

ABANDONMENT OF TOWN HIGHWAYS

“The Road Less Traveled By”

For the
NYS Tug Hill Commission at the
35th Annual Local Government Conference
on April 21, 2026

Presented By:
Kenneth L. Ayers, Esq. &
Jennifer L. Chrisman, Esq.
The Ayers Law Firm, PLLC
50 West Grand Street, P.O. Box 638
Palatine Bridge, NY 13428
www.theayerslawfirm.com

Introduction

Since its creation in 1777, the State of New York has authorized towns by statute to establish town highways, identify and describe lands that have been used as town highways for twenty years or more and once established, to discontinue and abandon such town highways. After nearly 250 years, towns face the daunting task of accurately describing those roads which have been established and remain town highways and those which have been discontinued as town highways by the direct action of the town or have been abandoned by the public’s non-use of the highway.

Town Highway Abandonment under Highway Law § 205(1).

The statutory authority for the abandonment of town highways is found in Highway Law § 205 (1) which provides:

“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.”

Highway Law §205 (1) further requires:

“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... 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.”

Highway Law § 205 (1) specifically requires the highway superintendent, with the written consent of the town board, to prepare a “written description” of each town highway or portion thereof not travelled or used as a highway and to file the written description of the highway and the written consent of the town board in the Town Clerk’ office. Upon such filing, the highway or portion thereof described in the written description is declared to have been abandoned. The superintendent’s description of a highway not used by the public as a highway for six years, taken together with the written consent of a majority of the town board, has been referred to as a “Certificate of Abandonment,” even though that term does not appear in Highway Law § 205 (1). Any action or proceeding involving or challenging the abandonment of a town highway must be commenced within one year of the date of filing the Certificate of Abandonment. (Highway Law § 205(2)).

Establishment as a Town Highway.

Before addressing whether a town highway has been abandoned, it must first be shown to have been established as a public, town highway and, if it was, whether the Town acquired fee title to, or only an easement over, the land to be used as part of the town highway.¹

Whether a highway, now sought to be declared abandoned by the public’s nonuse, was ever established or recognized by a town requires a search of town, county and other public records. In situations where public records have been destroyed it may be necessary to review ancient documents and historical materials to determine if a highway was ever established or recognized by a municipality as a public road. Courts have consistently held that old maps, surveys and other documentation provide ample basis for a court to conclude that an existing road was established as a public road in the 19th Century. *Ciarelli v. Lynch*, 69 A.D.3d 1008 (3rd

¹ See “Appendix A” for a summary of the law on the Establishment and Abandonment of Town Highways.

Dept 2010); *LaSalle Company v. Town of Hillsdale*, 199 A.D. 2d 685 (3rd Dept. 1993); *Kings Estates Ltd. Partnership v. Town of Chester*, 162 A.D. 2d 802, 804 (3rd Dept. 1990) (county highway map is prima facie evidence of its content); *Dandomar Co., LLC v. Town of Pleasant Valley*, 142 A.D. 3rd 681 (2nd Dept. 2016). In addition, the ancient records rule (CPLR § 4522) provides that “all maps, surveys and official records affecting real property” filed in public repositories “for more than ten years, are prima facie evidence of their contents.”

A town should create and maintain a file on each highway proposed to be abandoned, setting forth the search conducted and the records, documents and facts supporting its determination that the road had been established and recognized as public. town road. This would include deeds, town meeting minutes, Official Town Maps, county title records, County Highway Maps, filed maps and historical atlases, maintenance records, annual highway inventories, receipt of state aid, installation of traffic control signs or devices, and other acts of the town demonstrating its exercise of dominion and control of the highway.

Town Highway may be Abandoned Only When Town has an Easement for Highway Purposes.

Town highways can only be abandoned pursuant to Highway Law § 205 (1) where a town has acquired an easement for highway purposes over the land the highway traverses. A town cannot abandon a town highway if it holds fee title to the land used for highway purposes.²

Where a town highway has been established by prescription, the town can only acquire an easement for highway purposes. Where a town highway has been established by statute, deed, condemnation, or dedication the town acquires only an easement of passage unless the specific statute, deed, condemnation proceeding, or dedication establishing the highway expressly conveys the fee to the town. Therefore, before proceeding to abandon a highway pursuant to Highway Law § 205(1), a town must determine whether the town acquired a fee interest in those highways proposed to be abandoned which were either laid out by the town highway commissioners or town highway superintendent under Highway Law § 171(1) and §171(2), or were acquired by deed, condemnation proceedings, or dedication.

² Where a town a holds fee title to town highway the same may be discontinued pursuant to Highway Law §§ 171, 172, 207, 211-a, and 211-b.

To determine whether the town acquired fee title or only an easement would require a town to search its records, including town and planning board meeting minutes, deeds, offers of dedication, and approved subdivision plats and documents filed in the County Clerk's office including deeds, maps, and condemnation proceedings.

Proof of Abandonment

Whether a town road has been abandoned by nonuse is a factual question. When a town proposes to declare a highway as abandoned pursuant to Highway Law § 205 (1), the burden to demonstrate that the facts support a determination of abandonment falls squarely on the town. For each highway proposed to be declared abandoned, the Town Superintendent must set forth and certify in the Certificate of Abandonment those facts which support the town's assertion that each specifically described town highway, or a portion thereof, has not been traveled or used by the public for six continuous years. This can be a formidable and heavy burden since depending on the circumstances even minimal, seasonal, and recreational use of a highway on foot or in a vehicle may be sufficient to prevent the finding of abandonment. See, Appendix "A", pp. 5-6.

Typically, affidavits of private individuals and town officials with personal knowledge of the lack of public use or proof that the condition of the road has precluded public use in a reasonably normal fashion along an established line of travel for a period of six (6) years, are the only proof available. However, such proof may be rebutted by affidavits of individuals with personal knowledge opposing the abandonment which assert and document even a minimal level of public use. One court has held that a Certificate of Abandonment declaring a highway abandoned should only be made and filed when the proof of the public's non-use of the highway for six years is undisputed. *Avoca Soil Imp. Co., Inc. v. Wilber*, 137 Misc. 827 (Sup. Ct. Columbia Co. 1930).

Moving forward, to ensure a sufficient factual basis to support the proposed abandonment, a town should begin to monitor the public use and document the condition of those highways it proposes to declare abandoned to gather and compile facts supporting the superintendent's finding that the highway has not been traveled or used by the public for six continuous years. Regular monitoring, inspection, and reports by town officials and the use of devices such as "trail cameras" to document the lack of public use, and periodic ground level and

aerial (drone) photographs and videos of the condition of the highway would be useful to document the lack of public use.

The fact that a town has for decades considered a highway to be abandoned or has not maintained or received state-aid for a highway is not relevant in determining whether a highway has been abandoned. The determining factor is whether the highway has not been traveled or used as a public highway in a reasonably normal fashion for a continuous period of six years. See “Appendix A”, p. 5-6.

Certificate of Abandonment

Highway Law § 205 (1) provides that “every highway that shall not have been traveled or used as a highway for six years, shall cease to be a highway...” The language of the statute establishes the factual requirement necessary to determine if a town highway has been abandoned, to wit: the highway “shall not have been traveled or used ... for 6 years ...” Thus, a town highway is automatically abandoned by operation of law after six years of nonuse. *Cranson v. Homer*, 132 Misc. 2d 284 (Sup. Ct. Cortland Co. 1986); *Will v. Town of Orleans*, 236 A. D. 2d 889 (4th Dept. 1997).

The filing of the Certificate of Abandonment does not effectuate the abandonment of the section of highway described in the Certificate but declares that the highway had been abandoned by the public not traveling over or using the highway for six years prior to the filing of the Certificate. Filing the Certificate officially declares what has already taken place, namely, the abandonment of the highway or portion thereof described in the Certificate. The purpose of filing the Certificate of Abandonment is to allow the town board to find out what highways, or portions thereof, described in the Certificate had been abandoned and were no longer a part of the town highway system and not to provide notice to adjoining landowners that the highway described in the Certificate had been abandoned. *Cranson v. Homer, Id., Legislative Bill Jacket (Assembly Pr. 2181)* (1966).

The abandonment of a town highway which leaves adjoining landowners without access to a public highway implicates and may constitute an unconstitutional taking of a valuable property right. Highway Law § 205 (1) does not require notice to adjoining landowners affected by the Highway Superintendent’s factual determination that the town highway, or portion thereof, described in the Certificate of Abandonment had been abandoned.

Without providing notice to affected landowners and an opportunity to attack and rebut a factually unsupportable Certificate of Abandonment would deny adjoining landowners due process and may constitute an unconstitutional taking of a valuable property right. *Cranson v. Homer*, supra.

Filing the Certificate of Abandonment triggers the one-year statute of limitations within which any action or proceeding involving the abandonment of a town highway must be commenced challenging the town's determination that a highway described in the Certificate has been abandoned by the public's nonuse. (Highway Law § 205 (2); *Dandomar Co., LLC v. Town of Pleasant Valley*, 86 A.D.3d 83, 87 (2nd Dept. 2011)). The one-year statute of limitations extinguishes a landowner's right to challenge the Certificate of Abandonment if litigation is not commenced within one year of the date the Certificate of Abandonment is filed with the Town. If a Certificate of Abandonment is not filed, the Highway Superintendent's determination that the facts demonstrate that the subject highway had not been travelled or used for six years and thus had been abandoned by operation of law, can be challenged long after the claimed abandonment occurred because the one-year statute of limitations provided for in Highway Law § 205 (2) is never triggered.

After gathering the facts regarding which town highways had not been traveled or used by the public for six years and thus were deemed abandoned by operation of law, the Town Superintendent, after obtaining the written consent of a majority of the town board, is required to file a written description of each highway so abandoned in the town clerk's office.

We recommend the following process:

- A. The Highway Superintendent identifies which town highways and/or rights of way appear not to have been used by the public for a period of six years.
- B. The Highway Superintendent then prepares a report to the Town Board containing the written description of each of the highways and/or rights of way, or portions thereof, identified by the Highway Superintendent as not having been traveled or used by the public for six years, together with the empirical factual support for each such finding. And recommending that the Board consider consenting to filing a Certificate of Abandonment pursuant to Highway Law § 205 (1) with respect to each such highway, or portion thereof, described in the Report.

- C. At a duly noticed meeting, the Town Board then reviews the Superintendent's Report, and;
- i. Considers whether the proposed action to approve and consent to the Highway Superintendent's recommendation to file a Certificate of Abandonment with respect to the town highways described in the Superintendent's Report is an "Action" under SEQRA requiring additional environmental review or is "Exempt" from SEQRA and adopts an appropriate Resolution.
 - ii. Adopts a Resolution scheduling a Public Hearing on the Highway Superintendent's request to file a Certificate of Abandonment with respect to the town highways described in the Superintendent's Report.
 - iii. At a Town Board meeting held after the Public Hearing, the Town Board adopts a Resolution accepting or denying, in whole or in part, the abandonment of each town highway, or portion thereof, proposed to be abandoned in the Highway Superintendent's Report.
 - iv. Adopts, by a majority vote of the Town Board, a Resolution consenting to filing a Certificate of Abandonment of those highways, or portions thereof, described in the Highway Superintendent's Report.
 - v. The Highway Superintendent and majority of the Board then sign the Certificate of Abandonment.
- D. Once the Highway Superintendent receives the written consent of the Town Board, the Highway Superintendent files and records in the Town Clerk's office a written description (i.e. the Certificate of Abandonment), signed by the Highway Superintendent and by the Town Board of each highway and public right of way so abandoned. Upon the filing of the Certificate of Abandonment, the town highways described therein shall be discontinued.
- E. The Town Clerk shall within a reasonable time after the filing of the Certificate of Abandonment, shall mail by First Class Mail addressed to the person or entity listed on the Town's Assessment Roll as the owner(s) of each parcel of land adjoining a highway, or section thereof, described in the Certificate of Abandonment as

abandoned and discontinued, a copy of the Certificate of Abandonment and a Notice that the landowner's time within which to commence any action or proceeding involving the abandonment of the highways described in the Certificate of Abandonment must be commenced within one year from the date of the Highway Superintendent's filing of the Certificate of Abandonment with the Town Clerk.

APPENDIX "A"

APPENDIX “A”

Before addressing whether a specific public, town highway can be or has been abandoned pursuant Highway Law 205 (1), it must be determined if the town highway in question was ever established as a public highway and, if so, whether the Town acquired fee title to, or only an easement over, the land to be used as a public highway.

Ways to Establish Highways in New York State

New York generally recognizes that town highways may be established by the direct action of public authorities pursuant to statute, by dedication or by prescription (use). *City of Cohoes V. Delaware and Hudson Canal Co.*, 134 N.Y. 397 (1892); *Hillelson v Grover*, 105 A.D. 2 d 483 (3rd Dept. 1984) (a highway located in the geographical limits of a town may become a town highway either by dedication or use).

Highways Established by Statutory Procedure

The Highway Law invests the town highway superintendent with the authority and establishes the procedures by which the Superintendent may, with the consent of the Town Board, “lay out” town highways. Hwy. Law §§170-173. The meaning of the phrase “laying out” a highway although not defined in the Highway Law, identifies the land, and the location and course of the proposed highway, to be “given the status and subjected to the servitude for use as a public highway”. *Bradley v. Crane*, 201 N. Y. 14 (1911).

The Highway Superintendent may lay out a highway over land which has been dedicated by a landowner to a town for highway purposes or where an application to lay out a new highway is made by any person or corporation assessable for highway taxes in a town in which he resides or is assessable. Hwy. Law 171(1).

The statutory procedures for laying out a highway generally require the filing of a release of the landowner over whose property the proposed new road is to be located and the order of the town superintendent of highways in the town clerk’s office. Where no release is filed with the superintendent’s order laying out the highway, the order to lay out the highway has been held to be illegal and without force. *People ex rel. Eastman v. Scott*, 70 A.D. 618 (3rd Dept 1902), appeal dismissed 175 N.Y. 469 (1902). Also, where the record of the highway commissioners laying out a road by statute is defective, neither surmise of what was intended nor a presumption

as to the width intended can be used to satisfy the documentation required by the statute as evidence that the highway was duly laid out. *Saunders v. State*, 148 Misc. 712 (N.Y. Ct Cl. 1933).

Highways Established by Dedication

New York recognizes two kinds of dedications of private land to public use: those made under controlling principles of common law, and those resulting from compliance with the provisions of specific statutes. 43 NY Jur 2d Dedication §29 (2025). Whether a statutory dedication passes the fee of the land to the public or only an easement with the fee remaining with the dedicator depends on the language of the statute as well as the language used in the offer and acceptance of the dedication. 43 NY Jur 2d Dedication §46 (2025).

For a town to acquire fee title to land dedicated to the town by a private landowner for use as a public highway there must have been a complete surrender to public use of the land by the owners (i.e. a deed), acceptance by the town, and some formal acts on the part of the [town] adopting the highway (i.e., Town Board resolution), or use by the public coupled with a showing that the road was kept in repair or taken in charge by the public. *Jasinski v. Hudson Pointe Homeowners Assn.*, 124 A.D. 978 (3rd Dept. 2015); *Town of Lake George v. Landry*, 96 A.D. 3d 1220 (3d Dept, 2012); *Perlmutter v. Four Star Development Associates*, 38 A.D. 1139 (3rd Dept 2007).

In the absence of a statute expressly providing for the acquisition of a fee, or of a deed from the owner expressly conveying the fee, when a highway is established by dedication or by direct action of the public authorities, the public acquires merely an easement of passage, with the fee title remaining in the landowner. *Bashaw v. Clark*, 267 A.D. 2d 681(3rd Dept 1999).

Highways Established by Prescription

The town superintendent also has a duty to ascertain, describe and enter on record in the town clerk's office: (1) any town highways that have previously been laid out but not sufficiently described, and (2) any town highways that have been used for twenty or more years, but not recorded. Hwy. Law §140(8). This provision of the Highway Law has been held to be directory and not mandatory, and therefore the superintendent's failure to comply with the requirements of the statute would not alter the otherwise public character of a road

which has been acquired by prescription. *Carmen v. Hewitt*, 105 N.Y.S.2d 239 (Sup. Ct. Suffolk Co.) (1951), mod. as to other matters, 280 A.D. 866, (2nd Dept. 1952), *aff'd*, 305 N.Y. 718 (1953).

The failure of the town highway superintendent to cause a town highway used for twenty years or more to be ascertained, described and entered upon the Town Clerk's records raises a presumption that there had been no such prescriptive use and that the roadway at issue remained a private road. *Id.* The town superintendent's failure to record in the town clerk's office a description of a road claimed to have been used as a town highway creates a presumption that the facts necessary to support the claim that the public had used the road in the manner and for the statutory period necessary for it to become a public highway by use did not exist. *Goldrich V. Franklin Gardens Corp.*, 282 A.D. 698 (2d Dept. 1953). However, the superintendent's failure to ascertain, describe and record with the town clerk highways used by the public for the statutory period, and the presumption which arises there from that the facts necessary to establish a prescriptive highway did not exist, may be overcome by sufficient proof of the facts necessary to establish a highway by prescription pursuant to section 189 of the Highway Law. *Carmen v. Hewitt*, *supra*; *Goldrich v. Franklin Gardens Corp.*, *supra*.

Facts Necessary to Establish Highway by Prescription or Use.

“A public highway by use pursuant to Highway Law section 189 is established by showing that, for a period of at least 10 years, the road at issue was used by the public and the municipality exercised dominion and control over the road.” *Whitton v. Thomas*, 25 A.D. 996 (3d Dept. 2006). However, establishing a highway by prescription requires more than intermittent use by the public and more than occasional road work by the municipality. *LaSalle Co. V. Town of Hillsdale*, 199 A.D. 2nd 685 (3rd Dept. 1993).

When a highway is established by prescription the public acquires merely an easement of passage, with the fee title remaining in the landowner. *Bashaw v. Clark*, 267 A.D. 2d 681(3rd Dept 1999).

Abandonment of Town Highways pursuant to Highway Law §205 (1).

The phrase "once a highway, always a highway" summarizes the presumption in New York that a highway, once shown to exist, continues to exist. *Buffalo v. Delaware L. and N.R. Co.*, 190 N.Y. 84 (1907); *Cohoes v. Delaware and H. Canal Co.*, 134 N.Y. 397 (1892); *Beckwith v. Whalen*, 65 N.Y. 322 (1875); *Flacke v. Strack*, 98 A.D.2d 881 [3rd Dept.1983]. The burden of establishing that a town highway has been abandoned pursuant to Highway Law §205(1), is on the party claiming that the road has been abandoned. *Matter of Aldous v. Town of Lake Luzerne*, 281 A.D. 2d 807, 808-809 (3rd Dept. 2001); *DeCuyper v. Gonzales*, 214 A.D. 2nd 764 (3rd Dept. 1993); *Pruitsman v. Manchester*, 79 A.D. 2nd 1078 (3rd Dept. 1981). In particular, the burden of proving that there has been a lack of travel or use of the roads claimed to be abandoned is on the party asserting the lack of travel or use. *DeCuyper v. Gonzales, supra*. Proof of abandonment must also overcome the presumption favoring continuance of a public highway once established. *Matter of Smigel v. Town of Rensselaerville*, 283 A.D. 2d 863,864 (3rd Dept. 2001). Thus, when a town claims that a town highway has been abandoned, the burden of proof falls squarely on the town. To meet this burden of proof a town would need to marshal the facts which support the claimed lack of public use or travel over the road for six years through affidavits, photographs, or by monitoring public's use of such roads to document the lack of public use.

The statutory authority for the abandonment of highways is found in subdivision one of section 205 of the Highway Law which provides:

"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."

Highway Law §205 (1) further requires:

"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... 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."

The construction of the statute itself makes abandonment automatically effective after six years of nonuse or disuse. *Will v. Town of Orleans*, 236 A. D. 2d 889 (4th Dept. 1997). The statute requires the superintendent to prepare and sign (i.e. "certify") a written description of the road or section of road which has not been travelled or used by the public as a highway for six

years and, with the written consent of a majority of the town board, to file and record the written description and written consent of the town board, in the town clerk's office. The Superintendent's "certification" of the description of the road or section thereof not used by the public as a highway for six years, taken together with the written consent of a majority of the town board, has been referred to as a "Certificate of Abandonment," even though that term does not appear in Highway Law § 205 (1).

The purpose of requiring the superintendent to file the written description and written consent of the board is to officially proclaim what has already taken place, namely, abandonment. *Cranson v. Homer*, 132 Misc. 2d 284 (Sup. Ct. Cortland Co. 1986). Filing the Certificate of Abandonment declares that the highway or portion thereof described in the Certificate has been abandoned and triggers the one-year Statute of Limitations within which any action or proceeding must be commenced challenging the town's determination that the described section of highway has been abandoned by the public's nonuse. (Highway Law § 205 (2); *Dandomar Co., LLC v. Town of Pleasant Valley*, 86 A. D. 3d 83, 87 (2nd Dept. 2011)).

The acts, or failure to act, of local officials in filing and recording the description and consent (i.e., the "Certificate of Abandonment") are administrative and ministerial acts which are not necessary to validate the abandonment of the highway. *Grosz v. Town of South Bristol*, 182 Misc. 2d 61, (Sup Ct. Ontario Co. 1999); *Holland v. Superintendent of Highways of Town of Smithtown*, 73 Misc. 2d 851 (Sup. Ct. Nassau Co. 1973). However, failure to file the certificate of abandonment leaves the question of whether a particular town highway has been abandoned open to challenge long after the claimed abandonment occurred because the one-year statute of limitations provided for in Highway Law § 205 (2) is never triggered.

The determination whether a public highway has been abandoned by non-use is a factual determination (*Coleman v Village of Head of Harbor*, 163 AD2d 456, 458 [2d Dept], *lv denied* 76 NY2d 768 [1990]; *Daetsch v Tabor*, 149 A.D.2d 864, 865 (3d Dept. 1989); *Holland v Superintendent of Highways of Town of Smithtown, supra*. The certificate declaring the highway abandoned should be made and filed only when the fact of abandonment for six years is undisputed. *Avoca Soil Imp. Co., Inc. v. Wilber*, 137 Misc. 827 (Sup. Ct. Columbia Co. 1930).

It has also been held that the act of filing the "certificate" alone, when not supported by facts which clearly demonstrate that there has already been an actual abandonment of the highway for at least six years, does not constitute an abandonment of the highway. If

substantive facts do not support the highway superintendent's statement of nonuse and abandonment, the certificate of abandonment is a nullity. *Cranson v. Town of Homer*, 132 Misc. 2d 824, (Sup. Ct. Cortland Co. 1986).

The question of what acts constitute an abandonment of a highway by reason of nonuse has been addressed by the courts on numerous occasions. The 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 relevant inquiry is "whether travel on the road, whether by vehicle or on foot, continued to occur 'in forms reasonably normal, along the lines of an existing street'". *Ciarelli v. Lynch*, 69 A. D. 3d 1008 (3rd Dept 2010). Whether the form of travel in a particular case is reasonably normal depends on the setting, location and use of similar roads in the locality.

In the case of abandonment by non-use, a municipality's intention regarding a road is irrelevant (*Daetsch v Tabor*, 149 A. D. 2d 864 (3d Dept. 1989); *Matter of Van Aken*, 211 A. D. 2d 863) (a town's intention to abandon a road is also not relevant when the substantive facts establish that the road is not abandoned). Further, whether the town considered the road to be a town highway is irrelevant and its failure to maintain a road does not mean that the road ceases to be a highway. *Ciarelli v. Lynch*, supra; *Matter of Smigel v. Town of Rensselaerville*, supra. Similarly, listing a highway on the town's highway inventory is not dispositive of whether the road is a town highway. *Desotelle v. Town of Schuyler Falls*, 301 A.D. 2d 1003 (3rd Dept. 2003). Conversely, the exclusion of a segment of road from the annual inventory of town highways submitted to the State Department of Transportation for state aid "does not constitute proof of abandonment." *Aldous v. Town of Lake Luzerne*, 281 A.D. 2d 807,809 (3rd Dept. 2001).

Evidence of year-round travel by snowmobilers, bicyclists, cross-country skiers and pedestrians over a clearly defined roadway is sufficient to preclude a finding of abandonment by non-use. *Matter of Smigel v Town of Rensselaerville*, 283 A.D.2d 863 (3rd Dept 2001); *Hewitt v Scipio*, 32 A.D.2d 734 (4th Dept 1969), *aff'd no opn* 26 N.Y.2d 934 (1970); *Brown v. Town of Pitcairn*, 4 Misc. 3d 1029 (A) (Sup Ct. St. Lawrence Co. 2004) (Unreported Case) (disparate recreational use by snowmobilers, bicyclists, cross country skiers and pedestrians precludes claim of abandonment).

So long as the public's travel along the highway is regular and by reasonably normal means, non-vehicular and pedestrian traffic prevents the finding of abandonment. *Kyser v. New York Cent. R.R. Co.*, 211 A.D.2d 500 (4th Dept 1925); *People ex rel. New York, Ontario and W.*

Ry. Co. v State Tax Commn., 190 A.D. 73 (3rd Dept 1919); *Mangam v President, etc., of Village of Sing Sing*, 164 N.Y. 560 (1900), affd. on opn. below at 26 A.D. 464 (2d Dept. 1898). Even seasonal use of a public highway for recreational purposes will prevent abandonment, where that use is continuous and consistent. *Smith v Town of Sandy Creek*, 12 Misc. 2d 916, *affd. no opn.* 8 A.D.2d 688 (4th Dept), *lv denied* 7 N.Y.2d 707 (1959) (public travel every summer by pedestrians over beaten path across shifting sands to reach the shore of Lake Ontario). Furthermore, nonuse of a portion of the width of a highway while the rest continues to be utilized as a highway does not result in the abandonment of even the unused portion. *Holland, supra* at 852.

On the other hand, a highway may be deemed abandoned if, for at least six years, it has been made impassable for conveyances of any kind, is fenced off, and the public travels by another route. *Hovey v. Village of Haverstraw*, 124 N.Y. 293 (1891); *Schuyler v. Angelica*, 137 Misc. 190 (Sup. Ct. Alleghany Co. 1930), *aff'd* 232 A.D. 718 (4th Dept. 1930). If a highway is obstructed and closed off for more than six years so that the public is excluded it ceases to be a highway even if the highway was initially shut off and rendered impassable by a wrongdoer. *Barnes v. Midland Railroad Terminal Co.*, 218 N.Y. 91 (1926); *Hovey v. Village of Haverstraw, supra*; *Dinkel and Jewel Co. v. Tarrytown*, 177 A.D. 742 (2nd Dept. 1917). In addition, a town's change of the route of travel and failure to rebuild a bridge across a creek are unequivocal acts of abandonment of the portion of the road so rerouted. *Swezey v. Berry*, 143 Misc. 372 (Sup. Ct. Greene Co. 1932); *Schuyler v. Angelica, supra*. In addition, facts which reveal that trees several inches in diameter and brush were growing in the roadbed, fallen trees and barbed wire fences crossed the roadbed, and washouts prevented the use of the road for travel in any logical sense support a finding that the highway had been abandoned. *Hallenbeck v. State*, 59 Misc.2d 475 (Ct.Cl.1969).

Occasional, limited use will not defeat a town's determination that a highway has been abandoned. *Abess v. Rowland*, 13 A.D. 3d 790 (3rd Dept. 2004). Accordingly, the fact that the highway was slightly used by pedestrians (*Kyser v. New York C.R. Co.*, 211 A.D. 500 (4th Dept. 1925)), or that pedestrians climbed over obstructions to gain access (*Town of Leray v. New York Cent. R.R. Co.*, 226 N. Y. 109 (1919)), or that hunters, (*Schuyler v. Angelica, supra.*), hikers, (*Hallenbeck v. State, supra.*), or horseback riders (*Id.*) occasionally used portions of the

highway during the period of alleged nonuse, does not constitute sufficient use as a highway to prevent abandonment.

Conversely, temporary interruptions of public travel by reason of the weakness or destruction of a bridge, though covering a considerable space of time, do not operate as an abandonment of the highway. *Matter of Rutland*, 70 Misc. 82 (Sup. Ct. Jefferson Co. 1910). Similarly, the continuous use of a portion of the width of a highway by pedestrians, although the remainder is obstructed and unusable, does not amount to the abandonment of the highway. *People ex rel. New York O. and W.R. Co. v. Saxe*, 190 A.D. 73 (2nd Dept. 1919).

Finally, it is important to note that town highways can only be abandoned pursuant to section 205 (1) of the Highway Law where an easement, rather than fee title, has been acquired by the public for highway purposes. *N.Y. Central and H.R.R Co. v. City of Buffalo*, 200 N.Y. 113 (1910); *Excelsior Brick Co. v. Haverstraw*, 142 N.Y. 146 (1894); *Robbins Dry Dock and Repair Co. v. New York*, 155 A.D. 258 (2nd Dept. 1913), aff'd 213 N.Y. 631 (1914). This is because section 205 of the Highway Law has been interpreted as a statute of limitation on the life of an unused easement and, therefore, inapplicable when the public owns the fee. There can be no abandonment of a public highway based on the lack of public use or travel pursuant to Highway Law § 205 (1) where the fee has been deeded to the municipality for street purposes (*Fusaro v. D'Angelo*, 41 A.D. 2d 567 (2nd Dept. 1973)), granted to the municipality by statute, (*Re India Street*, 29 N.Y. 2d 97 (1971)), or condemned (*Id.*), unless such intention is shown by express terms or necessary implication of actions taken by the public authorities. (*Fink v. Jagger*, 211 NYS. 2d 51 (Sup. Ct. Suffolk Co. 1960)).