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Highway Right-of-Way Issues and the Municipal Roads General Permit

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Agenda

- What is a Town Highway?
- Where is the Right-of-Way Located? How Wide is It?
- When Does a Town Have Authority to Construct a Ditch, Turnout, or Culvert Outside the Right-of-Way?
- When Does a Town Have Authority to Discharge Stormwater from the Right-of-Way to Private Property?
- When Can the Town Remove Trees From the Right-of-Way?
- Thoughts on Anticipating and Avoiding Conflicts and Delays

What is a Town Highway?

A road over which the public has the right to travel, that the government has an obligation to maintain, and to which adjoining landowners have a conditional private right of access.

Okemo Mountain, Inc. v. Town of Ludlow Zoning. Bd. of Adjustment,
164 Vt. 447, 454 (1995)

Okemo Mountain, Inc. v. Town of Ludlow,
171 Vt. 201 (2000)

What is a Town Highway?

(12) **"Highways" are only such as are laid out in the manner prescribed by statute;** or roads which have been constructed for public travel over land which has been conveyed to and accepted by a municipal corporation or to the State by deed of a fee or easement interest; or roads which have been dedicated to the public use and accepted by the city or town in which such roads are located; **or such as may be from time to time laid out by the Agency or town.** However, the lack of a certificate of completion of a State or town highway shall not alone constitute conclusive evidence that the highway is not public. The term "highway" includes rights-of-way, bridges, drainage structures, signs, guardrails, areas to accommodate utilities authorized by law to locate within highway limits, areas used to mitigate the environmental impacts of highway construction, vegetation, scenic enhancements, and structures. The term "highway" does not include State Forest highways, management roads, easements, or rights-of-way owned by or under the control of the Agency of Natural Resources, the Department of Forests, Parks and Recreation, the Department of Fish and Wildlife, or the Department of Environmental Conservation.

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What is a Town Highway?

Occasionally, the **Town owns the land** under the highway, (i.e., “fee ownership”).

More often, the Town holds an **easement** - a group of legal rights and duties to use and maintain the land, but the land itself is owned by someone else.

The nature of the town’s ownership interest depends on how the highway was acquired.

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Where is the Highway Right-of-Way Located?

How Wide is the Right-of-Way?



Where is the Town Highway Right-of-Way Located and How Wide is It?

In the best case scenario, the Town has a **survey laying out the highway** or a **deed conveying the highway** to the Town, which specifies the highway's location and width.

Where there is **no public record** establishing the location and width of the highway, the law affords the Town **a legal presumption regarding the highway's location and width.**

Where is the Town Highway Right-of-Way Located and How Wide is It?

A roadway width of one and one half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined.

19 V.S.A. §32

The right-of-way for each highway and trail shall be three rods wide unless otherwise properly recorded. Any highway which had been designated as a trail prior to July 1, 1967 and later becomes a trail shall retain the same width of right-of-way as a trail as it had as a highway, but not exceeding three rods.

19 V.S.A. §702

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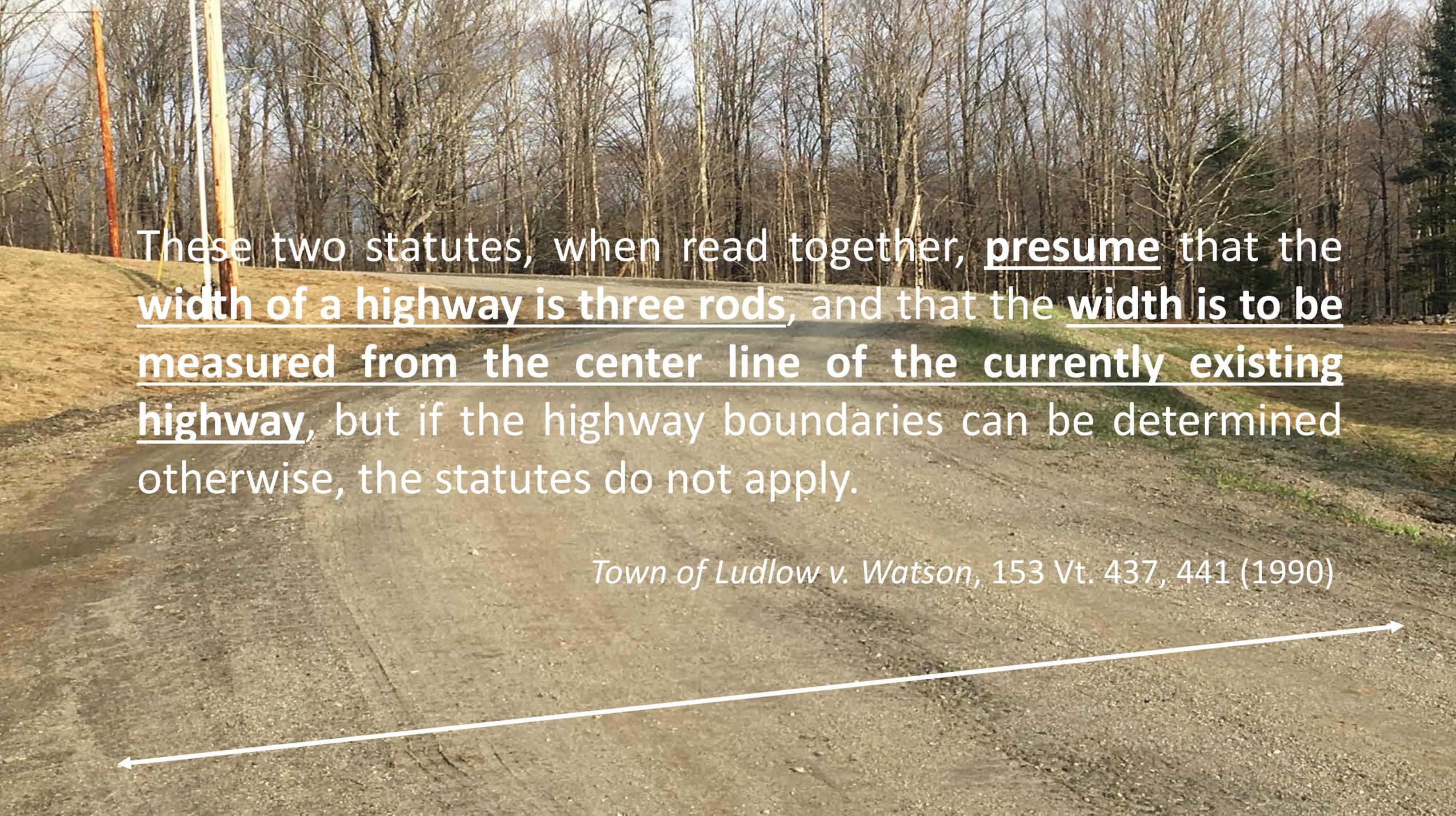
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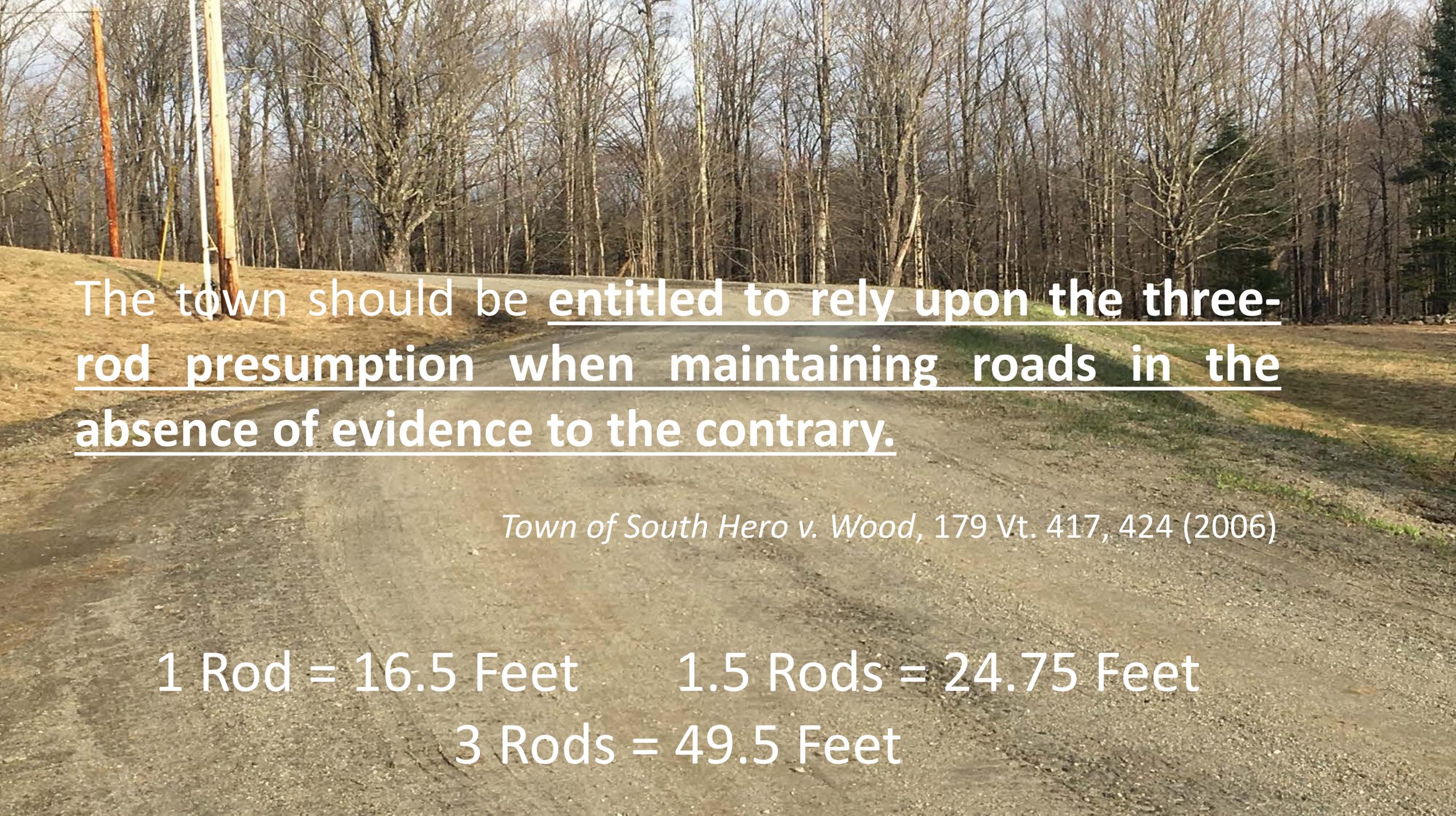
19 V.S.A. §702

A photograph of a dirt road winding through a landscape. In the background, there is a dense forest of bare trees. Two utility poles are visible on the left side of the road. The road surface is uneven and appears to be made of dirt and gravel. The text is overlaid on the middle of the image.

These two statutes, when read together, presume that the width of a highway is three rods, and that the width is to be measured from the center line of the currently existing highway, but if the highway boundaries can be determined otherwise, the statutes do not apply.

Town of Ludlow v. Watson, 153 Vt. 437, 441 (1990)

A white double-headed arrow is positioned horizontally across the lower portion of the image, pointing towards both the left and right edges.

A photograph of a dirt road winding through a wooded area. The trees are mostly bare, suggesting a late autumn or winter setting. The road is in the foreground, and the background is filled with a dense forest of tall, thin trees. The sky is visible through the branches, appearing overcast.

The town should be entitled to rely upon the three-rod presumption when maintaining roads in the absence of evidence to the contrary.

Town of South Hero v. Wood, 179 Vt. 417, 424 (2006)

1 Rod = 16.5 Feet 1.5 Rods = 24.75 Feet

3 Rods = 49.5 Feet



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When Does a Town Have Legal Authority to Construct a Ditch, Turnout, or Culvert Outside the Highway Right-of-Way?



When Does a Town Have Legal Authority to Construct a Ditch, Turnout, or Culvert Outside the Highway Right-of-Way?

In ordinary, non-emergency situations, the Town must acquire the right to construct a ditch, turnout, or culvert outside the right-of-way, either through an easement or by the exercise of eminent domain.

This would include both a temporary easement for construction and a permanent easement for placement, maintenance, and repair.

The process for a Town to acquire rights by eminent domain is described in 19 V.S.A. §923 (Notice, inspection, hearing, damages).





When Does a Town Have Legal Authority to Construct a Ditch, Turnout, or Culvert Outside the Highway Right-of-Way?

In **emergency situations**, if negotiations with the landowner are not possible or successful, and where there is **no alternative for preventing a greater harm, a Town has the right under the common law to work on private property without the permission of the landowner.** See, e.g., *Aitken v. Village of Wells River*, 70 Vt. 308 (1898) (necessity justified village's destruction of mill and dam to prevent further flood damage to highway and town).

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When Does a Town Have
Legal Authority to Discharge
Stormwater from a Highway
Right-of-Way to Private
Property?



When Does a Town Have Legal Authority to Discharge Stormwater from a Highway Right-of-Way to Private Property?

A “constructive taking” or “inverse condemnation” is an action by the government that deprives an owner of the use and enjoyment of his/her property.

Vermont courts use a **two-part test** for determining when governmental conduct amounts to a potential taking: (1) the **government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action** and (2) even where the effects of the government are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.

Regan v. Spector, 2016 VT 116 ¶ 18

When Does the Town Have Legal Authority to Discharge Stormwater from a Highway Right-of-Way to Private Property?

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When Does a Town Have Legal Authority to Discharge Stormwater from a Highway Right-of-Way to Private Property?

Courts generally find a taking of an easement only when there is an **onerous dedication of property**. When the intrusion is **limited and transient in nature** and **occurs for legitimate governmental reason**, it does not amount to a taking.

Ondovchik Family Limited Partnership v. Agency of Transportation, 2010 VT 35, ¶ 18.



When Does a Town Have
Legal Authority to Discharge
Stormwater from a Highway
Right-of-Way to Private
Property?



Does a Town Have Legal Authority to Construct a Ditch, Turnout, or Culvert Outside the Highway Right-of-Way?

Municipal Roads General Permit 3-9040. Section 6.1 Feasibility

Municipalities shall implement these standards to the extent feasible. In determining feasibility, municipalities may consider the following criteria: The implementation of a standard listed in Part 6 of this general permit does not require the acquisition of additional state or federal permits or noncompliance with such permits, or noncompliance with any other state or federal law. **The implementation of a standard does not require the condemnation of private property;** impacts to significant environmental and historic resources, including historic stone walls, historic structures, historic landscapes, or vegetation within 250 feet of a lakeshore; impacts to buried utilities; and excessive hydraulic hammering of ledge. **Municipalities shall document in the Implementation Table, for approval by the Secretary, each instance where these feasibility affects implementation of the standards.**

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What Liability Does a Town
Face for Water that is
Discharged from a Highway
Right-of-Way to Private
Property?



What Liability Does a Town Face for Water that is Discharged from a Highway Right-of-Way to Private Property?

Private Property Owners:

An upper property owner is entitled to have surface water pass to lower lands in its natural condition. However, **an upper property owner cannot artificially change the manner of flow by discharging it onto the lower land at a different place from its natural discharge. Such interference with the flow of surface water is a form of conduct that may result in a trespass or nuisance.**

Liability for trespass arises when one intentionally enters or causes a thing to enter the land of another. Thus, one who causes water to enter the land of another is liable for trespass. Even assuming water flow is an indirect invasion of property, and therefore not a trespass, interference with surface water may constitute a nuisance. **An upper property owner creates a nuisance when he or she causes water to flow onto lower lands in a manner or place different from its natural state, harming the lower property owner's interest in the use and enjoyment of that land.**

What Liability Does a Town Face for Water that is Discharged from a Highway Right-of-Way to Private Property?

An Immunity for Towns:

Building and maintaining streets, and the accompanying drainage system, are generally government functions, and no liability for injuries suffered as a result of such activities may attach.

Maintaining a town highway and its drainage system is a government function, protecting the town from any damages caused by its negligence in so doing.

Graham v. Town of Duxbury, 173 Vt. 498, 499 (2001)

What Liability Does a Town Face for Water that is Discharged from a Highway Right-of-Way to Private Property?

An Exception to the Immunity for Towns:

An exception to municipal immunity exists in circumstances where a town fails to repair a culvert necessary to allow a natural stream to pass unimpeded under a public roadway after notice that the culvert is not functioning as intended. **If a town does not repair a passage constructed for a natural stream after receiving notice that the passage is blocked, municipal immunity will not bar recovery for damages caused by the town's failure to take remedial action.**

Graham v. Town of Duxbury, 173 Vt. 498, 499 (2001)

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When Can the Town
Remove Trees in the
Highway Right-of-Way?

When Can the Town Remove Trees in the Highway Right-of-Way?

The **adjoining landowner typically owns the trees within the right-of-way** subject to the (very confusing) statutory authority of the Town to maintain and remove them.

The **Town's authority to maintain and remove a tree** depends upon the **size and nature of the tree**, its **location**, and **its purpose**, and actions undertaken by the owner.

When Can the Town Remove Trees in the Highway Right-of-Way?

The selectmen of a town, if necessary, shall cause to be cut and burned, or removed from within the limits of the highways under their care, trees and bushes which obstruct the view of the highway ahead or that cause damage to the highway or that are objectionable from a material or scenic standpoint.

Shade and fruit trees that have been set out or marked by the abutting landowners shall be preserved if the usefulness or safety of the highway is not impaired. Young trees standing at a proper distance from the roadbed and from each other, and banks and hedges of bushes that serve as a protection to the highway or add beauty to the roadside, shall be preserved. On State highways, the Secretary shall have the same authority as the selectmen.

19 V.S.A. §904

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19 V.S.A. §904

When Can the Town Remove Trees in the Highway Right-of-Way?

Shade and ornamental trees within the limits of public ways and places shall be under the control of the tree warden. The tree warden may plan and implement a town or community shade tree preservation program for the purpose of shading and beautifying public ways and places by planting new trees and shrubs; by maintaining the health, appearance, and safety of existing trees through feeding, pruning, and protecting them from noxious insect and disease pests and by removing diseased, dying, or dead trees which create a hazard to public safety or threaten the effectiveness of disease or insect control programs.

24 V.SA. §2502

When Can the Town Remove Trees in the Highway Right-of-Way?

A public shade tree within the residential part of a municipality shall not be felled without a public hearing by the tree warden, except that when it is infested with or infected by a recognized tree pest, or when it constitutes a hazard to public safety, no hearing shall be required.

24 V.S.A. §2509(a)

The Legislature has never defined “public shade tree” or “residential part of a municipality.”

In other states (e.g. Massachusetts), every tree in the public highway right-of-way is a public shade tree. In Vermont, we are left to our own devices to figure out what the “residential part of a municipality” is, and when the law applies.

When Can the Town Remove Trees in the Highway Right-of-Way?

As part of ordinary highway maintenance practices, **the Town can remove trees and brush from the highway right-of-way**. However, recognizing that trees within the Town highway right-of-way are owned by the adjoining landowner, the **Town should obtain the consent of landowner** before the trees are removed.

If consent to remove the trees cannot be obtained, then a **hearing should be held by the tree warden** under 24 V.S.A 2509.

The Vermont Supreme Court has held that cutting trees within the right-of-way without obtaining the landowner's permission and without holding a hearing is a violation of the landowner's due process rights.

Hamilton v. Town of Holland, 2007 VT 133 ¶ 17.

When Can the Town Remove Trees in the Highway Right-of-Way?

Along town highways in **built-up areas** (e.g., villages, locations within residential subdivisions) the Town should **assume that all trees are “public shade trees” located “within the residential part of [the] municipality”** and **hold a tree warden hearing** before removing the trees, regardless of whether the landowner consents to cutting the trees.

The notion is that the “public” in the “residential part of a municipality” has an interest the benefit these trees provide (e.g. shade) and ought to be heard before the trees are removed.

An exception to the tree warden hearing requirement exists if a tree to be removed is, “infested with or infected by a recognized tree pest, or when it constitutes a hazard to public safety.” 24 V.S.A. 2509.

“Hazard to public safety” should be narrowly applied. For example, if a tree is about to fall into the highway and block the road, then the tree can be removed without a hearing. On the other hand, if the hazard is prospective but not imminent, then a tree warden hearing should be held.

Does a Town Have Legal Authority to Construct a Ditch, Turnout, or Culvert Outside the Highway Right-of-Way?

Municipal Roads General Permit 3-9040. Section 6.1 Feasibility

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Thoughts on Anticipating and Avoiding Conflicts and Delays

Research and understand the scope and extent of the highway right-of-way early in the planning process.

- What **formal processes**, if any, does the Town need to complete before implementing the project? Will a tree warden hearing be required?
- What **legal rights**, if any, does the Town need to acquire to complete the project? Temporary easements for construction? Permanent easements?
- Can these rights be obtained from abutting property owners? If not, **is the project feasible** under the MRGP?

Identify property boundaries and stay within the right-of-way and easement areas. Notify abutting property owners before you begin work.

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