

The Town's Request for Judgement

WHEREFORE, the Town requests the Court to enter judgment:

(a) declaring that Estabrook Road, including the unpaved portion, was a "public way" prior and up to 1932; or, in the alternative, declaring that the Road was a "public way" prior to 1932 by prescription;

(b) declaring that the 1932 Discontinuance relieved the Town of its obligation to maintain the unpaved section of Estabrook Road;

(c) declaring that the 1932 Discontinuance did not affect any Town rights other than its obligation to maintain the discontinued portion of Estabrook Road, that it became a "public access" private way, and that therefore the general public has the right to access and the Town has the right to regulate that portion over the objections of the Defendants and any other unknown party with a claim of right therein; or, in the alternative, declaring that the Town (and the public) has a prescriptive easement to use Estabrook Road for trail purposes;

(d) entering a permanent injunction (i) prohibiting Defendants from maintaining the newly-installed gate across the Road; (ii) requiring Defendants to remove that gate and landscaping in its vicinity; (iii) preventing the Defendants from interfering with Town undertakings to install appropriately redesigned barriers, markers and signage as determined by the Town to ensure public safety and environmental protection and to warn the public that the way is no longer maintained for vehicular traffic; and (iv) barring Defendants from taking any action to prevent or deter members of the public from using the Road for pedestrian access and trail purposes; and

(e) ordering such other relief as is equitable and just.

After four years, the Town has not been able to produce any of the necessary documentation to show that the Trail was ever a public way and has admitted that such documentation may be "missing or not in our possession". A finding that the Trail was a public way by prescription requires a finding of continuous use and maintenance of a way by the Town and other municipal action by the Town. After four years, no significant evidence of this during the 1800s has been found.

After four years, the Town has not been able to produce any evidence that the Town ever had an obligation to maintain the Trail. In fact the Town records specifically say that the Trail was not maintained.

After four years, the Town has not been able to find any record of any public or Town rights relating to the Trail prior to 1932. The 1932 discontinuance extinguished any such rights as it has done on other old roads in Concord and around the Commonwealth.

A Town may only gain a prescriptive easement if they can show they have been treating and maintaining a way as a public way for 20 years. The Trail has been gated closed for the past 85 years and there has been no Town maintenance or other action since then. The public cannot gain a prescriptive easement, only individuals can who prove open, notorious, unpermitted, and adverse use of a property for 20 years.

If the Town were to prevail on the above points, they seek to control the entrance and signage of the Trail. It is important to note that there is a adjudication from 1932 which requires that the Trail be posted with signs "warning the public against entering"