Vermont Superior Court
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Rutland Unit

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-00221

Peter Doran and Greta Doran, Plaintiffs v. Town of West Haven, Raymond L. Bishop a/k/a Larry Bishop, and Christopher Sheldrick, Defendants	DECISION ON MOTION

RULING ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Peter Doran and Greta Doran ("the Dorans") and Defendants Christopher Sheldrick and Raymond L. Bishop own parcels of land around and under a road in the Town of West Haven that is commonly known as River Road. The Dorans filed this action to compel the Town to widen, improve, and maintain the Road, and seek an order prohibiting Defendants from interfering with any such road work. However, Defendants assert that River Road is not a legal public road or highway, but rather a private way crossing their properties. This case has been bifurcated to initially focus on and resolve this key threshold question whether River Road is indeed a public highway. The Dorans now join the Town in seeking summary judgment on the claim that River Road is a public highway, as well as a declaration of the Road's width.[1] For purposes of this ruling, the Dorans and the Town are collectively referred to as "Movants." The Town is represented by Kevin L. Kite, Esq. The Dorans are represented by Antonietta G. Dutil, Esq. and Rodney E. McPhee, Esq. Mr. Sheldrick is represented by John E. Brady, Esq. Mr. Bishop is represented by Peter F. Langrock, Esq.[2]

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[1] Plaintiffs did not amend their Complaint to include a claim seeking declaratory judgment that River Road is a public road or highway, or with regard to the Road's location and width. However, there is no dispute among the parties that such a claim has been made part of this case.

[2] On December 5, 2022, Attorney Langrock filed a notice with the Court suggesting that Mr. Bishop died on December 1, 2022. Under Rule 25(a)(1), if a party dies a "motion for substitution may be made by any party or by the successors or representatives of the deceased party." V.R.C.P. 25(a)(1). That Rule further provides that "[u]nless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of death as provided herein for the service of the motion [for substitution], the action shall be dismissed as to the deceased party." *Id.* No motion for substitution has been made by any party or by successors or representatives of Mr. Bishop. However, no Certificate of Service was filed with the Notice of Suggestion of Death on the Record certifying that it was served on the remaining parties. Moreover, the 90-day period may be extended for good cause,

For reasons discussed below, the Court DENIES Movants' motion as it relates to that portion of River Road commonly known as Upper River Road, and GRANTS the motion as it relates to that portion known as Lower River Road. The Court further GRANTS Movants' request for declaratory relief regarding the width of Lower River Road. Finally, Movants' request for a declaration of the width of Upper River Road is DENIED without prejudice.

Factual Background

The following facts appear in the record and are undisputed for purposes of the pending motion:

Within the Town of West Haven, Vermont, there is a traveled roadway with a gravel surface, currently in use, that is commonly known as River Road. *See* Movants' Joint Statement of Undisputed Material Facts ("Movants' SUMF") ¶¶ 4, 6, 8, 11-14, 65-67 (citing Movants' Ex. 28), 79-80 (citing Ex. 30); Movants' Exs. 32, 33 & 33B.[3] The easternmost point of River Road is where it intersects with Main Road, just south of the Hubbardton River Bridge. *See* Ex. 33B. From that point, River Road travels southwesterly, running roughly parallel to the Hubbardton River, until it veers northward for a short distance, then makes a tight u-turn, and then travels southward, until it intersects with Hackadam Road. *See id.* & Movants' SUMF ¶ 5. The portion of the Road that runs generally parallel to the Hubbardton River is commonly known as Lower River Road; the portion of the Road that runs southerly, from the apex of the tight u-turn described above, is commonly known as Upper River Road. *See* Movants' SUMF ¶ 7 & Ex. 33B. The Dorans and Defendants each own a separate parcel of real property that directly abuts and underlies a portion of what is known as Upper River Road. *See id.* ¶ 15. Each of these individual parties' land parcels on Upper River Road has been assigned unique, "River Road" mailing address. *See id.* ¶¶ 11-14 (stating that the Dorans have addresses of 724 and 900 River Road, and Defendants Bishop and Sheldrick have addresses of 727 and 995 River Road, respectively). An atlas published online by the Vermont Agency of Natural Resources depicts separately-bounded parcels of land – each identified or denoted on the atlas by the parties' unique mailing addresses – that abut and underlie separate portions of what is known as Upper River Road. *See* Ex. 32. Additionally, at the motion hearing held on May 8, 2023, the parties agreed that at least one individual party to this case owns real property abutting and underlying some portion of what is known as Lower River Road.

In 1785, when lands that are now within the boundaries of the Town of West Haven were part of the Town of Fairhaven (later named "Fair Haven"), the following entry was made in Volume 2A of the Land Records of the Town of Fairhaven:

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especially if a motion for enlargement of time is filed within 90 days of service of the notice of death. *See* Mary K. Kane, 7C *Fed. Prac. & Proc. Civ.* § 1955 (3d ed., April 2023 update). Accordingly, the Court will allow the parties an additional 90 days from the date of this decision, in which to file motions for substitution. If no motions are filed, Plaintiffs' case against Mr. Bishop will be dismissed.

[3] All subsequent citations to exhibits in this decision are to the Movants' exhibits.

> Fairhaven Nove'r. 30th 1785 then surveyed and laid out the S.& west line of a highway from Hubbardton River west of the Cedar Ledge bounded as follows[:] Viz Beginning at the root of a great Cedar tree turned up by the roots on the South bank of the river thence [course and distance description] to a Pine Stump in the North line of the highway, S of Mr. Frisbees house[.] [S]urveyed [p]er order of the Selectmen [by] Isaac Clark Surveyor. Eleazar Dudley, Philip Priest, Oliver Cleveland, Selectmen. Received and entered by Michael Merritt, T Clerk.

Movants' SUMF ¶ 38. This entry thus recorded a survey of a specific roadway, but the terms of the survey failed to specify the width or breadth of the roadway that it purported to lay out. However, assuming that this roadway had a width of three rods (which is about 49.5 feet), there is no dispute that the plotted course and location of this roadway was "marked[ly] similar[]" to the existing course and location of what is now known as Upper River Road. Ex. 33; *see* Ex. 33B. Indeed, in the undisputed opinion of Donald A. Johnson, a licensed professional surveyor who provided a sworn Affidavit for Movants, the two roads are the "same" road. Ex. 33.

During the twelve months prior to that 1785 survey, fifteen other highway surveys were authorized by the Fairhaven Selectmen and recorded in the Fairhaven Land Records. *See* Movants' SUMF ¶¶ 39-53. Of these sixteen surveys (including that of November 30, 1785), five failed to specify any roadway width; six specified a width of four rods; and five specified a width of six rods. *See id.* ¶¶ 38-53.

On March 7, 1808, after the establishment of the Town of West Haven, the following entry was made in Volume 2 of Miscellaneous Records of the Town of West Haven:

> Received for & Recorded this the 7th Day of March 1808 { A Survey of Highway then surveyed & Laid a Road [. . .] Beginning at the Main Road South Side of Hiberton [sic] River Bridge thence [course and distance description] to the Road By Daniel Kinyons the Whole Distance 222 Rods & said Road to be four rods to the right Hand of the Survey {Elijah Tryon, Surveyor[.] By Order of Oliver Church, Noble Martin, Selectmen, Attest William Wyman, Reg.

Movants' SUMF ¶ 56.[4] As surveyed, that road had a course and location that was "marked[ly] similar[]" to the existing course and location of what is now known as Lower River Road. Ex. 33; *see* 33B. In the undisputed opinion of Movants' expert, the two roads are the "same" road. Ex. 33.

An unnamed road of the same general location and course as today's River Road is depicted on three maps or atlases that were published by private, non-governmental entities in the mid-1800s. *See* Movants' SUMF ¶¶ 58-64 (citing Exs. 24-27). An unnamed road of the same general location and course as today's River Road is also depicted on several maps that were published between 1893 and 1989 by the U.S. Geological Survey. *See id.* ¶¶ 65-67 (citing Ex. 28). A road labeled or named "River Road," of the same general location and course as

[4] Movants also point to undisputed evidence that the surveyor, Elijah Tryon, was also then a Selectman of the Town of West Haven.

today's River Road, is depicted on several maps that were published between 2012 and 2021 by the U.S. Geological Survey. *See id.* (citing Ex. 28).[5]

On several General Highway Maps of the Town of West Haven, which were published by the State of Vermont's Agency of Transportation between 1947 and 1959, the portion of what is now known as Lower River Road is classified as a "Graded & Drained Road," and its length is listed as 0.72 miles. *See id.* ¶¶ 72-73 (citing Ex. 30). These maps each labeled or designated this road as "Town Highway No. 14," rather than "River Road." *Id.* On those same maps (published between 1947 and 1959), the portion what is now Upper River Road is classified as an "Untraveled Road," and there is no listing of the distance of that segment of road. *See id.*

The next available State Highway Map,[6] dated 1966, shows that a short segment of what is now considered Upper River Road had been classified as a "Gravel Road," and the remainder of that segment of road remained classified as "Untraveled Road." *See id.* ¶ 74. The portion of road that is now Lower River Road was designated on the 1966 Map as a "Soil Surface (2nd Class Gravel)" Road. *Id.* No changes were made on this map with regard to the length of Town Highway No. 14 (0.72 miles) or with regard to the remainder of the road (no mileage listed). *Id.* On the 1967 State Highway Map, the length of what is now River Road (both Upper and Lower, together), is listed as 1.03 miles, and the entire length is classified as a traveled town road. *See id.* ¶ 75. However, the other classifications, regarding the road's surface or condition, remained the same as on the 1966 Map.

On the next available State Highway Maps, both from 1973, the mileage of Town Highway No. 14 (today's River Road) remained listed at 1.03 miles. *See id.* ¶ 76. The road surface classification of what is now Lower River Road was changed to "Gravel Road," while the segment that is today's Upper River Road was classified as partially "Gravel Road" and partially "Soil Surface (2nd Class Gravel)." *Id.* Several subsequent State Highway Maps, from 1975 to 1986, were substantially the same as the 1973 Maps. *See id.* ¶ 77. However, beginning

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[5] Defendants have not responded to Movants' SUMF with "specific citations to particular parts of materials in the record that [Defendants] assert[] demonstrate a dispute." Vt. R. Civ. P. 56(c)(2). Instead, Defendants assert that Movants "cannot produce admissible evidence to support the fact[s]" set forth in their Rule 56(c)(1) statement. *Id.* Specifically, Defendants assert that the maps Movants rely on constitute inadmissible hearsay. The Court disagrees. The authenticity of the maps is not disputed, and the bulk of them have been in existence for at least 20 years. Accordingly, for purposes of the summary judgment motion, the Court assumes the maps fall within the hearsay exception set forth in Rule 803(16) of the Vermont Rules of Evidence. Further, Defendants do not dispute that the maps come from "sources whose accuracy cannot be reasonably questioned." Vt. R. Evid. 201(b)(2). As such, the Court may take judicial notice of facts that are "capable of accurate and ready determination by resort" to the maps, such as the geographic location and general course of River Road at different points in time. *Id.*; *cf. Austin v. Town of Middlesex*, 2009 VT 102, ¶ 5 n.2, 186 Vt. 629 (mem.) (indicating that historical maps from the 1850s showing a certain roadway would be admissible as reliable proof of the location of such road in that timeframe).

[6] Movants indicate that they obtained, and made part of the summary judgment record, all State Highway Maps that are available from the State.

in 1982, the legends of these maps indicated that what is now River Road was a "Class 3 Town Highway." *See id.* ¶ 78. Then, from the 1993 State Highway Map to the most recent available map (dated 2017), the entire length of this was classified as a "Other [non-state] Gravel" road. *See id.* ¶¶ 79-80. The length of this road remained at 1.03 miles, and it remained categorized as a "Class 3 Town Highway." *See id.*

<u>Discussion</u>

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Vt. R. Civ. P. 56(a). "The court need consider only the materials cited in the required statements of fact, but it may consider other materials in the record." Vt. R. Civ. P. 56(c)(5). In determining whether a genuine dispute of material fact exists, the nonmoving party "is entitled to the benefit of all reasonable doubts and inferences." *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476, 724 A.2d 454, 461 (1998). Further, "the moving party has the burden of proof." *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319. Where "reasonable people could draw different inferences from the undisputed facts, summary judgment is inappropriate." *Bradley v. Bradley*, No. 2020-049, 2020 WL 3046141, at *3 (Vt. June 2020) (unpub. mem.) (citing *Stamp Tech, Inc. ex rel. Blair v. Ludall/Thermal Acoustical, Inc.*, 2009 VT 91, ¶ 17, 186 Vt. 369)[7]; *see also Tillson v. Lane*, 2015 VT 121, ¶ 13, 200 Vt. 534 ("Summary judgment is improper where the evidence is subject to conflicting interpretations." (quotation omitted)).

There are two methods by which a public road or highway over privately held lands may be established: statutory condemnation or common-law dedication and acceptance. *See Kirkland v. Kolodziej*, 2015 VT 90, ¶ 43, 199 Vt. 606; 19 V.S.A. § 1(12). Movants assert that under either method, both Upper and Lower River Road were properly established as public roads and remain so today. The Court begins by analyzing each of these theories of public road establishment as applied to Upper River Road, and then turns to the issue of Lower River Road.

I. <u>Upper River Road</u>.

A. <u>Statutory Condemnation</u>

Public roads or highways may be established by way of statutory condemnation if they were laid out in a way that substantially complies with the manner or method prescribed by the statutes in effect at the time of the establishment effort. *See Kirkland*, 2015 VT 90, ¶ 29 (citing *Austin*, 2009 VT 102, ¶ 7). "'The procedure to be followed in laying out . . . a highway is . . . statutory and the method prescribed must be substantially complied with or the proceedings will be void.'" *Austin*, 2009 VT 102, ¶ 7 (quoting *In re Mattison*, 120 Vt. 459, 462, 144 A.2d 778, 780 (1958)); *see also LaFarrier v. Hardy*, 66 Vt. 200, 206-07, 28 A. 1030, 1032-33 (1894) (town

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[7] Trial courts are free to "consider three-justice decisions from [the Vermont Supreme] Court for their persuasive value, even though such decisions are not controlling precedent." *Washburn v. Fowlkes*, Docket No. 2015-089, 2015 WL 4771613, at *3 (Vt. Aug. 2015) (citing V.R.A.P. 33.1(d), which provides that an "unpublished decision by a three-justice panel may be cited as persuasive authority but is not controlling precedent," except under limited circumstances).

selectboard "must show affirmatively such compliance" "with every requisite of the statute" or the board's "jurisdiction of the subject matter of laying the street" will be lacking and the proceedings void (quotations omitted)). The law in effect at the time of the 1785 survey of what is now Upper River Road provided, in relevant part:

> [N]o Highway in future, shall be deemed a lawful Highway, unless surveyed by Chain and Compass, and a Survey thereof made out, entered and recorded in the town Clerk's Office of the town where such road lies, ascertaining the Breadth, Course and Distance of such Road.

1782 Act, § I.[8]

Notably, this Act of 1782 reflected a significant and fairly rapid evolution in the legal requirements for laying out a public highway. As Movants explain, the State's first highway act, enacted in 1779, was "relatively hands-off," since it merely required the town selectmen to "make, or cause to be made, a true survey of all such roads or highways," and have the survey recorded in the town clerk's office. Movants' Joint Mot. for Summ. J. at 20 (quoting 1779 Act, App. A). Soon thereafter, that original law was found to be problematic. As the Vermont General Assembly explained in 1781, when articulating the purpose of a newly revised highway law:

> Whereas a great part of the Highways in this State, have been laid out by the Select-men or Committees appointed for that purpose, and Bills by them have been laid before their towns, and accepted by them, and recorded in the Town Clerk's Offices: Which bills did not describe the Points of the Compass. And Whereas Contentions and Animosities have and likely will arise in some towns within this State respecting the Legality of such Surveys: Which to prevent, be it enacted . . . [the 1781 Act].

1781 Act, App. B (Preamble).[9] The new 1781 Act thus required all highway surveys to sufficiently "describe the Points of the Compass," as follows:

> [N]o Highway that shall be laid out for the future, shall be lawful, unless surveyed by the Compass: And further, that all roads heretofore laid out, that are not surveyed by the Compass, within two years from the passing of this Act, shall not be deemed lawful.

1781 Act, App. B, § II. Then, approximately twenty months later, the General Assembly passed the 1782 Act, revising the survey requirements further. That Act kept the "Compass" requirement, but additionally specified that all surveys must be done "by Chain," and also "ascertain[] the Breadth, Course and Distance of such Road." 1782 Act, § I. Here, "Chain"

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[8] This law was entitled "An Act Directing the Laying Out of Highways," and was passed on October 21, 1782.

[9] This law was entitled "An act to settle and establish all highways that are laid out in this State," and was passed on February 20, 1781.

refers to the use of an actual chain of a known and fixed length, when measuring roadway distances and widths. *See* Movants' Joint Mot. for Summ. J. at 19-20.

On November 30, 1785, the Selectmen of the Town of Fairhaven authorized and recorded a survey by Isaac Clark, purporting to lay out a public highway that today is known as Upper River Road. Critically, however, as Movants concede and despite the express requirement of the 1782 Act, Mr. Clark's survey did not specify the width or breadth of this roadway. Because the survey fails to satisfy the necessary and unequivocal statutory elements, Movants are not entitled to summary judgment under a theory of statutory condemnation unless they can demonstrate that a road survey that is silent as to breadth still "substantially complies" with the statutorily prescribed manner or method of road establishment of the time. *See, e.g.*, *Austin*, 2009 VT 102, ¶ 7 (where the statutory procedure for laying out a public highway is not "substantially complied with[,] . . . the proceedings will be void" (quotation omitted)).

Movants make two arguments in support of their contention that the Court should make a finding of substantial compliance, neither of which is persuasive. To start, Movants observe that five of sixteen highway surveys recorded in Fairhaven during a twelve-month period (including the survey of November 30, 1785) failed to specify any roadway width, and that the remaining eleven surveys expressly specified widths of either four or six rods. Given that every roadway that was surveyed must have *some* width, Movants reason that the failure of the five surveys to expressly specify widths "suggest[s]" that the omission was intentional, done with a common expectation and understanding – shared alike by "the surveyors, the selectmen, and the general populace" – that all five of those surveyed roadways had the same, default standard width of three rods or less. *See* Movants' Joint Mot. for Summ. J. at 23-24. Thus, Movants' theory is that the absence of a stated width effectively indicates or means that the road surveyed on November 30, 1785, had a width of three rods. This argument fails for several reasons.

First, Movant's position is at odds with established rules of statutory construction. As noted in *Daiello v. Town of Vernon*, a recent decision by our Supreme Court concerning public road creation by statutory condemnation, courts "generally presume that amendment of a statute shows a legislative intent to change the effect of existing law." 2022 VT 32, ¶ 39, 282 A.2d 894 (quotation omitted). Relatedly, courts should presume that our Legislature "inserts statutory language purposefully," and avoid interpreting such language "in a manner that renders it surplusage or irrelevant." *Id.* ¶ 40 (quotation omitted); *see Town of Granville v. Loprete*, 2017 VT 101, ¶ 14, 206 Vt. 21 (applying same rules of construction to statutory condemnation case). Here, Movants' assertion that a minimum public roadway width of three rods or less essentially "goes without saying" would render the 1782 Act's "breadth" requirement irrelevant, or mere surplusage. It also fails to recognize the "breadth" requirement as evidence of legislative intent to change the effect of existing (pre-1782) law.

Second, Movants have failed to demonstrate that, as a matter of custom, usage, or ordinary practice, any survey in 1785 that failed to identify a roadway's width means that the road was three rods wide. Movants point to subsequent highway laws, enacted in 1806 and 1822, as proof that the commonly understood, "standard width" of each road surveyed in 1785 was three rods, unless the survey of such road otherwise explicitly specified the road's width. However, the 1806 law provided "[t]hat all public roads hereinafter laid out within this state,

shall not be laid of a less width than three rods," and thus merely required a mandatory minimum width as to all roads subsequently laid out. The law had no retroactive effect on prior highway statutes (such as the 1782 Act), and said nothing about the proper interpretation or effect of road surveys completed two decades prior that, contrary to existing law, failed to specify roadway width. Similarly, the 1822 law had no retroactive effect and merely implied that, as a matter of custom or ordinary practice, public roads had been laid out with a minimum width of three rods. This is not undisputed evidence as to how road surveys from 1785 that failed to specify roadway widths should be interpreted or given effect.

Relatedly, Movants have not presented any other evidence, such as a contemporaneous and generally accepted surveyors' standard or rule of practice, or an expert's opinion regarding such a standard or rule of practice, indicating that whenever a survey omitted a roadway's width, the road was regarded as having a width of three rods or less. There is also no evidence in the record as to the Town of Fairhaven selectboard's or the general population's understanding of the widths of public highways purportedly laid out by surveys that were silent as to roadway widths. *Cf. Benson v. Hodgdon*, No. 291-6-4 Wrcv, "Findings of Fact, Conclusions of Law, and Order," 2009 WL 6557338 (Vt. Super. Ct. Feb. 4, 2009) (absence of stated width in 1804 survey "does not render survey insufficient" given 1784 action by Town of Royalton "establishing a designated width for all town roads"), *aff'd*, 2010 VT 11, 187 Vt. 607 (mem.). Relying extensively on *Daiello*, Movants argue that the 1785 survey is sufficient because, even if it does not specify the road's width, it still shows that the Town of Fairhaven's Selectboard formally or officially recognized a surveyed road (now called Upper River Road) as a public highway. But the issue here, which was not present in *Daiello*, *see* 2022 VT 32, ¶ 55, is whether the survey in question – regardless of the selectboard's apparent intentions to so establish a public highway – substantially met the essential "breadth, course and distance" requirements of the state highway law in effect at the time of the survey. The Court has found no cases, nor have Movants cited any, supporting the theory that a town selectboard's official sanction or recognition of a road as a public highway can suffice to cure a road survey that omits essential, statutorily required information. *See Kirkland*, 2015 VT 90, ¶ 29 (holding that the selectboard "took steps to lay out" a public highway is not proof that "the selectboard substantially complied with the statutes in doing so"); *Austin*, 2009 VT 102, ¶ 5 n.1 (noting that a road was officially "laid out" in a survey under the direction of the town's selectboard "does not satisfy the requirements of the law applicable in 1879").

Moreover, as underscored by Movants' own admission that its evidence is merely *suggestive* of the ultimate or crucial facts at issue, their theory requires that the Court afford them the benefit of all possible factual inferences. Even if a fact finder might agree with Movants and reasonably draw inferences as they suggest, such inferences cannot be given here in Movants' favor. *See Bartlett v. Roberts*, 2020 VT 24, ¶ 9, 212 Vt. 50 (in applying summary judgment standard, "we give the nonmoving party the benefit of all reasonable doubts and inferences" quotation omitted)).

Alternatively, Movants contend that the actions taken by the Fairhaven Selectboard and its surveyor to establish what is now Upper River Road are owed a presumption of regularity. "That presumption is in general about this: Where the regularity of an official act is dependent upon some coexisting or pre-existing fact or act, there is a presumption in favor of the doing of

such act or the existence of such fact." *Bacon v. Boston & Maine R.R. Co.*, 83 Vt. 421, 434, 76 A. 128, 134 (1910) (citing *District of Columbia v. Robinson*, 180 U.S. 92, 101 (1901)). However, where, as here, a town government's eminent domain powers are given exclusively by statute, and where the statute commands that requisite acts or evidence be recorded, the presumption of regularity cannot operate or suffice to prove "whether the town undertook the proper statutory formalities in laying out a road." *Kirkland*, 2015 VT 90, ¶¶ 20, 25-27 (citing, *inter alia*, *Bacon*, 83 Vt. at 432-35, and *Barber v. Vinton*, 82 Vt. 327, 331-33, 73 A. 881, 882-83 (1909)); *see also In re Bill*, 168 Vt. 439, 442, 724 A.2d 444, 446 (notwithstanding presumption of regularity, when selectboard fails to discontinue highway in the manner prescribed by statute, that is a jurisdictional failing that voids the board's actions); *Kent v. Vill. of Enosburgh Falls*, 71 Vt. 255, 256, 44 A. 343, 344 (1899) ("Nothing is presumed in favor of the jurisdiction of boards and inferior courts exercising special and limited statutory powers not according to the course of common law, but the facts that confer jurisdiction must affirmatively appear."); *cf. Kelly v. Town of Barnard*, 155 Vt. 296, 303-04 & 303 n.3, 583 A.2d 614, 618-19 & 618 n.3 (1990) (presuming that town opened a road as a town highway as required by statute, notwithstanding the lack of a recorded certificate of opening, because separate evidence of opening was uncontested and no certificate was required by statute to have been recorded). In *Barber*, 82 Vt. at 333, for example, the Court was clear that an express statutory requirement for public road establishment – notice to the landowner over whose property the road will pass of public hearings regarding the road's necessity and of damages owed – could not be satisfied by a presumption of regularity. Similarly, in *Bacon*, 83 Vt. at 435, where the existing highway statute required that a certificate of road opening be made and recorded, the Court held that there could be no presumption that the selectboard actually performed such duties. *See also Post v. Rutland Railroad Co.*, 80 Vt. 551, 554-55, 69 A. 156, 156-57 (1908) (where an eminent domain statute required the recording of the "courses, distances, and boundaries" of a railroad's claimed right-of-way, the survey of record is the only permissible evidence of the location of the right-of-way).

Further, even if the presumption of regularity might have some prima facie legal basis, the evidentiary record here would not support its application. "The presumption of regularity of official acts is a disputable presumption" that "disappears and goes for naught" in the face of evidence that is sufficient "to make a question for the jury on the fact involved." *Montpelier v. Calais*, 114 Vt. 5, 14, 39 A.2d 350, 355 (1945) (quotation omitted). For example, where a highway statute requires a governmental agency to survey, plat, and record a traveled way for it to become a public highway, and where the evidentiary record "showed what the [agency] did as to surveying, platting, and recording the road, . . . the effect of [such evidence] could not be taken from the jury and a presumption [of regularity] substituted for it." *Robinson*, 180 U.S. at 101-02. Similarly, in the instant case, the available evidence shows what the Town of Fairhaven did as to surveying what is now Upper River Road, and it shows that the survey neglected to ascertain the road's width. This is not a case involving a survey that has gone missing; on the contrary, the only survey on record shows that roadway width was never ascertained and put down in the survey itself. Indeed, on that basis, a jury could reasonably find that the road's width was never properly ascertained by any recorded survey, contrary to the plain terms of the 1782 Act. Thus, it would be improper as a matter of law for this Court to rely on a presumption to establish that factual issue, especially on a motion for summary judgment filed by the party that has the burden of proving road establishment by statutory condemnation.

In short, the Court concludes that Movants have not demonstrated they are entitled to summary judgment on their claim that Upper River Road is a public road based on the statutory condemnation theory.

B. Common Law Dedication and Acceptance

The common law process of "transferring ownership of a road from private hands to a town requires dedication by the owner and acceptance by the town." *Island Indus., LLC v. Town of Grand Isle*, 2021 VT 49, ¶ 28, 212 Vt. 162 (quotation omitted). Dedication of a public road is proven where there is evidence of use of the road by the public, coupled with clear evidence of an intent by the owner of the servient estate to allow the road to be used by the public in common. *See Town of Springfield v. Newton*, 115 Vt. 39, 43-44, 50 A.2d 605, 608-09 (1947). Intent to dedicate "need not be evidenced by any writing or by any form of words." *Id.* Rather, intent can be implied from "attending circumstances." *Gore v. Blanchard*, 96 Vt. 234, 239, 118 A. 888, 890 (1922). These circumstances may include conduct of the owner, so long as such conduct "clearly," *Newton*, 115 Vt. at 44, or "convincing[ly] and unequivocal[ly]," *Gore*, 96 Vt. at 239, shows the owner's intent to dedicate his or her private lands to public use. *See City & County of San Francisco v. Grote*, 52 P. 127, 128 (Cal. 1898) ("It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use."), *cited with approval in Gore*, 96 Vt. at 239. Dedication "is not . . . to be presumed from length of time alone," *Newton*, 115 Vt. at 44, "for the long-continued use[] by the public without objection by the owner is entirely consistent with a license to the public to use the land." *Hartley v. Vermillion*, 70 P. 273, 274 (Cal. Unrep. 1902), *cited with approval in Gore*, 96 Vt. at 239-40; *see Wooster v. Fiske*, 98 A. 378, 379 (Me. 1916) ("Dedication exists only when so intended by the party, and permissible use does not prove it."), *cited with approval in Gore*, 96 Vt. at 240. However,

> a long acquiescence in use[] by the public, if the attending circumstances are such as clearly to indicate an intent by the owner to devote the land *to public use as a highway*, is evidence upon which a dedication may be predicated. The allowance by the owner of repairs at public expense is a circumstance strongly tending to show such an intention.

Newton, 115 Vt. at 44 (emphasis added).

There does not appear to be any real dispute in this case regarding the Town's acceptance of Upper River Road as a public road. Rather, the key question is dedication by the landowners. Movants rely almost exclusively on several State Highway Maps, particularly those published in the 1960s and 1970s. Movants maintain that these maps contain evidence of improvements to the quality of the road, especially its surface. That is, Movants contend that the maps were created jointly by officials from the Town of West Haven and the Vermont Agency of Transportation, thereby verifying that Upper River Road was a town highway and eligible for state highway aid. Movants then reason that because the Town was statutorily required to use those public funds as directed, the Town is entitled to a presumption that it did so and that improvements were made to Upper River Road using public funds. Finally, Movants assert that the landowners along Upper River Road must have known of such publicly funded road work

and acquiesced to it, indicating their intent to dedicate their lands to use as a town highway. The Court finds Movant's evidence and legal theory insufficient to meet their burden on summary judgment.

First, for purposes of summary judgment, the State Highway Maps, standing alone and without any explanation or expert interpretation, are not "evidence" of road improvements done with public funds. It is far from clear that such maps show changes or improvements to the surface or other characteristics of what is now Upper River Road, much less that the Road was improved through the use of public funds. For example, between 1959 and 1966, a short segment of Upper River Road was redesignated, from "Untraveled Road" to "Gravel Road," but the maps do not indicate whether this is an actual change in road surface quality, or a change in road usage, or both. Indeed, Movants' theory as it relates to the State Highway Maps places considerable weight on supposed distinctions between various terms of art (e.g., "Untraveled Road," "Gravel Road," "Graded & Drained Road," and "Soil Surface (2nd Class Gravel) Road") that are wholly undefined by the maps themselves, or elsewhere in the record. The period of 1959 to 1966 is further muddled by the fact that no mileage for Upper River Road is listed on the maps, and thus, no portion of the Road is counted as a town highway for purposes of calculating state highway aid. Accordingly, even if it was beyond speculation or inference that an "Untraveled Road" is indeed of a distinct and lesser quality than a "Gravel Road," the maps do not show that this apparent change was the result of the Town's request, receipt, or expenditure of any state highway aid.[10]

The 1967 Map does little to clarify the picture. There, Upper River Road's full length is listed and counted towards the Town's highway mileage (for state highway funding purposes), but the Road's surface quality, or usage, or both, remain unchanged from the Map of 1966. Thus, one could reasonably infer from the map that state highway aid was sought (and perhaps obtained), but that most of Upper River Road nevertheless remained "Untraveled," and was not improved or maintained in any respect. Thus, it is unclear what the 1967 Map proves, with

[10] In *Gardner v. Town of Ludlow*, 135 Vt. 87, 90, 369 A.2d 1382, 1384 (1977), the identification of a road as an untraveled public highway on a State Highway Map, rather than as a private road, was evidence that supported the trial court's findings of dedication and acceptance. However, *Gardner* was an appeal following a bench trial, so the evidence concerning the landowner's intent to dedicate and of the town's acceptance was viewed in the light most favorable to prevailing party. *See, e.g.*, *Benson v. Hodgdon*, 2010 VT 11, ¶ 10, 187 Vt. 607 (mem.) (articulating standard of review); *Smith v. Town of Derby*, 170 Vt. 553, 554, 742 A.2d 757, 759 (1999) (mem.) (same). Here, by contrast, the record is viewed in the light most favorable to the two individual Defendants, as non-movants. Relatedly, the inference that Upper River Road was improved or maintained through expenditures of public funds is not "required" by the categorization or description of the Road, on the Highway Maps, as an "Untraveled Road," "Gravel Road," or "Class 3 road." *Smith*, 170 Vt. at 554. Moreover, since State Highway Maps are created with input from town officials, rather than private landowners, such maps would appear more probative of the issue of a town's intent to accept a road as a town highway, rather a landowner's knowing acquiescence to roadway improvements or repairs through use of public funds. *See*, *e.g.*, *Smith*, 170 Vt. at 555 (failure to list road on State Highway Map militates against a finding of acceptance by town (citing *Gardner*, 135 Vt. at 90)).

regard to the issue of road improvements caused by expenditures of public funds. Subsequent State Highway Maps, starting in 1973, categorize Upper River Road as partly or wholly "Gravel Road," "Soil Surface (2nd Class Gravel) Road," or "Class 3 Road." But again, as each of these terms are undefined;[11] it would be up to a fact finder to ascertain their meaning, and whether they fairly show that road improvements or maintenance was performed through the expenditure of public funds. In short, Movants' theory requires the Court to give them the benefit of significant factual inferences, which is not the Court's proper role in deciding a motion for summary judgment.

Second, Movants' observation that towns receiving state highway aid are generally prohibited from expending such funds for any other purpose does not establish that any improvements were made to Upper River Road with public funds, particularly as an undisputed fact for purposes of summary judgment. Surely towns receiving state highway aid have some discretion in the manner in which public road repairs are done and funds are spent each year, and there is no indication from Movants that such funds are earmarked down to the mile or by particular roadway segment. Notably, Movants do not point to anything in the state highway laws that would prohibit towns from exercising this type of discretion. Thus, the listing of Upper River Road's full mileage on any State Highway Map might evidence a request for state funding, but it does not prove that the Town ever spent state highway funds to maintain that particular segment of Road.[12] On this issue, the Court finds the *Bacon* Court's analysis of the evidence instructive. There, the Court found that a line item in a treasurer's report indicating payment for road grading was insufficient to prove road maintenance actions were undertaken by the town in recognition of the road as a public highway, where there was no other evidence in the record to show the work was actually performed "within the limits of the highway described in the record." *Bacon*, 83 Vt. at 435-36. Here, too, Movants' evidence does not show that State highway aid was ever expended to improve or maintain Upper River Road in particular.

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[11] Section 5 of Act No. 63 of the 1973 Adjourned Session of the Legislature, which became effective on July 1, 1974, amended Section 17 of Title 19 of the Vermont Statutes Annotated to provide that "[c]lass 3 town highways are all traveled town highways other than class 1 or 2 highways as certified in [19 V.S.A. § 15]" and "are a highway negotiable, under normal conditions, all seasons of the year by a standard manufactured pleasure car." Yet, this statutory definition does not indicate whether or how a "Gravel Road" or "Soil Surface (2nd Class Gravel) Road," are distinct from a Class 3 road, if at all. Nothing on the maps or elsewhere in the records fairly spells that out.

[12] Movants also argue for a presumption of regularity here, but they have provided no basis for recognizing a presumption that where a town submits a list of town highways and their mileages to the State for purposes of creating a State Highway Map, public funding was thereafter obtained and used to improve or maintain each mile or segment of listed roadway. Thus, under the doctrine of regularity of official acts, a "requirement to spend" state highway aid on each segment of a road listed on a State Highway Map does not appear to be a "co-existing" act or fact. *Bacon*, 83 Vt. at 434. Nor have Movants shown that publicly funded road maintenance is a necessary, "pre-existing" act or fact to a particular roadway becoming listed or identified on the State Highway Maps as a town highway.

Nor do the multiple maps produced by non-governmental entities during the mid-1800s and maps by the U.S. Geological Survey dating to the late 1800s relied on by Movants as depicting a road with a path similar to today's Upper River Road speak to the creation of a public road or the issue of road work using public funds. In *Austin*, 2009 VT 102, ¶ 5 n.2, the Supreme Court cast doubt on the use of various historical maps depicting a particular road as reliable evidence of an act by a town selectboard to officially authorize the road as a town highway. *See also Wayne v. Town of Stockbridge*, No. 483-8-10 Wrcv, 2014 WL 10321349, at *7 (Vt. Super Ct. May 16, 2014) (maps from 19th century not persuasive "as it is not clear on any of those maps that roads depicted are exclusively town roads"). Thus, especially on summary judgment, the Court could at most infer that the historical maps show a long period of use of the road now known as Upper River Road, but not ordinary use of the road by the public as a matter of right or a clear intent by landowners to dedicate their private lands to use as a public road. *Id*. at *8 ("Usage alone, even in reliance on the 1931 map, is not a sufficient basis from which to infer dedication."); c*f. Harriman v. Howe*, 28 N.Y.S. 858, 860 (N.Y. Gen. Term 1894) ("It is true there are entries in certain old records pertaining to this road, but they fail to show its origin, or that it ever took on any public character."), *cited favorably by Gore*, 96 Vt. at 240.

Finally, it bears mentioning that Movants do not rely on Town records, such as reports, budgets, or road commissioner's files, or witness testimony to show that improvements, maintenance, or repairs to Upper River Road were done at any particular time using public funds. Likewise, they have not provided other usual records, such as deeds from past landowners recognizing a public road or right-of-way running across or over conveyed premises, to show an intent to dedicate the land for public use. *Cf. Town of S. Hero v. Wood*, 2006 VT 28, ¶ 16, 179 Vt. 417 (finding deeds were evidence of owners' intent to dedicate private lands to public use as a right-of-way); *Okemo Mtn., Inc. v. Town of Ludlow Zoning Bd. of Adjustment*, 164 Vt. 447, 455, 671 A.2d 1263, 1269 (1995) (same); *Druke v. Town of Newfane*, 137 Vt. 571, 574-75, 409 A.2d 994, 995-996 (1979) (holding trial "court properly concluded that [property] deeds both recognized a pre-existing interest in the public created by dedication, and that the deeds are further evidence of the intent to dedicate"). Further, no showing has been made as to the "character" of the affected property, the "amount of travel" of the road, or the "nature" of the public's use of the road. *Gore*, 96 Vt. at 240 (identifying such considerations as "potent factors in ascertaining the intent of the owner" regarding dedication). *See also Wayne*, 2014 WL 10321349, at *7 ("The facts showing usage over the years do not prove that the road was dedicated for public use, as all uses are as consistent with private ownership in which the owners tolerate use by others (as the [plaintiff-owners] have done) as it is with Town ownership."); *Wooster*, 98 A. at 379 ("There is no evidence that ordinary travel ever passed over the road from one end to the other, or that it was ever dedicated to public uses, or that any owner of the land ever assented to its use for public purposes, as a public way."). Thus, the Court has no basis to find that any landowners suffered damage, inconvenience, or adversity as a result of supposed public usage of the road. *Cf. Gore*, 96 Vt. at 240 (holding that intent to dedicate would not be presumed where usage demonstrated "did not damage or inconvenience the land owner, and to have opposed it would have been regarded as unneighborly and churlish").

Lastly, in response to a point raised by the Court during oral argument, Movants argue that dedication may be shown by the use of Upper River Road as a mail delivery route by the U.S. Postal Service. Indeed, Movants' supplemental brief cites numerous cases from other

jurisdictions that have pointed to a roadway's use as a regular mail route as proof of dedication. However, Movants' Statement of Undisputed Material Fact does not allege that Upper River Road was ever actually used by carriers of the U.S. Mail, nor are there any sworn statements in the record to establish this. *See* Vt. R. Civ. P. 56(c)(1) ("A moving party asserting that a fact cannot genuinely be disputed must support the assertion by filing a separate and concise statement of undisputed material facts consisting of numbered paragraphs with specific citations to particular parts of materials in the record . . . ."). The fact that the parties have street addresses on River Road does not satisfy Movants' burden. Again, while a fact finder might infer that the Postal Service traveled Upper River Road to deliver mail to the parties' mailboxes, this is not an inference the Court can draw in Movants' favor on summary judgment.

In conclusion, Movants have not demonstrated that they are entitled to summary judgment on grounds that Upper River Road became a public road through common-law dedication and acceptance. Accordingly, Movant's motion for summary judgment as to Upper River Road must be denied.

II. Lower River Road – Statutory Condemnation.

The Court concludes that there are no disputed issues of fact that Lower River Road was established as a public highway via statutory condemnation. In 1808, when the effort to create the road was undertaken, the relevant highway statute provided:

> [E]very highway or road which shall in future be laid out or opened, shall be actually surveyed, and a survey thereof made out, entered and recorded, in the town clerk's office, where such highway or road lies . . . ascertaining the breadth, course and distance of such road.

Act of 1797, at § 1 (codified at 1 Laws of Vermont, Chapt. XLV, § 1 (1808)). Movants present undisputed evidence that on March 7, 1808, a survey was conducted and duly recorded in the West Haven Town Clerk's Office. That survey establishes that it was ordered by the Town selectmen, and the survey ascertained the breadth, course, and distance of the road in question. Movants also present undisputed evidence that the road as surveyed in 1808 had a course and location that was markedly similar to the existing course and location of what is now known as Lower River Road. Indeed, Movants' evidence shows the road surveyed in 1808, and the road now commonly known as Lower River Road, are one and the same public road. Defendants offer no challenge to Movants' motion as it relates to the claim that Lower River Road is a public highway. Accordingly, the motion for summary judgment on this issue is granted, and the Court declares that Lower River Road is a public highway, duly created by the Town's exercise of its statutorily granted powers of eminent domain.[13]

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[13] Because Lower River Road was expressly laid out and recorded as a public road with a width of four rods, the Road's existing width today is two rods to each side of the Road's observed, existing center line. *See Cameron's Run, LLP v. Frohock*, 2010 VT 60, ¶ 13, 188 Vt. 610 (mem.) (under 19 V.S.A. § 32 and 19 V.S.A. § 702, the width of an existing public highway is presumed to be one and one-half rods on either side of the road's existing center line "absent proof to the contrary," such as a "preserved and properly recorded original survey"). The issue

Order

For the foregoing reasons, Movants' motion for summary judgment is GRANTED IN PART and DENIED IN PART. The motion relating to the claim that Upper River Road is a public road is DENIED. Further, Movants' request for a declaration of the width of Upper River Road is DENIED without prejudice.

The summary judgment motion relating to the claim that Lower River Road is a public road is GRANTED. In addition, the motion relating to the request for declaratory relief regarding the width of Lower River Road is GRANTED, and the Court hereby declares that the Road's existing width today is two rods to each side of the Road's observed, existing center line.

This matter shall be set for a status conference in 30 days to discuss next steps and the parties' readiness for trial.

Electronically signed on August 31, 2023 at 10:33 AM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge

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of the specific location of the existing center line of Lower River Road has not been raised at this stage of this case.