

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-366

MAY TERM, 2002

	}	APPEALED FROM:
	}	
Town of Hubbardton	}	Rutland Superior Court
	}	
v.	}	DOCKET NO. S0395-99RcC
	}	
Phil Marcell	}	Trial Judge: Richard W. Norton
	}	
	}	
	}	

Trial Judge:

In the above-entitled cause, the Clerk will enter:

Plaintiff Town of Hubbardton appeals from a superior court judgment dismissing its action for damages and injunctive relief, under 19 V.S.A. § 1105, 1108, and 1111, against defendant Phil Marcell. The Town contends the trial court erred in: (1) finding that the Town had attempted and failed to comply with the statutory requirements for laying out a public highway; and (2) failing to address its argument that the road in question had been established as a public highway by dedication and acceptance. We agree with the latter contention, and therefore reverse and remand.

As found by the trial court, the underlying facts are as follows. Defendant Marcell lives in the Town on Ganson Hill Road, also known as Town Highway 15, which runs east from Vermont Route 30. On several occasions, Marcell has dug a ditch across the road to drain water from his property. The ditch has interfered with the flow of traffic on the road. Road crews from the Town have filled in the ditch and regraded the road to eliminate the ditch, but Marcell has redug it, sometimes within twenty-four hours of the repairs by the road crew. In addition, on at least two occasions Marcell has padlocked shut a gate at the entrance to Bridge 18, located on Gaston Hill Road to the east of Marcell's property, thereby restricting access to the bridge and road. Marcell also has placed stones and other objects and planted trees near the edge of the road, in portions the Town considers its right- of-way. All of the foregoing actions were taken without the Town's permission or the necessary permits.

After Marcell refused to comply with the Town's requests to refrain from interfering with access to and across the road and bridge, the Town brought this action for damages and injunctive relief, under 19 V.S.A. §§ 1105, 1108, and 1111, which prohibit obstructing or injuring a public highway, or installing a sewer or water line across a public highway without a permit. At a hearing on the complaint, Marcell largely acknowledged the Town's allegations, but argued that Gaston Hill Road was not a public highway subject to the statutes because the Town had attempted in 1974 to lay out the road as a public highway in accordance with 19 V.S.A. §§ 343, 344 (since repealed) but had failed to comply with the then existing statutory requirements that it survey the road and record the survey with the town clerk. The Town admitted that it had not been able to locate such a survey in its records, but argued that Ganson Hill Road was a public highway under the alternative theory of dedication and acceptance, based on evidence of long public use and maintenance of the road, and references in Marcell's chain of title to the "highway" as constituting defendant's property line.

In this regard, the Town adduced evidence noted in the court's findings that an 1869 atlas contained a Town map depicting the road now known as Ganson Hill Road/Town Highway 15; that Town reports from 1897/1898 and

1898/1899 refer to work done and money paid by the Town for upkeep of Ganson Hill Road; and that Ganson Hill Road appeared as a town highway/state aid road on a 1947 Rutland County Highway and Transportation Map, and General Highway Maps of Rutland County dating from 1963 and 1970. The court also found that deeds in Marcell's chain of title dating from the 1950's consistently referenced Ganson Hill Road as the "highway" forming the property's northern boundary.

The trial court nevertheless agreed with Marcell's argument that the Town's complaint failed because Ganson Hill Road was not a public highway, concluding that the Town had attempted to lay out the road as a public highway in 1974 under former §§ 343, but had not recorded a survey of the road as required by former § 344. Inexplicably, however, the court failed to address the Town's alternative argument that Ganson Hill Road was a public highway by virtue of dedication and acceptance. The court dismissed the complaint for failure to state a cause of action, and entered judgment for Marcell. This appeal followed.

The Town contends the trial court erred in finding that it had attempted and failed to lay out Ganson Hill Road as a public highway in 1974 under the statutory procedures then in effect. Although the court cited no evidence to support its finding, the record contains one document a 1987 statement of findings by the Town selectmen which describes Town Highway 15 as having been "laid out by the proprietors of the Town of Hubbardton, Vt. in June 1974." The document in question had nothing to do with laying out Ganson Hill Road as a highway, but rather was a formal reclassification of a portion of the road. As against this one sentence, which the Town characterizes as an inartful misstatement of the Town's overall 1974 recertification of its state-aid highways, the Town notes the extensive record evidence suggesting that it had accepted the road as a public highway and had expended public funds to maintain it for nearly one hundred years prior to 1974. Thus, there was no purpose to be served through an effort to lay out the road as a public highway through the statutory process.

We need not resolve the question, however, for even if the trial court were correct we perceive no reason why a flawed statutory procedure in 1974 would invalidate a prior dedication and acceptance. Our statutes define public highways as including those "laid out in the manner prescribed by statute . . . or roads which have been dedicated to the public use and accepted by the city or town in which such roads are located." 19 V.S.A. § 1(12) (emphasis added). This Court, moreover, has frequently observed that "[a] highway or public road may be established by statute or by dedication and acceptance." *Okemo Mountain, Inc. v. Town of Ludlow*, 164 Vt. 447, 454 (1995); accord *Cersosimo v. Town of Townshend*, 139 Vt. 594, 595 (1981) (methods for laying out public roads include "statutory condemnation, and dedication and acceptance"); *Town of Springfield v. Newton*, 115 Vt. 39, 43 (1947) ("A highway . . . is established either by regular statutory proceedings, or by dedication and acceptance.").

The trial court did not cite, nor have we found, any authority indicating that an invalid statutory attempt to lay out a public highway would void an earlier dedication and acceptance. Thus, even assuming that the court's findings and conclusion concerning the statutory proceedings were correct, the trial court should have addressed the Town's alternative claim that Ganson Hill Road was a public highway by virtue of dedication and acceptance. See *New England P'ship, Inc. v. Rutland City Sch. Dist.*, ___ Vt. ___, ___, 786 A.2d 408, 413 (2001) (trial court has duty to make all findings necessary to support its conclusions, resolve issues before it, and provide adequate basis for review). Because the issue of whether there has been a dedication and acceptance is a mixed question of law and fact, *Smith v. Town of Derby*, 170 Vt. 553, 554 (1999) (mem.), we conclude that the case must be remanded to the trial court to address this issue.

Reversed and remanded.

BY THE COURT:

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

