

**TWISTS AND TURNS IN ANCIENT ROADS:
AS UNIDENTIFIED CORRIDORS BECOME A REALITY IN
2010, ACT 178’S SHORTCOMINGS COME INTO FOCUS**

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TABLE OF CONTENTS

Introduction	118
I. Vermont Highway Law: An Amalgam of Statutes and Common Law ..	119
A. Defining Vermont’s Public Rights-of-Way: Highways and Trails ..	119
B. Statutory Highway Law: A Strict Process for Creation, Reclassification, Alteration, and Discontinuance	122
C. Highway Common Law: Creation Without Discontinuance	124
D. Private Rights in Discontinued Highways.....	131
E. When Creating or Reclassifying a Highway Is a Taking	132
II. Vermont’s Ancient Roads Problem.....	133
III. The Attempted Legislative Cure: Act 178	135
A. 2006 to 2010: The Mapping Requirement and Mass Discontinuance	135
B. 2010 to 2015: Unidentified Corridors.....	136
C. Interpreting Act 178: Ambiguity and Common Law Preemption	137
IV. Act 178’s Shortcomings: Continuing Clouds and Takings	139
A. Ancient Roads That Do Not Become Unidentified Corridors: Rights That Survive	139
B. Reclassifying Unidentified Corridors: A Taking?	144
Conclusion.....	147

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INTRODUCTION

Act 178 is a Vermont law passed in 2006 to resolve Vermont's ancient roads problem: the problem of legal highways which fell into disuse, were largely invisible to an observer on the ground, and increasingly clouded landowner's titles.¹ On its face, Act 178's solution seems simple: by 2010, towns must map the ancient roads they wish to preserve; in 2010, unmapped ancient roads become Unidentified Corridors; and in 2015, Unidentified Corridors are discontinued—seemingly ending the ancient roads problem. Many ancient roads were mapped by the 2010 deadline and therefore will be preserved by towns while putting landowners on notice about the roads' existence.² However, as Unidentified Corridors become a reality in 2010, new problems with Act 178 come into focus.

Act 178's Unidentified Corridor provisions leave holes in what is meant to be a comprehensive solution to ancient roads. Rights such as prescriptive public easements, private rights of access, trails, and "clearly observable" highways appear to fall outside the statutory definition of "Unidentified Corridors" and likely constitute ancient roads that will survive despite the Act. Furthermore, the statutory language allowing a town to reclassify an Unidentified Corridor into a permanent class of road may inadvertently lead to takings, thus requiring towns to pay damages to landowners. In its Unidentified Corridor provisions, Act 178 fails landowners who should be able to rely on the Act to extinguish ancient roads that may now be clouding their titles. Similarly, Act 178 fails towns that should be able to rely on the Act to systematically discontinue the ancient roads they do not want, while preserving those they do want.

This article analyzes these lurking holes in Act 178's Unidentified Corridors provisions. It does so in three parts. The first part summarizes the background of the statutes and common law that make up Vermont's highway law. The second part discusses the ancient roads problem in Vermont and how Act 178 purports to solve that problem. Finally, the third part analyzes weaknesses in Act 178's Unidentified Corridor provisions.

1. Act 178, 2006 Vt. Acts & Resolves 353–61, *modifying* VT. STAT. ANN. tit. 19, §§ 5, 302, 305, 717, 740, 771 (2007), VT. STAT. ANN. tit. 24, § 4306 (West 2009).

2. PLANNING OUTREACH & CMTY. AFFAIRS DIV., VT. AGENCY OF TRANSP., UNIDENTIFIED CORRIDORS (2010) [hereinafter 2010 LEGISLATIVE REPORT], *available at* http://www.aot.state.vt.us/Planning/Documents/Mapping/Publications/Act178_VTransRpt2010.pdf (reporting that 16 towns have completed their mapping, while most others are close to finishing, resulting in the addition thus far of about 130 miles of highways and trails to town highway maps).

I. VERMONT HIGHWAY LAW: AN AMALGAM OF
STATUTES AND COMMON LAW

Vermont's ancient roads problem grew out of Vermont highway law, which is an amalgam of statutory and common law. Therefore, to understand the ancient roads problem and Act 178's attempted solutions, one must have a basic understanding of highway law in Vermont.

*A. Defining Vermont's Public Rights-of-Way:
Highways and Trails*

1. Highways

In Vermont, all public roads are highways. Vermont statutes provide a broad definition of "highway" as a public right-of-way that is created in one of four ways:

[1] laid out in the manner prescribed by statute; or

[2] roads which have been constructed for public travel over land which has been conveyed to and accepted by a municipal corporation or to the state by deed or a fee or easement interest; or

[3] roads which have been dedicated to the public use and accepted by the city or town in which such roads are located; or

[4] such as may be from time to time laid out by the agency or town.³

Vermont courts have interpreted this definition broadly, finding that "highway" as statutorily defined is synonymous with "public road" and is consistent with the common dictionary definition of "highway": "a free and public roadway, or street; one which every person has the right to use Its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other."⁴

3. VT. STAT. ANN. tit. 19, § 1(12) (West 2009). The details of these various highway creation methods will be discussed *infra*.

4. *Okemo Mountain, Inc. v. Town of Ludlow Zoning Bd. of Adjustment*, 164 Vt. 447, 454, 671 A.2d 1263, 1269 (1995) (citations omitted) (quoting BLACK'S LAW DICTIONARY 656 (5th ed. 1979)).

There are two types of highways in Vermont: state highways and town highways. A state highway is exclusively maintained by the Vermont Agency of Transportation.⁵ A town highway is any other legal highway whether maintained exclusively by the town or in cooperation with the state.⁶

Act 178's Unidentified Corridors join four other classes of highways that existed prior to 2006. There are distinctions between the preexisting Class 1, 2, 3, and 4 highways,⁷ but broadly they can be separated into two categories: those that the town is mandated by statute to maintain (Classes 1, 2, and 3) and those that the town is not mandated to maintain (Class 4). These maintenance mandates are established by statute: a town "shall keep its class 1, 2 and 3 highways and bridges in good and sufficient repair during all seasons of the year," while class 4 highways "may be maintained to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town."⁸ Though Vermont courts often mistakenly speak of a town's duty to maintain all highways, when confronted with a Class 4 highway, courts have recognized that there is no statutory duty of maintenance for the town.⁹

In addition to statutory mandates to maintain highways, there are also tort liability considerations. Generally, due to sovereign immunity, towns have no duty under tort law to maintain a highway.¹⁰ However, the Vermont legislature has statutorily imposed tort liability on cities and towns for individual tort damages caused by "insufficiency or want of repair of a bridge or culvert."¹¹ Thus, even with a Class 4 highway that a town is not mandated by statute to maintain, a town must maintain the highway's bridges and culverts to avoid or minimize tort liability.

5. § 1(20).

6. *Id.* § 303. Highways in a town that are not maintained by the state are "under the general supervision and control of the selectmen of the town where the roads are located." *Id.*

7. *Id.* § 302.

8. *Id.* § 310(a)–(b).

9. *Smith v. Town of Derby*, 170 Vt. 553, 555, 742 A.2d 757, 759 (1999).

[T]he bridge must be a class 4 highway. The Town's obligation to maintain a class 4 road is limited by the "necessity of the town, the public good and the convenience of the inhabitants of the town." § 310(b). Here, neither necessity nor public good support maintaining a bridge for the sole use of the owners of one parcel of land and their invitees.

Id.

10. *See Graham v. Town of Duxbury*, 173 Vt. 498, 499, 787 A.2d 1229, 1232 (2001) ("Building and maintaining streets, and the accompanying drainage system, are generally government functions, and no liability for injuries suffered as a result of such activities may attach.")

11. § 985(a).

2. Trails

The only other statutorily defined public right-of-way is a trail: the barest form of public right-of-way for which towns face no statutory mandate or duty in tort to maintain.¹² A trail is defined by statute as either a former highway that has been reclassified as a trail, or a right-of-way originally laid out by the selectmen as a trail “for the purpose of providing access to abutting properties for recreational use.”¹³ Trails did not exist in common law, thus the only means of trail creation or discontinuance is statutory and no “trail” could have been created prior to the original 1921 trail statute.¹⁴

Confusingly, while trails are purely creatures of statute, Vermont statutes do not clearly explain all aspects of trails. Though trails are statutorily defined as being “reclassified” highways or “laid out” by the town, nowhere do the current statutes describe those processes.¹⁵ The standard process for laying out, reclassifying, altering, and discontinuing highways explicitly does not apply to trails and there is no similar statutory process for trails.¹⁶ The only statutory provision for the creation of trails is included in the statute for determining where title to a discontinued highway passes: a town “may designate the proposed discontinued highway as a trail.”¹⁷ Despite this statutory confusion, trails certainly exist as public rights-of-way and thus can burden a landowner’s title similar to a highway.

3. The Extent of the Public’s Rights to Highways and Trails

Highways and trails can be owned in fee or, more commonly, as easements. If the highway is held in fee, the state or town owns title to the land the highway passes over completely.¹⁸ As such, the state or town owns all rights in the land, including the right to allow the public to travel over

12. *Id.* § 310(c) (“A town shall not be liable for construction, maintenance, repair or safety of trails.”).

13. *Id.* § 301(8).

14. *See* 1921 Vt. Acts and Resolves 106 (“[T]rails shall be deemed highways.”).

15. *See* *Town of Calais v. Cnty. Rd. Comm’rs*, 173 Vt. 620, 623, 795 A.2d 1267, 1271 (2002) (“[T]here are no standards for trails.”).

16. §§ 708–717. The provisions for laying out, altering, reclassifying or discontinuing highways only mention highways and the definition of “trail” explicitly excludes highways: “‘Trail’ means a public right-of-way which is not a highway.” *Id.* §§ 301(8), 708–717.

17. *Id.* § 775.

18. *See, e.g., City of Montpelier v. Bennett*, 119 Vt. 228, 237, 241, 125 A.2d 779, 785, 787 (1956) (allowing Montpelier to maintain a parking area on the path of an old highway because the city had owned the land under the old highway in fee).

it.¹⁹ More frequently, however, the state or town owns an easement in the land over which the highway or trail travels, but not the land itself. Such an easement allows the public to travel over the land, while the underlying title in the land is held by the owner of the fee.²⁰

There is a presumption in Vermont that a highway or trail is three rods or 49.5 feet wide, extending 1.5 rods on either side from the existing centerline.²¹ This presumption can be rebutted by evidence that the highway or trail is in fact wider or narrower, but absent a rebuttal, the highway or trail will be found to be three rods wide.²² Furthermore, the three-rod presumption assumes that a highway or trail legally exists where it is visible, not necessarily where it existed at creation.²³ Thus, a highway that has wandered from its original location over time will be presumed to exist at its current location.²⁴

*B. Statutory Highway Law: A Strict Process for
Creation, Reclassification, Alteration, and Discontinuance*

As long as Vermont has been a state, it has always had a statutory means for towns to create highways.²⁵ The current highway creation statute includes a complex notice and hearing procedure, which is also used for altering, reclassifying, or discontinuing highways.²⁶ However, the terms and meaning of older statutes are often at issue because whether the laying out of a highway is legal depends on the statute in effect when the highway was purportedly created.²⁷

19. *Id.* at 238, 125 A.2d at 785.

20. *Abell v. Cent. Vt. Ry., Inc.*, 118 Vt. 189, 191, 102 A.2d 847, 848 (1954). “The owner of land, through which a highway is established, retains the fee of the soil embraced within its limits, with the full right of its enjoyment in any manner not inconsistent with the enjoyment of the easement by the public for the purpose of a highway.” *Id.* (citing *Cole v. Drew*, 44 Vt. 49, 52 (1871); *Holden v. Shattuck*, 34 Vt. 336, 342 (1861)).

21. § 702.

22. *Id.*; see *Town of South Hero v. Wood*, 2006 VT 28, ¶ 15, 179 Vt. 417, 898 A.2d 756 (finding that the law presumes a width of one and a half rods on each side).

23. § 702; see *Town of South Hero*, 2006 VT 28, ¶ 15 (noting that the width is measured from the existing traveled way).

24. *Town of Ludlow v. Watson*, 153 Vt. 437, 441–42, 571 A.2d 67, 67–70 (1990).

25. Eric Goldwarg, *Knowns and Unknowns: Ancient Roads in Northern New England*, 33 VT. L. REV. 355, 359 (2008) (citing An Act to Settle and Establish All Highways that Are Laid Out in This State, in *Vermont State Papers* 422, 423 (William Slade ed., Middlebury 1823)). Vermont’s first highway statute was passed in 1781 and required all highways to be surveyed by compass. *Id.*

26. §§ 708–717.

27. See, e.g., *Kelly v. Town of Barnard*, 155 Vt. 296, 302–03, 583 A.2d 614, 618 (1990) (applying the “1816 and 1817 . . . procedure for the establishment of a public highway”).

1. The Current Statutory Process

Currently, Vermont has a unified, intricate statutory process—including notice, hearing, survey, and recording—for laying out, altering, reclassifying, or discontinuing town highways.²⁸ “Laying out” a highway means undergoing the legal procedure establishing a new highway; “reclassifying” a highway means changing the classification of a highway (e.g., Class 3 to Class 4); “altering” a highway means significantly changing the physical characteristics of a highway; and “discontinuing” a highway means conveying, or releasing, the public rights to a highway to the underlying fee landowner.²⁹ The unified process must be substantially complied with for laying out, alteration, reclassification, or discontinuance to have legal effect.³⁰

The process is initiated either through petition by town residents or by the selectboard itself.³¹ Once the process is started, the selectboard must schedule a meeting to review the action, and notice of the meeting must be given to interested parties, including petitioners and owners of land which the highway in question crosses or abuts.³² At the meeting, the selectboard must examine the action and hear the comments of interested parties.³³

If the proposed action is laying out, altering, or reclassifying a highway, the selectboard must determine whether “the public good, necessity and convenience of the inhabitants of the municipality require” the action.³⁴ If, after applying this standard, the selectboard decides to move forward with the action, it must complete a survey of the highway. If the proposed action is discontinuing a highway, the selectboard must complete a written order containing a description of the discontinued highway.³⁵ Within sixty days of

28. §§ 708–717.

29. *Id.* (““Altered” means a major physical change in the highway such as a change in width from a single lane to two lanes. . . . “Discontinued” means a previously designated town highway which through the process of discontinuance all public rights are re-conveyed to the adjoining landowners. . . . “Lay out” means the legal procedure establishing the alignment or right-of-way of a highway. . . . “Reclassify” means to change the classification of a highway using the legal process described in this chapter.”).

30. *In re Bill*, 168 Vt. 439, 442, 724 A.2d 444, 446 (1998) (distinguished by *Benson v. Hodgdon*, 2010 VT 11, ¶ 11 n.4, 2010 Vt. LEXIS 15, 992 A.2d 1053 (2010) on other bases).

31. § 708. Town residents can start the process by submitting a petition to the selectboard signed by five percent of town residents, while the selectboard can also start the process on its own by motion. *Id.*

32. *Id.* § 709.

33. *Id.*

34. *Id.* § 710.

35. *Id.*

the hearing, the selectboard must return a report containing their findings and a final order, all of which must be recorded with the town clerk.³⁶

2. The Importance of Older Statutes

The statutory process for creating and discontinuing highways has changed over time. When the legal existence of a road is challenged and a town's defense is that the highway was created by substantial compliance with statutory procedure, the court will examine the town's procedure in the context of the law in effect when the highway was allegedly created—not the current statute. Thus, courts are often applying statutes over a century old to determine whether a road legally exists. In *Kelly v. Town of Barnard*, this meant applying Vermont's 1808 statute for highway creation, which required only the completion and recording of a survey.³⁷ In *Austin v. Town of Middlesex*, this meant applying an 1820 statute that required a survey, recording of the survey, and a recorded certificate from the selectboard that the highway was open.³⁸

C. Highway Common Law: Creation Without Discontinuance

Statutory highway law exists simultaneously with highway common law. Common law highway creation can occur through dedication and acceptance and, possibly, prescription by the public.³⁹ However, common law doctrines for discontinuing fee ownership or easements—

36. *Id.* § 711(a).

37. *Kelly v. Town of Barnard*, 155 Vt. 296, 302, 583 A.2d 614, 618 (1990) (citing Laws of Vermont, ch. XLV, no. 1, § 1, 445, 446 (1808)) (describing this requirement as: “[E]very highway or road which shall in future be laid out or opened, shall be actually surveyed, and a survey thereof made out, entered and recorded, in the town clerk’s office, where such highway or road lies, (and for want thereof, in the proprietors’ clerk’s office) ascertaining the breadth, course and distance of such road.” (brackets in original)).

38. *Austin v. Town of Middlesex*, 2009 VT 102, ¶ 8, 186 Vt. 629, 987 A.2d 307. The statute described this requirement as follows:

[W]hen the selectmen of any town shall open any road, heretofore, or hereafter, laid out, they shall cause a certificate thereof, signed by them, or a major part of them, to be forthwith recorded in the town clerk’s office, in such town; and the day on which such certificate is recorded, shall be taken and deemed to be the time of opening such road.

Acts Passed by the Legislature of the State of Vermont ch. 6, § 2 (1820); *see also* *Warren v. Bunnell*, 11 Vt. 600 (1839) (finding that a survey was sufficient to establish a right-of-way).

39. *See generally* *Town of Springfield v. Newton*, 115 Vt. 39, 43, 50 A.2d 605, 608 (1947) (setting out the common law of dedication and acceptance in Vermont); *Buttolph v. Eriksson*, 160 Vt. 618, 620, 648 A.2d 824, 826 (1993) (recognizing prescription by the public).

predominantly adverse possession and prescription—are barred by statute from affecting highways and trails.⁴⁰

1. Dedication and Acceptance

Dedication and acceptance is the most frequently used common law doctrine for the creation of a highway. As the doctrine's name suggests, there are two elements required to create a legal highway: dedication and acceptance.

a. Dedication

Dedication is a landowner's offer to set apart land for public use as a highway.⁴¹ Whether dedication has occurred is a question of fact proved by showing a landowner's intent to dedicate his property.⁴² Proof of intent can be either express or implied from the actions of the landowner. Express dedication is simply a landowner explicitly setting apart land for the public's use as a highway, for example in a writing or through an affirmative act.⁴³ Implied dedication occurs when a landowner demonstrates intent to dedicate through actions. Courts have accepted two principle ways of proving implied dedication of a highway: long acquiescence to public use and/or acquiescence to maintenance at the public's expense.⁴⁴ However, because the existence of intent to dedicate is a question of fact, these two principles may suffice to prove intent, but they are not the exclusive means.

40. VT. STAT. ANN. tit. 12, § 462 (2009). After setting the statute of limitations for actions to quiet title—i.e., the time of continued possession necessary for adverse possession or prescription—Vermont statutes explicitly exclude public real property from the requirement: “Nothing contained in this chapter shall extend to lands given, granted, sequestered or appropriated to a public, pious or charitable use, or to lands belonging to the state.” *Id.*

41. *Springfield*, 115 Vt. at 43, 50 A.2d at 608–09.

42. *Id.* at 44, 50 A.2d at 609 (citing *District of Columbia v. Robinson*, 180 U.S. 92, 93 (1901); *Folsom v. Town of Underhill*, 36 Vt. 580, 587 (1864)).

43. *See, e.g.*, *Hunt v. Tolles*, 75 Vt. 48, 50, 52 A. 1042, 1043 (1902) (holding that a landowner's express written dedication conveyed land to the town for use as a cemetery); *Town of Fairfield v. Morey*, 44 Vt. 239, 243 (1872) (holding that a landowner's offer of land for an alternative route for a highway on his land was a dedication).

44. *Town of South Hero v. Wood*, 2006 VT 28, ¶ 11, 179 Vt. 417, 898 A.2d 756 (citing *Druke v. Town of Newfane*, 137 Vt. 571, 575, 409 A.2d 994, 996 (1979)) (“Long acquiescence in use[] by the public, if the attending circumstances clearly indicate an intent by the owner to devote the land to public use, is evidence upon which a dedication may be predicated. The allowance by the owners of repairs at public expense is one circumstance that strongly tends to show the intent to dedicate.”).

The fact-finder can weigh any “reasonable and credible evidence” of intent to dedicate.⁴⁵

b. Acceptance

Acceptance is the adoption of a dedicated highway by officials delegated the duty to maintain highways.⁴⁶ Vermont delegates the duty to maintain highways to town selectboards, and therefore it is the selectboard that must accept the dedication.⁴⁷ Like dedication, acceptance is a question of fact proven by showing intent to accept, and such proof can be express or implied. Express acceptance is simply a formal act by the selectboard accepting an express or implied dedication, e.g., receipt of a deed conveyance, resolution, or ordinance.⁴⁸ Implied acceptance occurs when a selectboard demonstrates its intent to accept through its actions. Similar to implied dedication, finding the selectboard’s intent to accept is a question of fact.⁴⁹ The principle evidence of intent to accept is town maintenance of the highway, e.g., the town assuming “the burden of maintaining the road and keeping it in repair, and where it is found that labor or money has been expended.”⁵⁰ However, maintenance is not necessary or conclusive proof of intent to accept; it is possible for a town to maintain a private highway

45. *Id.* at ¶ 12 (citing *Mann v. Levin*, 2004 VT 100, ¶ 17, 177 Vt. 261, 861 A.2d 1138). In other jurisdictions, such credible evidence of implied dedication has included:

[F]encing land and leaving a way through it; . . . building a house and fences so that, if an existing street were extended, they would be in line with the houses and fences on such a street; laying out a road and allowing the public to use it; requesting parties laying out a road to construct it over this land; constructing a sidewalk; . . . signing a petition for a road and remonstrating against its removal; erecting a hedge along an alleged way; failing to list the property as taxable; selling lots on opposite sides of a strip suitable for a street and acquiescing in its use by the public for a long period of time.

C.J.S. *Dedication* § 58 (2009 & Supp. 2010).

46. *Springfield*, 115 Vt. at 47, 50 A.2d at 611.

47. VT. STAT. ANN. tit. 19, § 301(7) (West 2009) (stating that town highways are exclusively maintained by the towns); *see also id.* § 303 (stating that town highways “shall be under the general supervision and control of the selectmen of the town”).

48. C.J.S. *Sufficiency of Acceptance* § 44 (2009 & Supp. 2010).

49. *Springfield*, 115 Vt. at 44, 50 A.2d at 609 (citing *District of Columbia v. Robinson*, 180 U.S. 92, 93 (1901); *Folsom v. Town of Underhill*, 36 Vt. 580, 587 (1864)).

50. *Springfield*, 115 Vt. at 45, 50 A.2d at 609; *see also Town of Woodstock v. Cleveland*, 125 Vt. 510, 512, 218 A.2d 691, 693 (1966) (holding that the town’s voluntary maintenance and repair of a road is evidence of acceptance of the road as a public town highway, and that allowance of repairs by the owner establishes dedication).

without accepting it as a town highway.⁵¹ Furthermore, acceptance can be proven through combining public use with other credible evidence, e.g., the selectboard placing the road on the state highway map.⁵²

c. What Does Dedication and Acceptance Create?

The selectboard can only accept what is dedicated because a dedication is “an easement to use the property in a manner consistent with the dedication.”⁵³ Thus, if a highway for public use is dedicated, and a selectboard accepts, a highway for public use is created.⁵⁴ However, once a highway is created by dedication, the dedicated highway is governed by the same statutes as a highway created by statute.⁵⁵ Therefore, absent evidence to the contrary, a dedicated highway will be presumed by statute to be three rods wide.⁵⁶

2. Prescription by the Public: A Second Means of Common Law Highway Creation?

Common law prescription by the public may also create highways, or it may create a public easement of a different sort. Vermont case law is replete with statements to the effect that highways can only be created by statute or by dedication and acceptance.⁵⁷ However, Vermont case law also recognizes a third way to create a public right-of-way: prescription by the public. Though it is unclear what prescription by the public creates, there is no question that prescriptive public easements exist and could cause confusion as they relate to Act 178 and Unidentified Corridors.

51. *See* *Smith v. Town of Derby*, 170 Vt. 553, 555, 742 A.2d 758, 759 (1999) (noting that a town agreeing to make structural repairs to a bridge while still calling it a private bridge is not acceptance as a matter of law).

52. *Id.* (citing *Druke v. Town of Newfane*, 137 Vt. 571, 576, 409 A.2d 994, 996 (1979); *Gardner v. Town of Ludlow*, 135 Vt. 87, 90, 369 A.2d 1382, 1384 (1977)).

53. *Town of Newfane v. Walker*, 161 Vt. 222, 226, 637 A.2d 1074, 1076 (1993).

54. *Id.*

55. *Town of South Hero v. Wood*, 2006 VT 28, ¶ 15, 179 Vt. 417, 898 A.2d 756.

56. *See supra* Part I.A.3 (discussing the extent of the public’s rights to highways and trails).

57. *See, e.g., Okemo Mountain, Inc. v. Town of Ludlow Zoning Bd. of Adjustment*, 164 Vt. 447, 454, 671 A.2d 1263, 1269 (1995) (“A highway or public road may be established by statute or by dedication and acceptance.”); *Cersosimo v. Town of Townshend*, 139 Vt. 594, 595, 431 A.2d 496, 497 (1981) (“Under Vermont law there are two methods of laying out public roads: statutory condemnation, and dedication and acceptance.”); *Town of Springfield v. Newton*, 115 Vt. 39, 43, 50 A.2d 605, 608 (1947) (“A highway . . . is established either by regular statutory proceedings, or by dedication and acceptance.”).

The Vermont Supreme Court recognizes that the public, like an individual, can take an easement through prescription.⁵⁸ The doctrine of prescription by the public has been recognized since at least 1860. In *Morse v. Ranno*, the court found that the public had taken an easement for a highway by prescription, “upon the basis of mere enjoyment, unaccompanied by other acts or circumstances; in short, upon adverse possession, [which] must be continuous and for that period of time (fifteen years) which ripens possession into title.”⁵⁹ More recently, the elements of prescription by the public have been described as the same as those for prescription by an individual: “open, notorious, hostile and continuous possession of the property at issue for a period of fifteen years.”⁶⁰ Although one of the doctrine’s elements is adverse use, there is a presumption that open and notorious use is adverse.⁶¹ Thus, title passes to the public by prescription simply through fifteen years of continuous open use.

In *Gore v. Blanchard*, it appears the court removed the presumption of adversity for prescriptive public easements.⁶² The court reasoned that the neighbors’ use of a private road to access a landowner’s pond for fishing and ice was merely a “neighborly concession” and a presumption of landowner permission, rather than adversity, should apply.⁶³ More recently, however, the court in *Buttolph v. Eriksson* narrowed *Gore*’s holding to the facts in *Gore*, and found that a presumption of adversity for notorious use still exists when “roadway use by the public has been for very many years by residents of the area and the public in general.”⁶⁴

Buttolph’s support of the presumption of adversity appears to allow the public, like an individual, to acquire title through prescription simply through open and notorious use for a continuous period of fifteen years.⁶⁵ Like all prescription and adverse possession claims, the title passes by prescription once the fifteen years tolls, not when parties assert their rights. Thus, if a party can prove the elements during *any* fifteen year period in the past—e.g., fifteen years from 1800 to 1815—the prescriptive public

58. *Morse v. Ranno*, 32 Vt. 600, 605 (1860).

59. *Id.*

60. *Buttolph v. Eriksson*, 160 Vt. 618, 618, 648 A.2d 824, 825 (1993) (citing *Cmty. Feed Store, Inc. v. Ne. Culvert Corp.*, 151 Vt. 152, 155, 559 A.2d 1068, 1070 (1989)).

61. *Id.* at 618, 648 A.2d at 825 (citing *Gore v. Blanchard*, 96 Vt. 234, 241, 118 A. 888, 891 (1922)).

62. *Gore*, 96 Vt. at 241, 118 A. at 891.

63. *Id.*

64. *Buttolph*, 160 Vt. at 620, 648 A.2d at 826.

65. *Id.*

easement would exist today.⁶⁶ Though finding the evidence to prove the fifteen years of open use in the distant past might seem difficult, parties in other states have been successful. For example, in neighboring New Hampshire, a 2004 case provides an example of the showing necessary to overcome the evidentiary hurdle. In *Gill v. Gerrato*, the New Hampshire Supreme Court found that the current existence of a prescriptive public easement based on evidence of continuous and open use in the mid 1700s.⁶⁷ In *Gill*, the court accepted descriptions of the highway from 1700s deeds, historical maps showing the highway, and archaeological evidence of stone walls lining the highway to prove the elements of open and continuous use.⁶⁸ Additionally, in *Town of Bethel v. Welford*, a 2009 Vermont case, the court accepted similar evidence as sufficient to prove the location of a legal but long-unused highway, including titles referencing the highway, surveys, survey maps, expert testimony of a land surveyor, and recollections of town residents.⁶⁹ If such evidence is sufficient for proving highway location, it may also be sufficient to prove public use for the purposes of prescription by the public.

3. Does Prescription by the Public Create a Highway?

A prescriptive public easement could be a highway or it could be something else. Vermont cases which have found a prescriptive public easement have called the easement created a “public way” and have been hesitant to equate a public way with the statutorily defined highway.⁷⁰ The statutory highway definition does include “roads which have been constructed for public travel over land which has been conveyed to and accepted by a municipal corporation or to the state by deed or a fee or easement interest.”⁷¹ This definition appears to require some form of

66. See VT. STAT. ANN. tit. 12, § 501 (2009) (establishing the statute of limitation for the recovery of possession of real property at fifteen years. Thus, after fifteen years of continuous use, the title for a prescriptive easement passes. Though that title can be affirmed in an action to quiet title sometime in the future (e.g., twenty years after the fifteen year statute of limitations accrues), the title actually passes after fifteen years of continuous use).

67. *Gill v. Gerrato*, 940 A.2d 233, 235–36 (N.H. 2004).

68. *Id.*

69. *Town of Bethel v. Welford*, 2009 VT 100, ¶ 10, ___ Vt. ___, ___ 987 A.2d 956, 958–59 (2009).

70. See *Buttolph*, 160 Vt. at 620, 648 A.2d at 826 (“Ample evidence was also in the record, however, which would support the trial court’s findings and conclusions of law that the Shore Road was a *public way*.” (emphasis added)); *Gore v. Blanchard*, 96 Vt. 234, 237, 118 A. 888, 889 (1922) (“The action is tort to recover damages which the plaintiff claims to have suffered from not being allowed to use a certain way, which he claims was a *public* or common way.” (emphasis added)).

71. VT. STAT. ANN. tit. 19, § 1(12) (West 2009).

acceptance by the state or local government, not simply by public use alone. But, if a prescriptive public easement passes title to the state or the town, presumably—consistent with the definition of highway—the town could acknowledge this and the easement would become a highway. If this is true, then “public ways” taken prescriptively by the public could represent highways dedicated to the public, which are simply awaiting state or town acceptance.

The important question is this: does title passed by prescription to “the public” pass title to either the state or the town? If so, the easements could become statutorily defined highways. It is not clear which public entity receives title to such easements. Though the answer is absent from Vermont common law, the third Restatement of Property is explicit that title conveyed to “the public” is conveyed to the sovereign, that is, the state of Vermont: “the right to control [an easement] for the benefit of the public is located in the state.”⁷² Furthermore, in non-highway dedication and acceptance cases (where public use alone is sufficient for acceptance) courts have assumed that title passing to “the public” is synonymous with title passing to the town. In *Town of Newfane v. Walker*, a landowner’s explicit dedication of an easement by deed to “the public” was interpreted as a dedication to the town in which the easement was located.⁷³ Though unexplained, if dedication to “the public” is dedication to the town, prescription by “the public” could also presumably pass title to a town.⁷⁴

If prescriptive public easements are highways, they are subject to Vermont law governing highways. Though generally what is taken by prescription is limited to that which is used, a prescriptive easement that is a highway, like a dedicated highway, would benefit from Vermont’s presumption that a highway is three rods wide.⁷⁵ Furthermore, control over prescriptive public easements not maintained by the state would be delegated by statute to the towns like all other highways not maintained by the state.⁷⁶ Even if they are not highways, prescriptive public easements still exist. However, there would be no three-rod presumption, and the easement itself would be limited to that taken by actual use and occupation by the adverse party.⁷⁷ In either case, prescriptive public easements are at least

72. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18(2) (1998).

73. *Town of Newfane v. Walker*, 161 Vt. 222, 225–26, 637 A.2d 1074, 1076 (1993).

74. *Id.*

75. § 702.

76. *Id.* § 303 (stating that highways in a town that are not maintained by the state are “under the general supervision and control of the selectmen of the town where the roads are located”).

77. *Gore v. Blanchard*, 96 Vt. 234, 242, 118 A. 888, 891 (1922).

easements over which the public has the right to travel through and maintain.⁷⁸ Further development of the doctrine is necessary to completely understand the rights conveyed through prescription by the public, but the law that does exist is sufficient to have implications for Unidentified Corridors.

4. No Common Law Discontinuance

Until Act 178, the only way to discontinue a highway in Vermont was through the statutory discontinuance process. Though the common law can lay out highways through dedication and acceptance, and perhaps prescription by the public, there is no common law doctrine for discontinuing a highway; by statute, adverse possession and prescription are ineffective against highways.⁷⁹ Furthermore, unlike other states that established a presumption of abandonment and discontinuance for unused roads, in Vermont “an easement acquired by deed cannot be extinguished by nonuse alone, no matter how long it continues.”⁸⁰

D. Private Rights in Discontinued Highways

Beyond public rights to highways, Vermont also recognizes a private right. When a highway is created in Vermont two rights are created: public and private. The public has a right to use a highway, while adjacent landowners have a common law private right to access their land by using the highway.⁸¹ When a highway is discontinued, the public right is extinguished, but adjacent landowners maintain a private right in the discontinued highway for “reasonable and convenient” access to their land.⁸² There are two elements to the private right of access: (1) the person claiming the right must own land that abuts the highway; and (2) the

78. *Buttolph v. Eriksson*, 160 Vt. 618, 620, 648 A.2d 824, 826 (1993).

79. VT. STAT. ANN. tit. 12, § 462 (2009); see *In re Town Highway No. 20 of Town of Georgia*, 2003 VT 76, ¶ 20, 175 Vt. 626, 834 A.2d 17 (“[L]and that is held by a municipality for public use, however, is exempt from claims of adverse possession.”).

80. Sean D. Clarkson, *Breaking the Curse of Vermont’s Phantom Roads*, 30 VT. BUS. J. 28, 30 (2005) (citing *Capital Candy Co. v. Savard*, 135 Vt. 14, 17, 369 A.2d 1363, 1366 (1976); *Town of Barton v. Town of Sutton*, 93 Vt. 102, 103, 106 A. 583, 584 (1919)); Goldwarg, *supra* note 25, at 360 (quoting *Lague v. Royea*, 152 Vt. 499, 501, 568 A.2d 357, 358 (1989)).

81. *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 207, 762 A.2d 1219, 1224 (2000) (“The general rule is that an owner of property abutting a public road has both the right to use the road in common with other members of the public and a private right for the purpose of access.”).

82. *Thompson v. Ryan*, No. 2006-286, 2007 WL 5313344, at *2 (Vt. May 1, 2007); *Okemo Mountain, Inc.*, 171 Vt. at 207–09, 762 A.2d at 1225–26.

discontinued highway must be a public highway.⁸³ What is “reasonable and convenient” access depends on the landowner’s need for the easement.⁸⁴ If a landowner has access to his land other than the discontinued highway, what is “reasonable and convenient” may be limited to the landowner’s prior use of the discontinued highway.⁸⁵ Additionally, if the only access to a public highway is via the discontinued highway, presumably what is “reasonable and convenient” is access for all lawful uses of one’s land.⁸⁶

This should not be confused with the doctrine of easement by necessity. An easement by necessity can be claimed by the owner of a landlocked parcel when (1) there was a division of a commonly owned parcel of land; and (2) the division resulted in the creation of a landlocked parcel.⁸⁷ When these elements are met, the owner of the landlocked parcel has a right to an easement by necessity through the other parcel as long as the necessity exists. Under this doctrine, an easement is only allowed if there is “strict necessity,” meaning that absent the easement, there is “a lack of reasonably practical [over-land] access.”⁸⁸ Consequently, the owner of land that can only be accessed by water and is without an easement has “strict necessity,” and therefore has the right to an easement by necessity across the adjoining parcel.⁸⁹ Alternatively, just because the means of access is an extreme inconvenience, the inconvenient access is available and there is no strict necessity. For example, a long, winding, hilly, expensive way of accessing one’s parcel may be “extremely inconvenient” but would not constitute “strict necessity.”⁹⁰

E. When Creating or Reclassifying a Highway Is a Taking

Finally, because creating highways usually involves condemning private land for public use, the creation of highways is generally a taking

83. *Okemo Mountain, Inc.*, 171 Vt. at 207, 762 A.2d at 1225.

84. *Thompson*, 2007 WL 5313344, at *2.

85. *Id.* at *3 (finding that a landowner’s private right of access over a discontinued highway was limited to “reasonable and convenient” access for hunting and logging when hunting and logging is all the landowner used the discontinued highway for and the landowner had access to his land from another public highway).

86. *Id.*

87. *Berge v. State*, 2006 VT 116, ¶ 6, 181 Vt. 1, 915 A.2d 189 (citing *Okemo Mountain, Inc.*, 171 Vt. at 206, 762 A.2d at 1224).

88. *Id.* ¶ 10.

89. *See generally id.* (discussing strict necessity in general and particularly discussing whether parcels accessible only by water meet the “strict necessity” standard).

90. *Dee v. King*, 73 Vt. 375, 377–78, 50 A. 1109, 1110 (1901).

requiring the compensation of the affected landowners.⁹¹ The failure to pay damages or compensation would make the taking unconstitutional under the Vermont and Federal constitutions which prohibit the government from taking private property for public use without just compensation.⁹²

Taking title to an easement or fee for use as a highway is always a taking: the government is exercising its power of eminent domain to take title to private property.⁹³ Thus, failure to pay just compensation for what is taken—or damages—would be unconstitutional.⁹⁴ However, once title is taken, altering that which has already been taken is not a taking. Once the government has paid just compensation for title, the government has all the rights to use the property that come with title. Any changes to the highway which do not alter the dimensions of the easement require no further compensation and therefore cannot be a taking. For example, maintaining or reclassifying a highway without changing its physical dimensions is not a taking.⁹⁵ If the creation, reclassification, or alteration of a highway is a taking requiring compensation, the condemning authority must pay damages in accordance with Vermont's statutory guidelines.⁹⁶

II. VERMONT'S ANCIENT ROADS PROBLEM

Vermont's combination of statutory and common law highway law created the ancient roads problem. Ancient roads are legal highways that have fallen into disuse and are largely invisible to an observer on the ground.⁹⁷ Despite being invisible, ancient roads legally existed because according to Vermont law prior to Act 178, public roads existed in

91. *Sanborn v. Village of Enosburg Falls*, 87 Vt. 479, 484, 89 A. 746, 748 (1914).

92. U.S. CONST. amend. V; VT. CONST. ch. I, art. 2.

93. *Sanborn*, 87 Vt. at 484, 89 A. at 748.

Any permanent occupation of private property for public use and exclusion of the owner from its beneficial use, regardless of how the title is left, must be by the exercise of the right of eminent domain, and must be compensated for, unless it can be referred to some other governmental power, as the police power.

Id. See also *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427–29 (1982) (“When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.”).

94. U.S. CONST. amend. V; VT. CONST. ch. I, art. 2.

95. *Whitcomb v. Town of Springfield*, 123 Vt. 395, 397, 189 A.2d 550, 552 (1963) (highway takings only occur when towns “acquire the use of lands belonging to the . . . abutting property-owners.”).

96. VT. STAT. ANN. tit. 19, §§ 501–519 (West 2008).

97. Paul S. Gillies, *Sleeping Roads*, 30 VT. BUS. J. 14, 14 (2004).

perpetuity unless towns took formal affirmative acts to discontinue them.⁹⁸ Thus, ancient roads might not appear on town highway maps and the only evidence of their legal existence could be the musty records of Vermont towns.⁹⁹ These legal yet invisible roads were ticking time bombs for Vermont landowners who could, with no prior notice, suddenly find their titles clouded by centuries-old, but nonetheless-legal, highways.¹⁰⁰

Prior to Act 178's passage in 2006, ancient roads were title clouds causing a problem for owners and insurers of otherwise marketable titles. In Vermont, a title is marketable if it is held by one person, or by an unbroken chain of title, for forty years.¹⁰¹ In theory, marketable titles are secure—and thus safe to buy and insure—because by surviving a forty-year title search they are immune by statute from most claims of defect.¹⁰² However, one of the exceptions to this general statutory immunity is a claim for a “public highway or other property of a municipality.”¹⁰³ Consequently, towns' claims to highways, whenever created, are not voided by marketable title laws. This includes highways legally created in the 1700s or 1800s, which no longer appear visibly on the landscape and do not appear on town highway maps. Even if a thorough title examiner was willing to search beyond the forty years required by statute, the only evidence of these highways could be crumbling records in the basement of a town hall, which even the most careful title search stands little chance of uncovering.¹⁰⁴

Despite the age and hidden nature of these highways, they were legal and in the late 1990s and early 2000s, resulted in a series of conflicts between landowners and towns. In some cases, careful landowners discovered the ancient roads and confronted towns to obtain a discontinuance to remove the title cloud and/or filed suit against the town to

98. See discussion *supra* Part I.C.4 (discussing statutory discontinuance as the only process by which to discontinue a highway before Act 178).

99. Gillies, *supra* note 97, at 14.

[R]oads, once laid out, never fade away, never are abandoned by neglect or non-use or lose their official character, even if nothing of them remains except a musty record in a book in the town clerk's office. With highways, what was once is forever, unless formally discontinued with notice, a view, hearing, and written decision by the selectboard, and even then a simple misunderstanding about the origin of the highway can result in ineffective discontinuance.

Id.

100. See generally Clarkson, *supra* note 80, at 28 (describing the consequences for landowners of ancient roads); Gillies, *supra* note 97, at 14 (describing the problem of ancient roads).

101. VT. STAT. ANN. tit. 27, § 601 (2009).

102. *Id.* § 601(a).

103. *Id.* § 604(a)(5).

104. Gillies, *supra* note 97, at 14.

quiet title.¹⁰⁵ In other cases, towns interested in asserting their rights to these legally-created highways began adding them to the town highway map.¹⁰⁶ In one case, a landowner discovered that an ancient road ran directly through the home onto which she was trying to build an addition.¹⁰⁷ The problem of ancient roads was only going to create more conflict between landowners and towns. The legislature had to act.

III. THE ATTEMPTED LEGISLATIVE CURE: ACT 178

The Vermont legislature responded to the ancient roads problem in 2006 by passing Act 178.¹⁰⁸ Act 178 attacks the problem in two phases: 2006 to 2010 and 2010 to 2015. From 2006 to 2010, Vermont towns researched ancient roads within their borders, mapped them, and could vote to discontinue those that were not mapped.¹⁰⁹ From 2010 to 2015, ancient roads that were not mapped or part of a mass discontinuance become a new class of highway—Unidentified Corridors—which automatically discontinue in 2015.

A. 2006 to 2010: The Mapping Requirement and Mass Discontinuance

The primary requirement of Act 178 is that all legally-created highways must appear on town highway maps by July 1, 2010.¹¹⁰ Town highway maps must be prepared subject to 19 V.S.A. § 305, which requires towns to submit a description of their highways and trails to the Vermont Agency of Transportation before February 10 each year.¹¹¹ Thus, the actual deadline for towns to discover and file all highways and trails was February 10, 2010. This mapping requirement attempts to fulfill the central policy of Act 178: giving landowners notice of all legal highways and trails that burden their titles.

105. *See, e.g.*, *McAdams v. Town of Barnard*, 2007 VT 61, ¶ 2, 182 Vt. 259, 260, 936 A.2d 1310, 1311 (describing the discontinuation hearing of Town Highway number 15).

106. *See* Goldwarg, *supra* note 25, at 368 (citing *Spencer v. Town of Barnard*, No. 272-5-02 Wrcv, slip op. at 1 (Windsor Super. Ct. Feb. 2, 2004)). The town of Barnard was especially aggressive in finding ancient roads and asserting its rights to those roads. *Id.* at 1.

107. Clarkson, *supra* note 80, at 28.

108. Act 178, 2006 Vt. Acts & Resolves 353–61, *modifying* VT. STAT. ANN. tit. 19, §§ 5, 302, 305, 717, 740, 771 (2007), VT. STAT. ANN. tit. 24, § 4306 (2007).

109. VT. STAT. ANN. tit. 19, § 302(a)(6), *see also* 2010 LEGISLATIVE REPORT, *supra* note 2, at 1–2 (describing the Act 178 process).

110. § 302(a)(6)(A)(ii).

111. *Id.* § 305(b).

Act 178 also offers towns a simple solution to dealing with their ancient roads: mass discontinuance. Act 178's mass discontinuance provision allows towns to vote to discontinue all legally-created highways and trails that (1) do not appear on the highway map filed with the Secretary of Transportation on February 10, 2010; and (2) are not clearly observable by physical evidence of their use as a highway or trail.¹¹² Because mass discontinuance is such a drastic relinquishment of town property rights, Act 178 contains extensive procedural notice and hearing requirements that towns must follow.¹¹³ Likely due to this complicated procedure—and, perhaps, towns' reluctance to completely abandon potentially valuable rights to ancient roads—few towns took advantage of the provision.¹¹⁴

B. 2010 to 2015: Unidentified Corridors

If a town does not undertake a mass discontinuance, most highways not placed on the town highway map become a new class of highway: an Unidentified Corridor.¹¹⁵ The purpose of Unidentified Corridors is to create a mechanism to discontinue unmapped ancient roads. Act 178 defines Unidentified Corridors as highways that:

- (i) have been laid out as highways by proper authority through the process provided by law at the time they were created or by dedication and acceptance; and
- (ii) do not, as of July 1, 2010, appear on the town highway map prepared pursuant to section 305 of this title; and
- (iii) are not otherwise clearly observable by physical evidence of their use as a highway or trail; and
- (iv) are not legal trails.¹¹⁶

Unidentified Corridors only exist from July 1, 2010 to July 1, 2015.¹¹⁷ During these five years, Unidentified Corridors are legally like other classes of highways and, as with Class 1, 2, 3, and 4 highways, the statutory

112. *Id.* § 305(h).

113. *Id.* § 305(h)–(n).

114. 2010 LEGISLATIVE REPORT, *supra* note 2, at 4–5 (reporting that twelve towns opted for mass discontinuance, while three more were in the process).

115. § 302(a)(6).

116. *Id.* § 302(a)(6)(A).

117. *Id.* § 302(a)(6)(A), (G).

provisions for reclassification or discontinuance apply.¹¹⁸ While they exist, Unidentified Corridors may only be used as they had been used by the public for the ten years prior to January 1, 2006.¹¹⁹ On July 1, 2015, all Unidentified Corridors are discontinued and the public rights to the Unidentified Corridors are conveyed to the underlying fee title.¹²⁰

The intended outcome of Unidentified Corridors is not clear. Why allow ancient roads that towns did not map by 2010 to continue to exist for five more years? The answer may be to give towns a second chance to claim and keep title to the ancient roads. If a town neglects to put a highway on its February 2010 map and that highway becomes an Unidentified Corridor, towns still have until 2015 to reclassify that Unidentified Corridor into a Class 1, 2, 3, or 4 highway—thus allowing towns a second chance to preserve ancient roads.¹²¹ This second chance may mean five more years of towns looking for ancient roads that have become Unidentified Corridors, but which can be reclassified and reclaimed, therefore avoiding the 2015 discontinuance.

Finally, Unidentified Corridors only affect public rights in ancient roads. Act 178 contains a caveat protecting private rights to discontinued Unidentified Corridors. The act states:

A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way.¹²²

C. Interpreting Act 178: Ambiguity and Common Law Preemption

To understand the provisions of Act 178 currently taking effect, one must consider how Vermont courts interpret statutes. In Vermont, the courts' primary goal when interpreting a statute is to give effect to the legislature's intent.¹²³ The first and definitive source of legislative intent is the language used in the statute. If the statutory language is clear and unambiguous then

118. *Id.* § 302(a)(7).

119. *Id.* § 302(a)(6)(C).

120. *Id.* § 302(a)(6)(G).

121. *Id.* § 302(a)(7).

122. *Id.* § 717(C).

123. *Ins. Co. of Pa. v. Johnson*, 2009 VT 92, ¶ 5, 20 Vt. L. Wk. 273, 987 A.2d 276, 279 (2009).

that unambiguous meaning is given effect.¹²⁴ However, if the language is ambiguous, courts will look for meaning in a statute's "subject matter, its effects and consequences, and the reason and spirit of the law."¹²⁵ Finally, it is presumed that the legislature meant all statutory provisions to have meaning and therefore statutes must be interpreted such that they are not meaningless or ineffective.¹²⁶

By attempting to solve a problem that partially grew out of the common law, Act 178 necessarily overturns and preempts some Vermont common law. In Vermont, the common law is the law as long as it is not preempted or overturned by statute or barred by the state or federal constitution.¹²⁷ Vermont incorporates the common law by statute, providing: "[s]o much of the common law of England as is applicable to the local situation and circumstances and is not repugnant to the constitution or laws shall be laws in this state and courts shall take notice thereof and govern themselves accordingly."¹²⁸

A statute can void the common law by overturning it or preempting it.¹²⁹ A statute overturns the common law when it does so explicitly; the statutory language overturning the common law must be "clear and unambiguous" or "clearly inconsistent with the common law."¹³⁰ A statute preempts the common law by regulating the same subject matter as the common law: that is, filling the same regulatory space as the common law. Preemption must be clear, not by "doubtful implication," and when the

124. *Benson v. MVP Health Plan, Inc.*, 2009 VT 57, ¶ 4, 186 Vt. 97, 978 A.2d 33 ("Our first step is to look at the language of the statute itself; we presume the Legislature intended the plain, ordinary meaning of that statute." (quoting *Weale v. Lund*, 2006 VT 66 ¶ 6, 180 Vt. 1551, 904 A.2d 1191 (mem.))).

125. *State v. Kimmick*, 2007 VT 45, ¶ 12, 181 Vt. 635, 928 A.2d 489 (quoting *State v. Thompson*, 174 Vt. 172, 175, 807 A.2d 454, 458 (2002)).

126. *Chittenden v. Waterbury Ctr. Cmty. Church, Inc.*, 168 Vt. 478, 491, 726 A.2d 20, 29 (1998) ("[T]here is a presumption that the Legislature does not intend to enact meaningless legislation . . . [and], thus, when we construe a statute, we must do so in a manner that will not render it ineffective or meaningless." (quoting *State v. Yorkey*, 163 Vt. 355, 358, 657 A.2d 1079, 1080 (1995))).

127. VT. STAT. ANN. tit. 1, § 271 (2009); *E.B. & A.C. Whiting Co. v. City of Burlington*, 106 Vt. 446, 458, 175 A. 35, 41 (1934) ("The common law thus adopted is so much of the unwritten law of England, as amended or altered by acts of Parliament, which was in force at the time of the migration of settlers to this country, as is applicable to the local situation and circumstances and is not repugnant to our Constitution or laws and such other acts of Parliament passed since the migration which have been adopted by our courts.").

128. § 271.

129. *See Langle v. Kurkul*, 146 Vt. 513, 516, 510 A.2d 1301, 1303 (1986) (explaining that a statute can only change the common law if the "statute overturns the common law in clear and unambiguous language, or if the statute is clearly inconsistent with the common law, or the statute attempts to cover the entire subject matter"); *E.B. & A.C. Whiting Co.*, 106 Vt. at 464, 175 A. at 44.

130. *Langle*, 146 Vt. at 516, 510 A.2d at 1303.

statute is narrower in scope than the common law, the common law outside the scope of the statute remains in force.¹³¹

IV. ACT 178'S SHORTCOMINGS: CONTINUING CLOUDS AND TAKINGS

As Act 178's 2006 to 2010 period for mapping and mass discontinuance passes, the 2010 to 2015 life of Unidentified Corridors begins. On the surface, Unidentified Corridors appear to simply be a vehicle to get rid of ancient roads: ancient roads become Unidentified Corridors and Unidentified Corridors are discontinued by statute in 2015. However, the statutory language providing for Unidentified Corridors leaves holes in the attempted solution for ancient roads. First, and most significantly, though Unidentified Corridors are meant to discontinue the public rights that created the ancient roads problem, many rights might nevertheless persist. Prescriptive public easements, private rights to discontinued highways, trails, and "clearly observable highways" all escape the Unidentified Corridors statutory definition and thus survive the discontinuance of Unidentified Corridors in 2015. Second, Act 178 appears to give towns a second opportunity to preserve ancient roads through reclassification, but reclassifying temporary Unidentified Corridors into permanently existing Class 1, 2, 3 or 4 highways could very well be an unconstitutional taking. Therefore, contrary to the legislature's intent, towns' second chance to save ancient roads through reclassification could be meaningless.

A. Ancient Roads That Do Not Become Unidentified Corridors: Rights That Survive

Despite attempting to end the ancient roads problem, several rights that resemble ancient roads will survive Act 178's 2015 discontinuance. The only rights Act 178 discontinues are those that first become Unidentified Corridors. Consequently, a right that does not become an Unidentified Corridor—absent a mass discountenance—survives. Some potentially surviving rights are: (1) prescriptive public easements; (2) private rights of access; (3) trails; and (4) "clearly observable" highways.

131. *State v. Deyo*, 2006 VT 120, ¶ 16, 181 Vt. 89, 915 A.2d 249; *State v. Hazelton*, 2006 VT 121, ¶ 29, 181 Vt. 118, 915 A.2d 224 (explaining that though the Vermont rape statute allowed for consent it did not preempt the common law's prohibition on consent by minors).

1. Prescriptive Public Easements

Prescriptive public easements are likely unaffected by Act 178 and could continue to exist perpetually as ancient roads despite Act 178. Regardless of what they are—highways or some other kind of easement—prescriptive public easements in all likelihood escape the definition of an Unidentified Corridor and therefore will survive the 2015 discontinuance. If prescriptive public easements are not highways, Act 178 would have no effect on them and prescriptive public easements would continue to exist as common law rights.¹³² If prescriptive public easements are highways, Act 178's impact would depend on whether highways created by prescriptive public easements are included in the definition of an Unidentified Corridor: prescriptive public easements would have to “have been laid out as highways by proper authority through the process provided by law at the time they were created or by dedication and acceptance.”¹³³

If prescriptive public easements are not highways, then they necessarily exist outside of Act 178's provisions, and will continue to exist after 2015. Act 178 can only preempt a common law right if the statute “is clearly inconsistent with the common law.”¹³⁴ Prescriptive public easements that are not highways are not clearly inconsistent with Act 178 and are thus not preempted.¹³⁵ The 2015 discontinuance only includes Unidentified Corridors, and only legally-created highways can become Unidentified Corridors.¹³⁶ Any public right that is not a highway—e.g., a prescriptive public easement—would not be clearly inconsistent with Act 178 because the statute only affects highways; there would be no preemption.¹³⁷

If prescriptive public easements are highways, to become Unidentified Corridors, and thus be discontinued in 2015, they have to “have been laid out as highways . . . through the process provided by law . . . or by dedication and acceptance.”¹³⁸ Therefore, to become an Unidentified Corridor, prescriptive public easements would have to be created by a “process provided by law.” A Vermont court interpreting Act 178's language will give effect to its clear, unambiguous meaning.¹³⁹ However, if Act 178's

132. VT. STAT. ANN. tit. 19, § 302(a)(6)(A)(i) (West 2009).

133. *Id.* § 302(a)(6)(A)(i).

134. *Langle*, 146 Vt. at 516, 510 A.2d at 1303.

135. *Id.*

136. § 302(a)(6)(A)(i).

137. *Langle*, 146 Vt. at 516, 510 A.2d at 1303.

138. § 302(a)(6)(A).

139. *Benson v. MVP Health Plan, Inc.*, 2009 VT 57, ¶ 4, 186 Vt. 97, 978 A.2d 33 (“Our first step is to look at the language of the statute itself; we presume the Legislature intended the plain,

language is ambiguous, meaning can be found in the Act's "subject matter, its effects and consequences, and the reason and spirit of the law."¹⁴⁰

At first blush, a "process provided by law" would seem to unambiguously include prescription: logically it should include all law—statutory and common law—and thus include all forms of highway creation.¹⁴¹ However, the statute's definition of an Unidentified Corridor says more, including highways created "through the process provided by law . . . or by dedication and acceptance."¹⁴² By treating the common law doctrine of dedication and acceptance as distinct from "the process provided by law" the statute creates an ambiguity: the statute could be reasonably construed as excluding all common law doctrines, including prescription, from "the process provided by law." If the common law is not included in the "process provided by law," then only highways created by statute or dedication and acceptance can become Unidentified Corridors. Thus, though they are highways, prescriptive public easements would be excluded from becoming Unidentified Corridors and would survive Act 178's 2015 discontinuance.

Whether highways or not, prescriptive public easements offer towns a possible avenue to circumvent the discontinuance requirements of Act 178 and leave landowners with potential title clouds despite Act 178. Mere evidence of public use for fifteen consecutive years at some point in the past could be enough to resurrect an invisible, long-dormant right of the public to travel over a landowner's property.¹⁴³ In this context, prescriptive public easements are potential ancient roads unaddressed by Act 178.

2. Private Rights to Unidentified Corridors Survive Act 178's Discontinuance

Act 178 also expressly preserves private rights in discontinued Unidentified Corridors. Act 178 states that:

ordinary meaning of that statute." (quoting *Weale v. Lund*, 2006 VT 66 ¶ 6, 180 Vt. 1551, 904 A.2d 1191 (mem.)).

140. *State v. Kimmick*, 2007 VT 45, ¶ 12, 181 Vt. 635, 928 A.2d 489 (quoting *State v. Thompson*, 174 Vt. 172, 175, 807 A.2d 454, 458 (2002)).

141. BLACK'S LAW DICTIONARY 900 (8th ed. 2004) (stating one definition of "law" as "[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action").

142. § 302(a)(6)(A).

143. *Buttolph v. Eriksson*, 160 Vt. 618, 620, 648 A.2d 824, 826–27 (1993).

A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access.¹⁴⁴

However, it is unclear what this private right is. The new statutory right is similar to the common law private right to discontinued highways that existed prior to Act 178.¹⁴⁵ But confusingly, there are differences between Act 178's statutory right and the common law right. Furthermore, the statutory right and the common law right are "clearly inconsistent," and thus Act 178 likely preempts the common law.¹⁴⁶

Act 178 potentially includes two important changes to the common law private right of access. First, Act 178 limits the private right of access to discontinued highways that provide the *sole* means of access to a parcel.¹⁴⁷ Under the common law, a landowner, regardless of other access, had a private right of access over a public highway abutting his land.¹⁴⁸ Now, for whatever reason, Act 178 is limiting that right to instances where a landowner has no other access except over the discontinued Unidentified Corridor.

Second, Act 178 limits the private right to situations where the access is "necessary."¹⁴⁹ In contrast, the common law extended the private right of access to "reasonable and convenient" access. This effectively granted abutting landowners an easement over all discontinued highways for reasonable use in order for the landowner to lawfully enjoy his land.¹⁵⁰ Act 178's "necessary access" seems much more like the easement of necessity's "strict necessity" requirement—only granting an easement to landlocked parcels with no other means of overland access.¹⁵¹

144. § 717(C).

145. *See Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 208, 762 A.2d 1219, 1225 (2000) ("While the definition of a public road for purposes of the common-law right to access might be different from the statutory definition, we decline to detail any definitional difference because, in this case, there is no doubt that Okemo Mountain Road is a public road under any definition.").

146. *Langle v. Kurkul*, 146 Vt. 513, 516, 510 A.2d 1301, 1303 (1986).

147. § 717(C).

148. *Id.*

149. *Id.*

150. *Thompson v. Ryan*, No. 2006-286, 2007 WL 5313344, at *2 (Vt. May 1, 2007).

151. *See generally Berge v. State*, 2006 VT 116, 181 Vt. 1, 915 A.2d 189 (discussing strict necessity in general, and particularly discussing whether parcels accessible only by water meet the "strict necessity" standard).

The significant practical effect of these two preemptions of the common law private right of access is that Act 178 has removed landowners' ability to rely on "reasonable and convenient" access over a highway that abuts their land. Landowners will now have to show that the discontinued highway is their sole means of access and that an easement over the discontinued highway is "necessary."

Despite Act 178's narrowing of the common law right, one might wonder why it preserved the right at all. Landowners who assumed any ancient roads on their property were extinguished by Act 178 may be surprised to discover that abutting landowners might still have rights in discontinued ancient roads passing over their property. These private rights are ancient roads that will persist despite Act 178.

3. Explicitly Excluded from Unidentified Corridors Discontinuance: Trails

Act 178 explicitly excludes trails from the definition of an Unidentified Corridor and therefore prevents any trail from being discontinued in 2015.¹⁵² Trails cannot be as ancient as many ancient roads: trails did not exist until they were statutorily provided for in 1921.¹⁵³ Further, because they are purely statutory, trails do not have the problems caused by the common law that plague highways.¹⁵⁴ Despite this, landowners should still be wary that trails could have been created after 1921 by statute, are not on town highway maps, and will survive the 2015 discontinuance of Unidentified Corridors to cloud their titles.

Act 178's exemption for trails is likely a concession to recreational organizations in Vermont. Groups like the Vermont Association of Snow Travelers (the main Vermont snowmobiling association) lobbied heavily to exclude trails from discontinuance under Act 178 to preserve their trail networks throughout the state.¹⁵⁵ However, this broad exemption of trails leaves a category of rights in existence that is the same as ancient roads. Though trails have only existed since 1921, they, like highways, exist perpetually until they are legally discontinued.¹⁵⁶ Invisible legal trails are

152. § 302(a)(6)(A) ("Unidentified corridors are highways that: . . . (iii) are not otherwise clearly observable by physical evidence of their use as a highway or trail; and (iv) are not legal trails.").

153. 1921 Vt. Acts and Resolves 106.

154. § 301(8).

155. Goldward, *supra* note 25, at 372 ("The majority of VAST trails are on private land, and many follow Class 4 highways and other town rights-of-way.").

156. VT. STAT. ANN. tit. 12, § 462 (2009). The limitations on adverse possession and prescription on public real property extend equally to trails as to highways. *Id.*

therefore just as much ancient roads as invisible legal highways. Furthermore, because towns have no statutory duty of maintenance or tort duty of care for trails, they have been much more willing to add trails discovered during the 2006 to 2010 mapping process to their maps (adding 171 miles of trails compared to 57 miles of highway since 2006).¹⁵⁷ Thus, landowners believing Act 178 will extinguish all ancient roads may be surprised to find that invisible unmapped trails persist on their property. Landowners might be even more surprised to learn that Act 178 may have encouraged towns to map trails that previously lay unmapped and dormant.

4. Explicitly Excluded from Unidentified Corridors Discontinuance: “Clearly Observable” Highways

Finally, Act 178 also excludes “clearly observable” highways, which may resemble ancient roads to many landowners. The definition of Unidentified Corridors excludes highways that “are not otherwise clearly observable by physical evidence of their use.”¹⁵⁸ Act 178 does not define what “clearly observable” is. Nevertheless, the standard appears to be a reaffirmation of an exception to Vermont’s marketable title laws: an otherwise marketable title is subject to a claim for an easement that is “clearly observable by physical evidence of its use.”¹⁵⁹ However, even in the context of the marketable title exception, the “clearly observable” standard has not been litigated. Thus, a town could attempt to preserve an ancient road from being discontinued in 2015 by claiming that there is “clearly observable physical evidence of use.” Furthermore, a town may be able to resurrect an ancient road simply by arguing it is “clearly observable.” What evidence constitutes “clearly observable” will have to wait for litigation: litigation that would be infuriating for landowners that assumed Act 178 had discontinued ancient roads burdening their property.

B. Reclassifying Unidentified Corridors: A Taking?

It is unclear whether reclassifying an Unidentified Corridor into another class of highway without compensation might constitute an unconstitutional taking. Unidentified Corridors are unlike other classes of highways. They

157. 2010 LEGISLATIVE REPORT, *supra* note 2, at 1.

158. VT. STAT. ANN. tit 19, § 302(a)(6)(A)(iii) (West 2009).

159. VT. STAT. ANN. tit. 27, § 604(A)(6) (2009) (“This subchapter shall not bar or extinguish any of the following interests, by reason of failure to file the notice provided for in . . . this title . . . [a]ny easement or interest in the nature of an easement, the easement, the existence of which is *clearly observable* by physical evidences of its use.” (emphasis added)).

are a public right with a temporary duration: five years from July 15, 2010 to July 15, 2015.¹⁶⁰ All other classes of highways exist in perpetuity until the town discontinues them through the statutory process.¹⁶¹ Landowners have a plausible argument that reclassifying temporary Unidentified Corridors into permanent highways without compensation is an unconstitutional taking. However, towns have an equally plausible argument that Act 178's provisions providing for the reclassification of highways would be meaningless if reclassification without compensation is a taking.

Generally, whether a reclassification without compensation is a taking or not depends on whether the reclassification alters the dimensions of the existing highway easement. The initial condemnation of an easement always requires compensation because it is a taking: it is the government taking title of private property for public use without compensation.¹⁶² However, once the easement is taken, any public use as a highway within the existing dimensions of the easement could not constitute a taking and would not require further compensation.¹⁶³ Thus, the reclassification of a highway that does not alter the dimensions of a highway is never a taking.¹⁶⁴

Landowners could argue that Unidentified Corridors are an exception to this general takings rule. Although they would concede that merely reclassifying an Unidentified Corridor would not alter the physical dimensions of the highway easement, they would point out that the reclassification would change the duration of the easement. Before the town's post-2010 reclassification, the highway easement existed only until 2015, but after the town's reclassification it exists into perpetuity.¹⁶⁵ Thus, the landowner would argue that Act 178 gave him rights to the easement from 2015 on and the town's subsequent reclassification took title to those rights. To the landowner, from 2015 on, the town will be occupying private land for public use and this is a taking requiring compensation.¹⁶⁶

160. VT. STAT. ANN. tit. 19, § 302(a)(6)(A), (G) (West 2009).

161. See discussion *supra* Part I.C.4 (discussing statutory discontinuance as the only process by which to discontinue a highway before Act 178).

162. *Sanborn v. Village of Enosburg Falls*, 87 Vt. 479, 484, 89 A. 746, 748 (1914).

163. *Whitcomb v. Town of Springfield*, 123 Vt. 395, 397, 189 A.2d 550, 552 (1963) (holding that highway takings only occur when towns acquire lands to lay out a highway or "acquire the use of lands belonging to the . . . abutting property-owners" to widen or enlarge existing highways).

164. *Id.*

165. § 302(a)(6)(A), (G).

166. *Sanborn*, 87 Vt. at 484, 89 A. at 748.

Alternatively, towns will argue that the reclassification of an unidentified corridor is not a taking because both the property owner's right to anticipate the ancient road's 2015 termination and the town's right to reclassify were created by the same statute. If reclassification is a taking requiring compensation, then Act 178's provisions allowing the reclassifications would be meaningless because towns always had the power to condemn and pay damages. Vermont courts will presume that the legislature meant all of Act 178's statutory provisions to have meaning and therefore Act 178 must be interpreted such that it is not meaningless or ineffective.¹⁶⁷ Act 178 provides both that "[a]fter July 1, 2015, an unidentified corridor shall be discontinued" and "[o]n or by July 1, 2015 . . . an unidentified corridor may be reclassified as a Class 1, 2, 3, or 4 highway or as a trail."¹⁶⁸ If Act 178 provides that Unidentified Corridors can be reclassified, but this reclassification is in fact a taking requiring compensation, Act 178's reclassification provision is meaningless. Towns can always condemn and pay damages for a highway easement.¹⁶⁹ If these reclassifications are takings, then reclassifying an Unidentified Corridor would just be an exercise of that preexisting condemnation power.¹⁷⁰ To give the reclassification provision meaning, a court could simply interpret Act 178 as not giving anything to landowners before the 2015 discontinuance. Because nothing is given before 2015, nothing can be taken by reclassification before 2015, and Act 178's reclassification provision would have meaning.

It is unclear whether or not a court would find that the reclassification of an Unidentified Corridor is a taking. However, what is quite clear is the legislature did not consider this takings issue when providing for Unidentified Corridors and towns could conceivably be forced into the uncertainty of litigation in order to exercise the reclassification power given to them in Act 178.

167. *Chittenden v. Waterbury Cmty. Ctr., Inc.*, 168 Vt. 478, 491, 726 A.2d 20, 29 (1998) (“[T]here is a presumption that the Legislature does not intend to enact meaningless legislation . . . [and], thus, when we construe a statute, we must do so in a manner that will not render it ineffective or meaningless.” (alteration in original) (quoting *State v. Yorkey*, 163 Vt. 355, 358, 657 A.2d 1079, 1080 (1995))).

168. § 302(A)(6)(G), (A)(7).

169. *Id.* §§ 501–519.

170. *Id.*

CONCLUSION

The Vermont legislature was right to recognize and try to remedy the problem of ancient roads. Landowners should not have to live in fear of invisible and undiscoverable public rights-of-way on their property that could appear at any moment to cloud their titles. Act 178 is, however, an incomplete solution. Legislators attempted to create a vehicle for extinguishing ancient roads in Unidentified Corridors. However, in creating Unidentified Corridors, legislators did not fully understand the extent of highway common law or the implications of their explicit exclusions from the definition of Unidentified Corridor. Prescriptive public easements and private rights of access are acknowledged by Vermont courts but ignored or misunderstood by Act 178. Similarly, the explicit exclusion of trails and clearly observable highways from the Unidentified Corridor definition leaves two categories of what most would consider ancient roads to cloud titles in the future. Furthermore, though Act 178's provision for the reclassification of Unidentified Corridors attempts to give towns a second bite at the apple to save ancient roads from discontinuance, this provision ignores the potential for unconstitutional takings. In creating Unidentified Corridors, the legislature gave landowners future rights to Unidentified Corridors, but simultaneously gave towns the right to take those rights away through reclassification. All of these problems are holes in what is meant to be a comprehensive solution to the ancient roads problem.

Act 178's 2010 deadlines have come and gone and the age of Unidentified Corridors is upon us. As these new provisions take effect, their immediate shortcomings will become clear and may be addressed by the legislature. However, more disturbingly for landowners, issues of persisting rights clouding titles and potential takings leave uncertainty which could lead to litigation and the unresolved continuance of many ancient roads.