ISSUE PAPER SERIES

Road Abandonment

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NEW YORK STATE TUG HILL COMMISSION

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This paper relies heavily on legal memorandums between The Ayers Law Firm and the Tug Hill Commission during 2025 and 2026, while under contract. No commission staff are attorneys, and municipalities should confer with legal counsel on specific road issues in their town or village.

Introduction

Road abandonment, qualified or total, is a tool towns can use in specific situations to reduce the highway mileage under their jurisdiction. It can be very complicated and is deeply rooted in case law. This paper provides significant detail for towns considering this process, and should be used in conjunction with the town's attorney.

How Roads are Established in New York

Roads in New York are established in one of three ways: 1) by **statutory** procedure or by law, 2) by **dedication**, also referred to as **by deed**, or 3) by **prescription**, also referred to as **by use**. This section includes many references to relevant court cases, included as endnotes, where decisions bear on how towns should address highway-related efforts moving forward. This level of detail is very technical, but because of the legal process that governs road abandonment, commission staff felt it was important for readers to have the detail.

Statutory Roads

Statutory roads are authorized by NYS Highway Law § 170-173, which gives the town highway superintendent authority to establish or lay out roads with consent of the town board, and Eminent Domain Procedure Law. While the phrase "laying out" a highway is not defined in law, the process is taken to mean identifying the land, location and course of the proposed highway to be "given the status and subjected to the servitude for use as a public highway"[i]. Highways established by statute generally require the filing of a release from the landowner over whose property the proposed new road is to be located, as well as the order of the town superintendent of highways in the town clerk's office. If this release is not properly filed, the order is considered illegal and unenforceable[ii]. Very few roads on Tug Hill are statutory roads.

Roads by Deed

Roads established by dedication, or by deed, refer to the dedication of private land to public use. The first, more common method is for the town to acquire fee title to the land from a private landowner by a deed. The second method is to establish a public right of way, or easement, by deed. With this method, fee title remains with the private landowner, but a formal public right of way is granted to the town.

Both methods require full surrender of the land for use as a public highway. The town must formally accept the surrender and adoption of the road, such as with a town board resolution. The dedication can also be accepted less formally by the town's use by the public, coupled with showing that the road was kept in repair or was taken charge of by the public.[iii]

Roads by Use

For roads by use, the public acquires an easement of use over the road and land, not ownership of the land itself[iv]. As defined in Highway Law § 189:

> *All lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town superintendent shall open all such highways to the width of at least three rods.*

Highway Law § 140 (8) includes, among the general powers and duties of the town superintendent, the duty to ascertain, describe, and enter on record in the town clerk's office any town highways that have been laid out, but not sufficiently described, and any town highways that have been used for twenty years, but not recorded."[v]

According to case law, this provision in Highway Law § 140 (8) is seen as directory and not mandatory; a highway superintendent's failure to comply does not necessarily alter the otherwise public character of a road by use[vi]. It can, however, potentially raise uncertainty about the road's status and jurisdiction.[vii] That uncertainty may be overcome by further facts to prove the highway is a highway by use[viii].

The facts necessary to establish a highway by use refer to Highway Law § 189. In *Whitten v. Thomas* (2006), it was determined that "A public highway by use pursuant to Highway Law § 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." Establishing a highway by use requires more than just intermittent travel by the public and more than occasional road work by the municipality[ix].

Attorney General Informal Opinion No. 99-19

Establishing a highway is a road by use can be difficult, but not procedurally or factually impossible. Informal opinion 99-19 by the NYS Attorney General's office clarifies some of the language in Highway Law § 189 that has been confusing and discussed in various court cases. The opinion states that the primary condition needed is that the right of way has seen "[use] by the public for ten years or more". If that condition is not met, then a road may not be officially established by use. However, there is some uncertainty as to what "[use] by the public" really means.

The courts have interpreted the public use requirement to mean the two following conditions:

1) That a road was open to use by the public during the statutory period, and
2) That a road was continuously maintained by public authorities during the statutory period[x].

The Court of Appeals in *Speir v. Town of New Utrecht, supra* further interprets the "used by the public" phrase:

> *… the mere fact that a portion of the public travel over a road for [ten years] cannot make it a highway; and the burden of making highways and sustaining bridges cannot be imposed upon the public in that way. There must be more. The user must be like that of highways generally… A private way opened by the owners of the land through which it passes for their own uses does not become a public highway merely because they are also permitted for many years of travel over it.*

Therefore, the highway in question must be open to the general public like all other public highways to be considered a highway by use.

Furthermore, for a highway by use to meet the requirements of Highway Law § 189 and legal precedent, it must also meet the condition of being continuously maintained by authorities. Courts have upheld that isolated acts of maintenance, irregular snowplowing, and policing of the area and acts done for an accommodation of a portion of the public do not constitute the continuous maintenance required to make a road a public highway by use[xi]. To be considered "continuous maintenance" and meet the threshold of the public exercising domain over the road, the prescriptive highway in question must receive a level of maintenance equivalent to the maintenance performed on other town roads[xii].

To summarize, a highway by use must be factually shown to have been traveled by the general public for at least ten years and maintained by the town for at least ten years without interruption[xiii].

Attorney General Informal Opinion No. 95-31

According to Highway Law § 189 and the duties of the highway superintendent outlined in Highway Law § 140 (8), once the factual determination is made regarding whether or not a road is a highway by use and the road is then sufficiently recorded and filed with the town clerk, the highway must then be opened to the "width of three rods." Three rods is equivalent to 16.5 yards, or 49.5 feet. It is not always feasible or cost-effective for rural towns to widen roads by use to this scale. This requirement of Highway Law § 189 has caused consternation over the years and required judicial input.

In *People v. Sutherland, supra,* the Court of Appeals held that,

> *The town supervisor could not… in the language of Highway Law, section 209* [the statutory predecessor of Highway Law § 189], *open such highway "to the width of at least two rods," for there was no evidence of use by the public for [the statutory time period, e.g. ten years] of a road two rods in width… If a road of way be established by prescription or user, the public use defines the extent of the easement.*[xiv]

If a town wants to improve a highway beyond the extent of actual public use, (e.g. widening the road, constructing ditches, removing trees), the town must obtain permission of the fee holder or pay just compensation[xv]. For example, in Tug Hill, attempts to widen certain roads to accommodate large snow-plowing equipment may not always be possible on rural roads. This is especially relevant with seasonal roads or extremely low-volume roads by use bordered on both sides by NYS owned land, where acquisition of property would be

difficult or impossible. Therefore, depending on the actual use by the public, court case review has determined that the width of a highway by use is limited to the width of the historical use, which may be less than three rods despite the language of Highway Law § 189.

Importance of Method of Road Establishment

Most town highways on Tug Hill are roads by use. While Highway Law § 140 and several court cases outline the duty of highway superintendents to ascertain, describe, and enter all highways by use into the record, in reality there may be limited documentation available for these roads, especially if never improved beyond the corduroy or plank stage, or used primarily for industries that no longer exist.

Documentation of road establishment (local law, records of a conveyed fee or easement, town board minutes and resolutions, etc.) often does not exist or is difficult to find. For example, record keeping in the 1800's was often limited, delays or oversights can occur in adding a highway to the official map, and uncontrollable circumstances like fires at town clerks' offices, municipal buildings, or highway garages over can destroy records. These circumstances may cause confusion for public officials involved in determining whether a road originated by deed or by use. This can also have broader implications and create difficulty for a town facing complaints about road maintenance, land ownership, legal challenges, or when considering actions like road abandonment.

Due to the procedural requirements of each road type, determining the origin of a road is a factual matter. If these facts are not well-documented or kept for posterity, a records search will be necessary to determine how a road came under a town's authority. Knowledge, or access to this knowledge, is the prerogative and responsibility of the highway superintendent. The importance becomes clear when a municipality wishes to pursue a total road abandonment or qualified road abandonment.

For example, without clear facts to support whether a "by use" right-of-way is a highway by use (travel by the public, not just private landowners, and regular municipal maintenance) or whether it is technically, if not procedurally, abandoned (the road has had no travel by in six years, the highway superintendent may or may not have filed a certificate of abandonment pursuant to Highway Law § 205 (1)), the legal status of a road may be considered contentious.

Two Types of Road Abandonment

Municipalities are granted authority to abandon roads in Highway Law § 205 and § 205-b, which describe the necessary criteria for a road to be considered abandoned, the procedural steps in entering this information onto the record, and the long-term effects of either action. There are two legal ways to abandon a road:

- Road Abandonment (Highway Law § 205 (1))
- Qualified Road Abandonment (Highway Law § 205 (2) and Highway Law § 205-b)

As discussed in the companion paper, *Municipal Tools for Local Roads Management*, the concept of "once a road, always a road" is key to understanding local roads. The burden of proof and legal processes required to overcome this presumption is steep but not impossible to satisfy. Highway Law § 205 and § 205-b grant municipalities authority to

	ABANDONED Highway Law § 205 (1)	**QUALIFIED ABANDONED** Highway Law § 205 (2) Highway Law § 205-b
PROCESS	1. Road must not have been traveled or used for six years* 2. The highway superintendent, with the written consent the 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 a majority of the town board of each highway and public right-of-way so abandoned (e.g. a Certificate of Abandonment) 3. No public notice required 4. No public hearing required 5. No landowner notification required	1. Roads must not have been traveled by more than two vehicles per day for two years (in addition to pedestrians and horseback) 2. Town highway superintendent and county highway superintendent must agree that it will not cause undue hardship or injustice to landowners and occupants 3. County highway superintendent holds a hearing 4. Town and county highway superintendents shall file, and cause to be recorded in the town clerk's office a written description 5. County responsible for public notice for public hearing 6. 20-day written notice by county highway superintendent to "owners and occupants of such lands" adjoining the highway
EFFECT	• The highway and right-of-way ceases to be a highway • Public right to use road is extinguished • Easement of passage reverts to neighboring landowners • The town cannot change their mind and reopen road	• The road shall not be worked at the public expense • No persons are required to keep any part of the road in a state of repair • The easement of passage remains, and the public has the right to use the right-of-way • Landowners may gate across the property, but cannot lock the gates or otherwise fully obstruct the right of way • Not a permanent abandonment: the town may change their mind at any time and resume maintenance

abandon a road under specific criteria and procedural actions. This paper explores the legal basis and processes for both road abandonment options, when a town cannot abandon a road, procedural recommendations, and the complexities of the legal landscape. This paper will refer to abandonment as described by Highway Law § 205(1) as "total abandonment," to distinguish it from "qualified abandonment" as described in Highway Law § 205(2) and, circumstantially, Highway Law § 205-b.

**this is a factual determination process which needs to bear under scrutiny with qualitative information and evidence (e.g. affidavits, photographs, monitoring the public's use of these roads through photos, traffic counts, trail cameras, etc.) to pass procedural muster and buffer any potential challenge in court.*

When Can a Town Not Totally Abandon a Road?

Towns cannot totally abandon a public highway under Highway Law § 205[xvi] if the fee has been deeded to the municipality for street purposes[xvii], granted to the municipality by statute[xviii], or condemned[xix]. Town highways can only be totally abandoned under Highway Law § 205 when the town has acquired an **easement** for highway purposes. The distinction between which section of law applies based on the road's manner of establishment is due to court case interpretation of Highway Law. Court precedent has routinely interpreted Highway Law § 205 as a statute of limitation on the life of an unused easement. The law, therefore, does not apply when the town owns more than an easement of use and in fact retains the fee title of the right-of-way itself. A town may also not seek to qualify abandon a road under Highway Law § 205-b as described above. A town may, however, seek to **discontinue** the road under Highway Law § 171, 172, 207, 211-a, and 211-b. The difference may seem semantic, but roads must be either "abandoned" or "discontinued" under the applicable section of law with prescribed processes to ensure validity of the action and outcome.

Road Abandonment: A General Overview

When a town is considering abandoning a road due to nonuse, or determining whether the road in question has already been abandoned, the town must refer to Highway Law § 205(1). Road abandonment is a factual and procedural undertaking that the town must follow carefully for either total abandonment or qualified abandonment.

The legal authority for the **total abandonment** of 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.*

The law 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 [the superintendent] and by said town board of each highway and public right of way so abandoned, and the same shall thereupon be discontinued.*

If the total road abandonment procedure is implemented properly, and the public does not use the one-year statute of limitations to challenge and potentially overturn an abandonment filing, the town no longer has to maintain the road, the public right to use the road is extinguished, and the easement of use reverts to the neighboring landowners. If the

town wanted to reestablish the road at some later date, a new highway would need to be established by statute, deed, or a new easement.

Towns can **qualify abandon** a road under Highway Law § 205 (2):

> *Where it appears to the town superintendent and said town board, at any time, that a highway has not become wholly disused [as in the case of Subsection 1], but that it has not for two years… been usually traveled… by more than two vehicles daily, in addition to pedestrians and persons on horseback…*

In such circumstances, with the approval of the county highway superintendent, the law further allows,

> *… a qualified abandonment of such a highway is proper… [if it] will not cause injustice or hardship to the owner or occupant of any lands adjoining such highway… [The] highway superintendent shall have held a public hearing thereon upon giving at least twenty days' notice to such owner and occupants of such land at the time and place of such hearing, they shall file and cause to be recorded in the town clerk's office a certificate containing a description of the portion of the highway partly disused… and declaring a qualified abandonment.*

Qualified road abandonment means that the town no longer maintains the road after completing the process. However, the easement of passage remains in place, the public still has use of the right-of-way, and property owners may gate but not lock the road passage. The town may change its mind at any time about the road's qualified abandoned status and resume maintenance activities.

Procedural Steps for Total Road Abandonment

While total road abandonment does not require a public hearing, public notice, or landowner notification process, the commission recommends following a more robust procedure based both on the language of Highway Law § 205 (1), and well as input from legal counsel following a thorough review of highway law, town law, other applicable statutes, and case law. The recommended procedure is:

1. A factual determination is made by the highway superintendent that the highway(s) in question has not been opened, used, or maintained in a six-year period.
2. The highway superintendent prepares a signed report for the town board containing a written description of each of the relevant highways and/or rights of way together with empirical, factual support for each such finding, and recommends that the board consider consenting to filing a **certificate of abandonment**.
3. At a duly noticed meeting, the town board reviews the superintendent's report and considers whether the superintendent's recommendation to file a certificate of abandonment described in the report is an "action" that falls under SEQRA and requires further environmental review, or if it is "exempt."

4. The town board adopts a resolution scheduling a public hearing on the highway superintendent's request to file a certificate of abandonment[xx].
5. At a town board meeting after the public hearing, the board adopts a resolution accepting or denying, in whole or in part, the proposed abandoned road segments included in the highway superintendent's report; and, by a majority vote, adopts a resolution to file the certificate of abandonment of those highways, in whole or in part, as included in the report.
6. This written description/report and resolution are signed by the town highway superintendent and the majority of the board.
7. The signed description and consent of the majority of the town board are filed with the town clerk and entered into the record. From the moment of filing, the abandonment is considered in effect and triggers a one-year statute of limitations for legal challenge.

The town clerk mails the adjoining parcel owners listed on the town's assessment roll 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 certificate's filing.

Procedural Steps for Qualified Road Abandonment

The general process for road abandonment pursuant to Highway Law § 205 (2) are:

1. A factual determination is made by the town highway superintendent and the county highway superintendent that the road has not been traveled by more than two vehicles per day for two years.
2. The county highway superintendent provides public notice for public hearing, as well as twenty days' notice to "owners and occupants of such lands" adjacent to the highway.
3. County highway superintendent holds the public hearing.
4. Town and county highway superintendents shall file a written description of the qualified abandoned road and cause it to be recorded in the town clerk's office.

However, if a road proposed for abandonment serves as an access road to state forest preserve lands or "lands now owned or hereafter acquired by the state and held under the jurisdiction of the department of environmental conservation,"[xxi] the town must provide written notice to NYS Department of Environmental Conservation (DEC) of their intent to abandon the road. Highway Law § 205-b applies, and the town's resolution for abandonment must include language indicating the perpetuity of the easement. These roads cannot be permanently abandoned, as described in Highway Law § 205 (1). The public will retain an easement of passage over the right-of-way in perpetuity. The town is no longer obligated to maintain the road, whereas DEC may perform road maintenance

activities, if so desired. Also note that for qualified abandoned roads under Highway Law § 205 (2) or Highway Law § 205-b, the town may change its mind at any time and resume jurisdiction and maintenance of the road.

Total Road Abandonment: Factual Determinations and Troubleshooting

Determining if a road has been abandoned by nonuse is a factual question and must be answered long before a certificate of abandonment is filed. Specifics on what evidence is needed in the factual determination process are not described in Highway Law § 205 or Highway Law § 205-b, but the need for a rigorous process has been determined and regularly upheld in court proceedings[xxii]. When gathering facts is done improperly or not at all, the abandonment process can stall or be thrown out in court.

Towns can use the authority granted in Highway Law § 205 (1) to abandon a town highway due to nonuse. This requires two key pieces of information:

1. First, the town must prove that the highway in question was, in fact, established or recognized by a town highway at some point in its history;
2. Second, the town must be able to gather the facts to prove that the highway in question has been unused by the public for at least a period of six years.

When a town claims that a road has been abandoned under Highway Law, the town has the burden of proof to overcome the "once a road, always a road"[xxiii] standard. Therefore, when a town claims that a town road meets the criteria for total abandonment or qualified abandonment, they must be able to prove the lack of travel for six or more years (in the case of total abandonment) or negligible travel (two or less vehicles per day, not including travel by foot or horse, in the case of qualified abandonment) [xxiv].

Meeting the burden of proof may be especially difficult in rural areas like Tug Hill. The law states that the town superintendent determines if a road has been abandoned by nonuse in the case of total abandonment, and the county highway superintendent determines it in the case of qualified abandonment. Before that factual determination can be made, however, the town must first establish how and/or whether the road in question has been established as a public town highway, and if it was by fee title or easement.

In a hypothetical scenario, "Town A" is trying to abandon "Road A" due to nonuse under Highway Law § 205(1). Before Town A can begin the abandonment process, they must find proof that Road A is a road by use. In this scenario, Town A will need to search through its records, as far back in time as necessary. If those local records do not exist or cannot be found, then Town A might need to reach out to its county for other reference materials. Examples of possible sources supporting a road's origin and its use as a public road may include the following:

- Deeds
- Town meeting minutes
- Official town maps
- County title records
- County highway maps
- Filed maps
- Historical atlases
- Maintenance records

- Annual highway inventories
- Receipt of state aid
- Installation of traffic control signs or devices

In particular, distinguishing whether the town acquired the fee title or only an easement would require the following records search:

- Town and planning board meeting minutes
- Deeds
- Offers of dedication
- Approved subdivision plats
- Documents filed in the County Clerk's office including deeds, maps, and condemnation proceedings.

A review of these kinds of records would be highly beneficial for Town A to determine the origin of Road A and identify that it is a road by use and thus eligible for total abandonment pursuant to Highway Law § 205(1). Once the preliminary background research has been completed, the town can move to the factual determination process proving the road's nonuse.

In situations where public records have been destroyed, poorly kept, or are inaccessible to current town staff, it may be necessary to cast a wider net beyond the town offices. For example, outreach to the county records office, copies or scans of county road maps, or consultation with a municipal historian or historical society might yield documentation. Community connections and resource sharing can provide a breakthrough for town officials to review ancient documents and historical materials to determine if a highway was ever established or recognized by a municipality as a public road. The ancient records rule 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"[xxv]. This is precedented: old maps, surveys and other documentation have provided ample basis for a court to conclude that an existing road was established as a public road in the 19th century[xxvi].

Whether a town road has been abandoned is a factual question[xxvii], and it requires a factual answer to be satisfactory in the legal and procedural sense. In the hypothetical case of "Town A" abandoning "Road A" pursuant to Highway Law § 205(1), once the origin of Road A is determined, the town highway superintendent must then certify that the specific road or a portion of the specific road has not been traveled or used by the public for six continuous years. This may be a formidable process, as depending on the circumstances of the road, even minimal, seasonal, and recreational use of a highway on foot or in a vehicle may be sufficient cause in preventing the finding of abandonment.

For many rural towns, factual proof may be difficult to acquire. Typically, affidavits of private individuals and town officials with personal knowledge regarding the lack of public use along the line of travel for six or more years may be the only proof available. While affidavits from private persons with local familiarity may have a role to play in some circumstances, the latter "proof" may be easily rebutted by affidavits to the contrary, wherein a private person can attest to or demonstrate a bare minimum level of public use

along a road that would disprove the six-year time period of nonuse specified in Highway Law § 205. Monitoring and documentation of public use are facts that should support a highway superintendent's findings that a highway has not been traveled on or used by the public for six continuous years. In fact, one court 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 continuous years is undisputed[xxviii].

While it may be impossible for a town to muster empirical evidence to support a factual determination of a road that has been historically abandoned, this paper can suggest a few best practices a town might employ to monitor its road use moving forward, such as:

- Affidavits, to a minor degree;
- Regular monitoring, inspection, and reports by town officials regarding the road's condition;
- Regular monitoring, inspection, and reports by town officials regarding the road's use by the public (e.g. trail camera, traffic counters) to document lack of use;
- Periodic ground-level and aerial (drone) photographs and videos of the condition of the road.

Continuing with the hypothetical case of "Town A" wishing to abandon "Road A," if traffic counts and video footage show that there has been zero traffic of any kind—by motor vehicle, foot, horseback, recreational vehicles, etc.—then Town A has gathered sufficient evidence to proceed with determining that Road A has been abandoned, and can thereafter move to file for a certificate of abandonment. In a true case scenario, any empirical facts or regular/semi-regular monitoring or documentation is better than nothing to support the highway superintendent's findings and the consenting actions of the town board in signing a certificate of abandonment than nothing.

Certificate of Abandonment

In the case of either total road abandonment or qualified road abandonment, Highway Law § 205 (1) and (2) Highway Law § 205-b all reference the town and/or county highway superintendent preparing and signing a "[written] description" of the road or road section to be abandoned. This written description and the written consent of the majority of the town board, must be filed and recorded in the town clerk's office. Taken together, these documents have been referred to as a "certificate of abandonment." The certificate is a critical step in the road abandonment process, even though the term does not appear in Highway Law § 205 or § 205-b. Functionally, it does two things:

1. It requires the superintendent to file the written description and written consent of the town board to officially proclaim what has already taken place: namely, abandonment[xxix].
2. It 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[xxx].

Filing a certificate of abandonment is not, itself, the act of abandoning the road: it merely documents and consents to a requirement of law that has already occurred. Pursuant to Highway Law § 205 (1), a road may well meet the criteria for abandonment with or without the filing of a certificate of abandonment. A certificate of abandonment is not necessary to validate the abandonment of the highway,[xxxi] but failure to file a certificate of abandonment leaves the question of whether a particular town highway has been abandoned, which leaves the town open to legal challenge long after the claimed abandonment occurred because the one-year statute of limitations provided for in Highway Law § 205 (1) and (2) is never triggered. Additionally, if substantive facts do not support the highway superintendent's statement of nonuse and abandonment, the certificate of abandonment is void[xxxii]. See Appendix A for sample certificate of abandonment.

Troubleshooting through Legal Precedent and Case Law Review

Revisiting the hypothetical of "Town A" wishing to abandon "Road A," let's assume the town had set up trail cameras to track the use or nonuse of the road for a period of six years and successfully determined that there was no activity on the right-of-way. From there, "Town A" successfully filed a certificate of abandonment, and "Road A" was stricken from the town highway system. While this represents a perfect-case scenario for fulfilling statutory criteria, reality is often messier. For example: suppose that "Town A" did, in fact, capture evidence of use by the occasional recreationist or vehicle on "Road A". Does this reset the clock on the continuous six-year nonuse requirement for total abandonment? Or may the town have some recourse to proceed?

The question of what act constitutes the total abandonment of a highway by reason of nonuse has been addressed by the courts on numerous occasions. Early 20th-century precedent has shown that the extent of the use of a highway is largely immaterial, provided it is used as a highway[xxxiii]. What is material is "whether travel on the road, whether by vehicle or by foot, continued to occur 'in forms reasonably normal, along the lines of an existing street''[xxxiv]. 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. What many constitute "regular and reasonably normal" traffic for the specific road or road segment is highly circumstantial and judged by the specific context of the road in question.

Above all, the determining factor is whether a highway can be abandoned by nonuse is whether or not the highway has been traveled or used as a public highway in a reasonably normal fashion for a continuous period of six years. The following sections will provide a deeper look into what sort of evidence (apart from affidavits and empirical evidence) was used to support an argument for road abandonment, and whether or not it was considered sufficient upon case review.

Court case evidence that SUCCESSFULLY supported claims of abandonment by non-use:

- If a highway has been made impassable for conveyances of any kind for a period of at least six years, is fenced off, and the public travels by another route[xxxv];

- If a highway is otherwise obstructed or 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 rendered impassable by a wrongdoer[xxxvi].
- If facts reveal that natural, impassable obstructions prevented use of the road for travel in any logical sense, it may support the finding of abandonment (e.g. trees several inches in diameter and brush growing in the railbed, fallen trees and barbed wire fences crossed the roadbed, and washouts)[xxxvii];
- If atypical, limited use of the highway occurs, a town might still be able to support a determination of road abandonment[xxxviii] (e.g. the highway was slightly used by pedestrians[xxxix], pedestrians climbed over obstructions to gain access[xl], or that hunters[xli], hikers[xlii], or horseback riders[xliii] occasionally used portions of the highway during the period of alleged nonuse);

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.

Evidence that UNSUCCESSFULLY supported claims of abandonment by non-use:

- A municipality's intention regarding a road is irrelevant when there is substantive evidence that the road is not abandoned by nonuse[xliv];
- A town's failure to maintain a town road, lack of receipt of state-in-aid funding, or the exclusion of a segment of road from the annual town highway inventory submitted to the State Department of Transportation does not mean that the road ceases to be a highway [xlv];
- Temporary interruptions of public travel (e.g. the weakness or destruction of a bridge, even if covering a considerable space of time)[xlvi] may invalidate a finding of abandonment by nonuse;
- 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[xlvii]. Road abandonment refers to the length of the easement, not the width (e.g. a certain amount of mileage, not a lane or portion of a lane).
- Road abandonment refers to the abandonment of the length of the easement, not the width. If a portion of a highway is obstructed and unusable, yet receives continuous use of a portion of the width of a highway by pedestrians, this may not amount to the abandonment of the highway[xlviii];
- Evidence of year-round travel by snowmobilers, bicyclists, cross-country skiers and pedestrians over a clearly defined road is sufficient to preclude a finding of abandonment by non-use. So long as the public's use of the highway is regular and reasonably normal, non-vehicular travel (e.g. pedestrian or recreational traffic)

could mean that the road may not meet the statutory standard for total abandonment [xlix];

Certificate of Abandonment Troubleshooting

A certificate of abandonment officially declares the abandonment of a highway or a portion as described in the certificate. The certificate itself does not validate a road abandonment, and a missing certificate does not necessarily mean the road has not been abandoned. Two key oversights in Highway Law § 205 may open a town up to liability, even if the letter of the law is technically followed:

1. A certificate of abandonment, its description, and its purpose in initiating a statute of limitations on challenging the road abandonment is not embedded within the Highway Law's language, and
2. The law's procedural steps for road abandonment do not describe the need for a public hearing or a formal notification process to the adjoining landowners of the highway segments in question[l].

While these steps (a public hearing/landowner notification during the legal process, and the filing of a certificate of abandonment after) are not required by law, court case review shows the legal importance of these steps, and without taking them a town may be open to legal challenges and liability.

The following are some of the risks involved in omitting these steps:

1. **No certificate of abandonment**: 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 begin[li]. If a landowner does not initiate a challenge within one year, their right to contest the certificate is extinguished. If a certificate is not filed, the highway superintendent's determination can be challenged long after the claimed abandonment occurred because the one-year statute of limitations provided for in Highway Law § 205 (2) was never triggered.
2. **No notification process or public hearing**: The abandonment of a town highway which leaves adjoining landowners without access to a public highway may constitute an unconstitutional taking of a property right. Without providing notice, adjoining landowners may be denied due process, and it may constitute an unconstitutional taking of a valuable property right[lii].

As always, the commission recommends that a town consults with its municipal attorney if there are any legal questions. Taking into consideration the complicated and evidence-based process necessary for a successful abandonment procedure, consultation with the municipal attorney is especially important to help avoid possible legal challenges.

Appendix A: Resolution and Certificate of Abandonment Template

ABSOLUTE AND TOTAL ABANDONMENT OF A HIGHWAY UNDER HIGHWAY LAW SECTION 205 (1)
RESOLUTION AND CERTIFICATE OF ABANDONMENT TEMPLATE

Resolution #: _____
Date: _____
Introduced by: _____
Seconded by: _____
Name of Highway: _____

Description and location of the highway or portion being absolutely and totally abandoned under Highway Law Section 205 (1):

_____
_____
_____
_____

WHEREAS, the above-named section of highway has not been opened or worked by the town of _____for more than six years, and

WHEREAS, the above-named section of highway has not been significantly nor substantially used by the public for more than six years, as supported by affidavits, photographs, traffic counts, and/or trail cameras, and

WHEREAS, the above-named section of highway has been determined to have been established by use or prescription after review of the available documentation;

NOW, THEREFORE, it is

RESOLVED, that the above-named section of highway is absolutely and totally abandoned under Highway Law Section 205 (1), and it is further

RESOLVED, that the town highway superintendent shall file a copy of this resolution which shall act as the official certificate of abandonment of said road with the town clerk, and it is further

RESOLVED, ownership of the roadbed beneath the above-named section of highway shall revert to the adjoining landowners to the extent permitted by law.

_____ Aye/Nay/Abstain _____Aye/Nay/Abstain

Councilman Signature Town Supervisor Signature

_____ Aye/Nay/Abstain

Councilman Signature

_____ Aye/Nay/Abstain

Councilman Signature

_____ Aye/Nay/Abstain

Councilman Signature

_____ Aye/Nay/Abstain

Councilman Signature

(TOWN SEAL)

ATTEST:

_____

Town Clerk Signature

SO ORDERED, the above-named section of highway is hereby absolutely and totally abandoned under Highway Law Section 205 (1).

Dated: _____ _____

Highway Superintendent Signature

End Notes

[i] *Bradley v Crane,* 201 N.Y. 14 (1911).
[ii] *People ex rel. Eastman v. Scott,* 70 A.D. 618 (3rd Dept 1902), appeal dismissed 175 N.Y. 469 (1902)
[iii] *Jasinki 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 Department 2007)
[iv] *Badshaw v. Clark,* 267 A.D. 2d 681 (3rd Dept. 1999)
[v] NYS Highway Law § 140 (8)
[vi] . *Carmen v. Hewitt, 105N.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).*
[vii] *Goldrich v. Franklin Gardens Corp.,* 282 A.D. 698 (2d Department 1953)
[viii] *Carmen v. Hewitt,* supra; *Goldrich v. Franklin Gardens Corp.,* supra.
[ix] *LaSalle Co. v. Town of Hillsdale,* 199 A.D. 2nd 685 (3rd Dept. 1993).
[x] *Diamond International Corp. v. Little Kildare, Inc.,* 22 NY/2d 819 (1968); *People v. Sutherland,* 252 NY 86 (1929); *Speir v. Town of New Utrecht,* 121 NY 420 (1890); *Matter of Danial v. Town of Delhi,* 185 AD2d 500 (3rd Dept 1992), *lv denied,* 81 NY2d 706 (1993).
[xi] *Goldrich v. Frankling Gardens Corp., 282 AD 689 (2d Dept 1953)* and *1957 Op Atty Gen 146* and cases cited therein
[xii] *LaSalle Co. v. Town of Hillsdale,* 199 A.D. 2nd 685 (3rd Dept. 1993) and Attorney General Informal Opinion No. 99-19
[xiii] Attorney General Informal Opinion No. 95-31
[xiv] *People v. Sutherland,* 252 NY 86 (1929), *Nograd v. Strand,* 38 AD2d 390 (1970).
[xv]*Usher, supra; Jones, supra; Op St Comp 61-281; 1971 Op Atty Gen (Inf) 102; as referenced in Attorney General Informal Opinion 95-31*.
[xvi] *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)
[xvii] *Fusario v. D'Angelo,* 41 A.D. 2d 567 (2nd Dept. 1973)
[xviii] *Re India Street,* 29 N.Y. 2d 97 (1971)
[xix] *Re India Street,* 29 N.Y. 2d 97 (1971)
[xx] The filing of a Certificate of Abandonment does not automatically trigger a notification process on behalf of the town or town clerk to the landowners adjoining the proposed road segments for abandonment; it merely attests to the town board that a highway, or portions of highways, described in the Certificate of Abandonment had been abandoned and no longer are a part of the town highway system. *Cranson v. Homer,* Id., Legislative Bill Jacket (Assembly Pr. 2181) (1966). A notice of public hearing provides an appropriate avenue for public involvement, question, and comment, including members of the public that may be adjoining landowners.
[xxi] NYS Highway Law § 205-B (1)
[xxii] *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. Wilbur,* 137 Misc. 827 (Sup. Ct. Colombia Co. 1930).
[xxiii] *Matter of Smigel v. Town of Rensselaerville*, 281 A.D. 2d 863,864 (3rd Dept. 2001
[xxiv] *DeCuyper v. Gonzales,* supra
[xxv] NYS Civil Practice Laws and Rules § 4522
[xxvi] *Ciarelli v. Lynch*, 69 A.D.3d 1008 (3rd 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 (Jfd Dept. 1990); *Dandomar Co., LLC v. Town of Pleasant Valley*, 142 A.D. 3rd 681 (2nd Dept. 2016).

[xxvii] *Coleman v. Village of Head 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*.
[xxviii] *Avoca Soil Imp. Co., Inc. v. Wilber,* 137 Misc. 827 (Supt. Ct Columbia Co. 1930)
[xxix] *Cranson v. Homer,* 132c Misc. 2d 284 (Sup. Ct. Cortland Co.1986).
[xxx] Highway Law § 205 (2); *Dandomar Co., LLC v. Town of Pleasant Valley,* 86 A.D.3d 83, 87 (2nd Dept. 2011)
[xxxi] *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)
[xxxii] *Cranson v. Town of Homer,* 132 Misc. 2d 824, (Sup. Ct. Cortland Co. 1986).
[xxxiii] *Townshend v. Bishop,* 61 A.D. 18 (4th Dept. 1901)
[xxxiv] *Ciarelli v. Lynch,* 69 A.D.3d 1008 (3rd Dept. 2010)
[xxxv] *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).
[xxxvi] *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).
[xxxvii] *Hallenbeck v. State,* 59 Misc.2d 475 (Ct.Cl.1969).
[xxxviii] *Abess v. Rowland,* 12 A.D. 3d 790 (3rd Dept. 2004)
[xxxix] *Kyser v. New York C.R. Co.,* 211 A.D. 500 (4th Dept. 1925)
[xl] *Town of Leray v. New York Cent. R.R. Co.,* 226 N.Y. 109 (1919)
[xli] *Schuyler v. Angelica,* supra.
[xlii] *Hallenbeck v. State,* supra
[xliii] *Hallenbeck v. State,* supra
[xliv] *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).
[xlv] *Ciarelli v. Lynch,* supra; *Matter of Smigel v. Town of Rensselaerville, supra.,*; *Desotelle V. Town of Schuyler Falls,* 301 A.D. 2d 1003 (3rd Dept. 2003); and *Aldous v. Town of Lake Luzerne,* 281 807,809 (3rd Dept. 2001).
[xlvi] *Matter of Rutland,* 70 Misc. 82 (Sup. Ct. Jefferson Co. 1910)
[xlvii] *Holland, supra* at 852.
[xlviii] *People ex rel. New York O. and W. R. Co. v Saze,* 190 A.D. 73 (2nd Dept. 1919) and *Holland, supra* at 852.
[xlix] *Matter of Smigel v. Town of Rensselaerville,* 283 A.D.2d 864 (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-county skiers and pedestrians precludes claim 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), *aff'd on opn. Below* at 26 A.D. 464 (2d Dept. 1898); *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)
[l] *Cranson v. Homer*, Id., Legislative Bill Jacket (Assembly Pr. 2181) (1966).
[li] NYS Highway Law § 205 (2); *Dandomar Co., LLC v. Town of Pleasant Valley*, 86 A.D.3d 83, 87 (2nd Dept. 2011).
[lii] *Cranson v. Homer*, supra