

ANCIENT NEW ENGLAND HIGHWAYS: THE HANOVER "GREENWAYS" CONTROVERSY

INTRODUCTION

To say that ancient discontinued highways are rarely the subject of controversy is an understatement. Usually such highways have long ago been forgotten. If an ownership controversy does somehow emerge, the well-settled general rules on highway ownership can be applied to quiet the dispute quickly and with legal certainty. The fee¹ to a highway is in the abutting landowners; the public has only an easement² or right of way.³ Interestingly enough, several ancient highways, unused for over a hundred years, were "discovered" in Hanover, New Hampshire, in 1975. Because of their unique origin, established New Hampshire highway law was seemingly inapplicable. A serious ownership controversy arose between the town and private property owners over whose land the discontinued highways traversed. These ancient highways came to be called "greenways" in Hanover.

After months of study, discussions, accusations, letters, fliers, and petitions, Hanover voters decided the fate of the greenways at a special town meeting held on November 5, 1983. The town relinquished its rights to the greenways by a vote of 352-350.⁴

This note examines the historical and legal background of the greenways controversy. It is divided into four main sections. Section one contains a short overview of the modern setting. Section two gives the historical background. Section three examines Hanover's claim of title, while section four presents historical and legal arguments opposing Hanover's claim of title. Finally, the note concludes that Hanover's claim of ownership to the greenways was historically and legally unjustified.

1. An absolute or fee simple estate "is one in which the owner is entitled to the entire property, with unconditional power of disposition . . ." BLACK'S LAW DICTIONARY 554 (5th ed. 1979).

2. An easement is "a right of use over the property of another." BLACK'S LAW DICTIONARY 457 (5th ed. 1979).

3. A right of way, "as used with reference to right to pass over another's land, it is only an easement; and grantee acquires only right to a reasonable and usual enjoyment thereof with owner of soil retaining rights and benefits of ownership consistent with easement." BLACK'S LAW DICTIONARY 1191 (5th ed. 1979).

4. Valley News, Nov. 7, 1983, at 1, col. 1. A map of Hanover's greenways is included herein at Appendix A.

I. THE MODERN SETTING—AN OVERVIEW

Beginning in 1975, Hanover sought to establish a series of trails, called greenways, for public use on discontinued highways running throughout the town. These old highways crossed private owners' property. Some of the ancient roads were still distinguishable as pathways, while others had completely vanished.

An examination of the origin of the word greenways provides a more detailed background to the controversy. Certain sensitive wildlife areas surrounding urban Hanover, including town forests, marshes, and open space lands, had been set aside from intensive development by 1975 and designated as a "greenbelt." In March of that year, Hanover adopted a master plan which, among other things, called for the Conservation Commission to extend the greenbelt concept into the rural areas of the town. The Conservation Commission responded by establishing the Etna-Hanover Center Natural Areas Study Committee⁵ which first used the term greenways to describe a proposed network of conservation-recreation pathways which would connect the greenbelt districts. The Commission proposed that unmaintained Class VI highways⁶ serve as a core of the greenway concept. In addition, the Commission "discovered" that the town owned several strips of land which were formerly ancient highways. These strips of land were placed under the Commission's supervision and designated as greenways.

Hanover claimed ownership of the greenways because of the

5. The Etna-Hanover Center Natural Areas Study Committee was established by the Hanover Conservation Commission in March 1975, "to develop a plan for identifying and protecting natural areas, not only to satisfy the expressed desire of the town, but also to fulfill a prerequisite for receiving federal funding of conservation/recreation open space lands." Hanover League of Women Voters, Background Information Sheet 2 (Sept. 1983).

6. The New Hampshire statutes define five classes of maintained roads. A sixth class is described as follows:

Class VI Highways shall consist of all other existing public ways, and shall include all highways discontinued as open highways and made subject to gates and bars, and all highways which have not been maintained and repaired by the town in suitable condition for travel thereon for 5 successive years or more.

N.H. REV. STAT. ANN., § 229:5(VII) (1982). A road can be discontinued as an open highway and made subject to gates and bars only through a town meeting. While under gates and bars, the road continues to exist as a public highway although unmaintained. However, if a town meeting votes to discontinue an open highway without subjecting it to gates and bars, then the underlying land is freed of public highway use and reverts to the previous owners, usually the abutters.

unique way these old highways were created.⁷ Roads in Hanover were laid out in the latter part of the eighteenth century either on highway allowances or on land acquired by the town in exchange for an equivalent portion of unused highway allowance land.⁸ Highway allowances⁹ were strips of land specifically reserved in the town charter and in the original proprietary surveys for highway purposes. In the original surveys, the allowances crisscrossed the town more or less northeasterly to southwesterly in strips of land six, eight, and ten rods wide,¹⁰ and in strips four rods wide extending northwesterly to southeasterly.¹¹ Every 100 acre lot in the first and second division of surveyed lots was bounded on one, two or even three highway allowances.¹² Thus, a landowner could be compensated from allowances bordering his property if an exchange of land was necessary. If a highway were established on a portion of an original highway allowance, neither exchanges nor surveys were necessary. Highways were surveyed in the late eighteenth century after a road had been laid out and used, primarily to determine how much land should be exchanged from the highway allowances as compensation to adjoining lot owners over whose land an actual highway ran.¹³

Hanover claimed unquestionable title to road sections lying across the original highway allowances.¹⁴ In addition, the town claimed to have acquired title to roads established over the portions acquired in exchange for the highway allowances.¹⁵ The town's rationale for ownership was twofold. First, in the original 1761 Hanover Town Charter, the highway allowances were reserved for public use. Thus, when the highways were laid out and established, the town acquired ownership.¹⁶ Second, at that time

7. L. Gardner, Hanover Town Attorney, Town of Hanover Greenways 3 (June 8, 1983) (Legal Memorandum, on file in Hanover Town Office Building) [hereinafter cited as Gardner Memorandum].

8. Goldthwait, *Hanover Roads*, in J. K. LORD, HISTORY OF HANOVER, NEW HAMPSHIRE, app. II (1929) [hereinafter cited as *Hanover Roads*].

9. Highway allowances are also referred to as highway allotments and highway reserves.

10. A rod is a unit of length commonly used in early surveys and equal to sixteen and one-half feet.

11. See *Hanover Roads*, *supra* note 8, at 303. See also Appendix B herein illustrating the highway allowance grid.

12. *Id.*

13. *Id.*

14. Gardner Memorandum, *supra* note 7, at 1.

15. *Id.*

16. Letter from H. Bernard Waugh, Jr. to Richard Hauger, Acting Town Manager (July 5, 1983) (discussing Hanover greenways in response to David H. Bradley's letter of June 20,

the word "exchange" meant exchange of fee simple title for fee simple title, and was used by the provincial government,¹⁷ the state legislature,¹⁸ and in a 1777 proprietary vote¹⁹ to give authority to the town to acquire highways by exchanging lands in the highway allowances for land more suitable for roads on private property.²⁰ In order to exchange the property, Hanover argued, it must have owned the fee to the property.²¹ Hanover maintained that when the roads were discontinued by town vote in the 1800's, the general law of highways—that land underlying a discontinued road reverts to the abutters—did not apply because the town held title to the underlying land.²² Consequently, Hanover argued that the town still retained title because it never relinquished title when the roads were discontinued.²³

The private landowners, on the other hand, argued that the original 1761 charter did not grant the highway allotment to the town.²⁴ They maintained that the charter granted all land in Hanover to the original sixty-eight proprietors.²⁵ The landowners argued that if the town acquired title to the lands used for highways, it must have received title through either the original proprietors or individual lot owners.²⁶ Nowhere, the landowners argued, did the town have a deed to these lands. In addition, there was no mention in the town records that the proprietors had granted these lands to the town. Therefore, the landowners insisted that the town received only a public easement to use the lands as public highways.²⁷ Thus, the general rule of highways applied because the town did not hold title to the underlying lands and when the high-

1983 — on file in Hanover Town Office Building). [hereinafter referred to as Waugh Letter].

17. See *infra* note 82 and accompanying text.

18. See *infra* note 98 and accompanying text.

19. See *infra* note 92 and accompanying text.

20. See Gardner Memorandum, *supra* note 7, at 1.

21. Waugh Letter, *supra* note 16.

22. See generally Gardner Memorandum, *supra* note 7. The general rule of highways assumes that owners of property abutting a road originally furnished the underlying property.

23. *Id.*

24. Letter from David H. Bradley to the Hanover Board of Selectmen (June 20, 1983) (discussing why the board should abandon efforts to claim ownership of the greenways — on file in Hanover Town Office Building) [hereinafter cited as Bradley Letter].

25. *Id.* The proprietors were private individuals, similar to modern developers, and not town officials. See *infra* notes 43-51 and accompanying text.

26. See Bradley Letter, *supra* note 24.

27. *Id.*

ways were discontinued, the land reverted to the abutters.²⁸

Additionally, the landowners argued that even if the town once held title to the greenways, adverse possession²⁹ or estoppel³⁰ or laches³¹ acted to bar the town's assertion of title.³² The landowners argued that adverse possession applied because, after the roads were discontinued, the underlying lands were openly and continuously occupied by various landowners for over twenty years. During this time, the town never exercised dominion over these lands. Furthermore, the landowners argued that the town lost title by estoppel or laches because Hanover did not assert title to the strips of land when private individuals conveyed the lands after their discontinuance as roads. Therefore, according to the landowners, the town should be estopped from claiming title because the town never asserted nor disclosed its title even though it had full knowledge of private sales and conveyances. In addition, the town had taxed the property as private land.³³

The November 5th vote settled the greenways issue in Hanover, at least for now. Nonetheless, the controversy raises interesting questions concerning property which was allotted for public

28. *Id.*

29. Adverse possession is:

a method of acquisition of title to real property by possession for a statutory period under certain conditions In order to establish title in this manner, there must be proof of nonpermissive use which is actual, open, notorious, exclusive and adverse for the statutorily prescribed period. State statutes differ with respect to the required length of possession from an upper limit of 20 years to a lower one of 5 years with even more extreme time periods covering certain special cases Adverse possession depends on intent of occupant to claim and hold real property in opposition to all the world, and also embodies the idea that owner of or persons interested in property have knowledge of the assertion of ownership by the occupant.

BLACK'S LAW DICTIONARY 49 (5th ed. 1979).

30. Estoppel "means that a party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly." BLACK'S LAW DICTIONARY 494 (5th ed. 1979).

31. Laches is a doctrine:

based upon maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity.

BLACK'S LAW DICTIONARY 787 (5th ed. 1979). Estoppel by laches is "a failure to do something which should be done or to claim or enforce a right at a proper time." *Id.*

32. See Bradley Letter, *supra* note 24. Hanover argued that adverse possession, estoppel by deed and estoppel by laches cannot be asserted against a town. See *infra* notes 147-84 and accompanying text.

33. See generally Bradley Letter, *supra* note 24.

use in original town charters. Other New England towns may someday claim title to lands reserved for public use in their town charters. Towns could assert title over these properties without having a written instrument conveying title, and despite the sale, conveyance, and taxation of the property as privately owned land for over a hundred years. Thus, what happened in Hanover is relevant to New England towns with similar historical backgrounds. There are probably hundreds of other ancient discontinued highways scattered throughout New England, and each of these exists as a potential land dispute.

II. THE HISTORICAL BACKGROUND

One can neither understand nor appreciate the issues raised in the Hanover greenways controversy without an historical awareness of the proprietary land grant system of colonial New England. This section briefly describes New Hampshire history in general and Hanover history in particular from the colonial period to 1800.

The English crown originally claimed all land in New England through the right of discovery and possession.³⁴ The King claimed ownership of the soil, as well as the power to dispose of it.³⁵ Furthermore, the King reserved the right to establish local government, and to confer legislative powers.³⁶ Title to the land passed from the King to the colonial governments through grants called royal charters.³⁷ King James II created the royal province of New Hampshire in 1679.³⁸ The power to grant land was vested in the governor of New Hampshire with the advice and consent of the provincial council.³⁹

Most of the provincial lands in New England were disposed of by township grants to groups of individuals who became known as proprietors.⁴⁰ Each township grant usually contained a tract of six miles square.⁴¹ The proprietors had absolute ownership and control

34. R. ARAGI, *THE TOWN PROPRIETORS OF THE NEW ENGLAND COLONIES* 5 (1924) (recognized as the authoritative source on colonial New England proprietary history).

35. *Id.*

36. *Id.*

37. *Id.* at 6.

38. *Id.* at 9.

39. *Id.*

40. *Id.*

41. *Id.*

over the land,⁴² and, as a land community, they were independent of the political community in any township.⁴³ "As grantees of a township, [the proprietors] preceded the birth of a town; they were the creators of towns in the evolutionary sense."⁴⁴ The proprietors alone had territorial jurisdiction; they were "the sole instrument in the transition of land titles from collective to individual ownership"⁴⁵

Town proprietors were also public servants, and "the proprietary was understood to be receiving and administering its grant of land as a public trust."⁴⁶ The eighteenth century New Hampshire township grants simultaneously gave land to proprietors and incorporated towns.⁴⁷ Early New Hampshire laws contained detailed provisions regulating proprietorships and town meetings.⁴⁸ Proprietors, as public agents entrusted with certain kinds of public service,⁴⁹ were required to make public improvements as one of the conditions of their grants.⁵⁰ For example, the proprietors were responsible as follows:

for the general plan of the town, its streets and highways, its home lots and farms, its commons and common fields, its pastures and woodlands; for the establishment of town government, religious institutions, schools, mills of different descriptions, and other necessities of early agrarian community; for the supervision of settlements, the encouragement of settlers, the distribution of land to newcomers, and the reservation of land for . . . future use [The proprietors accomplished their tasks] in the seventeenth century as actual settlers and toilers, [and] in the eighteenth century as capitalists and speculators.⁵¹

The proprietors were a privileged group, distinct from the ma-

42. *Id.* at 3.

43. *Id.* at 288-89.

44. *Id.* at 288.

45. *Id.* at 289.

46. C. Clark, Special Report to the Selectmen of Hanover, app. C (Sept. 2, 1983) [hereinafter cited as Clark Report]. Professor Clark is Professor of History at University of New Hampshire, and was hired by the town of Hanover to study the greenways controversy.

47. See, e.g., *Hanover Charter*, in 25 STATE PAPERS OF NEW HAMPSHIRE 78 (A.S. Batchellor ed. 1895) [hereinafter cited as *Hanover Charter*].

48. See, e.g., *An Act for the Better Regulating of Town and Proprietary Meetings*, in 2 LAWS OF NEW HAMPSHIRE, PROVINCIAL PERIOD 1702-45 264-65 (A.S. Batchellor ed. 1913).

49. See Clark Report, *supra* note 46, app. C.

50. *Id.*

51. R. AKAGI, *supra* note 34, at 288-90.

jority of the town population. Most inhabitants came to the towns after the original proprietary settlement, and they were excluded from proprietary ownership privileges in common lands. In the majority of the speculative eighteenth century land grants, most of the proprietors were non-residents, and most of the inhabitants were non-proprietors.⁵²

Land speculation became increasingly prevalent in the eighteenth century. By 1725, "the speculative mania had completely seized the land policy of Massachusetts, Connecticut and New Hampshire."⁵³ At the end of the French and Indian War in 1760, an interest arose in developing the upper valley of the Connecticut River, land unoccupied until then, except by Native Americans. The royal governor of New Hampshire, Benning Wentworth, was besieged by "crowds of adventurers . . . who desired grants of land,"⁵⁴ and from 1761 to 1764, he granted over 140 towns in this region.⁵⁵

Hanover was one of these towns. On July 4, 1761, Governor Wentworth granted five charters, covering the towns of Hanover,⁵⁶ Norwich,⁵⁷ Hartford,⁵⁸ Lebanon,⁵⁹ and Enfield.⁶⁰ The Hanover proprietorship was divided into sixty-eight shares.⁶¹ Fifty-five shares were granted to persons from Connecticut, and the remainder were designated to beneficiaries of the Governor, for it was his custom to enrich his personal friends and members of his government, as well as himself.⁶² The Governor reserved 500 acres, the equivalent of two shares, for himself.⁶³ The Hanover charter "contained an act of incorporation, establishing in effect a government of and by the 'inhabitants' of the township (as distinguished from proprietors),

52. *Id.* at 5. See also F. CHASE, HISTORY OF DARTMOUTH COLLEGE 165 (1928).

53. R. AKAGI, *supra* note 34, at 294.

54. F. CHASE, *supra* note 52, at 156.

55. *Id.*

56. See *Hanover Charter*, *supra* note 47.

57. *Norwich Charter* 1761, in 26 STATE PAPERS OF NEW HAMPSHIRE 319 (A.S. Batchellor ed. 1895).

58. *Hartford Charter* 1761, in 26 STATE PAPERS OF NEW HAMPSHIRE 212 (A.S. Batchellor ed. 1895).

59. *Lebanon Charter* 1761, in 25 STATE PAPERS OF NEW HAMPSHIRE 209 (A.S. Batchellor ed. 1895).

60. *Enfield Charter* 1761, in 24 STATE PAPERS OF NEW HAMPSHIRE 723 (A.S. Batchellor ed. 1894).

61. *Hanover Charter*, *supra* note 47.

62. F. CHASE, *supra* note 52, at 159.

63. *Id.* The governor's 500 acres are now the site of Dartmouth College.

even though there were then no 'inhabitants' at all."⁶⁴

The initial business of the Hanover proprietors was to survey the new lands in preparation for settlement in accordance with their charter. The charter required that town lots be marked out, with allowances made for highways.⁶⁵ At the first proprietary meeting, held in Connecticut on August 25, 1761, a committee was set up to perform the surveys.⁶⁶ These original surveys were accomplished in September and October of that year.⁶⁷ A town plot was marked out containing sixty-eight one acre lots in a 121 acre tract.⁶⁸ It contained highway allowances and a large open area in the middle. In addition, the survey team laid out sixty-six river lots, each of which contained about twenty-one acres. At a special proprietors' meeting on January 4, 1762, numbers were drawn from a hat for each share in the town plot and for each of the river lots.⁶⁹

On January 18, 1764, the proprietors voted to survey a division of sixty-six 100 acre lots to be located just east of the river lots.⁷⁰ A survey committee was appointed. On March 13, 1764, the proprietors voted that the survey committee should also "make reserve for and mark out highways . . . as they shall judge needful and lay out each hundred acre lot upon a highway."⁷¹ The surveys were made in June 1764, and the roads were cleared in October of that year.⁷² The highway allowances were numerous, well spaced, and wide. The committee report, which described the survey and the highway allowances, was presented to the proprietors on December 4. The report provided that:

If the land reserved for either of said highways or any part thereof be utterly unfit for said purpose, then and there said road to be laid upon the next adjoining meet land for the same where will be most convenient and do least damage, said reserved land unfit for highways to belong to the lot on which

64. Clark Report, *supra* note 46, app. B.

65. *Hanover Charter*, *supra* note 47.

66. F. CHASE, *supra* note 52, at 166.

67. *Id.*

68. *Id.*

69. *Id.* at 167. The Hanover town plot was never subsequently used, and remains a "paper city" today. See *id.* at 166.

70. I HANOVER PROPRIETARY RECORDS 1701-1803, at 11.

71. *Id.*

72. F. CHASE, *supra* note 52, at 169.

the road is turned.⁷³

The proprietors met in Coventry, Connecticut on January 28, 1765, and drew numbers for each of the 100 acre lots. They voted to accept and record the survey committee report, and thus adopted the stated highway provision.⁷⁴

Settlement in Hanover began in 1765.⁷⁵ By 1767, ninety-two persons were living in Hanover.⁷⁶ The first meeting of the inhabitants of Hanover occurred on July 22, 1767.⁷⁷ Previous "town" meetings had been held in Connecticut in conjunction with the proprietary meetings.⁷⁸ Before 1767, town meetings were purely formal and the minimum necessary officials were elected to conform to the charter.⁷⁹ The proprietors continued to meet in Connecticut until 1769,⁸⁰ when they voted to meet in the future in Hanover. The first proprietary meeting held in Hanover occurred on October 17, 1769.⁸¹

On January 10, 1766, the Provincial Assembly passed legislation entitled "An Act to Enable Selectman to Change Highways and to Apply Land Left for Highways Where it is not Suitable . . ." ⁸² This act authorized towns to exchange any unused or unnecessary highway allotments for land more suitable for highways. It empowered town selectmen

to exchange any lands left for highways, or any highways or any Part of them where a way is not necessary to be Continued, for other lands more suitable therefore, Making due Satisfaction in all the Foregoing cases, out of the Town stock or other ways, for the Same, to the owners or proprietors of the Lands through which said Highways shall run.⁸³

In addition, it provided that when the land could not be exchanged by agreement with the owner, the selectmen could sell portions of

73. I HANOVER PROPRIETARY RECORDS 1701-1803, at 17.

74. *Id.*

75. Lathem, *Of Colonial — Revolutionary Adventure*, in HANOVER, NEW HAMPSHIRE, A BICENTENNIAL BOOK 11 (F. Childs ed. 1961).

76. *Id.*

77. F. CHASE, *supra* note 52, at 165. See also I HANOVER TOWN MEETINGS RECORDS 1761-1818 1-3.

78. F. CHASE, *supra* note 52, at 165.

79. *Id.*

80. *Id.*

81. *Id.* at 165-66. See also I HANOVER PROPRIETARY RECORDS 1701-1803 53-54.

82. 3 LAWS OF NEW HAMPSHIRE, PROVINCE PERIOD 1745-74 382-83 (H. Metcalf ed. 1915).

83. *Id.*

the highway allotments and use the money to purchase the land over which the new highway was to be located.⁸⁴

The first evidence that the town had assumed responsibility for maintaining highways can be found in the town meeting records in June 1772.⁸⁵ Decisions were being made whether to "shut up" or "open" roads.⁸⁶ The proprietors became less concerned with establishing and maintaining highways as the town gradually assumed that responsibility. After 1777, the proprietary interest in highways disappeared.⁸⁷ Town meetings gave the selectmen the responsibility to clear highways of encumbrances, authenticate existing highways, and to lay out new roads leading to the meeting house.⁸⁸

On November 8, 1776, the town voted to give the selectmen power to "settle and establish highways laid out and to exchange allowances therefore."⁸⁹ Town citizens probably believed that the 1766 Provincial Act gave them the requisite authorization. Town officials soon realized, however, that they were acting without proper proprietary authorization.⁹⁰ Therefore, in March 1777, the November vote was modified to empower the selectmen to settle the highways as soon as the proprietary gave the appropriate authorization.⁹¹ Thus, the town officials recognized that they needed authority from the proprietary before they exchanged or sold the highway allowances.

The proprietors responded by voting on March 31, 1777 to grant to the town the power to convey the unused highway allowances to compensate landowners for land taken for roads over private property.⁹² This vote goes to the heart of the greenways dispute. The text reads as follows:

Voted, that whereas the allowances left for highways in the several divisions of land made by this propriety are in many instances unfit for the purpose of travelling and in others, the

84. *Id.*

85. See I HANOVER TOWN MEETINGS RECORDS 1761-1818. See also Clark Report, *supra* note 46, app. B.

86. Clark Report, *supra* note 46, app. B.

87. *Id.*

88. F. CHASE, *supra* note 52, at 178.

89. I HANOVER TOWN MEETINGS RECORDS 1761-1818 21.

90. F. CHASE, *supra* note 52, at 179.

91. I HANOVER TOWN MEETINGS RECORDS 1761-1818 21-22.

92. I HANOVER PROPRIETARY RECORDS 1701-1803 85.

situation of them such as to render it unnecessary for a highway to be laid in said allowance; and whereas in many instances it has been found necessary that the town lay out highways through land being private property, where no advantage can accrue to the town by any of said allowances, but under the present situation of the matter the town must of necessity purchase said highways; and as it was ever the design and intent of this propriety that the town should be supplied by them with necessary highways, of a reasonable width, out of the reserves by them made for highways,—this propriety do, therefore, grant to the said town of Hanover, or their selectmen for the time being, forever hereafter, or so long as any of said allowance remain, that whenever it shall be necessary to lay out a highway through any part of the town, being private property, that they have power to sell or convey to the person or persons, through whose land said highway shall be laid, so much of the aforesaid unfit or unnecessary allowances as to be a compensation for such highway, deducting the advantage such highway may be to the owner of such land, and that such exchange of land being recorded on the town records, shall entitle such persons thereto against all future claims of the propriety; provided, nevertheless, that no allowance shall be wholly taken from any lot in either of the hundred-acre divisions, unless by consent of the then owners of such lot or lots. Nothing in this vote to be considered as excluding this propriety hereafter disposing of any of the aforesaid allowances not before disposed of by the town or selectmen.⁹³

Despite this vote, not much was done in the next twelve years toward settling the highways of Hanover.⁹⁴ On June 22, 1789, the town redirected the selectmen to see that the highways “be regularly laid out and conveyances taken from the persons on whose land said roads are laid; and . . . that they make to such persons compensation out of the land left by the propriety”⁹⁵ On February 27, 1794, the selectmen reported to the town that twenty-four highways had been established and that the landowners had been compensated with land given in exchange.⁹⁶ The new highways were surveyed and the results were recorded in Hanover’s record of highway surveys entitled “Highway Allotments and

93. *Id.*

94. F. CHASE, *supra* note 52, at 180.

95. I HANOVER TOWN MEETINGS RECORDS 1761-1818 85.

96. I HANOVER HIGHWAY ALLOTMENTS, 1777-1889 1-23.

Surveys 1777-1889."⁹⁷

Meanwhile, on February 8, 1791, New Hampshire, now one of the United States, passed "An Act for Laying Out Highways."⁹⁸ This Act authorized towns to "sell or exchange any land left or appropriated in such town for highways."⁹⁹

On November 28, 1794, the proprietors clarified their vote of 1777 by providing that the Hanover selectmen were "not authorized to give more than an equal quantity of any allowance for highways by them laid out and that they deduct from that quantity according to the advantage any highway may be to the owner or owners of the land through which the same shall be laid."¹⁰⁰ Five years later, on October 21, 1799, the proprietors voted that the power of the selectmen to exchange unused highway allowances would end on March 1, 1800.¹⁰¹ Two further proprietary votes in March and December of 1802 allowed an extension of the period during which private property owners could agree to the highway exchanges.¹⁰²

III. HANOVER'S CLAIM OF TITLE

On its face, Hanover's claim of title to the greenways was historically and legally persuasive. In support of town ownership, Hanover mustered a three-pronged argument. First, Hanover asserted that before 1800, it had acquired title to the land reserved by the proprietors for highways as well as the land which was later acquired in exchange for the original highway allowances.¹⁰³ Second, Hanover argued that it did not lose title through adverse possession by abutting landowners.¹⁰⁴ Third, Hanover claimed that estoppel or laches could not be used to prevent the town from asserting title.¹⁰⁵ This section examines these arguments.

97. *Id.*

98. 5 LAWS OF NEW HAMPSHIRE 1784-92 577-79. (H. Metcalf ed. 1916).

99. *Id.*

100. II HANOVER PROPRIETARY RECORDS 1761-1803 7.

101. *Id.* at 16-17.

102. *Id.* at 19, 20-22.

103. Gardner Memorandum, *supra* note 7, at 1-10.

104. *Id.* at 10-14.

105. *Id.* at 14-16.

A. Hanover's Pre-1800 Claim of Ownership

Hanover based its claim of greenways ownership primarily upon the unique way in which the old highways were laid out.¹⁰⁶ Most of the greenways were strips of land which were acquired in exchange for the original highway allowances. In regard to greenways ownership, the town memorandum said:

There is no question that the town had title to those portions which lie across the lands originally reserved by the proprietors for highways. Because of the specific meaning of the word "exchange" in the early common law, and because of the clear intent of the 18th century proprietors that Hanover highways would be located on commonly owned lands, it is likely that the town would be held to have gained title to those lands for which it exchanged the original highway allowances.¹⁰⁷

Hanover's legal memorandum listed a chronology of the town's acquisition of title¹⁰⁸ to support the assertion that the town "ac-

106. *Id.* at 3.

107. *Id.* at 1.

108. The chronology is listed as follows:

1. 1761 — Royal charter granting all land in Hanover to 68 proprietors.
2. 1763 — Edmund Freeman Survey dividing the Town into lots and designating certain unallotted strips as highway allowances.
3. January 7, 1764 — Original 68 proprietors draw choice of lots from hat. Lots are allocated subject to exchange for highway allowance where a highway must be turned into a lot because the topography of the highway allowance is unsuitable for a highway.
4. January 10, 1766 — Provincial statute authorizing towns to use land left over from highway allowances in exchange for private land required for highway layouts.
5. November 5, 1776 — Town Meeting votes to authorize the Selectmen to exchange highway allowances and settle the establishment of highways.
6. March, 1777 — Town Meeting vote modifying vote of 11/5/1776 to the extent that the Selectmen shall settle highways with exchanges as soon as the proprietors vote to transfer highway allowances to the Town.
7. March 31, 1777 — Proprietors vote to convey unused highway allowance to the Town to be used to compensate landowners for private land taken for public highways.
8. June 6, 1789 — Town Meeting again votes to authorize the Selectmen to straighten out the highways and exchange unused highway allowances for private property over which highways have been laid out.
9. February 8, 1791 — Act of New Hampshire legislature authorizing towns to use land left over from highway allowances in exchange for private land required for highway layouts.
10. 1793 — 24 highways adjusted and settled by assigning unused highway allowances in exchange for surveyed highways.
11. 1796 — 9 more highways settled in the same manner.
12. October 21, 1799 — Proprietors vote to end authority of Selectmen to

quired title to land reserved by the proprietors for highways, and to land for which such land was exchanged prior to 1800."¹⁰⁹

To buttress this historical claim of title, Hanover asserted several additional arguments. First, notwithstanding the general law in New Hampshire and in most other jurisdictions that title to land underneath a highway belongs to the abutting landowners,¹¹⁰ Hanover maintained that a town can legally own the fee to land underneath a highway.¹¹¹ Hanover cited court recognition of town highway ownership.¹¹² For example, in 1834, the New Hampshire Superior Court of Judicature said in *Copp v. Neal*,¹¹³ "[t]here is nothing . . . to preclude a town from holding the title to land over which highways are laid, and they have frequently claimed the title in case of ancient rangeways laid out by the original proprietors."¹¹⁴ The *Copp* court added that when a town claims ownership, "the burthen of proof . . . rest[s] upon the town, after a discontinuance of the road, to show their claim of title to the soil as against the original owner."¹¹⁵ Further judicial discussion of town ownership of roads is found in *Town of Troy v. Cheshire Rail Road Co.*¹¹⁶

In general, towns are not the owners of highways, though there . . . may be cases where the towns . . . have thought it judicious to purchase the fee of the land itself. We are not aware of any rule of law . . . which forbid[s] this to be done, while there are many cases, in which it may be very sound policy for towns to make such purchases, where the land can be obtained.¹¹⁷

convey unused highway allowances as of March 1, 1800.

Gardner Memorandum, *supra* note 7, at 3.

109. *Id.* at 2.

110. The general law is expressed as follows: "In highways laid out through the lands of individuals in pursuance to statutes, the public has only an easement, a right of passage; the soil and freehold remain in the individual, whose lands have been taken for that purpose." *Makepeace v. Worden*, 1 N.H. 16 (1816). For a description of the general law in other New England states see *Perley v. Chandler*, 6 Mass. 454 (1810); *Pettibone v. Purdy*, 7 Vt. 514 (1832); *Read v. Leeds*, 19 Conn. 182 (1848).

111. Gardner Memorandum, *supra* note 7, at 4-5.

112. *Id.*

113. 7 N.H. 275 (1834).

114. *Id.* at 276-77. "Rangeway" is another term for highway allowances and highway allotments.

115. *Id.* at 277.

116. 23 N.H. 83 (1851).

117. *Id.* at 92.

A second way that Hanover sought to bolster its historical claim was to maintain that recordation of deeds conveying title to the old highways from the proprietors to the town was unnecessary.¹¹⁸ Proprietors customarily conveyed parcels of land by vote.¹¹⁹ In fact, this method of conveyance was part of the early New England common law.¹²⁰ Hanover claimed that the proprietors conveyed the original highway allotments to the town by voting in 1777 for the town to use the land either to sell or to exchange in the process of acquiring land more suitable for highways.¹²¹ Because a proprietary vote was the valid and accepted method of conveying land, Hanover argued that no recorded deed was necessary to establish clear town ownership.¹²²

Hanover maintained that lands acquired in exchange for parcels in the original highway allowances also became town property.¹²³ Hanover based this argument on the way the word exchange was used by the Provincial Assembly in the Statute of 1766,¹²⁴ by the proprietary vote of 1777,¹²⁵ and finally by the New Hampshire legislature in the Statute of 1791.¹²⁶ These two statutes and the proprietary vote unquestionably gave the town authorization to exchange lands in the original highway allowances. The word exchange had a specific legal meaning in the eighteenth century. Blackstone defined exchange as

a mutual grant of equal interests, the one in consideration of the other. The word 'exchange' is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution. The estates exchanged must be equal in quantity; not of

118. Gardner Memorandum, *supra* note 7, at 7-10.

119. For example, in *Proprietors of Cornish v. Kenrick*, Smith Reports 270, 274 (N.H. 1809), the court stated: "It always has been the usage, in this state, for proprietors to convey by vote, and it is too late to object to the legality of such conveyances . . . Like ancient towns, [the proprietors] may convey lands by vote."

120. The court in *Kenrick* described this method of conveyance:

This conveyance of lands by vote is a part of the New England common law. Our statute of 1718 expressly declares, in affirmance of this common law, that proprietors of common and undivided lands may dispose of them as shall be concluded and agreed on by the major part of the proprietors.

Id.

121. See *supra* note 108, chronology listing No. 7.

122. Gardner Memorandum, *supra* note 7, at 6-10.

123. *Id.* at 1.

124. See *supra* note 82 and accompanying text.

125. See *supra* note 92 and accompanying text.

126. See *supra* note 98 and accompanying text.

value, for that is immaterial, but of interest; as fee simple for fee simple¹²⁷

Thus, Hanover argued that because it held fee simple title to the original highway allowances, when portions of those allowances were exchanged for more suitable highway lands running over adjacent private property, the town received fee simple title to those newly acquired adjacent lands.¹²⁸ Based on the clear legal meaning of the word exchange, as well as its statutory and proprietary use, Hanover argued that the town must have had title to the original highway allowances before any exchanges could take place.¹²⁹ Because the exchanges occurred, it logically followed that the town received title to the land under the highways which were exchanged for the allowances.¹³⁰

Hanover extended this reasoning to assert that not only was it unnecessary for the town to receive separate deeds from lot owners who exchanged land for the allowances, it was also unnecessary for any deeds to be recorded.¹³¹ The New Hampshire legislature, however, passed an act in 1791 which required all conveyances to be in writing and to be recorded in the Registry of Deeds in the county where the lands lay.¹³² Nonetheless, Hanover asserted that at common law, an exchange did not require the passing of deeds.¹³³ For example, in *Hardy v. Houston*,¹³⁴ decided in 1820, the New Hampshire Superior Court held that the existence of a highway could be proved from a reference in the town records.¹³⁵ Based on *Houston*, Hanover argued that the exchanges were valid even without the specific recordation of deeds in the Grafton County Clerk's Office,

127. 2 W. BLACKSTONE, COMMENTARIES *323.

128. Gardner Memorandum, *supra* note 7, at 1.

129. *Id.*

130. Blackstone writes that if there were a defect in title on either side, the harmed party could repossess his land.

For if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.

2 W. BLACKSTONE, COMMENTARIES *323. Thus, Hanover could conceivably have argued that a defect in title would result in repossession of those portions of the highway allowances used in the original exchanges.

131. Gardner Memorandum, *supra* note 7, at 6-10.

132. 5 LAWS OF NEW HAMPSHIRE 1784-92 652-55. (H. Metcalf ed. 1916).

133. Gardner Memorandum, *supra* note 7 at 7. See also W. HAWKINS, ABRIDGEMENT OF LORD COKE'S INSTITUTE 85-86 (1751).

134. 2 N.H. 309 (1820). *Hardy v. Houston* specifically involved a highway in Hanover.

135. *Id.* at 310.

because all exchanges in Hanover were duly recorded in the town of Hanover record books.¹³⁶

Hanover also used *Moultonboro v. Bissonnette*,¹³⁷ a 1963 New Hampshire case, to support its recordation argument.¹³⁸ In this case, the town of Moultonboro claimed title to a landing area on Lake Winnepesaukee through a reservation in the original 1763 Moultonboro Town Charter. A town meeting in 1818 appointed a committee of three to "look after the landing place near center harbor."¹³⁹ In 1819, the committee recorded its report in the town records. The report included a plan of the landing place as laid out.¹⁴⁰ The court described ancient town titles as having a presumption of validity when subjected to attack in the twentieth century.¹⁴¹ Furthermore, the court stated that the burden is "placed on the contestant to show a better title than the town in order to successfully maintain his claim. This has tended to alleviate uncertainty of title which would otherwise result"¹⁴² The court held that the town was entitled to enjoin the defendant from building a boathouse in the area.¹⁴³ Thus, according to *Bissonnette*, an ancient town title need not have been conveyed by deed. Citing *Bissonnette*, Hanover argued that town title to the greenways could be proved by the town records in which the exchanges between 1777 and 1801 were duly recorded.¹⁴⁴

Finally, Hanover argued that actual deeds conveying title of the exchanged lands to the town were unnecessary because the original town lots could be viewed as having been granted by the proprietors upon a condition subsequent.¹⁴⁵ The condition in the

136. Gardner Memorandum, *supra* note 7, at 6.

137. 105 N.H. 210, 196 A.2d 703 (1963).

138. See Waugh Letter, *supra* note 16, at 2.

139. *Moultonboro v. Bissonnette*, 105 N.H. at 211, 196 A.2d at 704.

140. *Id.*

141. *Id.* at 212, 196 A.2d at 705.

142. *Id.*

143. *Id.* at 213, 196 A.2d at 705.

144. Gardner Memorandum, *supra* note 7, at 9.

145. *Id.* A condition is:

a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated.

BLACK'S LAW DICTIONARY 265 (5th ed. 1979).

A condition subsequent is:

one annexed to an estate already vested by the performance of which such estate is kept and continued, and by the failure or non-performance of which

original survey was that actual highways might be laid out upon any lot, in which case the lot owner would take title to portions of the reserve allowance through the exchange process.¹⁴⁶ Thus, when the highways were actually laid out, the condition contained in the original grant was realized and no additional deeds from lot owners to the town were necessary.

B. *Hanover's Rebuttal of the Landowners' Adverse Possession Claim*

Hanover claimed that the town had not lost title to the greenways through the adverse possession of abutting landowners.¹⁴⁷ The applicable New Hampshire statute states: "No person shall acquire by prescription a right to any part of a town house, schoolhouse or church lot, or of any public ground by fencing or otherwise enclosing the same or in any way occupying it adversely for any length of time."¹⁴⁸ This statute originated in 1862. Therefore, if the greenways were owned by the town in 1862, no private landowner could have acquired title through adverse possession since that time. Most of the greenways, however, were discontinued before 1830. Thus, whether adverse possession could apply before 1862 remained a question.

One year before the 1862 statute was enacted, *Webber v. Chapman*¹⁴⁹ addressed the adverse possession issue. In this case, a private landowner had fenced off a portion of a highway. No record existed which showed whether the highway had actually been laid out.¹⁵⁰ The court considered whether title could be acquired by adverse possession against the public. Inferring that the disputed highway never existed, the court found that adverse possession against the public was not an issue.¹⁵¹ The court held that only a prescriptive right to the land in question was available.¹⁵² Thus,

it is defeated; or it is a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition.

Id. at 266.

146. I HANOVER PROPRIETARY RECORDS 1701-1803 17.

147. Gardner Memorandum, *supra* note 7, at 10.

148. N.H. REV. STAT. ANN. § 477:34 (1983).

149. 42 N.H. 326 (1861).

150. *Id.* at 335.

151. *Id.*

152. *Id.* at 337-38. A prescriptive right or prescriptive easement is:

a right to use another's property which is not inconsistent with the owner's

although inapplicable to a town having highway records, the *Webber* decision left open the question whether adverse possession could be maintained against a town before 1862.

The New Hampshire Supreme Court reviewed *Webber* in *State v. Franklin Falls Co.*¹⁵³ Referring to the 1862 statute on adverse possession, the *Franklin Falls* court stated:

On so important a topic, it has been found quite embarrassing in practice to apply one rule up to 1862, and the contrary rule after that date. Under these circumstances, we do not feel bound to adhere to the former decision, if upon examination it is found to be opposed to reason, and to the weight of authority, as well as to "the spirit of our legislation."¹⁵⁴

Hanover cited *Franklin Falls* as strong authority that adverse possession is not available to landowners claiming title to the greenways.¹⁵⁵ The town argued that, in the interests of consistency, courts would consider the law of adverse possession to be the same before 1862 as after 1862.¹⁵⁶

The rule that adverse possession cannot be used against a municipality is also based on common law. For example, the New Hampshire cases of *Moultonboro v. Crumb*¹⁵⁷ and *State v. Stafford & Sons, Inc.*¹⁵⁸ both hold that rights to public lands cannot be acquired by adverse possession. Furthermore, several New Hampshire cases, including *State v. Franklin Falls Co.*, cite the adverse possession rule without relying on the statute.¹⁵⁹

Nonetheless, the court in *Franklin Falls* seemed to leave open the possibility that long adverse use could ripen to possession. The court stated, "[w]e do not now decide that adverse user [sic],

rights and which is required by a use, open and notorious, adverse and continuous for the statutory period (e.g. twenty years). To a certain extent, it resembles title by adverse possession but differs to the extent that the adverse user acquires only an easement and not title. To create an easement by "prescription," the use must have been open, continuous, exclusive, and under claim of right for the statutory period.

BLACK'S LAW DICTIONARY 1065 (5th ed. 1979).

153. 49 N.H. 240 (1870).

154. *Id.* at 247.

155. Gardner Memorandum, *supra* note 7, at 12.

156. *Id.*

157. 114 N.H. 26, 314 A.2d 652 (1974).

158. 99 N.H. 92, 105 A.2d 569 (1954).

159. *State v. Franklin Falls Co.*, 49 N.H. 240 (1870); *Thompson v. Major*, 58 N.H. 242 (1878); *Manchester v. Hodge*, 74 N.H. 468, 69 A. 527 (1908).

whose origin is involved in obscurity, and which has continued for a great length of time, will in no case bar a public right."¹⁶⁰ Hanover argued that *Moultonboro v. Bissonnette*¹⁶¹ precluded such a possibility in relation to Hanover's greenways.¹⁶² In *Bissonnette*, the town failed to assert title to the property in question from 1818 to 1929. This period included forty-four years before the 1862 statute existed. Because the court held for the town of Moultonboro, Hanover argued that adverse possession cannot apply against a municipality either before or after the 1862 statute.¹⁶³

The adverse possession rule is subject to exceptions, primarily when land is held by a municipality in a purely proprietary capacity.¹⁶⁴ This governmental/proprietary distinction is recognized in New Hampshire.¹⁶⁵ Hanover, however, argued that the town held title to the greenways in a governmental capacity, and not in a proprietary capacity.¹⁶⁶ It cited the 1972 New Hampshire case of *McInnis v. Town of Hampton*¹⁶⁷ as authority.¹⁶⁸ This case involved individuals who attempted to assert adverse possession against a town in order to block a proposed town lease. The plaintiff argued that adverse possession was available against the town because the town, by being involved in the business of leasing land, was holding the property in a proprietary capacity.¹⁶⁹ The court held that because the land in question was only intended to be leased in the future and was not presently leased, the town held the land in its governmental capacity. Finding that the lands did not provide the town with any "particular and specific return,"¹⁷⁰ the court stated:

160. *State v. Franklin Falls Co.*, 49 N.H. at 254.

161. 105 N.H. 210, 196 A.2d 703 (1963).

162. Gardner Memorandum, *supra* note 7, at 12.

163. *Id.* at 12-13.

164. See generally 3 AM. JUR. 2d *Adverse Possession* § 205-09 (1964); Annot., 55 A.L.R. 2d 559.

Municipal corporations act in two distinct capacities: (1) governmental, legislative or public and (2) proprietary, commercial or quasi-private; the "governmental functions" of a municipal corporation are those functions exercised as arm of state, and for public good generally, where as "proprietary functions" are those exercised for peculiar benefit and advantage of citizens of municipality.

BLACK'S LAW DICTIONARY 1097 (5th ed. 1979).

165. See *South Hampton v. Fowler*, 52 N.H. 225, 231 (1872).

166. Gardner Memorandum, *supra* note 7, at 14.

167. 112 N.H. 57, 288 A.2d 691 (1972).

168. Gardner Memorandum, *supra* note 7, at 13-14.

169. 112 N.H. at 59, 288 A.2d at 692.

170. *Id.* at 60, 288 A.2d at 693 (quoting *Reynolds v. Nashua*, 93 N.H. 28, 31, 35 A.2d 194, 196 (1943)).

"It could properly be found that mere retention of title, without more, was a public use and that the land was held in a governmental capacity during the period when the plaintiffs claimed to have acquired rights by user."¹⁷¹ Hanover similarly argued that because it merely retained title and did not receive any "particular and specific return" from the greenways, the land was held in a governmental capacity.¹⁷² Therefore, the statute barring adverse possession against a municipality prevented the landowners from claiming title to the greenways.

C. *Hanover's Rebuttal of the Landowners' Estoppel and Laches Claim*

Hanover argued that neither the doctrines of estoppel nor laches applied to prevent the town's assertion of title to the greenways.¹⁷³ The New Hampshire Supreme Court has ruled that rights to public lands cannot be lost by laches,¹⁷⁴ nor can estoppel be used against a municipality.¹⁷⁵ In *State v. Franklin Falls Co.*,¹⁷⁶ the court stated its rationale for disallowing the use of estoppel against a town:

Experience does not justify the presumption that a community at large will assert their public rights, with the same promptness with which individuals assert their private rights. The opposite is notoriously true

. . . .

. . . It cannot be expected that [state or town] agents will manifest the same vigilance in detecting and resisting encroachments on public interests that individuals evince in the protection of their private rights. Moreover, the state officials are generally few in number and fully occupied with the regular routine of official duties¹⁷⁷

In *State v. Stafford & Sons, Inc.*,¹⁷⁸ the New Hampshire Supreme Court provided further authority barring the use of estoppel against a town. The *Stafford* court stated that the state's rights to

171. *Id.*

172. Gardner Memorandum, *supra* note 7, at 14.

173. *Id.* at 14-15. See *supra* notes 30-31 and accompanying text.

174. See *Moultonboro v. Crumb*, 114 N.H. 26, 314 A.2d 652 (1974).

175. *Id.*

176. 49 N.H. 240 (1870).

177. *Id.* at 252.

178. 99 N.H. 92, 105 A.2d 569 (1954).

public lands are not forfeited by laches, estoppel or waiver.¹⁷⁹ Several other New Hampshire cases similarly have denied the use of estoppel against the state or municipality.¹⁸⁰

Municipalities have lost title by estoppel only when private landowners have made expensive improvements.¹⁸¹ In the absence of substantial improvements by private landowners, Hanover argued that it would not be estopped from asserting title.¹⁸²

Finally, courts have held that a municipality is not estopped from asserting title merely because its agents have erroneously collected a tax on the property.¹⁸³ Therefore, even though taxes had been collected on the greenways property, Hanover argued that it would not be estopped from asserting title.¹⁸⁴

IV. HISTORICAL AND LEGAL ARGUMENTS OPPOSING HANOVER'S CLAIM OF TITLE

A. *Hanover Never Acquired Title to the Highway Allowances*

Hanover's claim of title to the greenways was based on the premise that, prior to 1800, the town had acquired fee ownership to the original highway allowances.¹⁸⁵ From this premise, Hanover argued that it took title to those portions of the highways which were actually built over the original highway allowances, as well as title to any strips of land acquired in exchange for unused portions of the original highway allowances.¹⁸⁶ A close examination of the historical record and the law of property as it existed in the eighteenth and nineteenth centuries, however, indicates that Hanover never acquired fee simple title to the original highway allowances.

Hanover's claim of title to the greenways was, in essence, an

179. *Id.* at 97, 105 A.2d at 573.

180. See *State v. Hutchins*, 79 N.H. 132, 105 A. 519 (1919); *Ham v. Me.-N.H. Interstate Bridge Authority*, 92 N.H. 268, 30 A.2d 1 (1943); *State v. Cote*, 95 N.H. 428, 65 A.2d 280 (1949); *Moultonboro v. Bissonnette*, 104 N.H. 210, 196 A.2d 703 (1963); *Moultonboro v. Crumb*, 114 N.H. 26, 314 A.2d 659 (1974).

181. 56 AM. JUR. 2d *Municipal Corporations* § 537 (1964). See *Peoria v. Central Nat. Bank*, 224 Ill. 43, 79 N.E. 296 (1906); *Sioux City v. Chicago & N.W. Ry. Co.*, 129 Iowa 694, 106 N.W. 183 (1906); *Davenport v. Boyd*, 109 Iowa 248, 80 N.W. 314 (1899); *Dabney v. Portland*, 124 Or. 54, 263 P. 386 (1928).

182. Gardner Memorandum, *supra* note 7, at 16.

183. 56 AM. JUR. 2d *Municipal Corporations* § 537 (1963).

184. Gardner Memorandum, *supra* note 7, at 16.

185. *Id.* at 1, 6. See also *supra* notes 106-46 and accompanying text.

186. Gardner Memorandum, *supra* note 7, at 1.

assertion of title. The town's memorandum asserted: "Original highway allowances and land acquired in exchange for unused highway allowances belongs to the Town."¹⁸⁷ This assertion was "supported" by (1) a chronological list of events,¹⁸⁸ especially focusing on the 1777 proprietary vote, and by (2) the specific meaning of the word exchange in early common law.¹⁸⁹ The town examined the chronology and the word exchange and concluded, "[t]here can be little question that the proprietors *intended* that the Town would take title to the lands under such highways."¹⁹⁰

Hanover's assertion of ownership failed to define clearly how and when the town of Hanover actually acquired title to the original highway allowances. Yet, the importance of establishing clear town ownership over the original allowances cannot be underestimated. This ownership is the basis upon which all the town's arguments and defenses were built. Without ownership of the original allowances, Hanover's claim of title to the highways laid out over the original allowances, as well as its claim to highways acquired in the exchange process, fails. Thus, close examination of Hanover's assertion of title is necessary.

The 1777 proprietary vote was described in the Hanover town attorney's memorandum as follows: "March 31, 1777—Proprietors vote to convey unused highway allowances to the Town to be used to compensate landowners for private land taken for public highways."¹⁹¹ This, however, is a misrepresentation of the vote. The crucial language of the 1777 vote, boiled down, is as follows: "This proprietary do . . . grant to the said town of Hanover, or their selectmen . . . that they shall have power to sell or convey . . . the . . . allowances . . ."¹⁹² This language unambiguously reveals that the proprietary intended only to grant to the town the *authority* to act on behalf of the proprietors. The vote contained no explicit language conveying the fee of the highway allowances to the town.¹⁹³ The vote represented a grant of agency power¹⁹⁴ to the town and town selectmen rather than a grant of fee simple title.

187. *Id.*

188. See *supra* note 108.

189. Gardner Memorandum, *supra* note 7, at 5-6.

190. *Id.* at app. iii.

191. Gardner Memorandum, *supra* note 7, at 3.

192. I HANOVER PROPRIETARY RECORDS 1701-1803 85. See *supra* note 93 and accompanying text.

193. In fact, the town admitted this in a letter responding to landowners' objections to the town's position. The letter said,

Furthermore, the 1799 vote puts the 1777 vote in perspective. If a wholesale conveyance of the highway allowances occurred in 1777, it would make little sense for the proprietors to later vote, as they did on October 21, 1799,¹⁹⁵ to withdraw the authority of the selectmen to convey any unused highway allowances. Power to sell or convey the highway allowances was granted to the town in 1777. That power was withdrawn in 1799 when the new highways were settled. It is illogical to assert that the 1777 vote conveyed to the town the fee to the unused highway allotments because, under that reasoning, the 1799 vote would represent nothing more than an irrational and futile attempt by the proprietors to un-convey what they had previously conveyed.¹⁹⁶

If anyone in the 20th century is facially entitled to claim ownership to the greenways, it would arguably be the descendants of the original Hanover proprietors, not the town of Hanover. When town officials exchanged portions of the highway allowances for more suitable highway land owned by private landowners, the fee of those portions of the highway allowances passed from the proprietary to the private landowners via the town. Hanover town officials merely facilitated the transaction. The proprietors, acting through the town selectmen, exchanged fee simple title for fee simple title with the private landowners over whose land the new highways were located. Thus, the proprietary theoretically received the fee in the new strips of land for which the allowances were exchanged.¹⁹⁷

Hanover further claimed title to the greenways "because of the specific meaning of the word 'exchange' in the early common

It is true that the proprietors' vote of Mar[ch] 31, 1777 was not a wholesale, unconditional conveyance of all highway allowances to the town. This truth can also be inferred from the fact that in 1799 the proprietors withdrew the town's authority to make exchanges of highway allowances.

Waugh Letter, *supra* note 16, at 2.

194. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." BLACK'S LAW DICTIONARY 58 (5th ed. 1979). An agent is "[o]ne who acts for or in place of another by authority from him; a substitute, or deputy, appointed by principal with power to do the things which principal may do." *Id.* at 59.

195. See II HANOVER PROPRIETARY RECORDS 1761-1803 at 16-17.

196. B. Waugh, in a letter responding to landowners' objections to the town's position, admitted that the 1777 vote did not convey the highway allowances to the town. See *supra* note 193.

197. See *infra* notes 227-34 and accompanying text, discussing *Stiles v. Curtis*, 4 Day 328 (Conn. 1810). Plaintiffs in *Stiles*, descendants of original town proprietors, unsuccessfully asserted title to a discontinued highway in the town of Woodbury, Connecticut.

law”¹⁹⁸ Using this word to support town greenway ownership would be valid only if the town first owned fee simple title in the highway allowances. The exact language in the proprietary votes of 1777 and 1799, examined above, shows that the proprietors merely empowered the town to exchange or sell the allowances for highway improvement purposes. Thus, Hanover’s exchange argument, based on the use of the word in the proprietary votes, was unjustified.

In addition, Hanover misinterpreted the use of the word exchange in the 1766 Provincial Act¹⁹⁹ and in the 1791 New Hampshire Act.²⁰⁰ The town claimed that the use of the word exchange in both these statutes represented a legislative acknowledgment that towns owned the highway allowances left over from proprietary land grants.²⁰¹ Hanover argued that it must have owned fee simple title to the highway allowances since it could not exchange something it did not own.²⁰² The Provincial Act, however, merely “empowered [town selectmen] to exchange any lands left for highways.”²⁰³ Similarly, the 1791 New Hampshire Act only “empowered” town selectmen to sell or exchange remaining highway allowances for more suitable private land needed for highways.²⁰⁴ There is no explicit acknowledgment in either statute that towns owned the fee to unused highway allowances. Hanover, however, boldly asserted that “the wording of the statute makes it clear that in 1791 the legislature recognized that title to the lands underlying highways laid out over original highway reserves was vested in the town.”²⁰⁵ This interpretation makes no sense because if towns owned the land underneath the highway reserves, they would not have needed the legislature to so advise them.

The 1766 and the 1791 legislation is substantial evidence that New Hampshire towns did not own the fee to their highway al-

198. Gardner Memorandum, *supra* note 7, at 1. See also *supra* note 5, 123-30 and accompanying text.

199. 3 LAWS OF NEW HAMPSHIRE, PROVINCE PERIOD 1745-74 382-83 (H. Metcalf ed. 1915). See *supra* note 82 and accompanying text for a discussion of this Act.

200. 5 LAWS OF NEW HAMPSHIRE 1784-92 577-79 (H. Metcalf, ed. 1916). See *supra* note 98 and accompanying text for a discussion of this statute.

201. Gardner Memorandum, *supra* note 7, at app. iv.

202. Waugh Letter, *supra* note 16, at 3.

203. 3 LAWS OF NEW HAMPSHIRE, PROVINCE PERIOD 1745-74 382 (H. Metcalf ed. 1915).

204. 5 LAWS OF NEW HAMPSHIRE 1784-92 577.

205. Gardner Memorandum, *supra* note 7, app. iv. Furthermore, this assertion was contradicted by a later town opinion. See *supra* note 197 and accompanying text.

allowances. The statutes were probably enacted in response to the needs of New Hampshire towns whose original proprietors had all died. Proprietary authorization to use the allowances to settle highways became impossible to obtain in towns which had been established in the seventeenth and early eighteenth centuries. Yet, to use highway allowances to settle highways, towns needed either actual authorization from an existing proprietary, or a colorable authority from an appropriate legislative act. The 1766 and the 1791 Acts empowered towns to sell or exchange highway allowances for the specific purpose of laying out new highways or improving existing highways. Neither Act conveyed to New Hampshire towns the fee to unused highway allowances. Thus, Hanover's reliance on the word exchange in both the 1766 and the 1791 legislative Acts to connote exchange of fee simple title for fee simple title was unwarranted.

Finally, Hanover claimed to have acquired title to the greenways in the same way that the town of Moultonboro acquired title to the landing area in *Moultonboro v. Bissonnette*.²⁰⁶ The 1761 Hanover Town Charter provided for highway allowances,²⁰⁷ as the Moultonboro charter provided for a landing area.²⁰⁸ The Hanover proprietors reserved these allowances in the original surveys. Hanover then constructed highways over the highway allowances or used the allowances to make exchanges for more suitable highways in the same manner that Moultonboro laid out its landing area. Hanover reasoned that the town acquired ownership when it "laid out highways over allowances or land exchanged for allowances,"²⁰⁹ because the allowances "had been reserved in the original Charter for a public purpose."²¹⁰ Thus, Hanover used *Bissonnette* to maintain that even without the 1777 vote, the town took legal title to the highways when the highways were laid out and recorded in the town records.²¹¹ Furthermore, Hanover argued that the result in *Bissonnette* indicates that the New Hampshire Supreme Court would resolve any uncertainty in favor of the town.²¹²

Hanover's conclusion was unsound for three reasons. First,

206. 105 N.H. 210, 196 A.2d 703 (1963). See *supra* note 137 and accompanying text for a description of Hanover's argument.

207. See *Hanover Charter*, *supra* note 47.

208. See *Bissonnette*, 105 N.H. at 210, 196 A.2d at 704 (1963).

209. Waugh Letter, *supra* note 16, at 2.

210. *Id.*

211. *Id.*

212. *Id.*

while reservation of highway allowance land in both the town charter and in the original surveys undoubtedly reflected a "public purpose," it was an unwarranted leap of logic to conclude that "public purpose" meant "public ownership." Second, the *Moultonboro* court placed the burden "on a contestant to show better title than the Town in order to successfully maintain his claim."²¹³ The Hanover landowners would have met this burden had the dispute been litigated. Third, and most importantly, a profound dissimilarity existed between the *Bissonnette* case and the Hanover greenways issue. *Bissonnette* involved a town landing area while the Hanover controversy concerned ancient discontinued highways. Land reserved in town charters for public use, such as landing areas, town greens, or common lands for livestock grazing was then, and remains today, different in character from land reserved for highways. A separate law exists for highways,²¹⁴ which admittedly was still evolving in the late eighteenth century New England townships, but which developed and became well-settled by the nineteenth century. Thus, *Bissonnette* was irrelevant to Hanover's greenway controversy because the law applicable to highways differs from the law applicable to common lands.

To summarize, Hanover's claim to fee ownership of the greenways was fundamentally flawed because it was based on an argument containing a false major premise: that Hanover received fee ownership to the original highway allotments in the 1777 proprietary vote. Once this premise was granted, its conclusion about fee ownership logically followed. Hanover's legal theory of ownership was a simple, and seemingly logical, syllogism:

- (1) Because it received title to the original highway allowances in the 1777 proprietary vote, the town could exchange allowance portions for land more suitable for highways, in a fee simple for fee simple exchange. The town, by giving up its fee in one parcel of land, would receive the fee to another parcel of land.
- (2) The town perfected the exchanges from 1791 to 1800 and these were all duly recorded in the town books.
- (3) Therefore, since adverse possession, laches, or estoppel are not available against a town, Hanover retained the fee to those strips of land which it acquired in the exchanges which took place between 1791 and 1800.

213. 105 N.H. at 212, 196 A.2d at 705.

214. See *infra* notes 218-68 and accompanying text.

The conclusion was false because the major premise was false. Thus, it is unnecessary to even reach Hanover's arguments that a town can own the fee to highways, that recordation of deeds was unnecessary, or that adverse possession, laches or estoppel are not available against a town. Hanover's claim of title and all the elegant legal reasoning used to support that claim depended upon town ownership of the original highway allowances. Such ownership never existed.

B. *The Law of Highways as it Developed in the Late Eighteenth and Early Nineteenth Centuries*

An examination of New England highway law as it emerged in the late eighteenth and early nineteenth centuries indicates that Hanover's greenways claim was without legal justification. Property disputes involving original highway allowances arose as New England towns began to grow. These disputes raised four issues. First, who owned the unused highway allowances? Second, who owned the highway allowances after highways had been laid out upon them and then discontinued? Third, what rights did the public have in highways? Finally, what rights did adjoining landowners have? This section examines these issues in the context of several early New England cases.

Early New England state courts held that unused highway allowances belonged to the original town proprietors. *Buel v. Clark*,²¹⁵ decided by the Connecticut Superior Court in 1771, involved a dispute over unused highway allowances left by the original proprietors in the town of Coventry, Connecticut. The town proprietors had granted to the plaintiff's ancestor a lot on an unused portion of the original township highway allowance. The adjoining highway was reduced in width. The plaintiff later inherited the lot and fenced it in. Believing that the town, and not the original proprietors, owned the unused highway allowances, the Coventry town selectmen pulled down the fence. The plaintiff brought suit in trespass against the selectmen. The court found for the plaintiff.²¹⁶ A general rule emerged that "[l]ands left by the proprietors in the original laying out of the lots, for the use of highways, belong to the proprietors, if not wanted for that use."²¹⁷ Thus, the

215. 1 Root 49 (Conn. 1771).

216. *Id.* at 50.

217. *Id.* See generally J. ANGELL & T. DURFEE, A TREATISE ON THE LAW OF HIGHWAYS

original town proprietors had the sole right to divide the unused highway allowances into additional lots. Neither the town nor the general public had any fee interest in the unused allowances.

The Connecticut Supreme Court reiterated this view in 1789, in *Brown v. Freeman*.²¹⁸ The dispute, again, involved fee ownership of an original highway allowance. The plaintiff claimed that he had received title to the land under a grant from the town of Chatham. Chatham had once been part of the township of Middletown, which, in turn, had originally belonged to the Middletown proprietors. The act incorporating Chatham reserved all remaining common lands to the original proprietors of Middletown. The Middletown proprietors had granted the same land (a portion of the original highway allowance) to the defendant in order to satisfy a deficiency in an irregularly shaped lot. The court, finding for the defendant, held that "the fee did not pass out of the proprietors, and the lands are resumable by them if they are not wanted for highways."²¹⁹ Thus, the court found that the original Middletown proprietors remained the fee owners of the original highway allowances, and the town of Chatham did not take fee title to the highway allowances.

As time passed, courts began to treat unused highway allowances as part of the adjoining lots. For example, the New Hampshire Supreme Court, in discussing ancient rangeways in *Morgan v. Palmer*,²²⁰ said: "Practically, however, these rangeways, when not converted into public highways by the towns, have been treated as a part of one or both of the adjoining lots."²²¹ This is understandable because by the mid-nineteenth century, town proprietors had long since died.

Hanover summarily dismissed *Morgan v. Palmer* as not applicable to the greenways issue.²²² A town opinion stated, "[*Morgan*] says nothing about the parts of the ancient rangeways which were used for highways, or exchanged for highways, and is therefore irrelevant to the Greenways issue, since all Greenways were once public highways."²²³ Thus, Hanover focused on the particular issue

395-96 n.1 (1886) (discussion of *Buel v. Clark*).

218. 1 Root 118 (Conn. 1789).

219. *Id.* at 119.

220. 48 N.H. 336 (1869).

221. *Id.* at 337.

222. Waugh Letter, *supra* note 16, at 2.

223. *Id.*

in the greenways dispute: What happened to the fee when highways were laid out on the reserved allowances and then discontinued?

This question was brought before the Connecticut Supreme Court over 170 years ago in *Stiles v. Curtis*.²²⁴ The land in dispute originally belonged to the ancient township of Woodbury as common and undivided land. About one hundred years before the court action the proprietors had set aside a portion of the common land for a public highway, laid out lots on both sides of the highway, and then sold those lots as being bounded on the highway. The land was used as a highway for about one hundred years and then discontinued. The defendant, a private owner of land adjoining both sides of the highway, had enclosed the land and claimed possession. The issue in *Stiles* was whether the descendants of the original proprietors of the ancient township of Woodbury held fee title to the discontinued highway or whether the defendant took fee title as owner of lands adjoining the discontinued highway. The trial court had directed the jury that the proprietors, by laying out the highway, had parted with their right and interest in the title.²²⁵ The jury accordingly found for the defendant.²²⁶ The plaintiffs appealed to the Connecticut Supreme Court, which held, in an 8-0 decision, not to grant a new trial.²²⁷

The *Stiles* decision prevented the proprietary descendants from claiming title to the discontinued highways through their ancestors. In his opinion, Justice Swift described the nightmarish consequences that would result if the descendants of proprietors were given the right of the soil:

[T]here would be scarcely an instance where the descendants of the original proprietors could be traced. The consequence would be, that every man owning land lying on a highway, would be liable to have the street on his front dug up, and even the ornamental trees in front of his house cut down, by any person who was mischievous and wicked enough to do it, and there would be no possibility of redress. Such a monstrous principle cannot be a part of the common law. If it had not been universally understood, that the conveyance of land adjoining a highway conveyed the right of soil in it, express

224. 4 Day 328 (Conn. 1810).

225. *Id.* at 329.

226. *Id.*

227. *Id.* at 334, 335, 339, 340.

words for that purpose would long since have been inserted in deeds.

. . . .

. . . It is well known that decisions have been rendered that where the original proprietors of towns have laid out highways wider than was necessary, the land not wanted for the highway belonged to the proprietors, and might be taken up and laid out in lots. Sanction this action, and we shall see the descendants of the original proprietors of towns start up by thousands; every ancient highway will be measured; where they are a little wider than is absolutely necessary for public travelling, surveys will be made of the excess; and lots will be laid out in front of half the farms in the state. But the period has arrived when deviations from the well known rules of the common law will not be encouraged.²²⁸

Thus, *Stiles* indicates that any attempt to assert ownership over the greenways by the descendants of the Hanover town proprietors (if any exist) would fail.

The final and most important issue raised in early New England cases involving highway property disputes focused on the rights of the public in highways. Justice Swift expressed his view of the "well known rules of the common law" of highways in *Stiles v. Curtis*:

[C]ommon law most clearly is, that when [a highway is established, the public become vested with a right to use it for passing, which cannot be narrowed, varied, or destroyed by the act of any town or individual, or by the lapse of time . . . and that the proprietors of lands adjoining the highway have the freehold of the soil as appurtenant to their lands, and can maintain trespass for digging the soil, cutting the trees, erecting encroachments, or for any other injury whatever.²²⁹

This description of the law emerged in the context of a dispute involving an ancient discontinued highway. The *Stiles* court never mentioned any interest of the town or of the general public in the fee to the abandoned highway. Justice Swift stated explicitly that the public's interest in highways is merely "a right to use . . . for passing."²³⁰

228. *Id.* at 338-39.

229. *Id.* at 339.

230. *Id.*

Four years after *Stiles v. Curtis*, the Connecticut Supreme Court decided *Peck v. Smith*,²³¹ a seminal case in New England highway law. *Peck* is important because the majority justices expressed a view of highways that was to become the well-settled law.²³² Over and over, *Peck* has been cited as authority for the proposition that the public obtains only a right of way to a highway.²³³

In *Peck*, a highway had been laid out pursuant to statute, over the land of Benjamin Williams. Smith, the defendant, had erected a shop on the part of the highway not used for traveling. Williams conveyed his land to Peck by warranty deed, "saving and excepting the said highway."²³⁴ Peck then brought an action in trespass against Smith for continuing to operate his shop.²³⁵ The trial court directed the jury that if the acts complained of occurred within the highway limits, then judgment was due to the defendant.²³⁶ The jury accordingly found for the defendant, and plaintiff, in an appeal to the Connecticut Supreme Court, moved for a new trial.²³⁷ In a 5-4 decision, the court granted plaintiff's motion.²³⁸

The majority in *Peck v. Smith* was convinced that a highway gave the public only a right of passage. Justice Trumbull wrote: "[N]either our method of establishing highway by reservation, nor of laying them out according to our statute, gives to the public a freehold in the soil."²³⁹ To substantiate this view, Justice Edmund described the history of highways in the New England proprietary

231. 1 Conn. 103 (1814).

232. See majority opinions of Justices Edmund, Trumbull, and Swift in *Peck v. Smith*. *Id.* at 124, 129, 132 respectively.

233. See, e.g., *Copp v. Neal*, 7 N.H. 275 (1834); *Chatham v. Brainerd*, 11 Conn. 59 (1835); *Read v. Leeds*, 19 Conn. 182 (1848); *Nugent v. Vallone*, 91 R.I. 346, 161 A.2d 802 (1960). *Peck v. Smith* has even been cited beyond the New England states. See *Greenberg v. L. I. Snodgrass Co.*, 119 N.E. 2d 292 (Ohio 1954); *Fox v. Ohio Valley Gas Corp.* 222 N.E. 2d 412 (Ind. 1966).

234. 1 Conn. at 104.

235. *Peck* alleged that Smith,

without law or right, and with force and arms, entered into and upon the plaintiff's said land; and with the like force and arms erected upon said land one certain dram or grog-shop; and with the like force and arms, dug up, broke and destroyed the plaintiff's herbage, sod, turf and grass then and there standing and growing thereon, sunk and deposited therein and thereon large stone; together with various other enormities; to the plaintiff's damage"

Id. at 103.

236. *Id.* at 104.

237. *Id.*

238. *Id.* at 110, 129, 132, 146.

239. *Id.* at 130.

townships.²⁴⁰ He first described highways established along the reserved allowances, before the adjoining land was granted to individuals:

[I]t seems to have been the general practice of the owner of a township, or *propriety* (so called), being owners in fee simple of the land . . . to set apart and appropriate certain portions of their land, over which they granted a highway, or common passage. This . . . did not affect the freehold of the soil; it remained in the proprietors. They were then, *in fact*, the owners of the adjoining land on each side; they *in fact*, furnished the ground for the highways It follows, that the laying out of their highways did not divest them of the fee. It remained in connexion with other parts of the propriety as a common interest. Each and every of the proprietors . . . might be said to be not only owners, but adjoining owners.²⁴¹

Justice Edmund also described the division of the proprietary into lots for sale, and the effect of this on the highways which were laid out on the allowances:

But when the proprietors proceeded by their joint act to make a division of the whole or a part of their township or propriety . . . the common interest [in the allowances] terminated. Individuals became the adjoining owners; each received his allotment . . . by the known and established rules and principles of the common law; among which, no one rule perhaps was better known and established than the one . . . "that the freehold of the soil of a highway is in the owner of the land adjoining." The same act of the proprietors that constituted the individual the owner in fee . . . of the portion allotted him, vested him with the fee in those highways where by the location of his allotment, he became the adjoining owner, on both sides; and when adjoining on one side only, with the fee in a moiety, not as *incident*, *appendant* or *appurtenant*, but as a *component* part of his share or allotment in the division of the propriety.²⁴²

Step by step, Justice Edmund described the fee in the early highways as it passed from the original proprietors to the adjoining landowners. The fee in the highway and in the highway allowances vested in the adjoining landowners when the propriety began con-

240. *Id.* at 127-28.

241. *Id.* at 128.

242. *Id.*

veying adjoining lots. Any mention of town or general public ownership of the fee is entirely absent from this opinion. Thus, Justice Edmund's opinion in *Peck*, written from an historical perspective, is additional authority to refute Hanover's position in the greenways controversy.

Justice Swift's opinion, like that of Justice Edmund, described aspects of early New England highway development and history.²⁴³ Swift discussed highway allowances, exchanges, and the effect of legislative acts empowering towns to exchange and sell.²⁴⁴ These views are particularly relevant to the greenways controversy because Hanover justified its claim of ownership by asserting: (1) its view of the purpose of the highway allowances;²⁴⁵ (2) its understanding of the specific meaning of the word exchange;²⁴⁶ and (3) its opinion of the effect of the legislative acts of 1766 and 1791 on town ownership.²⁴⁷

First, concerning ancient highways in the original laying out of towns, Justice Swift said:

[I]t makes no difference who owned the land when the highways were reserved or granted. Who ever owned the land retained the fee in the place where the highway was reserved, and whenever he sold or granted the adjoining land, the freehold in the soil of the highway passed as an appurtenant to the land subject to the easement.²⁴⁸

This refutes Hanover's claim of ownership because it again describes the fee to the highways as passing directly from the proprietary to the adjoining landowners.

Second, Justice Swift's view of exchanges explicitly refutes Hanover's claim that, because the exchanges took place, the town must have received fee ownership of the highways. Swift's view is that towns never received fee title when exchanging highway allowances: "It is clear that towns have no power to exchange highways and cannot at any rate have the fee of the lands taken up for highways."²⁴⁹

243. *Id.* at 132-46.

244. *Id.*

245. See *supra* note 107 and accompanying text.

246. See *supra* notes 123-30 and accompanying text.

247. *Id.*

248. 1 Conn. 133.

249. *Id.* at 134.

Finally, Justice Swift's opinion refutes Hanover's argument that the legislative Acts of 1766 and 1791 somehow passed the fee of the highway allowances to the town. He said:

If by the common law, the public have only an easement in the land covered by a highway, it is difficult to see how a statute authorizing a sale of it, could vest them with the fee [N]obody ever supposed, because they possessed this power, that the fee of the land was in the legislature.²⁵⁰

Justice Swift realized that a statute which merely authorizes a town to sell or exchange unused highway allowances does not vest the fee to those allowances in the town.

On the other hand, the minority justices in *Peck v. Smith* believed that the public owned the fee in a highway.²⁵¹ For example, Chief Justice Reeve reasoned that when a highway is discontinued, the public could sell the land and apply the proceeds towards the purchase of other highways.²⁵² As long as the highway was used by the public, however, the adjoining landowners would have a defeasible freehold estate and could eject trespassers.²⁵³ Justice Ingersoll flatly asserted that land laid out for public highways becomes public property and no individual has any right or title to this land.²⁵⁴

When new townships have been taken up . . . it has been the general . . . practice, to reserve lands for highways This reservation . . . must . . . have been public; at any rate, it could not have been a mere right of passage over the land of an individual, inasmuch as no individual ever separately owned the land so reserved. As to all the ancient highways . . . there can be no pretense that they are mere rights of passage over the lands of an individual.²⁵⁵

Hanover argued from the same position in the greenways controversy: that because the allowances existed for a public purpose, the fee to the highway allowances vested in the public.²⁵⁶ Justice Ingersoll also specifically referred to exchanges as a method of acquiring highways: "Further, it has been an established practice

250. *Id.* at 144.

251. *Id.* at 105, 110 (opinions of Justices Reeve and Ingersoll).

252. *Id.* at 110.

253. *Id.* Defeasible means "[s]ubject to be defeated, annulled, revoked, or undone" BLACK'S LAW DICTIONARY 376 (5th ed. 1979).

254. 1 Conn. at 113.

255. *Id.* at 111.

256. See *supra* note 16 and accompanying text.

. . . to exchange highways for highways, when an old highway has been discontinued, and a new one taken up. This procedure must have been on the ground, that the town was entitled to the fee of the land taken up for highways."²⁵⁷ This is the exact approach used by Hanover to claim title to the greenways over 150 years later. The minority views in *Peck v. Smith*, however, did not become law. Therefore, Hanover's arguments, which mirrored the minority opinions, had no legal justification.

The majority's position in *Peck v. Smith* became the settled law, and was followed in subsequent New England cases.²⁵⁸ Simply stated, this basic law is that the public obtains only an easement in a highway, and adjoining landowners own the fee.²⁵⁹ Furthermore, when a highway is discontinued, the abutting landowners hold title to the land discharged of the easement.²⁶⁰

In sum, the law lends no support to Hanover's claim of greenways ownership. Issues involving ownership of township highway allowances had been raised, disputed, and resolved in cases originating over 150 years earlier.²⁶¹ Three conclusions of law concerning highway allowances and discontinued highways emerged in eighteenth and nineteenth century New England litigation. First, although unused highway allowances had once belonged to town proprietors, they were treated by courts in the nineteenth century as part of the adjoining lots.²⁶² Second, town proprietors gave up their fee interest in highway allowances when highways were actually laid out. As a result, proprietary descendants could not later claim fee title to discontinued highways.²⁶³ Finally, the public obtained only an easement to a highway; the fee was owned by adjoining landowners.²⁶⁴ Thus, the law of highways as it developed in the late eighteenth and early nineteenth centuries could have been used to refute Hanover's claim of ownership to the greenways.

257. 1 Conn. at 112-13.

258. See *supra* note 233 and accompanying text.

259. 1 Conn. at 145.

260. *Id.* See generally *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 168-69, 36 A. 1107, 1114-15 (1897) (Hamersley, J., concurring) (short descriptive summary of Connecticut's highway law as it developed in the nineteenth century).

261. Thus, the Hanover controversy was not really unique, at least in terms of the dispute involved. It certainly was unique, however, in its twentieth century timing.

262. See *supra* notes 215-21 and accompanying text.

263. See *supra* notes 224-28 and accompanying text.

264. See *supra* notes 229-60 and accompanying text.

CONCLUSION

An historical and legal examination of Hanover's greenway controversy leads to the conclusion that Hanover's claim was unjustified. Hanover never acquired fee title to its ancient highways. Following the close vote of the town meeting of November 5, 1983, Hanover resolved the controversy by granting quit-claim deeds to abutting landowners, thus relinquishing all right to the soil. This was a just outcome, and it saved the town from continuing what had become a long, expensive, and sometimes bitter ordeal.

The Hanover greenways controversy was anachronistic. It slumbered for 150 years and then awoke in the twentieth century. It could have been settled in modern courts by applying the law that had emerged in early nineteenth century New England cases. The dispute, however, was settled within the community, without resort to law.²⁶⁵

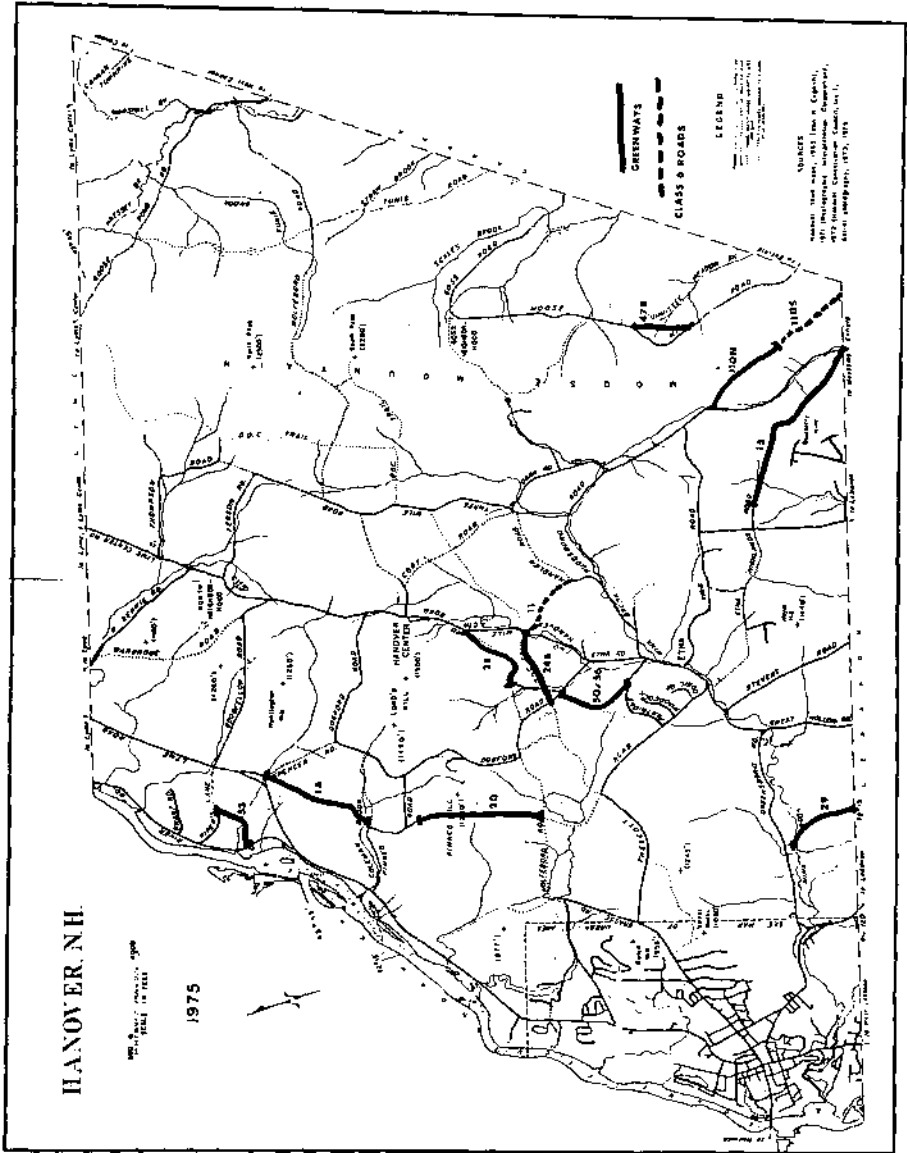
Despite the outcome of the controversy, which favored the landowner's claim, a new greenways dispute could conceivably emerge in another place at another time, or even in Hanover again, involving different or newly discovered greenways. Because of a common historical background of proprietary settlement, the New England states—Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island—together must have hundreds of ancient discontinued highways, any one of which could become a greenways controversy. Early New England history and highway law is available for use in resolving future greenways disputes whenever and wherever they might arise. The outcome of a litigated dispute is predictable. Any attempt by a town to assert legal title over its discontinued highways based upon their ancient origin will fail. Thus, if a New England town seeks to establish a series of conservation pathways connecting its surrounding wildlife districts, as was attempted in Hanover, another way will have to be found to achieve its goal, other than an outright claim of ownership based

265. The Hanover experience is perhaps representative of the likely community response. The strong temptation to press the old claim for the benefit of the majority is most likely to be resisted in the New England village context where the minority landowners are more likely to be able to generate a constituency, and where the majority members are more likely to feel empathy for the landowners. The outcome of a vote would probably be different in an urban environment, but in an urban environment it is unlikely that such a claim would arise.

on the unique way these highways were established in the eighteenth century.

Edward D. Sutton

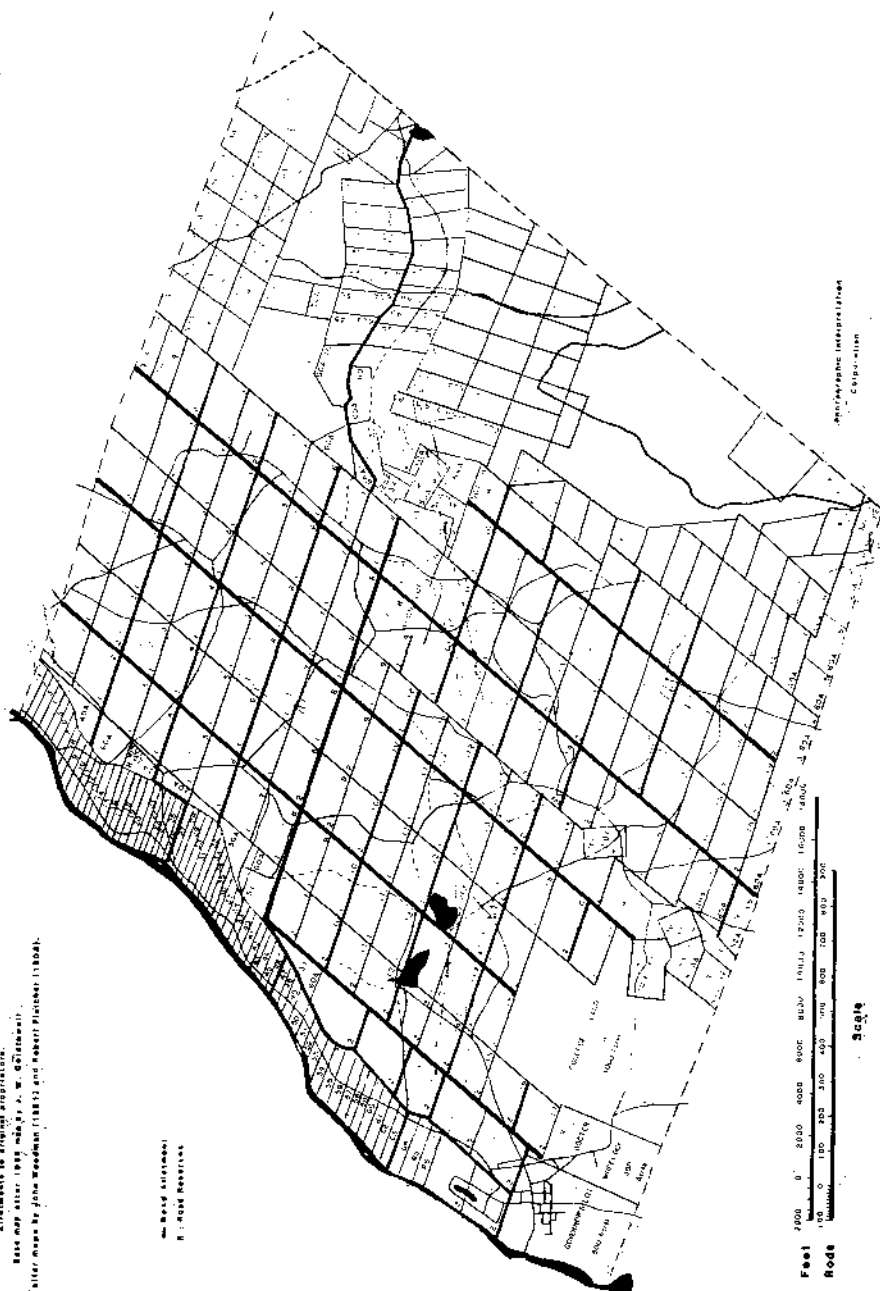
Appendix A



Appendix B

HANOVER, NH

Attachments to original map. See map after 1892 and p. 4, W. O. Clatswell. Original map by John Woodman (1851) and Robert Plitcher (1868).



— Roads
- - - Roads

Scale
Feet 0 200 400 600 800 1000 1200 1400 1600 1800 2000
Rods 0 100 200 300 400 500 600 700 800 900 1000

Photographic Interpretation
C. P. ...

