way shall be continued at the same width. The Commissioner of Forests, Parks and**

Recreation with the approval of selectmen, may also make this designation. If the discontinued highway is not designated as a trail, the right-of-way shall belong to the owners of the adjoining lands. If it is located between the lands of two different owners, it shall be returned to the lots to which it originally belonged, if they can be determined; if not, it shall be equally divided between the owners of the lands on each side. (Added 1985, No. 269 (Adj. Sess.), § 1.)

m. 19 V.S.A. Subchapter 9 Repairs, Maintenance, and Improvements

- i. **§ 935. Relocation Of Highway** - When a highway is made impassable, or the width reduced to prevent the free and safe passage, by a landslide or washout, or a bridge is swept away by a flood, the selectmen may change the location of the highway or the bridge and may discontinue any resulting unnecessary parts of the old highway. They may take, damage, or affect such land as may be necessary at the location of the slide, or washout, for the purpose of re-establishing, repairing, rebuilding, or protecting the highway or bridge, and may proceed immediately to build or rebuild the highway or bridge and open the highway or bridge for work and travel.
- ii. **§ 940. Diversion** - When it appears necessary to protect a highway damaged by or expected to be damaged by flood waters or ice jams, the selectmen may change the course of or widen a stream, or provide storage for accumulated ice, and for these purposes may purchase or take the necessary land. They shall follow the procedures established in section 923 of this title in giving notice, inspecting property, determining need, awarding damages, and satisfying appeals. (Added 1985, No. 269 (Adj. Sess.), § 1.)
- iii. **§ 952. Maintenance** - The town shall properly maintain the drain, ditch, or watercourse and keep it in good and sufficient repair until, upon notice and hearing, it is discontinued. (Added 1985, No. 269 (Adj. Sess.), § 1.)
- iv. **§ 971. Defective Roads And Bridges; Proceedings** - When a highway or bridge is out of repair or unsafe for travel, any three citizens or taxpayers in the State may give written and signed notice of the insufficiency to the selectmen of the town in which the highway or bridge is situated, setting forth in general terms the location of the highway or bridge and the nature of the insufficiency. If the town neglects for seventy-two hours to respond by either denying the allegation or to commence work upon the highway or bridge, or fails to continue the work in good faith and with reasonable dispatch until the highway or bridge is put in good and sufficient repair, the citizens may file with one of the County Road Commissioners or the Superior Court for the county in which the highway or bridge is situated, a written complaint signed and sworn to, setting forth in general terms the location of the highway or bridge and the nature of the insufficiency. The complainants shall also give the Commissioners security by deposit or otherwise for the costs of proceedings under the complaint.
- v. **§ 972. Notice and hearing** - The Commissioners after receiving the complaint with a deposit or other security shall promptly notify the selectmen of the town, and one or more of the persons filing the complaint, of the time and place where the Commissioners will meet for the examination of the highway or bridge and for conducting a hearing upon the complaint. The Commissioners, or a majority of them, shall examine the highway or bridge, and hear all interested persons as to whether the public good demands that the highway or bridge be repaired and as to its condition and the repairs necessary to make it safe and

convenient for public travel, and as to the costs of the required repairs. The deposit or other security shall be refunded if the complaint is valid. (Added 1985, No. 269 (Adj. Sess.), § 1.)

- vi. **§ 973. Report of county commissioners** - If, after the examination and hearing, the commissioners determine that the highway or bridge is out of repair or unsafe for travel, and that the public good demands that the highway or bridge be repaired, they shall determine what work or repairs are necessary. They shall make a written report of their findings, containing a full description of the repairs or work required and a statement of the amount estimated to accomplish it, and shall conclude with an order to the town to make the repairs or perform the work within such time as they judge reasonable. No town shall be required to spend more than twenty cents per hundred dollars on its grand list in any one year including costs of the proceedings. If they determine that the highway or bridge is not out of repair or unsafe for travel they shall make a written report of this finding. (Added 1985, No. 269 (Adj. Sess.), § 1.)
- vii. **§ 974. Filing report** - The Commissioners shall promptly file their report in the office of the Clerk of the county in which the highway or bridge is situated, and deliver a copy of the report to the selectmen. The report shall be final and conclusive unless an appeal is taken as provided in section 976 of this title. (Added 1985, No. 269 (Adj. Sess.), § 1.)
- viii. **§ 975. Proceedings upon failure to make required repairs** - At the expiration of the time limited for the repairs, without further complaint, and upon notice to the town as they deem reasonable, the commissioners shall determine if their order has been complied with by the town. If they find the town has failed to do the work ordered by them, and no appeal has been taken, they shall promptly appoint an agent to spend upon the highway the amount fixed in their report. They shall cause the agent to give a sufficient bond conditioned for the faithful performance of his or her duties and shall file in the county clerk's office a certificate, stating that their order had not been complied with, and that judgment should be entered against the town for the amount named in their report, and give the name of the person appointed to spend this amount. (Added 1985, No. 269 (Adj. Sess.), § 1.)
- ix. **§ 976. Judgment against town; execution** - The clerk shall file the report and enter judgment in favor of the commissioners against the town for the amount named in the report, with costs. However, the aggrieved party may appeal to the superior court by filing with the county clerk within 21 days after the judgment has been entered by the clerk, a notice of appeal and a certified copy of the complaint filed with the commissioners and by serving upon the appellee within the 21 days, a copy of the notice of appeal, who shall within 21 days thereafter, enter his or her appearance. The superior court shall hear the appeal on questions of fact and law and render final judgment. In case an appeal is not taken within 21 days after judgment, the clerk shall issue execution returnable in 30 days from the date of the judgment. In the execution, the collecting officer shall be directed to pay the amount of the judgment to the agent appointed by the commissioners and the costs to the county clerk. (Added 1985, No. 269 (Adj. Sess.), § 1.)
- x. **§ 985. Injuries from defective bridges and culverts**

(a) If damage occurs to a person, or his or her property, by reason of the insufficiency or want of repair of a bridge or culvert which the town is liable to keep in repair, the person sustaining damage may recover in a civil action. If the damage accrues in consequence of the insufficiency or want of repair of a bridge erected and maintained by two or more towns, the action shall be brought against all the towns liable for the repairs. The damage and costs shall be paid by the towns in the proportions in which they are liable for the repairs. The court may issue execution against any or all towns for their proportion only; provided that the liability to any town shall not exceed \$75,000.00 or, where insurance is carried, the maximum policy liability limits, whichever sum is greater, on account of injury to or death of a person and damage to his or her property.

(b) Towns and other corporations shall not be liable for damage to a person or his or her property by reason of the insufficiency or want of repair of a bridge or culvert while traveling on the highway or bridge in violation of the provisions of Title 23 regarding motor vehicle use. (Added 1985, No. 269 (Adj. Sess.), § 1.)