

Abandonment of Town Highways “The Road Less Traveled By”

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Discontinuance / Abandonment of Highways

Terms used interchangeably in statutes but don't mean the same thing

1. Discontinuance Highway Law §171
 - Direct Action to Terminate
 - By Public authorities
 - Must strictly adhere to procedure
2. Abandonment Highway Law § 205(1)
 - Loss via Nonuse
 - By public in no longer using
3. Qualified Abandonment Highway Law § 205(2)
 - Town no longer maintains
 - Town retains public easement for road
 - May be used as a public highway

Preliminary Question:

What is the status of Road to be Abandoned or Discontinued?

- Road must be shown to have been established as a Town Road before it can be discontinued or abandoned
- Did Town acquire fee title to Road or only an easement for highway purposes?

Once Shown to be a Town Road

- Presumption “Once a highway always a highway”
- Public highway continues to be a public highway until discontinued or abandoned
- Party seeking abandonment by non-use bears the burden of proving its non-use for six years

Discontinuance of Town Highway

High. Law § 171

- Town Highway Superintendent may, upon written application and with written consent of the town board, make an Order discontinuing a highway which has become useless since it was laid out.
- Both Highways owned in fee and for which Town only has an easement for highway purposes can be discontinued.
- A release of all damages from the owners of land taken or affected by the discontinuance required.
- Town Superintendent required to file an order discontinuing the highway with the Town Clerk.
- Discontinuance effective immediately upon filing.

Note: There are other statutes authorizing the discontinuance in specific situations.

Abandonment through Non-Use

Statutory Authority

Highway Law § 205(1)

- Every highway not opened and worked within six years from the time it was dedicated to the use of the public, or laid out, shall cease to be a highway
- Every highway not traveled or used as a highway for six years, shall cease to be a highway
- Every public right of way not used for said period shall be deemed abandoned as a right of way.

Application of Highway Law § 205(1)

- Abandonment occurs automatically by operation of law after 6 years of non-use.
- Filing written description with the Town Clerk memorializes fact of Abandonment.
- Filing Certificate of Abandonment a ministerial act.
- Failure to file Certificate of Abandonment does not necessarily mean not abandoned.
- Filing Certificate of Abandonment, if not supported by facts, not proof of abandonment.
- Upon the filing of the Certificate of Abandonment, the Road is discontinued.

- Whether highway abandoned:

- Always a Question of Fact
- Applies only where a Town has an easement
- Town can Abandon a portion of length but never a portion of width
- Whether Town has maintained the Road not a relevant fact



- Encroachment – doesn't constitute an abandonment; no adverse possession against town property held in a governmental capacity

- Challenge to Abandonment:

- Action / Proceeding must be commenced within one year of filing Certificate of Abandonment
- What if Certificate of Abandonment not filed?
 - No time limit on when the status of the road can be challenged

What acts support abandonment of a highway by reason of non-use?

- Road made impassable for conveyances of any kind, is fenced off and the public travels by another route for at least six years
- Highway obstructed and closed for more than six years deemed abandoned even if highway was initially shut off and rendered impassable by a wrongdoer
- Use as a highway contemplates travel in forms reasonably normal along the lines of an existing road



- Facts which revealed that trees several inches in diameter and brush were growing in the road bed, fallen trees and barbed wire fences crossed the roadbed and washouts prevented the use of the road for travel in any logical sense supported a finding that the highway had been abandoned. Hallenbeck v. State, 59 Misc. 2d 475 (Ct. Cl. 1969).

Facts not sufficient use to prevent abandonment

- Extent of the use of the highway is largely immaterial provided it is used as a highway. Townshend v. Bishop, 61 A.D. 18 (4th Dept. 1901).
- The fact that the highway was slightly used by pedestrians or that pedestrians climbed over obstructions to gain access, or
- That hunters, hikers or horseback riders occasionally used portions of the highway during the period of alleged non-use

Compare with recent cases which have held:

- “disparate recreational use by snowmobilers, bicyclists, cross country skiers, and pedestrians is sufficient ‘use’ to overcome a finding of abandonment by non-use.”
Brown v. Pitcairn



Recommended Process

- A. The Highway Superintendent identifies town highways not used by the public for a period of six years.
- B. The Highway Superintendent reports to the Town Board:
 - Written description of each of the highways not traveled or used by the public for six years
 - Provides the empirical factual support for each road
 - Recommending Town Board consents to filing a Certificate of Abandonment
- C. The Town Board reviews the Superintendent's Report:
 - Decides whether to consent to file a Certificate of Abandonment
 - Holds Public Hearing on whether to file a Certificate of Abandonment
 - Adopts a Resolution accepting or denying, the abandonment of each town highway
 - Adopts, a Resolution consenting to filing a Certificate of Abandonment
 - Highway Superintendent and majority of the Board then sign the Certificate of Abandonment

- D. Highway Superintendent files and records in the Town Clerk's office a Certificate of Abandonment of each highway. Upon filing a Certificate of Abandonment, the town highways described are discontinued as Town Highways.
- E. Town Clerk mails:
- A copy of the Certificate of Abandonment to adjoining Landowners
 - Notice that challenge must be commenced within one year of filing



Qualified Abandonment

Statutory Authority

- Highway Law § 205(2)
- Procedure is a formal discontinuance not an abandonment despite title

Elements

- For two years, less than two vehicles daily
- No injustice or hardship created for owners adjoining road
 - Fact of occupied premises doesn't preclude

Public Hearing required

- Description of part abandoned must be filed with County Clerk

•Effect of Qualified Abandonment

- No longer worked at public expense
- Continue to be subject to use as a Public Highway
- Can't be obstructed
- Landowners may but have no obligation to repair
- Adjoiners may fence & gate if left unlocked

Reopening a once qualified abandoned Highway

- Pursuant to Highway Law §171(2)
- Condition of road a time a proper factor
- Cost to town a factor
- Town can't be compelled to open

THE END.

