

*Judge Teachmont*

STATE OF VERMONT  
WINDSOR COUNTY, SS.

STANLEY and LYNN SPENCER  
and DAVID MULLER

v.

TOWN OF BARNARD

)  
)  
) Windsor Superior Court  
) Docket No. 272-5-02 Wrcv  
)  
)

FINDINGS OF FACT, CONCLUSIONS OF LAW, and DECLARATION

This matter came before the court for final hearing on September 3<sup>rd</sup> and 4<sup>th</sup>, 2003. Plaintiffs are represented by Paul S. Gillies, Esq. Defendant was represented by Timothy M. Eustace, Esq. Plaintiffs seek a declaration concerning the Town's claim that a certain town road encumbers their property.

Findings of Fact

Plaintiffs hold legal and equitable ownership interests in a parcel of land in the Town of Barnard. Town Highway 14 runs from Tower Road in Barnard to the interior of the Plaintiffs' parcel, which has long been a farm. Until 2002, maps showing town roads had shown Town Highway 14 as a dead end road, ending at a point in the interior of the Plaintiffs' land. For at least decades, it has ended at the buildings on the Spencer/Muller parcel, and has been maintained by the Town to that point.

For the past several years, a project has been ongoing in the Town of Barnard, largely through the work of John Dutton, to research and map town roads, as town maps did not completely and accurately depict all town roads of record. In 2002, the Town published a map of town roads which 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. This claim on the part of the Town precipitated this lawsuit, in which the Plaintiffs seek a declaration that the newly depicted road does not join Town Highway 14, and furthermore that it does not cross the Spencer/Muller property at any point. The Spencers are the legal owners of the parcel, which is under contract for sale to Mr. Muller.

In 1776, Nathaniel Paige bought lot 52 in Barnard. His land included a portion of what is now the Spencer/Muller parcel. At that time, there were no town roads.

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In 1779, the first public highway was laid out in Barnard and is described at Page 1 of the Barnard Highway Book, but without a survey description. It uses as reference points houses of White and Hodges: "...thence to Thomas W. White's house. . .by marked trees through said White's land by Capt. Hodges' House. . ."

Five years later, on June 10, 1784, a town road was laid out with a survey description which, in the opinion of surveyor Lisa Ginett, describes the same road that was first established in 1779, the difference in the descriptions being that the 1784 layout includes a survey description whereas the 1779 layout did not. No other surveyor who testified disagreed with her and her reasons are sound based on the descriptions. Therefore, the court finds that the 1779 and June 10, 1784 descriptions both refer to the same road, which is now called Tower Road, and is Town Highway 33. See Appendix A. As established in 1779 and 1784, this road passed through lots 39 and 40, and Thomas White owned lot 40 and Daniel Hodges owned lot 39. In 1784, Nathaniel Paige owned lot 52, which was north of the White and Hodges lots. His land included a portion of what is now the Spencer/Muller parcel, and he owned no land at any other location in Barnard.

Six days later, on June 16, 1784, the Selectboard laid out three public highways, one of which is the subject of the dispute in this case. The pertinent survey is set forth at Page 11 of the Barnard Highway Book. Despite the fact that there is a survey description of the line of the road and that it was approved by the Selectboard, this road does not appear in maps of the area or town maps, nor is there such a road in use on the ground. Whether or not it was ever constructed, at any location whether consistent or inconsistent with its legal description, is in dispute in this case. It is described as follows:

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 Shiverick Crowel's house, Said Road lying on the northward and eastward Side of Said Line.

Surveyors for both sides have attempted to locate this road on the ground, and found it virtually impossible to do. The description of the point of beginning refers to the line 'striking' the road between White (who owned lot 40 at the time) and Hodges (who owned lot 39 at the time, directly south of lot 40). From this description and the descriptions of the 1779 and 1784 descriptions of Tower Road, the "road" referred to matches the location of Tower Road.

This starting point of the description, using existing monumentation, is solid evidence that the 1784 disputed highway started at Tower Road near the lot line between lots 40 and 39.

This interpretation is corroborated by evidence that when the angles and distances are followed, the line ends in the vicinity of Shiverick Crowel's house, which can be located through historical and physical evidence: on October 1, 1785, Joshua Crowell conveyed lots 16 and 17 to Shiverick Crowel, and the location of this Crowel land is consistent with the end point of the survey description. A "large birch tree near Shiverick Crowel's house" is the only other monument, besides Tower Road, used in the survey description at Page 11. While the survey description makes no reference to town lots, it describes a road that begins between properties of White and Hodges on Tower Road, and ends near Shiverick Crowel's house.<sup>1</sup> See Appendix B.

The difficulty is that there is no evidence on the ground that is consistent with a road having been created along the line described in the 1784 survey. On the contrary, there is evidence on the ground at a few discrete locations approximately 1/3 of the way through the described line suggesting a physical road on the ground in the general vicinity, but not at locations that can be reconciled with the described line, and not particularly close to it. For example, there is a stretch of parallel stone walls approximately 41-48 feet apart (somewhat close to the 3 rod width of a public highway), a cellar hole which likely indicates a residence built next to a road, and another stone wall fragment with a gap in it. The location of these items cannot be reconciled with the described line. They are located north of the described line at some distance. In addition, there are two deeds in 1819 that include a reference to a road to the Paige house, the parcels being in the general vicinity of a portion of the described line, but not at a location that is consistent with the description of the course of the 1784 disputed highway.

All surveyors, one for the Plaintiffs and two for the Town, agree that it is not possible to reconcile the description at Page 11 with evidence on the ground. They reach different conclusions, however. Plaintiff's surveyor, Lisa Ginett, shows the described line on Exhibit 20. In an attempt to reconcile the description and ground evidence, she then ignored the monuments at the beginning and end of the survey description and, using the angles and distances set forth in the description, she attempted to rotate the described line around in different ways to try to force a reconciliation with the double stone walls, a road and stone wall to the east, and the gap in the

<sup>1</sup>The drafter of the survey description appears to have made two uses of the word "Line." Where it is first used in the description (13<sup>th</sup> word), it appears to refer to the lot line between lots 40 and 39, which was an existing line that intersected with the road. Since the first course of the road description runs parallel to the lot line (S 65 E) 1 ½ rods south of it for a distance of 58 rods, and the lot line is also a boundary line between properties of White and Hodges, the lot line, boundary line, and centerline of the highway being laid out all would appear to overlap for 58 rods. It would have been reasonable to lay out a public highway between two owners' lands, with the road straddling the boundary and providing each owner with equal frontage and equal burden. The second use of the word "Line" is at the very end of the description. Here it appears to refer to the line for which angles and distances were specified, i.e. the southeastern edge of the town highway described, given the description of "Said Road lying on the northward and eastward Side of Said Line." While there is an inconsistency between the two uses of the word "Line," such inconsistency is not material to the issues in this case as presented by the parties.



stone wall. See Exhibits 21 and 22. The results of these attempts are to move both the northern and southern ends of the line to points inconsistent with the description: the northern end is no longer at Tower Road, and the southern end is no longer near the Shiverick Crowel house. Moreover, neither of those rotations results in the disputed highway linking with Town Highway 14, and any rotation is a questionable technique, especially where the beginning and end points are described with monumentation.

Lisa Ginett's opinion is that the disputed highway is not an extension of Town Highway 14, because the original call and first course do not start at any point that matches the course described for Town Highway 14.

John Dutton, who, though not a licensed surveyor, has a considerable amount of surveying experience and expertise acquired before surveyors were required to be licensed, agrees that the 1784 described line cannot be reconciled with ground evidence. His response is to rely heavily on topography, and to gather an impression from where the road should be from different sources, including topographical features and an understanding of how roads were laid out historically. His opinion is that the first sentences in the described line are difficult to make sense of, and that it makes more sense to follow the described line beginning at the southern end with the location of the Shiverick Crowel house, which can be identified from old maps and the 1939 aerial photo that is Exhibit B. He relies heavily on the existence of the cellar hole, which is the former Elijah Aikens house and would have been located beside a road, and on the descriptions in the 1819 deeds, which refer to a road leading to Col. Paige's house, which was at a different location on the Spencer/Muller parcel than the house on that parcel is today.

He infers from this that the disputed highway led to Col. Paige's house, and that therefore it connects with what is now Town Highway 14. He does not think it is logical that the disputed highway would have started on Tower Road near the lot line between lots 39 and 40 because that requires traveling a grade that is steep, and roads were not laid out over steep grades then because they were designed for horse travel. He concludes that the description of the point of beginning is unclear and the first course in the described line is inaccurate, and calls it a transcription error. However, S 65 E is the exact course of the lot line between White and Hodges, and when topography is considered, while there is some grade, it is also apparent that the disputed highway, as it leaves Tower Road, would run generally between two peaks in the landscape near Tower Road in a manner not illogical, considering boundary lines as well as topography.

John Dutton's opinion is that the disputed highway was designed to serve the Paige property and the cellar hole property, and would logically have started at the Paige property. His opinion is that the 1784 disputed highway was used at the location shown by the dotted lines on Exhibit E, the Town's map which precipitated this litigation.

Michael Magoon is the surveyor hired by the Town for a second opinion. He also agrees that the 1784 described line of the disputed highway cannot be reconciled with ground evidence. When he followed the distances and angles starting at the Shiverick Crowel (southern) end, using

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the aerial photo (Exhibit B), he found that the starting point overshot Tower Road by 300 feet. He apparently concluded that the survey description was incorrect, even though the described line intersected with Tower Road at the northern end, or point of beginning, just as the Page 11 description of the point of beginning states. When he focused on the length of the disputed highway by relying on the total rods described in the described line, he concluded that the northern end was 500 feet short of Tower Road.<sup>2</sup>

He therefore discounted the survey description and relied heavily on field evidence, including specifically the fact that the distance between the short stretch of parallel stone walls is roughly 3 rods wide (the legally established width for a town road), and what he pointed out on the view as banks and cuts and stone walls south of the Spencer/Muller barn indicating a road running south of the Paige/Spencer/Muller buildings past the cellar hole and stone walls to the Royalton Turnpike. While the view revealed some occasional evidence of possible banks and cuts south of the historical location of the Paige residence, these were not on or near the line described in the 1784 survey, or close enough to suggest that they represented a deviation of that route. They are equally consistent with the existence of an internal farm road.

Mr. Magoon's opinion is that the disputed highway as used connects with Town Highway 14 on the Spencer/Muller property at the north end and overlaps with the later-built Royalton Turnpike at the southern end. He acknowledges that in order to reach this conclusion, he has to change the angles and reduce the distances of the 1784 survey, as well as ignore the description of the point of beginning, and that even adopting his interpretation, the northern end of the 1784 disputed highway does not match either where the Paige buildings were in 1784 or the southern point of Town Highway 14 as laid out in 1788.

Returning to the history following the 1784 layout of the disputed highway, the next pertinent event occurred in 1788, four years later, when the voters of the Town accepted the layout of a new road, which was a spur off Tower Road, starting at a point north of the beginning of the 1784 disputed highway, and running a distance of 1006 feet into Paige's property. See Appendix C. This is the present-day Town Highway 14. A recent State Aid map of town roads shows the length of this road as 0.4 mile, which is about 1000 feet longer than the length of the road as originally laid out, but the parties do not dispute that it is a town road with a length of 0.4 miles.

In 1801, a major road that was not a town road was laid out in the neighborhood. This was the Royalton Turnpike, which ran from Windsor to Montpelier. It was a straight north-south road lying east of Tower Road and the Paige property, and would have opened up access to undeveloped land considerably. Some of the attempts to map the 1784 disputed highway suggest that a portion of the Royalton Turnpike overlapped with a portion of 1784 disputed highway (Exhibits 20, B1 overlaid on B, and F1 overlaid on F). It appears that access to the parallel stone

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<sup>2</sup>His overlay of the literal description of the 1784 line of the disputed highway on the aerial photo shows it crossing a portion of what is now Spencer/Muller land.

walls, the stretch of stone wall with a gap in it, and the Aikens cellar hole could have been off the Royalton Turnpike, whether or not such access was a town road, or whether or not any road went all the way to the 1788 spur on Paige's property (now Town Highway 14). See Appendix D.

In 1819, Joshua Freeman conveyed two adjacent properties from what he owned, which was south of Paige land. These lots were later subsumed in the Spencer/Muller chain. The descriptions in the two deeds both refer to a road leading to Paige's dwelling house, and the road itself is not conveyed. It is not described as a town road, but John Dutton relied on these descriptions heavily in concluding that the road described is the disputed highway, and that it ran past the cellar hole (which was Freeman's house and became Elijah Aikens house as a result of one of the transfers) to Paige's house.

There are three problems with this theory. First, there is not sufficient evidence to support a finding that any such road, even though it probably existed, was a town road as opposed to a private road. Second, there is not sufficient evidence to show that such road actually linked with the spur created in 1788 off Tower Road, the present day Town Highway 14. It could have merely approached the Paige dwelling from the south, whereas the 1788 spur led into the Paige property from the north. Finally, the Aikens cellar hole is way off the course of the line described in the survey at Page 11. It is simply not close enough to the line described at Page 11 to, by itself, support a finding that there was a road next to the cellar hole that also went between the stone walls and the gap in the stone wall (both of which are also way off course) all the way north to Paige's dwelling, and that such road is the 1784 disputed highway.

In 1855, Doten published a map of roads in Barnard. Its purpose was to help people find their way around. It depicted some roads, whether they were town roads or not, but not all roads in existence at the time. It shows Tower Road, the Royalton Turnpike, and the 1788 spur leading to the property of A. Howe, a prior owner of the Spencer/Muller parcel. It does not show any other road in the location of the 1784 description of the disputed highway. Neither does it show any road in the vicinity of the parallel stone walls, stone wall with gap, or cellar hole.

In 1869, Beers Atlas was published. It does not show all roads in existence at the time, and does not purport to be a record of town roads. It shows Tower Road, the Royalton Turnpike, and the 1788 spur leading into the Paige/Spencer/Muller property (then Leavitt), but does not show a road in the location of the 1784 description of the disputed highway. Neither does it show any road in the vicinity of the parallel stone walls, stone wall with gap, or cellar hole.

After the 1927 flood, town roads were numbered for the first time so that they could be identified in order to qualify for state aid in the rebuilding and maintenance of town roads. Starting in 1931-32, maps of town roads were created to show roads qualifying for state aid. The state aid map for Barnard does not show a road in the location of the 1784 description of the disputed highway. Neither does it show any road in the vicinity of the parallel stone walls, stone wall with gap, or cellar hole.



Town records show that the highway laid out by the Town in 1784 and described in the Highway Book at Page 11 has never been formally discontinued.

### Conclusions of Law

The parties disagree about what must be proved in this case. Plaintiffs argue that their burden is to show (1) that the Town is wrong in its claim that the 1784 disputed highway links up with Town Highway 14, and (2) that no portion of the 1784 disputed highway crosses their property. They argue that they do not have to go further and prove where the 1784 disputed highway is actually located on the ground. They claim they have met their burden, and that the court should declare that no town highway runs from Town Highway 14 across their property to the Royalton Turnpike, and further that no town highway encumbers their property at any point.

The Town argues that it has presented sufficient record and field evidence to support its assertion of the location of the 1784 highway, and that the Plaintiffs have failed to produce evidence to rebut this presumption. The Town appears to be arguing that it enjoys a presumption in favor of its location of its town highway, and that in order to overcome this presumption, the Plaintiffs have the burden of proving a different and specific location of the highway.

The court agrees with the Town that it should enjoy the benefit of a presumption of accuracy. This is based on a presumption of good faith on the part of town officers, and on a policy that the Town should not have to spend resources responding to claims of property owners unless the owner presents a credible basis for a claim that a town road does not encumber the owner's property at the location asserted by the town. A similar presumption is used for appeals of property tax assessments: the value set by the listers in the Grand List is presumed to be accurate, and in order to overcome this presumption, an owner is obliged to come forward with specific evidence. Kruse v. Town of Westford, 145 Vt. 368, 371 (1985). However, any admissible evidence may rebut the presumption. Woolen Mill Associates v. City of Winooski, 162 Vt. 461, 463 (1994). In property tax appeal cases, once the presumption is overcome, the court (or State Board of Appraisers) has the obligation to proceed to the next step and establish the value of the owner's property for tax purposes. This is because such a value is needed for the annual assessment of property tax liability.

This case differs from the tax assessment situation, however, by its very nature. There is no statute that requires either the Town or this court to establish the exact location of town highways for any particular purpose such as an annual levy to fund public services. Plaintiffs are only seeking a declaration that the 1784 highway does not affect their land; they are not seeking to establish where the 1784 highway is. The Town has not sought declaratory relief in the form of establishing exactly where the 1784 highway lies on the ground, despite an invitation from the court to do so if it was seeking such an outcome.

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Therefore, it is the court's conclusion that the Town enjoys a presumption of the validity of its location of the 1784 town highway, and that the Plaintiffs have the burden of overcoming that presumption in order to prove entitlement to relief. It is not, however, necessary for the Plaintiffs to prove the actual location of the 1784 highway. In fact, it would be beyond the jurisdiction of this court, based on the claims before it, to make a declaration of the location of the 1784 highway. It is nonetheless necessary for the Plaintiffs to prove, by a preponderance of the evidence, each of the two points on which they seek a declaration: (1) that the Town's claim that the 1784 highway links with Town Highway 14 is wrong, and (2) that the Town's claim that the 1784 highway encumbers the Plaintiffs' property is wrong.

The Town's claim that the 1784 disputed highway links with Town Highway 14

Plaintiffs have overcome the presumption of validity of the Town's claim on this point by the evidence of the description of the point of beginning and first course in the survey description at Page 11 of the Barnard Highway Book of the 1784 disputed highway. This description provides strong evidence that the 1784 disputed highway begins on Tower Road near the lot line of lots 39 and 40 rather than at any point along where Town Highway 14 is located, and proceeds along the same course as the lot line between lots 40 and 39. Since Plaintiffs have overcome the presumption of validity, the question then becomes whether they have sustained their burden of proof to show that the Town's claim of a linkup between Town Highway 14 and the 1784 disputed highway is wrong.

A preponderance of the evidence shows that the 1784 disputed highway started on Tower Road (Town Highway 33, established in 1779 and 1784). The description of the point of beginning is based on a monument that can be located and is consistent with other evidence about what was located on Tower Road: White owned lot 40 and Hodges owned lot 39 immediately to the south; the 1779 layout suggests that they had houses on their lots on that road; the lot line between lots 40 and 39 intersected with Tower Road between properties of White and Hodges; and the reference to "road" is consistent with the establishment of Tower Road as a town road first in 1779 and by a supplemental survey description six days prior to the survey at Page 11.

The survey of the 1784 highway describes monuments only at the two ends. At one end is an intersection with the road between White and Hodges; at the other end is a large birch tree near Shiverick Crowel's house. When determining the intent of the survey, these true monuments are far more significant than any other evidence on the ground that was not mentioned in the document. See Barr v. Guay, 125 Vt. 1, 3-4 (1965) (impact of markings on ground is weakened if they are not set out as monuments by the deed); Haklits v. Oldenburg, 124 Vt. 199, 202-04 (1964) (description in deed cannot be altered by markers that were not mentioned in the written instrument).

Additional corroborating evidence that the 1784 disputed highway began from Tower



Road is that when the 1788 spur (now Town Highway 14) was laid out in 1788, four years later, it is described with a complete description which makes no reference whatsoever to any intersection or linking or overlap with the 1784 disputed highway. Neither White nor Hodges owned property near the 1788 spur and their properties are not referenced in 1788, yet they were used as monuments in the 1784 disputed highway description. Furthermore, the testimony of Michael Magoon shows that even relying on the distances of the 1784 disputed highway description and being flexible about the courses, he cannot make the northern end of the 1784 disputed highway match either the southern end of the 1788 description of Town Highway 14 or the southern end of Town Highway 14 as it is depicted on the State Aid map or as it is maintained by the Town. This evidence shows that when Town Highway 14 was laid out in 1788, it was established independently of the 1784 disputed highway, rather than as an overlay or extension of it or an alternate route. This undercuts the proposition that there is any continuity between the course of the 1784 disputed highway and the spur into Paige's property established as a town road in 1788. Finally, the Town's position requires ignoring not just the described point of beginning in the survey description, but the first six courses.

While there may have been a way commonly used by persons in the area to link the 1788 spur and another road to the south (which could have been a portion of the 1784 disputed highway or some other road), such a way could well have been private rather than public. More importantly, the issue before the court is not whether such a way was used, but whether Plaintiffs have proved that the Town's position with respect to where the 1784 disputed highway starts at its northern end is incorrect. If Plaintiffs prove the Town's starting point is wrong, the Town has no other basis for claiming that the 1784 disputed highway and the 1788 spur link together on Plaintiffs' land. The Town may only claim a road on private property if it was laid out by proper statutory process, which provides protection for landowners.

It is true that sometimes roads are actually in use at locations that are at variance from their legal descriptions. The Legislature and the Supreme Court have recognized that an "existing traveled way" may deviate from the line originally established, because "the precise location of roadways shifts over time." Town of Ludlow v. Watson, 153 Vt. 437, 441 (1990) (discussing 19 V.S.A. § 32). It appears that the Town is relying on such a principle in making its argument that ground evidence should be the basis for a finding of actual use. It asks the court to use such a finding as the basis for a derivative finding that the 1784 disputed highway and the 1788 spur either linked up or overlapped on Plaintiffs' land.

However, the circumstances of this case do not show an "existing traveled way" with a deviation caused by usage over time. Rather, there is only spotty evidence of any traveled way ever having existed at all, and the evidence concerning such road fragments cannot be reconciled or explained in relation to the line established by the 1784 survey. The fragments are simply too sketchy and too far off course for the court to find that they correspond to the course of the 1784 disputed highway. There is also insufficient evidence to show that the 'road use' relied on by the Town was use of a public highway, rather than a private roadway.

Where, as here, there is no current road on the ground, the road originally laid out was specifically described by survey with a starting point described with identifiable monumentation, the evidence of historical road fragments in the vicinity places them way off the course of the described line, and the evidence of historical road use does not show that the use was as a public highway, the court must recognize only the description of the location of the public highway that is included in the written description recorded in the Barnard Highway Book, at least with respect to the point of beginning and first course, the only portion relevant to this portion of the case. The court cannot reform the terms of the written instrument unless the evidence establishes a mistake beyond a reasonable doubt. Vermont Shopping Center v. Pettengill, 125 Vt. 145, 153 (1965) (citing Ward v. Lyman, 108 Vt. 464, 467 (1937)). In this case, there is insufficient evidence from which the court could find either that the 1784 disputed highway was linked to or overlapped with the 1788 spur when that spur was created in 1788, or that the public intended to use a link between the Royalton Turnpike and Town Highway 14 as a substitute or deviation from the course described for the 1784 disputed highway.

The preponderance of the evidence is that the beginning point of the 1784 disputed highway was from Tower Road at the lot line between lots 40 and 39, and that it proceeded for 58 rods along the lot line between lots 40 and 39, along the boundary of White and Hodges. Therefore, it could not have started at any point along Town Highway 14. Plaintiffs have proved that the Town's claim that the 1784 disputed highway links with Town Highway 14 at the southern end of Town Highway 14 is incorrect. Plaintiffs are entitled to declaratory relief on this point.

The Town's claim that the 1784 disputed highway encumbers the Plaintiffs' property

Plaintiffs have overcome the presumption of validity of the Town's claim on this point by the evidence that the line described in the 1784 survey cannot be located on the ground. Since Plaintiffs have overcome the presumption of validity, the question then becomes whether they have sustained their burden of proof to show that the Town's claim that the 1784 disputed highway encumbers Plaintiff's property at any point is wrong.

Even Lisa Ginett, Plaintiffs' surveyor, conceded that the 1784 disputed highway may cross Plaintiffs' property somewhere, even if it is not exactly at the location claimed by the Town and shown by the dotted lines on Exhibit E. There is evidence that a road was in use on land now owned by the Plaintiffs: the cellar hole is on the Plaintiffs' property, and the 1819 deeds describe parcels now subsumed in the Plaintiffs' property and refer to a road leading to Paige's house that was excepted from conveyances of parcels of adjacent parcels. Whether or not such road is the 1784 disputed highway will not be determined by this court in this case, because as previously noted, the court does not have jurisdiction in this case to declare and fix a physical location for the 1784 disputed highway.

Although the Plaintiffs have proved that the 1784 disputed highway started off Tower Road and proceeded along the boundary line of White and Hodges, and not where the Town

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asserted it started, it is nonetheless possible that other evidence, not introduced at this trial, would show that a deviant location of the middle portion of the 1784 disputed highway was established and used in the vicinity of the stone walls and cellar hole, even though the line described in the 1784 survey appears to be south of these places.

In the light of this evidence, Plaintiffs' evidence is not strong enough to establish by a preponderance of the evidence that the 1784 disputed highway does not affect Plaintiffs' property at all. While the court has found above that Plaintiff has proved that the 1784 disputed highway does not link with Town Highway 14, the court cannot find that the 1784 disputed highway does not encumber Plaintiffs' land at any location. Therefore, Plaintiffs are not entitled to the declaratory relief they seek on this point.


### Summary

Plaintiffs, having proved by a preponderance of the evidence that the 1784 disputed highway does not join Town Highway 14, are entitled to a declaration to that effect. Because they have not proved by a preponderance of the evidence that the 1784 disputed highway does not cross or encumber their land at any point, they are not entitled to a declaration that the 1784 disputed highway does not touch upon or otherwise encumber their property. The court makes no declaration with respect to the specific location of the 1784 disputed highway.

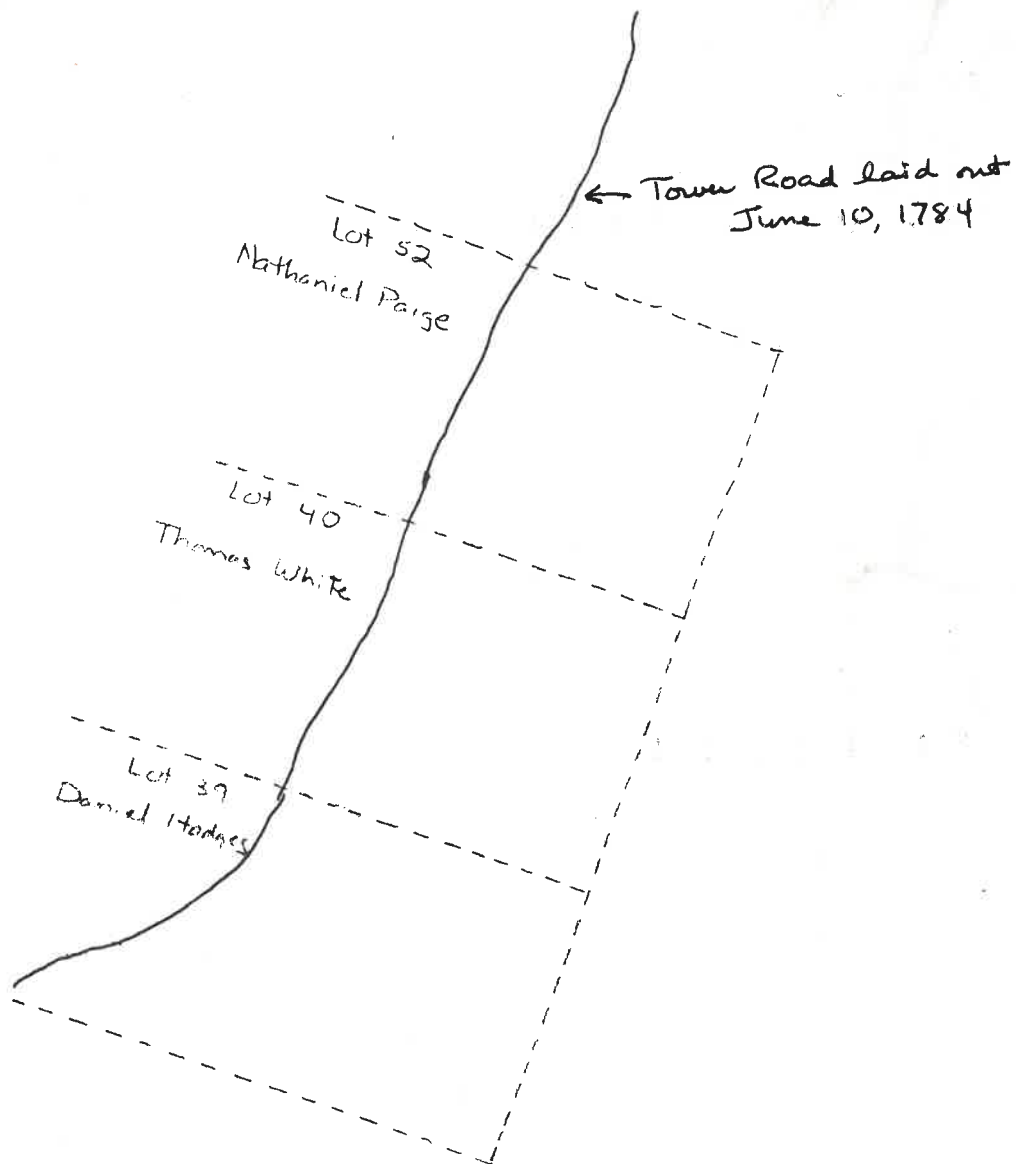
### DECLARATION

The town road described at Page 11 of the Barnard Highway Book, laid out by the Selectboard of the Town of Barnard on June 16, 1784, does not intersect with Town Highway 14 on Plaintiffs' property.

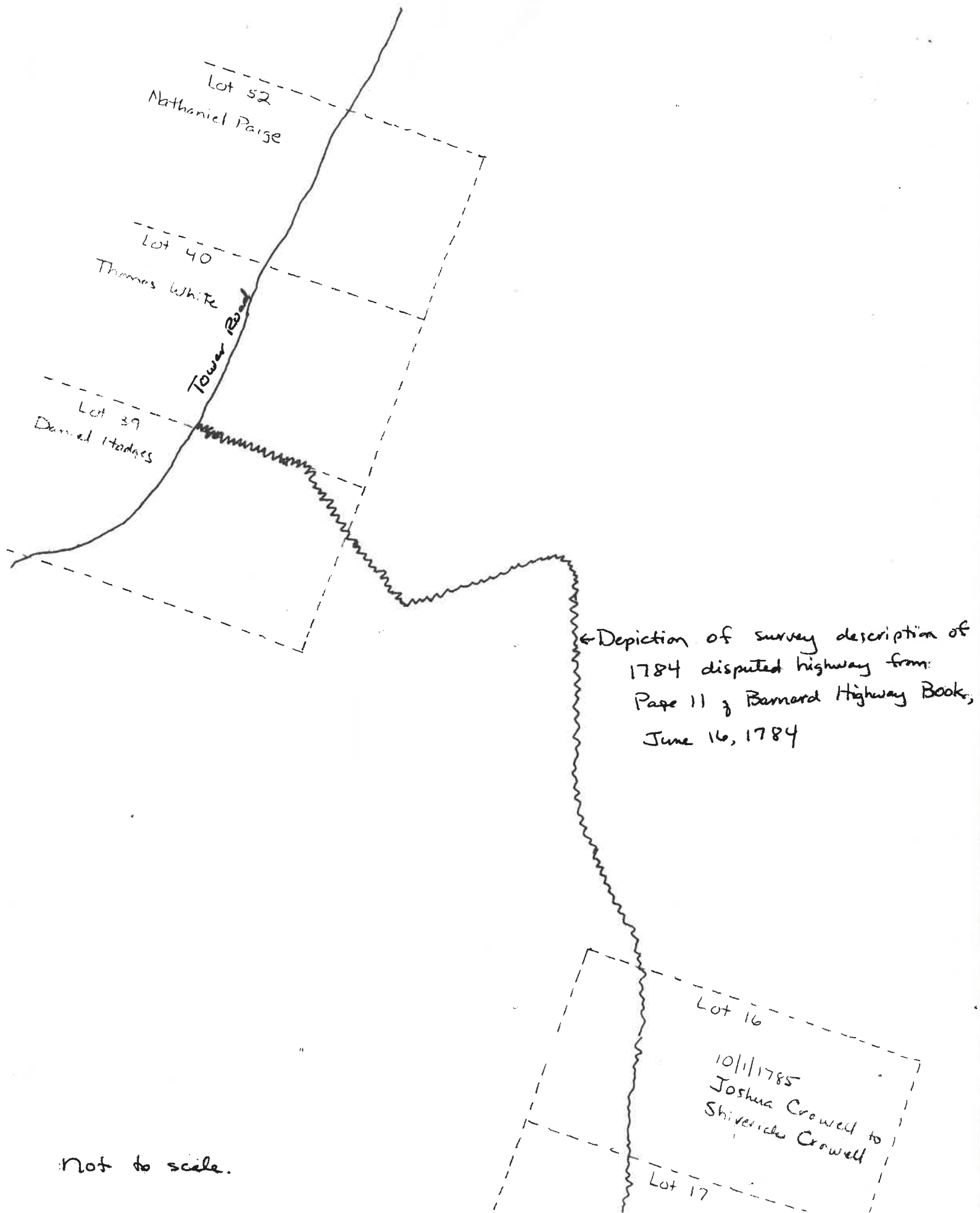
Dated at Woodstock, Vermont, this 2<sup>nd</sup> day of February, 2004.

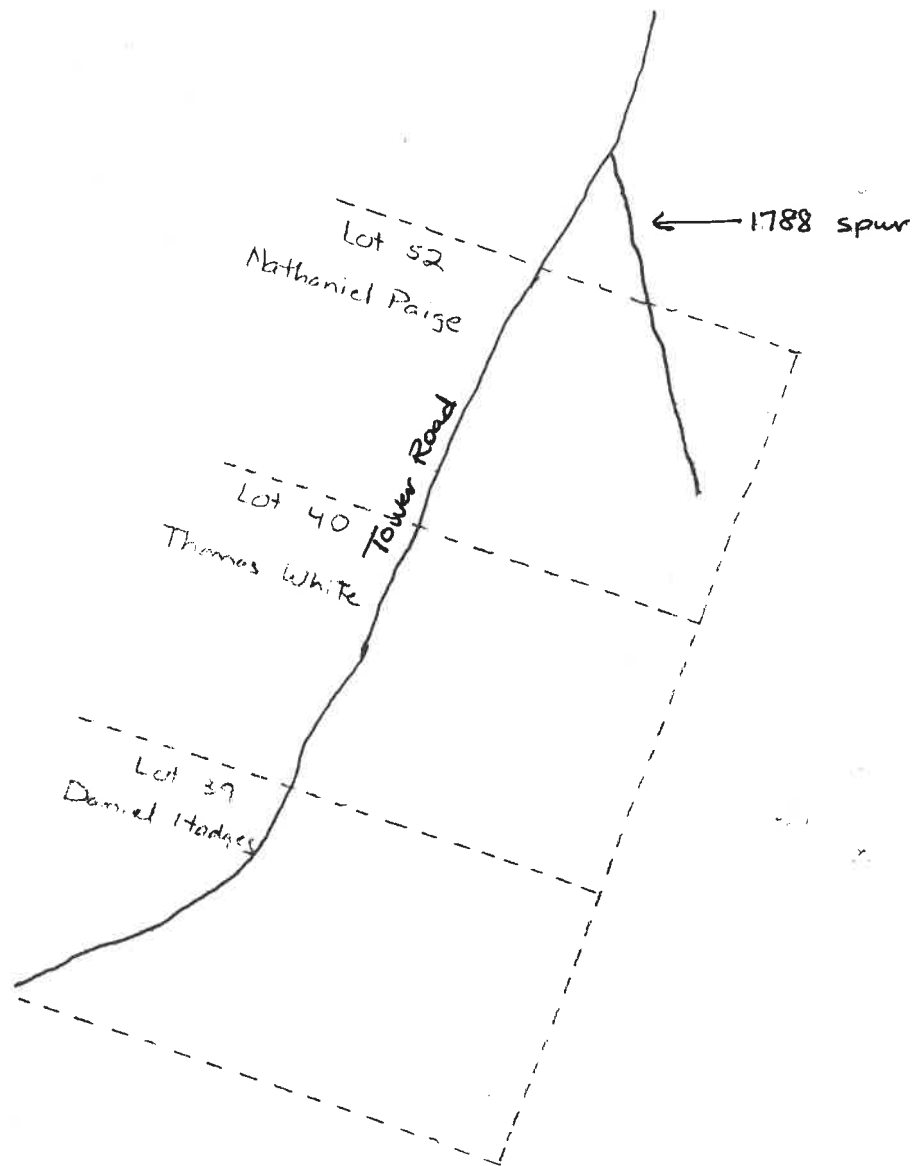
  
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Hon. Mary Miles Teachout  
Presiding Judge





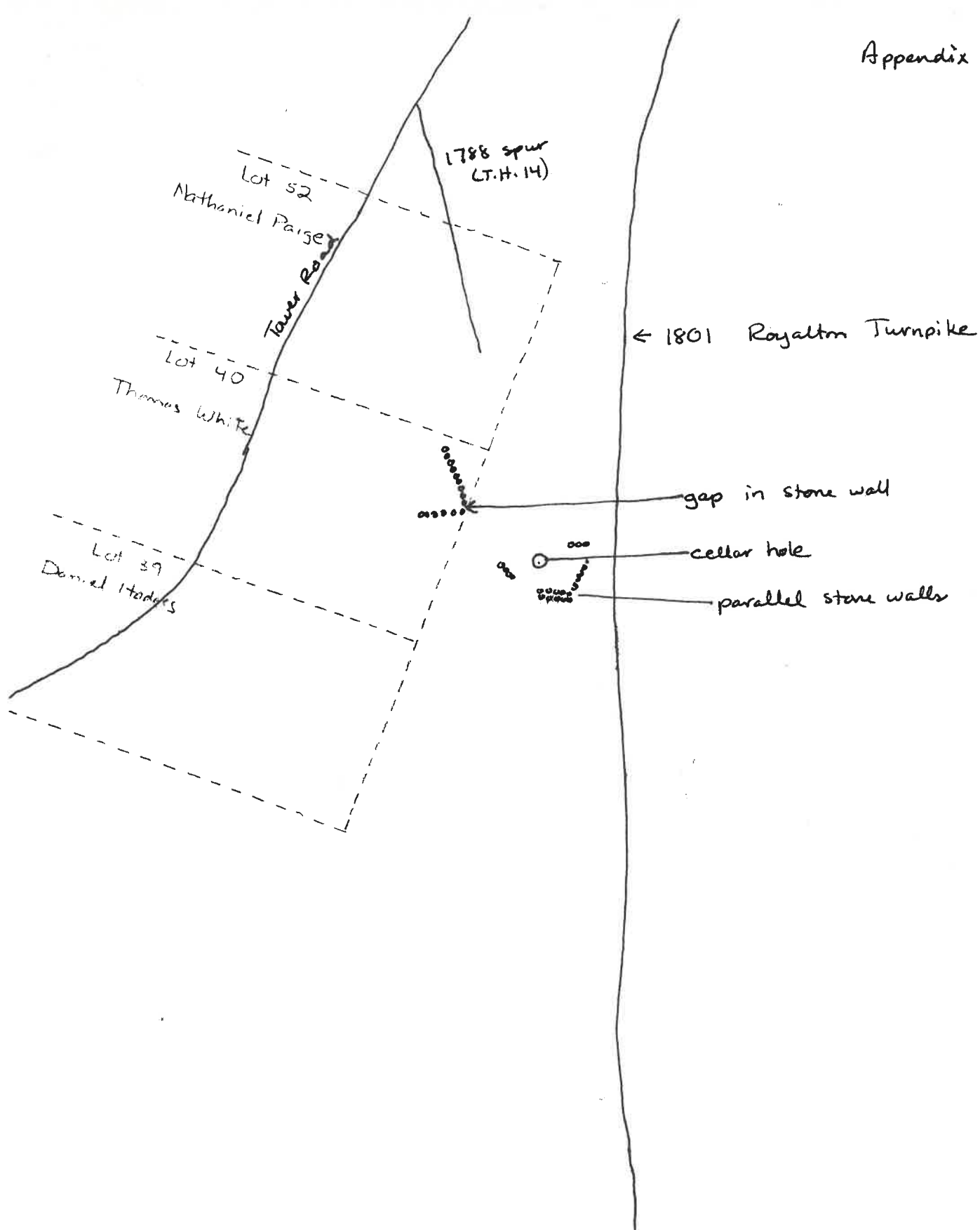
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