

From a little east of Elijah Brown's house, thence . . . to Jeffrey A. Booge's, 2 Rods south of his door bell,"* Past "a large Birch Tree near Shirerick Crowel's House," and on to Nowhere: Following the Curse of the Phantom Roads in Vermont.**

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Whether diverging in a yellow wood or somewhere in the sands of time, in few places do roads less traveled by make as much difference as in the State of Vermont.¹ In many Vermont towns, roads laid out by select boards long past were never built² or vanished from memory and use over the years. Although many lack corporeal form, these phantom roads still bear the form, force and spirit given them by law.³ These roads now haunt Vermont towns and private property owners. This study will examine two separate instances, indicative of the problems that are beginning to plague private property owners throughout Vermont, where phantom roads have recently been discovered by local governments in the towns of Barnard⁴ and

* See *Infra* p. 2 and note 5.

** See *Infra* p. 1 and note 4.

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1. ROBERT FROST, "The Road Not Taken," MOUNTAIN INTERVAL, 1920. With apologies to Mr. Frost: any discussion of the ramifications of choosing one path over another would be remiss without reference to this quintessential work, but I confess to lacking the eloquence of the late poet.

2. *Ferguson v. Sheffield*, 52 Vt. 77 (1879) (emphasizing the decision not to build a roadway previously laid out is not a new development in the State of Vermont, where the issue at hand was whether a town must build a road once laid out, even if a new route, superior in every way, was found).

3. See *In re Mattison*, 144 A.2d 778, 780 (Vt. 1958) (stating by the Supreme Court of the State of Vermont, unless a road, regardless of its state of use or abandonment, is discontinued by the relevant statutory provisions that road or right-of-way is presumed to remain legally viable); see generally VT. STAT. ANN. tit. 19 (governing roads and rights-of-way for the state covers nearly every eventuality within this area of the law, except abandonment). This presumption, as will be discussed, is creating nightmares for property owners across the state when phantom roads are resurrected by special interest groups.

4. BARNARD HIGHWAY BOOK 11 (1784). There is, or was, alleged to have been a road that connected the current Town Highway 14 with the current Tower Road, both in the Town of Barnard, Vermont, which was laid out by the Barnard Selectboard on June 16, 1784, and described on Page 11 of the Barnard Highway Book as:

Survey of a Road beginning one & half Rods South of the Line where it strikes the road between Thos. W. White & Daniel Hodges thence S 65 E 58 rods, S 18 E 16 rods, S 31 E 71 rods, N 84 E 32 rods, N 71 E 45 rods, S 69 E 15 rods, S 2 W 73 rods, S 26 W 20 rods, S 1 W 42 rods, S 24 E 51 rods, S 12 E 20 rods, S point 32 rods, S 13 W 12 rods, S 21 W 32 rods, S 11 W 19 rods, S point 18 rods, S 6 W 47 rods, S 1 W 36 rods, S 7 E 22 rods to a large Birch Tree near Shirerick Crowel's house, Said Road lying on the northward and eastward Side of Said Line.

Muller v. Barnard, No. 272-5-02 Wrev. slip op., at 2 (Windsor Sup. Ct. Feb. 2, 2004).

Chittenden.⁵ This study will also discuss various legal, philosophical, and political underpinnings of both private property rights and of the power of governmental entities to exert eminent domain in the establishment, construction, and maintenance of roads and rights-of-way. Ultimately, the study will conclude with several proposed solutions to exorcise phantom roads from the hills, and the title records of Vermont.

I. THE HAUNTING BEGINS: CURRENT PHANTOM ROADS CASES IN TWO VERMONT TOWNS

The selectboards of the Town of Barnard and the Town of Chittenden hired a private researcher to relocate long-forgotten roads and rights-of-way, ostensibly to provide recreational trails for town residents⁶ and to preserve the town's history.⁷ The raising of these phantom roads from their deed book tombs has cast a cloud upon the titles to countless parcels of land,⁸ and over the private property rights of all Vermonters, creating a nightmare for individual property owners.⁹

5. TOWN OF CHITTENDEN, DEED BOOK 2, 189-90 (1796) (describing the Green Road which runs, or did run, from the Town of Pittsford to the Town of Pittsfield, and through the Town of Chittenden).

This Survey of a Road in Said Town beginning at the west line of Said Town in the Road a little East of Elijah Brown's in Pittsford, then East 25o- North 50 rods then East 30o-North 80 rods to Jonathan Dike's, 2 Rods South of his house, then East 25 o- North 136 Rods then East 3 o- North 83 Rods then East 53 Rods then East 15 o- North 52 Rods then East 28 o- North 40 Rods then East 30 o- North 76 Rods then East 42 o- North 32 Rods then North 30 o- East 64 Rods then East 10 o- North 38 rods to a Spruce Stump Standing about 4 rods North of the School House on the heights then East 15 o- North 20 Rods then East 6 o- North 302 Rods to Jeffrey A. Booge's 2 Rods South of Door Yard then East 8 o- North 31 Rods then East 4 o- South 16 Rods to a Beach Stump Standing the North Side of Bartholomew Pearson's Spring then East 3 o- South 20 Rods to 2 Rods North of John Cowee's Door then East 15 o- South 232 Rods to a Stump Standing about 2 Rods South of Zeeb Green's house, the above Said Survey to be the center of the highway and is to be four Rods wide two Rods North and two Rods South of Said Survey.

TOWN OF CHITTENDEN, DEED BOOK 5, 491 (1830). See generally John E. Dutton, *The Green Road in Chittenden, Vermont: Findings of Fact as Researched and Documented by John E. Dutton for the Chittenden Rights-of-Way Committee*, Exhibit 1 (Mar. 2004) [hereinafter "Dutton Report"].

6. Seth Harkness, *Rights of way divide Chittenden residents*, RUTLAND HERALD, Oct. 28, 2003, at B1, [hereinafter "Harkness 1"], available at <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20031028/NEWS/310280316&SearchID=73204854499235> (last visited Apr. 11, 2005).

7. *Id.*

8. *Id.* "The uncertainty you've just created in this town—that there are 29 roads and you don't know exactly where they are—is going to adversely affect every person who may have a right of way running beside or across his land . . ." *Id.* (quoting Rutland attorney William Meub).

9. *Id.* Of note, the curse of phantom roads in Vermont is simply highlighted by the specific instances within the Towns of Barnard and Chittenden that are examined in this study. There are

For Mrs. Kathy Peterson, this nightmare is all too real. In 1997, Mrs. Peterson purchased property totaling just nine-tenths of an acre that she presumed to be free of any encumbrances.¹⁰ She then secured mortgages on the property¹¹ and constructed a home,¹² all with approval from and by recording documents with the Town of Chittenden.¹³ Trouble came for Mrs. Peterson when she asked her mother to live with her and planned to build an addition to create the needed space.¹⁴ In the intervening years, the Right-of-Way Committee of the Select Board of the Town of Chittenden had hired a private researcher to relocate twenty-six separate phantom roads within the town.¹⁵ Based upon this research of ancient surveys, deed book records, and plausible, though not absolute, physical evidence on the ground in Town of Chittenden,¹⁶ the Chittenden Selectboard had concluded that the house owned and constructed by Mr. and Mrs. Peterson sits on the phantom Green Road. As a result, the Selectboard denied the Petersons a building permit for their proposed addition.¹⁷ The actions of the Selectboard have likely rendered unmarketable the Peterson's title to their property,¹⁸ as well as other properties in the area of the phantom Green

potentially dozens of private property owners along the paths of the Barnard and Chittenden phantom roads that might be similarly affected. *Id.* The Green Road, in Chittenden for example, is but one of twenty-six phantom roads in Chittenden currently being researched. *Id.* There are 254 other municipalities in the State of Vermont that likely have their own inventory of phantom roads and hosts of private property owners that will be affected should these roads themselves rise from the grave. *Id.* The lack of a clearly identifiable remedy to clear titles of clouds caused by phantom roads presents itself as a problem of immeasurable size for property owners in the State of Vermont.

10. TOWN OF CHITTENDEN, DEED BOOK 50, 149-50 (May 3, 1997).

11. *Id.* at 151-59; DEED BOOK 51, 220-25 (Jan. 6, 1998); DEED BOOK 51, 383-88 (Apr. 16, 1998); DEED BOOK 56, 391-93 (Feb. 16, 2001); DEED BOOK 61, 815-26 (Jan. 16, 2003).

12. Seth Harkness, *Town right of way blocks home addition*, RUTLAND HERALD, Oct. 15, 2003, at B1, [hereinafter "Harkness 2"], available at <http://rutlandherald.com/Search/Categories/Article/73082>.

13. *Id.* See also DEED BOOK 50, 149-59; DEED BOOK 51, 220-25, 383-88; DEED BOOK 56, 391-93; DEED BOOK 61, 815-26.

14. *Id.*

15. Harkness 1, *supra* note 6.

16. See generally Dutton Report, *supra* note 5 (studying the Green Mountain road as it runs through Chittenden county for Chittenden Right-of-Way Committee).

17. Harkness 2, *supra* note 12.

18. Peatling v. Baird, 213 P.2d 1015 (Kan. 1950) (indicating an encumbrance, such as an undefined phantom road or right-of-way across or through the subject property, is quite likely to render the title unmarketable as it certainly carries with it a "likelihood of litigation," and such a title itself is not free from "reasonable doubt"); See also Boecher v. Borth, 51 A.D.2d 598 (N.Y. App. Div. 1976) (finding, or the presumption of, the existence of such a phantom road or right-of-way would likely render title unmarketable in most jurisdictions). This is particularly true in Vermont, where the Supreme Court of Vermont has recently held that even the existence of a defect such as lacking any municipal permit, or being out of compliance with any such permit, renders title to real estate unmarketable. *Bianchi v. Lorenz*, 701 A.2d 1037, 1041-42 (Vt. 1999). Mrs. Peterson also said a Town of Chittenden "selectman told her she cannot sell her home while the road issue is in dispute." Seth Harkness, *Old*

Road. The research upon which this determination was based was performed by a person with no surveyor's license,¹⁹ and the research itself is not a survey "pinpointing the location of the Green Road,"²⁰ as the Chittenden Select Board has acknowledged.²¹ Regardless, the Chittenden Selectboard is confident enough in this research to determine that the Peterson house, on its nine-tenths of an acre lot,²² sits directly in the path of the Green Road,²³ and that at no point along the more than seven mile path of this phantom road is there any deviation great enough to save the Petersons from this curse.

A similar situation arose for Stanley and Lynn Spencer and David Muller²⁴ in the Town of Barnard, Vermont, when that town launched a project "to research and map town roads, as town maps do not completely and accurately depict all town roads of record."²⁵ In 2002, based upon that research, the Town of Barnard published a map of town roads which

highways a headache for landowners, RUTLAND HERALD, Mar. 28, 2004, at A1, [hereinafter "Harkness 3"], available at: <http://www.rutlandherald.com/04/Story/81288.html>.

19. MINUTES OF SPECIAL MEETING OF CHITTENDEN SELECTBOARD, at 5 (Feb. 27, 2004) [hereinafter "SPECIAL MEETING"]. See also *Muller v. Barnard*, No. 272-5-02 Wrev. slip op., at 4 (Windsor Sup. Ct. Feb. 2, 2004). The State of Vermont has deemed that "[i]n order to safeguard property and the public welfare, the practice of land surveying in this state is declared to be subject to regulation." VT. STAT. ANN. tit. 26, § 2502(3) (Supp. 2004). The State then requires licensure of any person engaged in the practice of land survey, which includes:

[R]ecord research, reconnaissance, measurements, gathering parol evidence, analysis of evidence, mapping, planning, expert testimony, and consultation related to [among other things] locating, relocating, establishing, reestablishing, or retracing property lines or boundaries, or demarcating other legal rights or interests in any tract of land, road, right-of-way, or easement [or] creating, preparing, or modifying graphic documents such as maps, plats, and plans, or electronic data used or referenced in instruments of conveyance of rights in real property, or which define rights in real property, or are used to define such rights.

Id. §§ 2502(4)(A), (D). Any unlicensed person is barred from practicing land surveying, and though there are exceptions, those exceptions explicitly do not allow any unlicensed person to engage in land survey or the preparation of maps "intended to indicate the legally authoritative location or demarcation of property boundaries or extent where legal rights or interests in any tract of land are or may be affected." *Id.* at § 2503.

20. SPECIAL MEETING, *supra* note 19, at 5.

21. *Id.*

22. DEED BOOK 50, *supra* note 10, at 149-50.

23. Harkness 2, *supra* note 12.

24. See *Muller v. Barnard*, No. 272-5-02 Wrev. slip op., at 1 (Windsor Sup. Ct. Feb. 2, 2004) (indicating that the Spencers are the record owner of the subject parcel of property in the Town of Barnard and Mr. Muller has entered into a contract to purchase the same). Such a sale is currently prohibited due to the presumption by the Town of Barnard of the phantom road running through the Spencer property. *Id.* This presumption has clouded and rendered title to the Spencer property unmarketable. *Id.*

25. *Id.* John Dutton, the researcher hired by the Town of Barnard in the *Spencer/Muller* case, is the same researcher that was subsequently hired by the Town of Chittenden to research their phantom roads, including the Green Road. Dutton Report, *supra* note 5.

showed, for the first time, an unnumbered road beginning at the end of Town Highway 14 on the Spencer/Muller property and running south and east, intersecting with the Royalton Turnpike, Town Highway 2.²⁶ Until the publication of this map, all public maps for the Town of Barnard showed that Town Highway 14 came to a dead-end at the property owned by the Spencers and under contract to Mr. Muller. However, with the publication of the 2002 map, the Town of Barnard asserted a right-of-way across the property dating back to 1784.²⁷ This action rendered the title to the Spencer property unmarketable because the exact location of the alleged road was unclear. In fact, the private researcher hired by the Town of Barnard,²⁸ and surveyors subsequently hired by the town and by the Spencers, could not accurately or definitively locate any physical evidence of the road itself.²⁹

II. THE IMPACT OF THE CURSE: WHO AND WHAT IS HAUNTED AND HARMED BY PHANTOM ROADS

To understand the bases of municipal assertions of right to phantom roads and to private property rights that these assertions threaten, we must look to the historical, philosophical, and theoretical origins of both private property law and the laws that permit a sovereign to assert claim to properties.

A. *An Overview of the Historical Bases of Private Property Rights*

“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.”³⁰ This quote by William Blackstone summarizes a prominent Western theory of private property rights. The right to be secure in one's private property is one of the cornerstones of which the Judeo/Christian/Islamic, Anglo-European, and American systems of law and of liberty.³¹ Two of the Ten Commandments, which are at the foundation of both Judaic and Christian

26. Muller v. Barnard, No. 272-5-02 Wrev. slip op., at 1 (Windsor Sup. Ct. Feb. 2, 2004).

27. *Id.*

28. *Id.* at 4.

29. *Id.* at 2.

30. 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *1-2 (1978).

31. Gore v. Blanchard, 118 A. 888, 890 (1922).

The security and certainty of the title to real estate are among the most important objects of the laws of any civilized community. Around it the law has thrown certain solemnities and formalities so that the fact may be known and read of all men. What a man once had he is not presumed to have parted with, but the facts must be shown beyond conjecture. *Id.*

law, forbid infringements upon the property rights of others.³² Sections of the Qu'ran incorporate the prohibitions of the Judeo-Christian ideology mandating that the property rights of others be respected.³³ Furthermore, the Qu'ran require that personal property be put to beneficial use for oneself and others,³⁴ and be open to trade and commerce.³⁵ The elements of Judeo/Christian and Islamic law concerning private property and commerce became integrated into the European culture during the Middle Ages. It was not only within religious texts that the fundamental theories of Western private property rights evolved, as secular thinkers also added tremendously to the development of property rights theory. This culminated with a property revolt under King John and the drafting of the Magna Carta, setting forth a system of property rights.³⁶

American law incorporated by reference the early religious foundations for private property rights, and imported both explicitly and implicitly the mandates of the Magna Carta. These imported theories of property rights became increasingly important as the colonists grew weary of the yoke of an oppressive government. The Declaration of Independence cites no less than six invasions by the sovereign upon the property rights of individuals as among the grounds for rebellion.³⁷ Several of the most respected of the Founding Fathers wrote that rights to "[p]roperty [must] be secured, or liberty cannot exist."³⁸ The belief in the sanctity of private property rights spanned the breadth of the Founders' political ideologies, from Hamilton,³⁹

32. See *Exodus* 20:15 (emphasizing "[t]hou shalt not steal."); See also *Exodus* 20:17 (stating "[t]hou shalt not covet thy neighbor's house, nor shalt thou covet thy neighbor's wife, nor his manservant, nor his ox, nor his donkey, nor anything else that belongeth to thy neighbor.").

33. See *Qu'ran* 4:2 (teaching "[t]o orphans restore their property (When they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin."). See also *id.* at 4:24 (teaching "[a]lso (prohibited are) women already married, except those whom your right hands possess: Thus hath Allah ordained (Prohibitions) against you."). "And in no wise covet those things in which Allah Hath bestowed His gifts More freely on some of you than on others: To men is allotted what they earn, and to women what they earn." *Id.* at 4:32.

34. *Id.* at 4:5. "To those weak of understanding Make not over your property, which Allah hath made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice." *Id.*

35. *Id.* at 2:275. "Allah hath permitted trade." "O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will." *Id.* at 4:29.

36. MAGNA CARTA, 1215.

37. DECLARATION OF INDEPENDENCE paras. 18-19, 26 (U.S. 1776). "For cutting off our Trade with all parts of the world[;] For imposing Taxes upon us without our consent[;] He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people." *Id.*

38. JOHN ADAMS, DISCOURSES ON DAVILA: A SERIES OF PAPERS ON POLITICAL HISTORY 92 (1973).

39. THE FEDERALIST No. 79 (Alexander Hamilton). "In the general course of human nature, a

to Jefferson,⁴⁰ and to Madison.⁴¹ Furthermore, this belief is represented in each Constitution of the original thirteen states,⁴² and in the Constitution of each state admitted into the Union thereafter.⁴³ This view is mirrored in the Constitution of the United States, in which three separate Amendments within the Bill of Rights expressly state the need of citizens to be secure in their property.⁴⁴

power over a man's subsistence amounts to a power over his will." *Id.*

40. Thomas Jefferson, in an April 24, 1816, letter to Pierre Samuel Dupont de Nemours, espoused that,

right to property is founded in our natural wants, in the means with which we are endowed to satisfy these wants, and the right to what we acquire by those means without violating the similar rights of other sensible beings. Jefferson, Writings 1387, 1984. *Id.*

In a July 12, 1816, letter to Samuel Kercheval, Jefferson stated more plainly that "[t]he true foundation of republican government is the equal right of every citizen in his person and property and in their management." Jefferson, Writings 1398, 1984.

41. THE FEDERALIST No. 62 (James Madison). "Every new regulation concerning commerce or revenue; or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change and can trace its consequences; a harvest reared not by themselves but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said with some truth that laws are made for the few not for the many." *Id.* See also 14 THE PAPERS OF JAMES MADISON, 266 (R.A. Rutland, ed.) (1976) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, which impartially secures to every man, whatever is his own.").

42. DEL. CONST. OF 1776 art. 25 (1776) ("The common law of England . . . shall remain in force."). The Pennsylvania Constitution of 1776 carried a more concrete declaration "[t]hat all men . . . have certain natural, inherent and inalienable rights, amongst which are . . . acquiring, possessing and protecting property . . . [t]hat every member of society hath a right to be protected in the enjoyment of . . . property," and "[t]hat the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure" in the then-new State of Pennsylvania. PA. CONST. OF 1776 art. I, § 1 (1776).

43. HI. CONST. art. 1 § 2 (1959). "All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property." *Id.* There is at least one provision guaranteeing the rights of individuals to acquire, possess, and/or enjoy property in each state constitution adopted after the original Thirteen, from Vermont's Declaration of the Rights of the Inhabitants of Vermont to "[t]hat all men . . . have certain natural, inherent and unalienable rights; amongst which are . . . acquiring, possessing and protecting property," VT. CONST. OF 1786 ch. 1, § 1 (1786), to the adoption of a clause within the Hawaii State Constitution that reads, in part, "[a]ll persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property." HI. CONST. art. 1 § 2 (1959).

44. *Shelley v. Kramer*, 344 U.S. 1, 10 (1948) (surmising "the enjoyment of property rights was regarded by the framers . . . as an essential pre-condition to the realization of other basic civil rights and liberties."). *Id.* Principally, these are the Third, Fourth, and Fifth Amendments, though certainly elements of the Second and of the Eighth Amendments could increase to fully one-half of the original Ten Amendments that provide protection for private property rights.

B. An Overview of Eminent Domain and Control of Roads by Sovereign Entities

The right of control and dominion of the private individual over their property has never been absolute.⁴⁵ Even the most noted of philosophers behind the theories of private property rights have dealt with juxtapositions of the rights of individuals to property and rights to the same property by the public and the sovereign.⁴⁶ Eventually, all have surmised that the public retains an interest to certain “sticks in the bundle” of private property rights.⁴⁷ Also, a sovereign can retain or obtain an interest in the property of its subject,⁴⁸ though recently such acquisitions have required “just compensation.”⁴⁹

Throughout history, sovereign entities have held the power of eminent domain: the right to retain or assert an interest in or control over private property.⁵⁰ The use of eminent domain has been particularly evident when a sovereign seeks to create a benefit for the public that otherwise may go

45. 1 WILLIAM BLACKSTONE, COMMENTARIES, *134-35. (The inherent dichotomy between private property rights and that of the sovereign is “[t]he absolute right . . . of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.”). Each of the theological foundation for private property rights reserved rights within those of an individual for those of the deity and of the public. Similarly, within the various Constitutions in the United States, there are provisions for the use or usurpation of private property for public or sovereign benefit. 26 AM. JUR. 2D, *Eminent Domain*, § 2 (citations omitted).

46. JOHN LOCKE, TWO TREATISES ON GOVERNMENT, (1690). Locke struggled, though briefly, with the seeming incongruity of his theory of private property rights derived from Natural or Biblical law, and the Biblical provision that God had left the Earth and all on and within it to mankind. Locke’s solution, that all was left to all mankind, but that each man could seek out that which was “naturally” beneficial to himself and then to make it his through that labor, *id.* §§ 26-29, elegantly simple, is still the basis for many property rights philosophies today.

47. *Id.*

48. *Georgia v. Chattanooga*, 264 U.S. 472, 481 (1924). The power to condemn and take property of a subject is inherent within the power and right of sovereignty. *Id.*

49. U.S. CONST. amend. V. (Interesting, and perhaps ironically, the first guarantee of “just compensation” ever incorporated into a constitution was Article 2, Chapter 1 of the 1777 Constitution of the State of Vermont: That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money). VT. CONST. OF 1777 ch. 1, Art. 2; *See also*: 1 WILLIAM BLACKSTONE, COMMENTARIES, *134-35.

50. 26 AM. JUR. 2D, *Eminent Domain*, § 2 (citations omitted). An accepted and rather concise definition of “eminent domain” is:

Eminent domain is generally defined as the power of the nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner’s consent, conditioned upon the payment of just compensation. The phrase “eminent domain,” by definition, admits that the condemnor did not own, but took or appropriated, the property of another for a public purpose. *Id.* at 1.

undeveloped, such as the creation of a public highway.⁵¹ Highways are among a class of projects that sovereign entities, be they at the federal, state, or local level, have traditionally undertaken for the interest of the general populace.⁵² When exercising the “important and onerous duty” of eminent domain to build public roads or highways, the interest of the sovereign has been upheld with near universality.⁵³ This may, in part, be

51. 1 WILLIAM BLACKSTONE, COMMENTARIES, *134-35. So fundamental to the interest of a government in providing services for its citizens is the building of roads and highways that Blackstone's classic example of the taking of private property for the public good, with the obligatory consent of the owner, involved the construction of a road:

If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform. *Id.* at 135.

52. *Id.*; *But see* Pettibone v. Purdy, 7 Vt. 514 (1831) for a discussion of right still retained by the original owner of a parcel of property even after the seizure and dedication for use as a public highway:

By the establishment of an ordinary highway, the public acquires but an easement in the land; the right of making, repairing, and using the highway, as an open passage or thoroughfare. Subject to this right the owner of the soil retains, and may exercise all his rights of property therein. He may take from it stone, timber, and the like, which are not wanted for the support of the highway. And he may vindicate his qualified right of possession by action of trespass or ejection, against those who attempt to appropriate the land to any other than this public purpose. *Id.* at 6.

The establishment of an easement interest only in roadways set forth in Pettibone has developed an exception in recent years, *Montpelier v. Bennett*, 125 A.2d 779, 784 (Vt. 1956) (where there is an explicit transfer of fee interest by deed), but has been generally supported. *Abell v. Cent. Vt. Ry.*, 102 A.2d 847, 848-49 (Vt. 1954). The Pettibone supposition, that “[f]rom these principles it regularly follows, that when the highway is discontinued, the land becomes discharged of [the public] servitude, and the owner is restored to his former and absolute right,” remains as valid today as in 1831, perhaps even more so as it is now bolstered by statutory provisions codifying this reversion of interest. VT. STAT. ANN. 19, §775 (2003).

53. *Sherman v. Buick*, 32 Cal. 241, 252-53 (1867). An early California case is typical of the sentiment of most courts when asked to weigh in on the issue of the necessity of roads or highways:

To lay out and establish roads or highways is exclusively within the power and control of the Government. To do so is one of its most important and onerous duties...Whenever the necessities or the convenience of the public, which includes everybody, requires a road, for the purpose of trade or travel, it is the duty of the Government to provide one, and, if necessary, to take private property for that purpose, upon making just compensation. Whether a given road will subserve the public need or convenience is a question for the Government alone to determine. The Courts have nothing to do with it. Should the Legislature be of the opinion that the general welfare and prosperity of the people would be promoted by the construction of a system of roads which would open a pathway from every man's house or farm to the main arteries of travel and the marts of trade and commerce, there is nothing to prevent them from providing that such

due to the fact that the laying out, construction, and maintenance of roads and highways is generally done by the legislature, the branch of government traditionally viewed as most responsive to and reflective of the needs of the citizenry.⁵⁴ Based upon principles of Federalism,⁵⁵ courts have traditionally only intervened in the exercise of this power in extraordinary circumstances, and then to play only such a role as is statutorily established within the certain jurisdiction.⁵⁶ This deference in Vermont,⁵⁷ among other factors, has given rise to the current curse of phantom roads.

III. CRAFTING THE CURSE: THE LAWS OF LIFE, DEATH, AND AFTER-LIFE FOR VERMONT HIGHWAYS

It is the deference to local municipal governments in issues pertaining to roads,⁵⁸ the reluctance of Vermont courts to interfere with such municipal decisions,⁵⁹ and gaps within Vermont statutory and common law that have created the curse of phantom roads. Only by recognizing the breadth of the origin of this curse, and then by addressing each root in turn can the curse be exorcised from the State of Vermont. The logical beginning to seek out that origin is within the laws of Vermont that govern highways, roads, and private property. It is then necessary to turn to gaps within common law remedies for private property owners. Finally, one must look to the specific flaws within Vermont's statutory framework that must be addressed in order to find a cure to the phantom roads curse.

A. *Statutory and Common Law Provisions Involving Highways*

In the State of Vermont, statutes dictate how state and municipal roads are laid out, altered, reclassified, or discontinued.⁶⁰ Statutory provisions specifically define acts that must be undertaken in order to lay out a road, which may be accomplished either by an act of the local board of selectmen

roads may be opened. The ultimate decision of the question, whether a given road will subserve the public need or convenience, must rest somewhere, and it is wisely left for the Legislature to determine in such manner as they may provide.

Id.

54. *Id.*

55. *Id.*

56. *Ferguson v. Sheffield*, 52 Vt. 77, 81-82 (1879).

57. *Id.*

58. *Id.*

59. *Id.*

60. VT. STAT. ANN. tit. 19, §§ 701-819. (2003). Title 19 of the Vermont Statutes comprises laws governing public highways within the State, and the specific sections controlling the laying out, altering, reclassification, and discontinuance of highways are found in Chapter 7 of that Title. *Id.*

or by petition of local residents, including petitions,⁶¹ notice and public hearings,⁶² surveys,⁶³ and recording of decisions and necessary papers.⁶⁴ Additional provisions mandate specific acts that must be performed to officially take possession and title to properties condemned for new or altered highways,⁶⁵ time spans for affected landowners to vacate such properties,⁶⁶ damage awards that might be tendered,⁶⁷ removal of obstructions from the then-town owned lands,⁶⁸ and what shall constitute evidence of completion of new or altered highways.⁶⁹ Furthermore, there are provisions for specific acts that must be performed by the municipal government should it be determined that a town highway is no longer in the public good and should be discontinued.⁷⁰ There are provisions that mandate times for opening of a town highway.⁷¹ If a road that has been laid out and not opened, after a relatively short period of time (3 years), registered voters can petition to have the road opened, altered, or discontinued.⁷² Actions must be taken upon such petitions.⁷³

In addition, Vermont common law provides an avenue for the creation of a public highway outside of the statutory provisions. This process is done by a landowner formally dedicating⁷⁴ a road to a town, and the town accepting the road for use as a public highway.⁷⁵ Even if “it appears that all the available surveys and records are silent upon the subject . . . the legality of [the] establishment [of the public highway] is not disproved [], for it may have acquired its status by dedication and acceptance.⁷⁶ Dedication can be by expression or implication, without any written documentation, and can be asserted and proven by a host of actions, or inactions, by the original

61. VT. STAT. ANN. tit. 19, § 708 (2003).

62. *Id.* at § 709.

63. *Id.* at § 710.

64. *Id.* at §§ 705, 711.

65. *Id.* at §§ 711, 714.

66. *Id.* at § 713.

67. *Id.* at § 712.

68. *Id.* at § 714.

69. *Id.* at § 717.

70. *Id.* at § 710.

71. *Id.* at § 765.

72. *Id.* at § 750.

73. *Id.* at §§ 751-60.

74. *Springfield v. Newton*, 50 A.2d 605, 608 (Vt. 1947). (“A dedication of a road as a highway is the setting apart of the land for public use.”). *Id.*

75. *Hyde v. Jamaica*, 27 Vt. 443 (1855).

To constitute a highway by dedication, which the town are bound to repair, there must be a dedication of the land by the owner, and an acceptance of the dedication by the town; otherwise it would be in the power of an individual to impose upon a town a liability to make and keep in repair a road. *Id.* at 445.

76. *Id.*

landowner.⁷⁷ However, dedication, whether expressed or implied, must be joined by the town's acceptance in order to complete the transfer of private land into public highway.⁷⁸ In addition to public highway,⁷⁹ the town must take an affirmative, voluntary action to assume the responsibilities of maintenance and repair.⁸⁰ Without dedication and acceptance, there is no public highway.⁸¹

Two interesting discrepancies arise from the common law requirements establishing public highways by dedication and acceptance. The first is that acceptance is contingent upon the town assuming its responsibility of maintenance and repair of such roads.⁸² This mandate to maintain and repair the public highways within a town's sovereign limits⁸³ did not find a statutory exception until the 1921 provisions that establish or reclassify pre-existing roads as "trails."⁸⁴ Similarly, the 1974 provisions set forth various classifications of town roads.⁸⁵ These governing provisions require an affirmative act by a town selectboard for acceptance,⁸⁶ maintenance, repair,⁸⁷ and the exceptions to required maintenance for the highway in

77. *Springfield v. Newton*, 50 A.2d 605, 608 (Vt. 1947).

[Dedications] need not be evidenced by any writing or by any form of words, but may be shown by evidence of the owner's conduct, provided his intention, which is the essential element, clearly appears. It is not, like a grant, to be presumed from length of time alone, but may, if the act of dedication be unequivocal, take place immediately. However, a long acquiescence in user by the public, if the attending circumstances are such as clearly to indicate an intent by the owner to devote the land to public use as a highway, is evidence upon which a dedication may be predicated. The allowance by the owner of repairs at public expense is a circumstance strongly tending to show such an intention. Where the evidence is conflicting, the question of dedication is one of fact. *Id.*

78. *Id.* at 609. "[T]he mere [] dedication of land . . . is [in]sufficient to impose upon the town [] the obligation to keep it in repair, unless it has been accepted and adopted by the proper town authorities as a highway." *Id.*

79. *Bacon v. Boston & Me. R.R.*, 76 A. 128, 136 (Vt. 1910). "The adoption of a dedicated way as a highway must be evidenced by acts of the proper town authorities, and mere use by the public is not enough." *Id.*

80. *Springfield v. Newton*, 50 A.2d 605, 608-609 (Vt. 1947).

81. *See generally* *Springfield v. Newton*, 50 A.2d 605 (Vt. 1947); *see also* *Okemo Mt., Inc. v. Town of Ludlow Zoning Bd. of Adjustment*, 671 A.2d 1263, 1269 (Vt. 1995) and *Smith v. Town of Derby*, 742 A.2d 757, 758 (Vt. 1999).

82. *Springfield v. Newton*, 50 A.2d 605, 608-609 (Vt. 1947).

83. *Bacon v. Boston & Me. R.R.*, 76 A. 128, 136 (Vt. 1910). "[W]e know no such thing as a highway which nobody is bound to repair . . . Towns are bound to keep in repair all highways within their respective territorial limits unless there is some special statutory provision placing that duty in whole or in part elsewhere." *Id.*

84. 1921 Vt. Acts & Resolves 21.

85. 1973 Vt. Acts & Resolves 63.

86. *Springfield v. Newton*, 50 A.2d 605, 608 (Vt. 1947).

87. *Id.* (To maintain or repair a highway, the town must officially, and with written documentation, authorize such actions and allocate money from its general budget in order to pay for

question.⁸⁸ In both instances, the selectboard has taken absolutely no action toward the acceptance, maintenance, mapping, or repair of these roads in centuries.

Second, though public highways may be established by dedication and acceptance, they may not be discontinued in the same or similar manner.⁸⁹ Vermont courts have long held that procedures for discontinuance of highways are entirely statutory, and must be adhered to with strict allegiance if the discontinuance is to be valid.⁹⁰ Ironically, the courts in these cases link the same strict adherence to the laying out of highways,⁹¹ overlooking or disregarding the fact that highways may be established by dedication and acceptance.⁹² In fairness to private property owners who retain title in fee to lands encumbered by highways,⁹³ strict adherence to statutory provisions should be applied to both the creation and to the discontinuance of highways.⁹⁴ In the alternative, exceptions for one should be applied to the other.

B. Statutory and Common Law Provisions Involving Property Rights

Overall, the combination of statutory provisions and common law guidelines provides a coherent framework for the creation, maintenance, and addition to a highway system in a state that relies almost exclusively on highways to provide avenues for commerce and travel. However, there are no provisions in Vermont's statutes or common law that mandate a time limitation on the life of an established highway that has not been constructed, altered, or officially discontinued. In the absence of a sunset

such work). *See also* *Closson v. Hamblet*, 27 Vt. 728 (1855), "The fact of [an] alteration being made for travel, under the direction of the selectmen, made it a public highway by acquiescence of the authority of the town, who have the control and are liable for the sufficiency of the highways, within their limits." *Id.* at 731.

88. 1921 VT. ACTS & RESOLVES 21.; 1973 Vt. Acts & Resolves 63.; *Bacon v. Boston & Me. R.R.*, 76 A. 128, 136 (Vt. 1910).

89. *Capital Candy Co. v. Savard*, 369 A.2d 1363, 1366 (Vt. 1919) (Discontinuances of highways are only valid if done in strict compliance with statutory provisions, even if the highway were originally acquired through dedication and acceptance).

90. *Barton v. Sutton*, 106 A. 583, 584 (Vt. 1919).

91. *Id.* "The procedure to be followed in laying out or discontinuing a highway is wholly statutory and the method prescribed must be substantially complied with or the proceedings will be void." *Id.*

92. *Springfield v. Newton*, 50 A.2d 605, 608-609 (Vt. 1947); *Hyde v. Jamaica*, 27 Vt. 443 (1855); *Bacon v. Boston & Me. R.R.*, 76 A. 128, 136 (Vt. 1910); *Okemo Mt., Inc. v. Town of Ludlow Zoning Bd. of Adjustment*, 671 A.2d 1263, 1269 (Vt. 1995); *Smith v. Town of Derby*, 742 A.2d 757, 758 (Vt. 1999).

93. *Pettibone v. Purdy*, 7 Vt. 514 (1831).

94. *Barton v. Sutton*, 106 A. 583, 584 (Vt. 1919).

provision there have been several cases in the State of Vermont by private property owners seeking to clear title to real property previously owned, held or claimed by state and local governments.

The most common avenue of legal recourse in these cases has been to assert a right under adverse possession. As in most states, Vermont establishes the provisions for a claim of adverse possession through statute and common law. In Title 12 of the Vermont Statutes, Section 501 provides a 15-year time limit for actions of adverse possession.⁹⁵ The common law provisions for adverse possession in Vermont are stated rather artfully; “[o]ur well recognized rule is that a possession that will work an ouster of the owner must be open, notorious, hostile and continuous for the full statutory period of fifteen years.”⁹⁶ An adverse possessor “must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest.”⁹⁷ So long as a person, or the state, invades the property of another and “unfurls his flag” of ownership and use upon that land for fifteen consecutive years, the property can be claimed by adverse possession.

Unfortunately, asserting adverse possession is a disfavored remedy against the previous use of eminent domain and takings for public use by the sovereign. In fact, it is generally barred by statute where the lands involved are, or have been, “given, granted, sequestered, or appropriated to a public, pious, or charitable use, or to lands belonging to the state.”⁹⁸ There is no record of why such a liberal exemption to claims of adverse possession was included in the original version of this statute, passed in 1797,⁹⁹ but it has remained unchanged since 1801.¹⁰⁰ Accordingly, Vermont’s version of the common-law rule required that claims of adverse possession cannot succeed against publicly held lands.¹⁰¹ Section 462 bars not only claims of adverse possession against state lands, but lands presumably owned or seized by local and municipal governments, charitable organizations, or “pious” individuals or groups.¹⁰² This rather expansive category is based upon the theory that to allow claims of adverse

95. VT. STAT. ANN. 12, § 501 (2003).

96. *Laird Props., New England Land Syndicate v. Mad River Corp.*, 305 A.2d 562, 567 (Vt. 1973).

97. *Id.*

98. VT. STAT. ANN. 12, § 462 (2003).

99. *MacDonough-Webster Lodge No. 26 v. Wells*, 834 A.2d 25, 29 (Vt. 2003).

100. *In re .88 Acres of Prop. owned by Town of Shelburne*, 676 A.2d 778, 780 (Vt. 1996), citing *Soc. for the Propagation of Gospel in Foreign Parts v. Town of Sharon*, 28 Vt. 603, 612 (1856).

101. *Id.* at 779-80.

102. VT. STAT. ANN. tit. 12, § 462 (2003).

possession to succeed against such beneficial entities would be overly injurious to the public interest.¹⁰³

However, the Vermont Supreme Court has not found that Title 12 of the Vermont Statutes, Section 462, is an absolute bar to adverse possession claims against state property. In *Jarvis v. Gillespie*, the Court found that lands owned by a town that had never been given over to public use could be claimed by a private individual by adverse possession.¹⁰⁴ Should a phantom road be shown to be a road that was once open to public use, a private property owner could potentially succeed against the municipality in an action to quiet title. An early case in Vermont establishes that a road that has been laid out but not opened may be discontinued by abandonment based upon the simple fact that “[s]ince the [first] road was laid out but before a dollar is expended on it, another route . . . accommodating those having occasion to use it much better than the other route would, has been found.”¹⁰⁵ However, the question remains as to what happens in cases, such as the Peterson’s, where a road was once opened to public use but fell into disuse, abandonment and obscurity because “another route . . . accommodating those having occasion to use it much better than the [former] route” had been found, opened and put into service.¹⁰⁶ Could a private landowner then be successful in an action against a municipality, or would Section 462 bar such actions because at some time in the distant past a phantom road had been open to public use?

The answer to this question may depend, in part, upon whether the phantom road at issue is wholly within one town or spans town boundaries into separate municipalities. Should it be the latter, the matter becomes far more complex, as no single municipality would have sole jurisdiction over the road, and a decision to discontinue, reclassify, or alter the road would need to be made pursuant to 19 V.S.A. § 771.¹⁰⁷ “[T]he procedure to be

103. *MacDonough-Webster Lodge No. 26 v. Wells*, 834 A.2d 25, 29-31 (Vt. 2003).

104. *Jarvis v. Gillespie*, 587 A.2d 981 (Vt. 1991).

105. *Ferguson v. Sheffield*, 52 Vt. 77, 82 (1879).

106. *Id.*; *Harkness 2*, *supra* note 12.

107. VT. STAT. ANN. tit. 19, § 771 (2003) stipulates that:

The selectmen of two or more towns may discontinue a highway continuing into each of the towns by individually following the same procedure. The public hearing may be jointly held if the selectmen agree. If the decision is not the same in all towns involved, the superior court shall be petitioned to resolve the issue. If two or more counties are involved then the petition can be presented to the court in the county having the greatest share of mileage involved. The commissioners appointed to discontinue a highway or bridge shall be disinterested landowners who are not those appointed to lay out the highway or bridge. A decree or order made by the commissioners under the provisions of this section may be reviewed by the superior court under the same conditions and the same proceedings as are provided for the laying out of highways. *Id.*

followed in laying out or discontinuing a highway is wholly statutory in Vermont,¹⁰⁸ the statutory provisions must be strictly adhered to and perfected in letter, manner, and time, or the court will find the proceedings void and rule that the highway still, legally, in existence. This strict adherence to statutory provisions regulating the discontinuance of highways in Vermont dates back at least as far back as 1919,¹⁰⁹ and has been reaffirmed by Vermont Supreme Court cases from the 1950s,¹¹⁰ the 1990s,¹¹¹ and as recently as last year.¹¹² Strict adherence to statutory provisions governing highways within the State of Vermont becomes more complicated by the temporal and factual considerations of each phantom road case, as will be illustrated by using the circumstances surrounding the Green Road in the Town of Chittenden.

IV. A CLASSIC EXAMPLE OF THE CURSE: A CLOSER LOOK AT THE CASE OF THE GREEN ROAD

To determine the status of a given road and actions needed to change that status, it is necessary to look at the laws in place during the time of laying out and opening of that road.¹¹³ Among the discrepancies in the Dutton Report is an unsupported claim that the survey of the Green Road was actually recorded twice, once in 1796, and again in 1830.¹¹⁴ Determining which of these is the record survey of the Green Road will have a significant impact on the Petersons and other property owners affected by the Green Road, as laws governing highways in Vermont changed significantly between the years of 1796 and 1830.¹¹⁵ From 1787 to

108. In re Bill, 724 A.2d 444, 445-46 (Vt. 1998) (quoting In re Mattison, 144 A.2d 778, 780 (Vt. 1958).

109. Barton v. Sutton, 106 A. 583, 584 (Vt. 1919).

110. In re Mattison, 144 A.2d 778, 780 (Vt. 1958).

111. In re Bill, 724 A.2d 444, 445-46 (Vt. 1998).

112. In re Town Hwy. No. 20 of Town of Georgia, 834 A.2d 17 (Vt. 2003).

113. Paul Gillies, *A Short History of Vermont Highway Law Locating Vermont's Historic Roads and Highways*, 1 (Apr. 8, 1992) (unpublished article, on file with author).

114. Dutton Report, *supra* note 5 at 4. Unfortunately, this is but one of many glaring and critical discrepancies. Others include: an immediate, biased, and unsubstantiated photographic portrayal of the Green Road as a well-traveled, unimproved single lane road, when the actual photo is of a newly constructed logging road, *id.* at inside cover; assertions, without proof, that two separate, named Class 3 roads within the Town of Chittenden are actually part of the Green Road, *id.* at 3; assumptions as to the current ownership, and thereby exact locations of, the old homesteads referenced within the 1830 Green Road survey, *id.* at 5-6; omissions of critical terms within the transcription of the 1830 survey, *id.* at Exhibit 1; and erroneous legal assertions as to the processes necessary, and preclusions to, the discontinuance of highways within the State of Vermont. *Id.* at 7. Reliance upon such research is tenuous, at best, but regrettably has fueled at least four attempts by municipalities to claim title to phantom roads.

115. See generally Gillies, *supra* note 113 (“trac[ing] Vermont highway law from 1777–

1797, only one freeholder of land was required to petition the selectboard in order to have a road laid out and opened.¹¹⁶ In 1797, the General Assembly increased to three the number of petitioning freeholders needed to open a road.¹¹⁷ Prior to 1806, roads could be less than three rods in width; an Act of the legislature during that year required a three rod minimum, and allowed for petitioning by freeholders to widen any previously laid out, narrower road to the three rod width.¹¹⁸ Acts passed in 1820 required that certificates be recorded to verify the opening of any road laid out, where no such certificate was previously required.¹¹⁹ These Acts also gave jurisdiction over multi-municipality roads to the Vermont Supreme Court, whereas jurisdiction had previously rested with the individual towns.¹²⁰ During 1827, the legislature vested within appointed road commissioners the power to lay out roads, a power previously residing with, and then wrested from town selectboards.¹²¹ In 1830, the power of road commissioners was mitigated slightly requiring selectboards to first see and have an opportunity to reject any petition to lay out a road prior to it being submitted to the road commissioners.¹²² During the time of the road commissioners, 1827 to 1831, the power to discontinue roads was vested in county courts.¹²³ The General Assembly repealed the statutes governing road commissioners in 1831, re-vesting in selectboards the full authority to lay out roads.¹²⁴

Therefore, a determination as to when the Green Road was actually laid out and opened has a direct and substantial bearing on the laws governing the road, and upon any litigation arising from the rediscovery of this phantom road. If the Green Road were actually laid out and opened in

present.”).

116. An Act Directing the Laying Out of Highways, *reprinted in* LAWS OF VERMONT 1785-1791, at 325-27 (John A. Williams ed., 1967).

117. An Act for Mending and Repairing Highways, LAWS OF VERMONT 1791-1795, at 115-20 (John A. Williams ed., 1967). The Vermont Supreme Court had occasion to give an explanation for the certification requirement of 1820 in *Patchen v. Morrison*, 3 Vt. 590 (1831), stating:

When a road is laid through the lands of one of our citizens, it is necessary that he should be enabled to know when his dominion over the soil ceases, when he is no longer at liberty to keep it enclosed; and on the other hand every individual in the community should be able to ascertain when a road becomes a public highway, so that he has an undoubted right to travel thereon. *Id.*

It is rather ironic, and unfortunate, that more than 170 years after this case, Vermont is still plagued by roads that are of uncertain origin, location, and ownership.

118. 1806 VT. ACTS & RESOLVES 67.

119. 1820 VT. ACTS & RESOLVES 6.

120. *Id.*

121. 1825 VT. ACTS & RESOLVES 17.

122. 1830 VT. ACTS & RESOLVES 12.

123. 1831 VT. ACTS & RESOLVES 8-10.

124. 1831 VT. ACTS & RESOLVES 4.

1796, and the 1830 recordation was simply a second, redundant recordation of the original, then the laws of 1796 would apply and no certification of opening would be required.¹²⁵ However, if the Green Road was not opened in 1796, and/or the 1830 survey was not a redundant, second recordation of the original, but an original or an independent resurvey,¹²⁶ then the laws of 1830 would apply, requiring certification of the opening,¹²⁷ and the road itself would have had to have been laid out in accordance with road commissioner laws of either 1827¹²⁸ or 1830.¹²⁹ Likewise, a determination as to the time of laying out and opening of the Green Road will also define the physical boundaries of the road,¹³⁰ and affirmative actions needed to alter the characteristics of, or discontinue, the road, and by which sovereign body.¹³¹

Taking the Green Road as an example to illustrate the point, the actual location of a phantom road, based upon the original survey, has significant bearing on the legal resolution of these issues. Should a phantom road, such as the Green Road, be physically relocated through a licensed surveyor's analysis of the original survey and evidence on the ground,¹³² then property owners, such as the Petersons, whose property is affected by and whose improvements encroach upon the Green Road, will be forced to mitigate those infringements in some manner.¹³³ As in *Kelly v. Barnard*, when a licensed surveyor is able to locate an old road or right-of-way on the ground from following the original survey, and present such as evidence, the courts are likely to find that this relocation is sufficient to prove the existence of both the roadway and the town's right to this as a public right-of-way.¹³⁴ In that case, the town hired a licensed surveyor to officially relocate the old road.¹³⁵ The surveyor was successful in relocating enough physical evidence to persuade the court to find in favor of the town.¹³⁶

However, should a phantom road, such as the Green Road, not be

125. 1820 VT. ACTS & RESOLVES 6.

126. C.S., title X, ch. XX, §§ 8-9 (1839). Amazingly, if the 1830 survey is actually a resurvey, it may itself be void as no resurveys of pre-existing highways were authorized until the year 1839!

127. *Id.* See also *Patchen*, 3 Vt. 590. (The lack of a certificate, as required by law, showing the official opening of a highway renders any claim to such road as a public highway void.)

128. 1825 VT. ACTS & RESOLVES 17.

129. 1830 VT. ACTS & RESOLVES 12.

130. 1806 VT. ACTS & RESOLVES 67.

131. *Kelly v. Barnard*, 583 A.2d 614, 617-20 (Vt. 1990); *Bacon*, 76 A. at 136.

132. See Special Meeting, *supra* note 19. Also *Muller*, No. 272-5-02 Wrev. at 4. Recall, the individual who compiled the flawed Dutton Report is not a licensed surveyor.

133. 19 VT. STAT. ANN. tit. 19, § 33 (2003).

134. *Kelly*, 583 A.2d at 617. Here, as in the Green Road case, a report by John Dutton was the impetus for the town's attempt to relocate an old, presumably abandoned Class 4 road. *Id.*

135. *Id.*

136. *Id.* at 619-20.

preliminarily relocated by use of the original survey as a guide, the town is left with three options. First, it may drop the pursuit of the phantom road, leaving the issue to lie in wait for future generations of selectboards and property owners.¹³⁷ Second, it may press the case within the courts, relying on reports and the inconclusive preliminary relocation as evidence of the phantom road's existence.¹³⁸ If so, the town may well lose this gamble. The Vermont Supreme Court has made it relatively clear that there must be enough evidence on the ground, with guidance drawn from the filed records of the survey, to warrant a conclusion as to the location of a highway.¹³⁹ Without a definite location, the town may lose the case and claim to the phantom road outright.¹⁴⁰ Finally, the town may be forced to have the highway resurveyed.¹⁴¹ This is an expensive endeavor, as it will require that the town relocate the highway to avoid any physical improvements within the old right-of-way for more than 15 years, and pay compensation for any takings as a result of the resurvey.¹⁴² This could also pose significant difficulties for a town attempting a resurvey, as any such resurvey is required to follow the original exactly, and if there are to be deviations from the original, prior to any such resurvey, all property owners along the route must be notified by the town as if the highway were being

137. See *supra* note 3 and accompanying text.

138. See *supra* notes 114.

139. *Savard v. George*, 214 A.2d 76, 81 (Vt. 1965).

[I]t was an impossibility to establish the boundaries of the [] road by the filed description in the survey of 1852, and there is no evidence of any resurvey of such road by the town or State. In the absence of established monuments, the evidence showed it was the engineering custom in this State to establish as the center line of an old highway the center line of the present travelled way. The evidence being that the terminations and boundaries of the Calais highway could not be ascertained by the old survey of 1852, and with no evidence that a re-survey had been made, the provisions of 19 V.S.A. § 36 became applicable: 'When the survey of a highway has not been properly recorded or the records preserved, or, if termination and boundaries cannot be ascertained, the board of selectmen may use and control for highway purposes one and one-half rods each side of the travelled portion thereof.' *Id.*

"Savard requires that a road boundary be determinable by the filed description, but it does not bar use of whatever admissible evidence a party may have to establish a boundary under a filed description." *Pidgeon v. Vt. State Transp. Bd.*, 522 A.2d 244, 246 (Vt. 1983). However, both *Savard* and *Pidgeon* require that in the absence of any established monuments, there must be evidence on the ground to establish at least the present traveled way. Without either, there is no highway and no control of the area in question by the Selectboard. *Muller*, No. 272-5-02 Wrev. at 4-6.

140. *Muller*, No. 272-5-02 Wrev. at 4-6.

141. VT. STAT. ANN. tit. 19, § 33 (2003).

142. *Id.* See also *Trudeau v. Town of Sheldon*, 20 A. 161 (1890). The town must first undertake an official survey, although not properly recorded or preserved, to justify a resurvey. Without such an original survey, the town lacks jurisdiction to order a resurvey or to condemn private property to a public highway. *Id.* at 162-63.

laid out anew.¹⁴³ However, as is evident by the *Kelly*,¹⁴⁴ *Spencer*,¹⁴⁵ and *Peterson* cases,¹⁴⁶ it seems all too apparent that towns are willing to take the gamble on going to court with insufficient or incomplete information.¹⁴⁷ This forces private property owners to rely upon strict adherence to statutory provisions and upon the evidence, or lack thereof, of physical traces of phantom roads to defend their rights within the legal system.

Unfortunately, the vagaries of determining each case based upon strict adherence to statutory provisions and reliance upon the original survey to find evidence on the ground or provide for a re-survey and subsequent takings procedures can lead to absurd results.¹⁴⁸ Absurd results which give “permanency [to] highways not heretofore entertained,”¹⁴⁹ are exactly what the lack of an available, statutory method of clearing titles of phantom highways provides: it gives to highways abandoned or never opened by previous generations a “permanency not heretofore entertained,”¹⁵⁰ and makes them a bane to future generations of Vermont property owners.

V. BREAKING THE CURSE: POSSIBLE COMMON LAW INCANTATIONS AND LEGISLATIVE ACTION

A. *Equitable Remedies*

Equitable remedies may also have their place in the strategy of private landowners seeking to clear title to their property of a cloud formed by one or more phantom roads. Equitable estoppel and laches are two theories of remedy that may hold promise, but each has inherent difficulties in being used against the sovereign. Principally, both estoppel and laches are common law remedies that involve court precedent, not statutory authority. This is directly contradictory to the power of the Vermont courts in roadway cases:

143. *Town of Berkshire v. Nelson & Hall Co.*, 105 A. 28, 29 (Vt. 1918).

144. *Kelly*, 583 A.2d at 614.

145. *Muller*, No. 272-5-02 Wrev. at 4.

146. The Peterson’s case has not yet made it to trial, though it is certain to do so in late 2004 or early 2005 unless the Vermont General Assembly takes action to resolve this and all other phantom road cases.

147. *Supra* notes 144-146 and accompanying text.

148. Results that the Vermont Supreme Court, strangely, is all too cognizant of: “We are mindful that strict adherence to statutory rules with respect to highway discontinuances could, theoretically, produce the absurd result of bringing back highways long since gone.” In re Bill, 724 A.2d 444, 448 (Vt. 1998).

149. *Ferguson*, 52 Vt. at 83.

150. *Id.*

In so far as the courts have any duty or power devolved upon them in respect to laying out and discontinuing highways, it is derived from the statutes. This duty and power is of such character that it should be performed and exercised in a practical manner, not by technical rules. These highway petitions are, in view of the nature and purpose of the inquiry, addressed largely to the discretionary power of the court. They are based on an alleged public as well as individual necessity and convenience. They involve the imposition or relief of a public burden.¹⁵¹

1. Equitable estoppel

In Vermont, equitable estoppel “operates to prevent a party from ‘asserting rights which may have existed against another party who in good faith has changed his or her position in reliance upon earlier representations.’”¹⁵² In situations such as the Peterson case, this may mean that the private landowner whose title is clouded by a phantom road may be able to prevent the municipality from asserting the right to use, open, or re-classify the road because the property owner relied upon real estate professionals to certify that the title was clear of such encumbrances, prior lack of action by the town to open or reclassify the road, and in good faith purchased the property believing that no such cloud existed. To use this defense, a private property owner must prove the four elements of the Vermont test for equitable estoppel:

- (1) the party against whom estoppel is claimed knows the facts;
- (2) that party intends that his or her conduct will be acted upon or that the conduct is such that the party asserting estoppel has a right to think it should be acted upon;
- (3) the party seeking estoppel is ignorant of the true facts; and
- (4) that party detrimentally relied upon the other party's conduct.¹⁵³

In phantom road cases, a private property owner can likely present strong and compelling evidence that she did not know that such a road existed on her property prior to the acquisition thereof.¹⁵⁴ Further, the party

151. Hansen v. Charleston, 597 A.2d 321, 323 (Vt. 1991) (quoting *Ferguson*, 52 Vt. at 81).

152. Mellin v. Flood Brook Union Sch. Dist., 790 A.2d 408, 425 (Vt. 2001); Beecher v. Stratton Corp., 743 A.2d 1093, 1095 (Vt. 1999) (quoting Fisher v. Poole, 453 A.2d 408, 41 (Vt. 1982)).

153. Mellin, 790 A.2d at 425 (citing Beecher, 743 A.2d at 1096).

154. Indeed, what reasonable potential buyer would, or could purchase a property encumbered by a phantom road that renders the title to such property unmarketable?

against whom estoppel will be claimed is the municipality. Municipalities are charged with the keeping of records of land transactions,¹⁵⁵ including those pertaining to municipal lands and roadways and of the maintenance thereof.¹⁵⁶ A private landowner should be able to make a relatively strong case that the municipality should have known the facts about the phantom road,¹⁵⁷ and that a reasonable party in that situation would have known the facts. Finally, property owners rely upon the actions of municipalities when filing records,¹⁵⁸ applying for permits,¹⁵⁹ and approving improvements to properties.¹⁶⁰ When searching records and seeking to acquire or sell property, property owners rely upon whether the municipality has asserted rights to the property.¹⁶¹ Therefore, it is conceivable that in some cases a private property owner may be able to make a reasonably strong case against a municipality asserting a right to a phantom road relying upon equitable estoppel to prevent the municipality from succeeding.

Equitable estoppel as a means of preventing municipalities from claiming a right to phantom road is strengthened as it has traditionally been applied “with particular force where the estoppel is claimed by reason of silence or inaction and where the case involves title to land or a dispute as to a boundary.”¹⁶² However, this last scenario, also in play in the phantom roads cases, is premised upon there being “no negligence by [the party to be estopped] in asserting [their] right,” to the title to the land or disputed boundary in question.¹⁶³ Thus, in scenarios such as the Barnard and Chittenden cases, if the court were to determine that the municipality was negligent in remaining silent or not asserting a right to the phantom road, and that negligence applied most specifically to a claim over title to the land,¹⁶⁴ then the private land owner may be bound by the secondary premise

155. VT. STAT. ANN. tit. 24, § 1153-54 (2003).

156. VT. STAT. ANN. tit. 19, § 705.

157. A law within the State of Vermont from 1779 required all towns to conduct formal surveys of their roads and to keep good records thereof. An Act for Laying Out and Altering Highways, LAWS OF VERMONT 1785-1791, at 325-27 (Allen Soule, ed., State Papers of Vermont XIV) (1967).

158. VT. STAT. ANN. tit. 24, §§ 1151-1154 (2003).

159. VT. STAT. ANN. tit. 27, § 617 (2003).

160. VT. STAT. ANN. tit. 24, § 3101-3120 (2003).

161. An Act for Laying Out and Altering Highways, LAWS OF VERMONT 1785-1791, 325-27 (Allen Soule, ed., State Papers of Vermont XIV) (1967); VT. STAT. ANN. tit. 24, §§ 1151-1154 (2003); VT. STAT. ANN. tit. 27 § 617 (2003); VT. STAT. ANN. tit. 24, § 3101-3120 (2003). Indeed, since the records that property owners are required to search and to verify are located in municipal clerk’s offices, as are the regulations passed by those municipalities that those same property owners are required to comply with, it is not difficult to see how a reliance can be formed by property owners on the reasonable assertion of rights and performance of duties by the municipality.

162. 28 AM. JUR. 2D *Estoppel and Waiver* § 45.

163. *Id.*

164. *Id.*

that estoppel cannot be exercised against a party negligent in nonassertion of a right.¹⁶⁵

Further, the Vermont Supreme Court has established a rule within the state that courts are “reluctant to apply estoppel against the state unless there are ‘extraordinary circumstances’ or the ‘injustice which would result from a failure to uphold an estoppel is of sufficient dimensions to justify any effect upon public interest or policy which would result from the raising of an estoppel.’”¹⁶⁶ Therefore, the private landowner in Vermont must show that either the situation arises from “extraordinary circumstances”¹⁶⁷ or that to deny the estoppel would result in “injustice . . . sufficient . . . to justify any effect on public interest.”¹⁶⁸ Such effects are those that would arise from having a municipality estopped from asserting a right to a potential public right-of-way. This is a rather onerous burden for a private property owner to bear, especially in the light of the good faith transactions that led to the purchase of the property and the financial investments made in the property by the individual property owner. The burden, and the inequity, is multiplied when the implications are considered for other affected property owners whose rights and investments are jeopardized because a municipality slept on its right for decades.¹⁶⁹

2. Laches

The second equitable remedy of laches provides some additional resolution, but is likewise historically disfavored and would nevertheless be insufficient in many of these phantom road cases. “Laches is the failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right. Laches does not arise from delay alone, but from delay that works disadvantage to another.”¹⁷⁰ In these phantom road cases, it is clear that a delay in the assertion of the right of the municipality to the

165. *Id.*

166. *In re Spencer*, 566 A.2d 959, 966 (Vt. 1989); *In re McDonald's Corp.*, 505 A.2d 1202, 1204 (Vt. 1985).

167. *In re McDonald's Corp.*, 505 A.2d at 1203-04.

168. *Id.* (quoting *Chaplis v. County of Monterey*, 158 Cal. Rptr. 395, 400 (Cal. Ct. App. 1979)).

169. Again, the two instances that form the basis for this study are only in two of more than 250 municipalities in the State of Vermont, and in one of these towns there are reported to be more than 20 phantom roads. *Harkness I*, *supra* note 6. The implications for private property owners across Vermont are quite dire should even a small fraction of this number of roads exist in each town or if a fraction of the total number of towns contains equal numbers of phantom roads.

170. *In re Town Hwy. No. 20*, 834 A.2d at 23 (citing *Stamato v. Quazzo*, 423 A.2d 1201, 1203 (Vt. 1980)).

road for up to 200 years¹⁷¹ might be construed as an unreasonable delay, and one for which an explanation, if not unimaginable, is likely to be incredibly difficult to proffer. Further, the delay can quite easily be seen to have been prejudicial to the adverse party, working an egregious disadvantage to the current private owner for several reasons. The original owners, who likely knew of the right-of-way, are long deceased and title to lands will have certainly changed hands numerous times.¹⁷² Also, no title companies or real estate professionals routinely research titles more than the 40 years mandated by State of Vermont.¹⁷³

Therefore, the theory of laches seemingly would work to rectify the cases of re-appearing phantom roads. However, as previously shown with equitable estoppel, the courts are hesitant to enforce such affirmative defenses against the sovereign.¹⁷⁴ Regardless, even if laches or equitable estoppel were available as remedies against municipal claims to these phantom roads, the burden of proof and defense is placed upon the private landowner.¹⁷⁵ Therefore, even if equitable remedies are available, they are inadequate to break the curse.

B. Legislative Action is Necessary to Break the Curse of the Phantom Roads

There are several potential remedies to the problems created by phantom roads. Among the potential remedies are leaving the situation as it is, essentially hoping that these sleeping dogs will not wake up and bite in the near future. However, this approach leaves the curse upon later generations of property owners who may face local and state governments far less amenable to private property rights. Later generations of property

171. The phantom road in the Town of Barnard was laid out in 1784, BARNARD HIGHWAY BOOK, *supra* note 4, and in the Town of Chittenden in 1796. Dutton Report, *supra* note 5.

172. Either of the two phantom roads serving as examples in this study were laid out more than two centuries ago, and the last formal assertion of right to these highways was made sometime in the interim.

173. Vermont's version of the Marketable Record Title Act, VT. STAT. ANN. tit. 27, §§ 601–613. (2003), requires only that a person hold an unbroken chain of title to a property, *id.* at 602, or be a successor in interest, including a bona fide purchaser of said title, *id.* at 603, to such a person, to claim a marketable title. As such, real estate professionals, including real estate attorneys and title insurance companies, generally as a matter of practice only search and certify title to properties within the state back to the first general warranty deed at least 40 years in the past.

174. *In re Spencer*, 566 A.2d 959, 966 (Vt. 1989); *In re McDonald's Corp.*, 505 A.2d 1202, 1204 (Vt. 1985).

175. Recall, of course, that both equitable estoppel and laches are affirmative defense that can only be used once litigation has ensued. Thus the property owner must affirmatively seek to clear title to property that they originally purchased unaware of the defect in the title, and in which they have already invested significant time and financial resources.

owners may certainly encounter greater difficulty, both factually and financially, in clearing title to real estate of the clouds these roads have formed in the past. I believe that there are remedies to cure the curse of the phantom roads. Since the curse has been created by legislative oversight, it therefore should be addressed by the General Assembly of the State of Vermont. Indeed, if the government is to perform its most fundamental duty to the citizens, then the curse of the phantom roads must be removed by the legislature.¹⁷⁶ In the 2004 legislative session, one bill was considered in the Transportation Committee of the Vermont State House of Representatives,¹⁷⁷ and another remaining in draft form ready for submission in the Vermont State Senate.¹⁷⁸ Each of these bills approached the problems caused by phantom roads in a uniquely beneficial manner.¹⁷⁹ However, both bills did little more than merely treat the symptoms of the curse. Furthermore, the bills were insufficient to comprehensively solve the root problem of the phantom roads and to treat all their ill effects.¹⁸⁰ A

176. JOHN LOCKE, TWO TREATISES ON GOVERNMENT, (1690). "Government has no other end but the preservation of Property," *id.* at § 94, and that "whenever the Legislators endeavor to take away, and destroy the Property of the People . . . they put themselves into a state of War with the People" *Id.* at § 22.

177. H.R. 684 (Vt.2004). AN ACT RELATING TO THE ABANDONMENT OF STATE, TOWN, AND COUNTY HIGHWAYS. H.R. 684 had the stated purpose "to set forth a procedure for determining that a state, town, or county highway or other public way that has not been used for 30 or more consecutive years is legally abandoned."

178. *Id.* This bill carried a stated purpose "to establish a uniform system of dealing with ancient roads which have never been used, or the use of which have been discontinued and abandoned for substantial periods of time."

179. H.R. 684 (Vt. 2004). AN ACT RELATING TO THE ABANDONMENT OF STATE, TOWN, AND COUNTY HIGHWAYS. H.R. 684 introduced the theory of abandonment into Chapter 7 of Title 19 of the Vermont Statutes Annotated, placing the burden of proof of abandonment on the private individual seeking to establish the abandonment:

(c) [P]rima facie evidence of abandonment may not be rebutted should the state, town, or county fail to demonstrate that the highway or public way was designated as such on a publicly accessible map between January 1, 1950 and January 1, 2003 and has been open and worked as such for one or more consecutive years within the past 50 consecutive years.

(d) A rebuttable presumption that a state, town, or county highway or other public way has not been abandoned is created by a demonstration that the highway or public way was designated as such on a publicly accessible map between January 1, 1950 and January 1, 2003. The presumption can be overcome by a showing that the highway or public way was not open and worked as such for any discernible period within the past 30 consecutive years.

The un-introduced Vermont Senate bill would have simply abandoned and terminated rights to all "ancient highways" alleged to exist, but not appearing on the first town highway map adopted after 1931. Nor have these "ancient highways" been incorporated into a more recent highway map.

180. The Senate bill would have rendered all current phantom roads terminated and abandoned. However, it did not provide any method for preventing the curse of phantom roads from re-occurring in later generations from roads laid out more recently than 1931. H.684, however, still placed a considerable burden upon individual property owners and offers no prophylactic or preventative

comprehensive proposed solution in the form of draft legislation to the Vermont General Assembly is attached to this study as an appendix. This legislative proposal, a series of amendments to the Vermont Statutes Annotated, addresses the restrictions imposed on private property owners by 12 V.S.A. § 462. The proposal includes a sunset provision within Title 19 laws governing public highways, incorporates the rule of abandonment into Title 19, and implements a reversion of title to abandoned roads and rights-of-way. This comprehensive approach to breaking the curse of phantom roads accomplishes the goals of both previously mentioned bills, but goes further to insure that no phantom roads remain or rise in later generations, and that property owners once affected have a clear title to the full measure of property to which they are entitled.

The first component of the proposed remedy is based upon the federal Quiet Title Act¹⁸¹ and upon similar state statutes that provide remedies for private property owners whose real estate title is clouded by an interest held by the sovereign. Quiet title statutes provide that a private property owner can bring suit against another party—private, “public, pious, charitable, or [sovereign],”¹⁸²—to quiet an interest that party may claim against the property in question. Many jurisdictions allow such suits so that property can “enter the channels of commerce and trade unfettered and without the handicap of suspicion.”¹⁸³ In addition, the suits are used “in order that the land be put to its full potential use.”¹⁸⁴ These cases have succeeded against states and municipalities, especially where there may be no other adequate remedy at law,¹⁸⁵ as these suits do not involve awards of damages.¹⁸⁶ The suits involve only the judicial determination of clear ownership of title¹⁸⁷ and a decree that “the defendant has no right, title, or interest adverse” to the claim of the plaintiff.¹⁸⁸

To amend the relevant quiet title statutes within the State of Vermont to allow for such actions would be a relatively simple matter—repeal 12 V.S.A. § 462 (2003). However, such an act is unlikely to pass. There is the inherent reluctance of governments to relinquish power over state controlled lands, and the tendency of state legislatures to leave in place

measures.

181. 28 U.S.C.A. § 2409(a) (2003).

182. VT. STAT. ANN. tit. 12, § 462 (2003).

183. *Chicago Title Ins. Co. v. Wetherington*, 490 S.E.2d 593, 597 (N.C. Ct. App. 1997).

184. *Brosseau v. N. M. State Hwy. Dept.*, 587 P.2d 1339, 1342 (N.M. 1978).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Chicago Title Ins. Co.*, 490 S.E.2d at 597.

statutes from far earlier time, here 1797 and 1801.¹⁸⁹ Even in the unlikely event that § 462 were repealed, the repeal would create far more problems than it would solve. Not only would repealing this statute be a broad-brush approach to a narrow problem, it would raise significant public interest questions. Repealing § 462 would leave open all public lands, and such land belonging to other “public, pious, and charitable” organizations, to claims of adverse possession.¹⁹⁰ Leaving all public lands open to claims of adverse possession raises serious legal and political consequences especially for lands set aside by conservation organizations.¹⁹¹

The second component of the proposed remedy to the problems created by phantom roads is more narrowly tailored to the situation, and carries less potential liability to the public interest than the first proposed solution. Simply including a sunset provision into the Title 19 sections governing the laying out, opening, and discontinuance of roads would provide a narrowly tailored solution to the problem of phantom roads and would thus avoid the pitfalls associated with repealing 12 V.S.A. § 462. A provision is already in place that accomplishes the same goal when roads are statutorily discontinued by municipal or state governmental bodies.¹⁹² Having a default mechanism that reverts and quiets title to affected properties in cases where the road is abandoned seems to be a needed addition to the coherent framework of Title 19. In the event of a *de facto* discontinuance or abandonment from public service and use of any roadway, a provision that would create an automatic reversion of title to the previous owner(s), heirs, and assigns, after the normal 15-year limitation for adverse possession¹⁹³ seems to be a logical and efficient solution to the problem. A

189. See *supra* notes 99-100 and accompanying notes.

190. VT. STAT. ANN. tit. 12, § 462 (2003).

191. Land trusts, a subset of conservation organizations, hold in fee simple or control via conservation easements, considerable tracts of land throughout Vermont and the United States. As most land trust organizations, such as The Nature Conservancy or the Vermont Land Trust, are organized under IRC § 501(c)(3) to be charitable tax-exempt entities, legally the same as churches, schools, and other “public, pious, and charitable organizations.” *Id.* Repealing 12 V.S.A. § 462 would potentially leave open to claims of adverse possession any land owned or managed by these groups, or by churches, schools, or other charities. While the vulnerability of land held by environmental groups to adverse possession might curry favor in some political circles, it would most likely be met with stiff resistance by the conservation groups, other charitable entities, their millions of members, and an allied bevy of elected officials.

192. VT. STAT. ANN. tit. 19, § 775 (2003).

If the discontinued highway is not designated as a trail, the right-of-way shall belong to the owners of the adjoining lands. If it is located between the lands of two different owners, it shall be returned to the lots to which it originally belonged, if they can be determined; if not, it shall be equally divided between the owners of the lands on each side. *Id.*

193. VT. STAT. ANN. tit. 12, § 501 (2003).

15-year window presents a reasonable opportunity to continue or resume maintenance and public use of a road. This time-frame allows municipalities to re-assert their sovereign interest in the right-of-way within the allotted time thereby negating the adverse claim. These provisions within the law of adverse possession in the State of Vermont are not so lenient as to unreasonably jeopardize private property or to delay the reversion of title to affected properties so as to work to the disadvantage¹⁹⁴ of parties seeking to quiet title to property. Therefore, inclusion of these provisions into laws establishing the abandonment of roads and rights-of-way would seem reasonable, and provide an adequate partial remedy to the problem of phantom roads.

The final two components were provisions included within both H.684 and the unIntroduced Senate bill. Namely, the provisions included the introduction of the rule of abandonment into laws governing highways in Vermont, and an automatic reversion of title from abandoned highways.¹⁹⁵ A definition should be added, as would have been provided by H.684,¹⁹⁶ to 19 V.S.A. § 701, to establish the meaning of “abandoned” roads. The added definition should read: “‘Abandoned’ means a state, county, municipal, or town highway, road, trail, right-of-way, or other public way, which has not been open for public use, publicly maintained, or used publicly for at least 15 consecutive years.”

In addition, as with the unIntroduced Senate bill,¹⁹⁷ there must be an automatic termination of any abandoned road or right-of-way and an automatic reversion of title to the previous owner(s), or their heirs, assigns, and/or successors in interest. Such a provision would read: “Any abandoned highway, road, trail, right-of-way, or other public way, is deemed terminated and discontinued by the public through this section without further action necessary by any local, municipal, town, county, or state government, agency, court, or other body, and all rights or interests therein are also terminated, discontinued, and rendered null and void by this section. All rights, interest, and/or title to property previously affected by such an abandoned highway, road, trail, right-of-way, or other public way, are hereby deemed to revert to the previous owner(s), or their heirs, assigns, or successors in interest. Should none be found, or ownership of properties so affect by prohibitively unreasonable to establish, the property so in

194. *In re Town Hwy. No. 20*, *supra* note 170.

195. H.R. 684 (Vt. 2004). AN ACT RELATING TO THE ABANDONMENT OF STATE, TOWN, AND COUNTY HIGHWAYS.

196. H.R. 684 (Vt. 2004). AN ACT RELATING TO THE ABANDONMENT OF STATE, TOWN, AND COUNTY HIGHWAYS.

197. *Id.*

question shall be equitably divided between adjacent and abutting properties.” Such a provision would terminate any abandoned road, allowing phantom roads to evanesce into history. The provision also would not obligate any individual property owner to bring an action to quiet title or assert or defend any interest in property returned to them by abandonment of the sovereign.

For present and future private property owners and for the State of Vermont, which has an economy largely dependent upon the real estate market,¹⁹⁸ the stakes could not be higher.¹⁹⁹ If title insurance companies follow the lead of Vermont Attorneys Title Insurance, which stopped issuing policies for at least three towns in Vermont on September 1, 2004,²⁰⁰ the sale or purchase of real estate in these towns, or even in the State, could be dramatically affected.²⁰¹ The problem for title insurance companies, and thus for private property owners, is that the laws of the State of Vermont require only a limited search of the title record for any given property.²⁰² However, now that “[r]esearchers are being hired by

198. The U.S. Dept. of Commerce, Bureau of Economic Analysis finds that in 2001, the real estate market in Vermont accounted for \$2.357 billion, roughly 12.3% of a total Gross State Product of \$19.149 billion. Reg. Econ. Acc'ts., Bur. of Econ. Analysis, U.S. Dept. of Comm., (Apr. 8, 2004), available at <http://www.bea.doc.gov/bea/regional/data.htm>. This rather sizable percentage of the Vermont economy does not include the revenue derived from services associated with the real estate market, such as legal, financial, insurance, and construction. If the percentage of revenue from these services that is dependent upon the real estate market were included, the total value, and the overall percentage of the Vermont economy dependent upon real estate jeopardized by phantom roads, would certainly increase substantially. See also: Tom Gresham, *Housing Market Buoying Overall Economy*, SHELburne NEWS, Jul. 17, 2002, available at http://www.shelburnenews.com/archive/0702/0702_22_housing_market.html.

199. Harkness 3, *supra* note 18.

Andrew Mikell with Vermont Attorneys Title Insurance in Burlington[, Vermont,] said he would think carefully before underwriting any property titles in [the Town of] Chittenden. “I would probably say, ‘No, thank you, until we’ve resolved with absolute certainty that the the town says these are the roads and these are where they go[.]’” Mikell, who recently testified before the legislature on the subject of old roads, said buyers could assume the risk [posed by phantom roads] themselves [, however] banks would not offer a mortgage to someone who did. *Id.*

200. Chris Costanzo, *Title Insurance Threat Could Affect Home Sales in Bethel*, RANDOLPH HERALD, Jul. 14, 2004, available at http://www.rherald.com/news/2004/0714/Front_Page/f02.html (last visited Apr. 12, 2005).

201. *Id.* It seems likely that the other major title insurance companies will follow suit, as at least one has already suffered claims against their policies for the Town of Chittenden pursuant to a phantom road claim. “If no companies will insure titles, it would make it extremely difficult to buy or sell property in Bethel since banks require title insurance before approving home mortgage loans.”

202. *Id.*

The letter to Bethel from the title company pointed out that these roads have either never been used, or else have been unused for the past 50-200 years. [Andrew] Mikell [of Vermont Attorneys Title Insurance] noted that title searches,

towns to uncover these hidden or sleeping roads and to create rudimentary drawings depicting roads without the aid of surveyors,”²⁰³ any property in the State could be subject to a claim by a municipality of the existence of phantom roads. Such claims place little or no onus on the municipality to assert or verify such claims,²⁰⁴ other than the rudimentary research often done by unlicensed individuals.²⁰⁵ The burden of defending private property falls to the individual property owner²⁰⁶ while the expense is absorbed by the title insurance companies.²⁰⁷

The hills of Vermont are currently haunted by a curse of phantom roads, created by omissions within the State laws and of generations past. The curse of phantom roads has been inflicted upon private property owners by municipal governments which should be protecting the interests that they now place in jeopardy. However, a comprehensive and carefully crafted cure is possible through a remembrance of the fundamental principles of private property rights, and realization of the interdependence between liberty and private property.²⁰⁸

which attorneys carry out whenever property is bought, go back only 40 years. A 200-year title search that might uncover a past town right-of-way is impractical and prohibitively expensive[.] Since title insurance is based on the 40-year title searches, Mikell’s company believes it has no basis for assessing risks which might stem from ancient unused roads that might later be resurrected. However, he told The [Randolph] Herald, [Vermont] state insurance authorities have informed him that his company may not include in its policies a generic exception for such early state roads. *Id.*

203. *Id.*

204. *See supra* notes 4-29 and accompanying text.

205. *Id.*; *see also* Costanzo *supra* note 200. “Mikell was obviously referring to research such as that done by Bethel town historian John Dutton. Dutton’s research is a basis for Bethel’s road and tax map.”

206. *See supra* notes 4-29 and accompanying text

207. Costanzo *supra* note 200. First American Title Insurance Company, the second largest title insurance company in Vermont, has already suffered claims against its policies in the Town of Chittenden because of that town’s efforts to resurrect phantom roads.

208. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 551-52 (1978). “[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.” *See also* Costanzo *supra* note 200. [The solution is] the enactment of a Vermont abandonment law that would preclude the exercise of town authority over long unused town roads.