

Information Sheet on the Paine Road Public Right-of-Way

Dear Residents of Easton,

We have compiled this Information Sheet to consolidate key information on the status of the uncertain boundary lines of the Paine Road Public Right-of-Way. This will address some of the concerns brought up at the July hearing about Paine Road. Certain footnotes referenced herein may be accessed on the website version of this document, at <https://easton-nh.org>.

It is the current view of the Selectmen that it is in the public interest that right-of-way boundaries, in general, should be smooth and predictable, and should not haphazardly vary in width over short distances by pinching in or bulging out at random points. We hope this Information Sheet will aid in a better understanding of the Select Board's commitment to all residents of Easton.

Sincerely,

Board of Selectmen

October 10, 2022

Definitions

- A **Public Right-of-Way** ("ROW") or **Public Highway** is an easement held in trust by government for the use of the public. The underlying land is usually owned by abutting landowners. The public has the right to use a ROW for *viatic uses*. A ROW will usually be wider than a *traveled way* and will commonly include features such as a *traveled way*, ditching, culverts, bridges, turnouts, cuts and fills, utility poles and lines, etc., as well as undisturbed land at the outer edges.
- A **traveled way** is the course within a ROW over which motor vehicles, bicycles, pedestrians, etc. usually travel. A traveled way is usually narrower than the ROW to allow room for ditches, culverts, shoulders, utility poles, etc. along the sides of the traveled way.
- A **viatic use** is any use of a ROW reasonably incidental to the purpose of traveling. In addition to driving, bicycling and walking, NH courts have held that viatic uses include roadside parking, hoses pumping gas to cars, riding or driving animals, transporting boats to waterways, watching a parade, and children playing. Viatic uses have also evolved over time to include communication and transmission purposes.¹
- A **Rod** is a historical unit of measurement equal to 16.5 feet. Local ROWs in NH commonly have a width of either 2 Rods (33 feet) or 3 Rods (49.5 feet).

The Current Legal Status of Paine Road

The Grafton County Superior Court ruled in 2019 that **Paine Road was made a public ROW by "implied dedication and express acceptance in 1804"** when the Town of Lincoln² "[v]oted to [accept] the road as it is now laid out from the Franconia Line to Landaff". Although the 1804

¹ "[A]s science develops highways may be used for any improved methods for the transmission of persons, property, intelligence or other means to promote sanitation, public health and welfare. Such use of the public highways constitutes a proper highway purpose even though it may be new and is subordinate to the primary use of the highways for the traveling public." *Opinion of the Justices*, 101 N.H. 527 (1957).

² In 1804, the area that is today the Town of Easton was divided between the towns of Landaff and Lincoln.

vote did not specify a ROW width, the Court also held that “[t]he actual width of the travelled way of the Road in 1804, even if known precisely, would not be definitive in determining the actual width of the Road today or then.”

The Court also separately ruled, as a fallback, that “even if the court were not to find that the Road had become a public highway by dedication and acceptance, **the court would find that it was created by prescription** prior to 1968.” The Court held that the prescriptive width of the ROW “is not merely the traveled way, but also the area outside of the traveled way necessary for maintenance and use of the traveled way.”

Because the Court was unable to make an exact determination of ROW width with the evidence before it, the Court recommended that the Town, through its Board of Selectmen, has authority under RSA 231:27 to “reestablish the boundary lines” of the ROW “which shall have become lost, uncertain, or doubtful.

Why Do We Need to Reestablish the Paine Road ROW Boundaries?

In the past ten years, uncertainty as to the legal status and width of the Paine Road ROW has repeatedly caused disputes and cost the Town in time and expenses. Disputes have included:

- Installation of gates and bars across the road, at the north and south ends of the gravel section or installation of other safety measures³;
- Uncertainty as to the limits of the Town’s authority to maintain (grading, graveling, and ditching) and plow the road;
- A claim that the ROW was discontinued by town meeting vote in 1933⁴;
- A lawsuit challenging the town meeting’s authority to reclassify the gravel section of the road from Class VI to Class V to affirm the Town’s authority to perform maintenance;
- A lawsuit claiming that (1) the gravel section of the road was private property because either (a) the road was never legally created, and/or (b) the true location of the road was somewhere further up the side of the mountain, and (2) the gravel section of the road was so narrow as to effectively limit it to one-way traffic⁵;
- A lawsuit, among other questions, questioning a non-abutter right to plow the gravel section of the road;
- A lawsuit, among other questions, seeking to bar logging trucks from using the road in the winter;
- A claim that the Town was trespassing on private property when it installed longer culvert pipes beneath the graveled road (intended to protect the surrounding conservation area by ensuring streams passing under the road maintained their natural course);
- Accusations that new ditching and the addition of gravel were trespassing on private property;
- Accusations that plowing snow off the side of the road was trespassing on private property;
- Abutters planting saplings in turnouts on the graveled section obstructing public use.

To prevent similar future disputes, the Selectmen believe it is important for the Town government, road abutters, and the public to have a clear understanding of the location of the ROW boundaries.

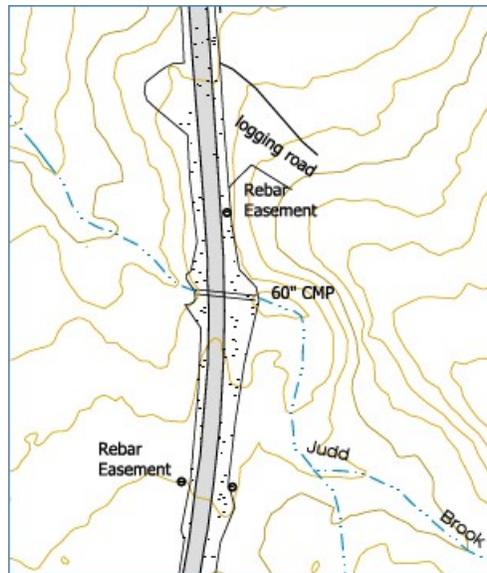
³ Stever letter 4/19/12, see reference file on town website

⁴ Nix letter 2/12/16, see reference file on town website

⁵ 2017 Stever v. Easton DJ Petition 1-5-17, see reference file on town website

The Need for Smooth Boundaries

Abutters to the gravel section of the road have asserted that the ROW boundaries should conform to the existing limits of disturbed areas. The below excerpt from a drawing of the traveled way and its surrounding disturbed areas shows how the areas shrink and expand at random over a relatively short distance.



One argument against uneven boundaries is that, over the long term, uneven and arbitrary boundaries will lead to public confusion about the limits of the ROW and contribute to further disputes relating to use and maintenance of the road.

A second argument against uneven boundaries is that they are inconsistent with a road that the Superior Court ruled is a ROW primarily by dedication and acceptance, not merely by prescription⁶. It is doubtful that a town meeting would have accepted a public highway with explicitly uneven boundaries. Further, it would be incorrect to assume that the limits of the present-day disturbed areas are the same thing as a prescriptive width of the ROW. As held by the Superior Court, the prescriptive ROW "is not merely the traveled way, but also the area outside of the traveled way necessary for maintenance and use of the traveled way." As stated by the Court:

[A] highway established by prescription is not as a matter of law restricted in width to the track of actual travel. In a case of prescription, the easement is **not necessarily limited to the traveled path and the ditches on each side**.... The space between the wrought road and its exterior limits may be needed for various purposes, as for furnishing earth and other materials for making the road, constructing culverts and watercourses, making changes in the travelled path, and avoiding obstructions by snow; and for these and other reasons the space given to highways is very generally **much more** than what is occupied by the travelled path....

Hoban v. Bucklin, 88 N.H. 73, 79 (1936) (citations, quotations, and ellipses omitted) (emphasis added).

⁶ 215-2016-CV-127 Roy R. Stever and Deborah P. Stever, trustees of the R & D Stever Family Trust vs. Town of Easton-- NOD 8-23-19, see reference file on town website

Following the instruction of the Superior Court and the *Hoban v. Bucklin* case, it is arguable that the prescriptive ROW boundaries extend beyond the present-day disturbed areas.⁷ Further, it is also arguable that the mere fact that an area next to the road does not show signs of disturbance does not mean that this area would not have been presumptively available for viatic uses (e.g. pulling a vehicle off the road for repairs) or for maintenance purposes (e.g. adding a ditch or culvert as watercourses changed over the years).

An uneven boundary leaves the road vulnerable to soil dynamics. Areas of drainage and slopes are subject to modification during storm events. The town needs the ability to establish new drainage when required by shifts in terrain after a flood, other weather event, or man-made accident⁸. The town also needs the ability to work on cuts, fills, subbase, base course, or culverts, all of which contain areas at high risk of blending back into nature over the years and be lost to future generations as “disturbed areas”. Vegetation works to obscure what was once disturbed. Evidence of old cuts abound, but are not easy to discern with the eye. A V-shaped cut is present at the Hamel property. Wide single-sided slope cuts exist at the Walter, Ward, and Stever (both paved and gravel sections) properties. These cuts were created so long ago that large trees have formed on them.

Numerous abutters have voiced concerns over hidden deed-chain issues that may be unearthed by deep research. That “will just open an expensive can of worms,” Jeanmarie Ward wrote, advocating that the ROW stay “prescriptive”. But it’s not the SB’s efforts that will open the can of worms. Litigation already has. During the trial the Town learned that the current section of Paine Road north of the gravel section may not match the same path that was laid out by Lincoln in 1804, and that the original road joined State Route 116 at a much more northerly point.

Furthermore, setting the ROW is not the same as setting a property boundary, because the ROW is a conceptual overlay that “slides” on top of property boundaries. No matter how wide or narrow the ROW is set to be, no one’s property boundaries change. This is an important point: boundaries of the ROW do not affect boundaries of properties. If one owned to a particular pin, tree, or stone wall beforehand, one would still own to that object afterwards. Even when one’s deed refers to “Paine Road” or “The Road”, that reference is to the road at that point in history, not to the present ROW.

Keeping the road prescriptive with haphazard and hard-to-follow boundaries would not be sustainable. The institutional memories and proofs of prescriptive-use fade over time, and the ability for the public to preserve their rights diminishes.⁹ The burden to find witnesses who traversed the road from 1947-1967 becomes harder and harder every day, and will eventually be impossible.

Smooth boundaries of a specific width would be more consistent with historical presumptions of dedication and acceptance or prescription.

⁷ It is also noteworthy that the population of Easton decreased 82% from 415 to 74 from its peak in 1860 to trough in 1960. The limits of public use and disturbance of the road from 1850-1870 are probably not readily discoverable today.

⁸ Easton Hazard Mitigation Plan 2016, https://eastonnh.files.wordpress.com/2016/05/2016-easton_hmp_finalforadopt_jan25_16.pdf

⁹ NH Municipal Association <https://www.nhmunicipal.org/town-city-article/roads-created-prescription-are-not-yesterday%E2%80%99s-problem>

Discussion of ROW Width(s)

Evidence that the Gravel Section ROW is at least 2 Rods Wide:

USDA Easement: Abutters to the gravel section of the road have placed large areas of their land into conservation easements¹⁰. The surveyor hired by the US government assumed a 2-Rod width to the road in drawing the easement boundaries on either side. The abutters approved these easement boundaries. Further, as the purpose of the easements was wetlands protection, it is possible that the surveyor/USDA found no significant wetlands of interest within the 2-Rod ribbon of road.

Limiting the impact of the ROW on the easement is that there is only a combined ~480 feet span of road where the USDA easement is on both sides of the road, where overlap is most possible (but still unlikely)¹¹. Since there is probably no overlap of a 2-Rod ROW with the USDA Easement, it can be concluded that the provisions of the Easement Administration Action described by Mr. Smock-Randall and Atty. Parent¹² would probably not be triggered.

Reel Brook Road Comparison: Reel Brook Road is a rural, unpaved Class VI road slightly south of Paine Road. The road conditions are generally worse than that of the gravel Paine Road, and the traveled way (11-12 feet) is generally narrower than that of the gravel Paine Road (12-15 feet). There is evidence that this historically similar road has been presumed to have a 2-Rod width:

1. When utility poles are placed on the opposite side of the road to a stone wall, the poles are generally 30 feet from the wall.
2. When there are stone walls on opposite sides of the road, the walls are generally 33 feet from each other.
3. Culvert disturbances range from 6-15 feet away from edge of traveled way on each side.

Evidence that the Entire Length of Paine Road ROW is at least 2 Rods Wide:

Ground evidence:

In the northern paved section: when there are stone walls on opposite sides of the road, the walls are generally 33 feet from each other, and in some cases more.

In the southern paved section: The Joyce v. Stark¹³ decision also demonstrates that homeowner fences do not necessarily mark a ROW boundary. "Snow has continued to be plowed beyond that fence approximately 3-4 feet on each side of the road. The evidence established that since the 1940's the Town has consistently used 28 feet for the travel portion of North Road and maintenance thereto."

Also, the utility poles numbered NHEC 2/153 C, D, H, I, J, and NET&T CO. 16/7, 8, 9, 10, 11, 12, 13, 13S, 14, 15, 16, and 16/17 are all in the current ROW because they are on record as having been licensed with the Town of Easton (not the abutting property owners) for their installation and maintenance.¹⁴ These poles are placed at 8, 15, 9, 11, 8, 9, 7, 6, 5, 7, 6, 7 feet

¹⁰ USDA Wetlands Reserve Program Warranty Easement Deed in Perpetuity, Exhibit B. Grafton County Register of Deeds, Book 4038 Page 0896, 1/31/2014

¹¹ Google Earth screenshots, generated with KML data obtained directly from USDA, the conservation easement holder see reference file on town website

¹² Attorney Parent letter to Attorney Decker, 8/4/2022, p. 4, see reference file on town website

¹³ Joyce v. Stark, Coos County Superior Court 88-E-62, p. 6, see reference file on town website

¹⁴ NHEC Plan 27-T and NHEC Plan 931568, see reference file on town website

from the edge of the traveled way. The average is 8 feet. Double that (to account for room on both sides) and combine that with general traveled way width of 16-18 feet, you have average width of 33 ft. These poles are located throughout the entirety of the southern paved section of Paine Road. In addition, poles 13 and 13S are placed 2 rods apart, on exact opposite sides of the road.

Measurement of Subgrade Soil Disturbance:

A proxy for determining the total extent of subgrade soil disturbance, at original grade, is to examine the length of a culvert as measured perpendicular to the traveled way. Some culverts are arranged at a sharp angle to the road (say, 45 degrees), so their actual lengths are not good indicators of road width at original grade. But we can measure them end to end perpendicular to the traveled way.

The mean and median of perpendicular culvert lengths do not vary significantly when comparing each of the sections of Paine Road (around 32-34 feet: 2 rods), *i.e.* road base courses at the culverts were not meaningfully narrower on the gravel portion vs. the paved portion as a whole. The traveled way is narrower for a higher portion of the gravel road because it is perched up higher on taller fills.

Evidence that the Paine Road ROW is 3 Rods Wide:

Ground Evidence from Paved Southern Section:

Where there are property pins on opposite sides of the road, they are generally 3 rods (49.5 feet) apart.

Where there are stone walls on opposite sides of the road, they are generally 3 rods apart.

Cuts to eliminate blind crests are evident at the Hamel and Walter properties. When counting these large cuts, the disturbed areas stretch over 40 feet. There is also an evident large cut across from the Ward driveway. (These cuts illustrate that even a relatively narrow-traveled width of 17 feet can require significant room for disturbance on either side for proper road design.)

Historically Comparable Roads:

The Easton Master Plan states:

The last half of the nineteenth century was the community's busiest period to date with the greatest number of residents, mills, and businesses. The number of residents at the time of the first census in 1880 was 302. The population reportedly peaked prior to that with 415 people in 1860. Old foundations throughout town reflect a distribution of homes and farms that were once much broader than today's. Some of today's trails follow the path of roads that once went to Lincoln, Woodstock and Landaff. Paine Road is considered to be the first north-south road through the valley, located east and uphill of the Ham Branch to avoid spring floods.¹⁵

Ruskin Road was laid out in 1828, with a 3 rod ROW¹⁶. Since Ruskin and Paine are very similar in features, and both existed through the same population boom around 1860, and the subsequent bust, it would be fair to infer that the public in the 1800's would have presumed the

¹⁵ Easton Master Plan <https://eastonnh.files.wordpress.com/2019/07/2019-easton-master-plan.pdf>, p. 52

¹⁶ Sabourn & Tower on Ruskin Road Layout, p. 3, see reference file on town website

same width for both roads. It is likely that both roads' disturbed surfaces have shrunk since attaining their greatest widths probably in the 1850-1870's. Paine Road arguably would have gotten more traffic than Ruskin Road, being a through road in a valley, leading to substantially more houses and farms.

If the Paine ROW was enlarged through prescriptive use, for example from 1850-1870, the ROW would not shrink back down even if the disturbed surface on the outer edges ceased to be utilized for a given amount of time. Public ROW areas, once established, cannot be lost by non-use (which would be the equivalent of a private property owner exercising adverse possession against the public) If old roads like Paine and Ruskin have been through a boom and bust cycle, the prescriptive ROW attained during the boom would hold (as long as the boom was before 1948). The population of Easton decreased 82% from 415 to 74 from its peak in 1860 to trough in 1960.¹⁷ That is a greater than five-fold difference which promoted nature's tendency to reclaim areas outside the immediate traveled way. Hence the true, original prescriptive ROW is greater than the currently disturbed areas, maybe much greater given the 160+ years of natural reclamation.

Presently Comparable Roads:

The physical characteristics of Paine Road are very similar to the physical characteristics of other known 3-Rod ROWs in Easton:

Road	Traveled Way Width	Ditching Width	Width of Disturbed Area (estimate)	ROW
Beaver Meadow Road	15-18 feet	6-12 feet	33-38 feet	3 rods
Ruskin Road	15 feet	6-12 feet	30-33 feet	3 rods
Valley View Road	12-15 feet	8-14 feet	27-35 feet	3 rods
Paved Paine Road	15-18 feet	7-15 feet	29-36 feet	?
Gravel Paine	12-15 feet	8-14 feet	27-30 feet Several notable narrows of ~24 feet	?

Three comparable town roads have a 3-rod ROW, Ruskin, Valley View, and Beaver Meadow. Although Beaver Meadow Road and Valley View Road were established at 3 rods through modern-day subdivisions, their physical similarity to Paine Road is an example of how, as stated in *Hoban v. Bucklin*, "the space given to highways is very generally much more than what is occupied by the travelled path". It is almost a certainty that the width of disturbed areas will not equal the ROW.

¹⁷ US Census Bureau, via https://en.wikipedia.org/wiki/Easton,_New_Hampshire

Reestablishing the ROW Boundaries Will Not Trigger a Widening of the Traveled Way

The Selectmen have heard concerns that reestablishing the Paine Road ROW boundaries will lead to widening of the traveled way. However, the Town's options are tightly constrained by these following factors, ranging from legal, and financial, to technical:

- The Town cannot act to expand the traveled way of any road without knowledge by and input from its citizens. Any actual work will go through much debate.
- The Town cannot act to expand the traveled way of any road without major funding. The Town's legislative body (the town's registered voters) controls the budget at Town Meeting.
- Significantly expanding the traveled surface will require moving utility poles, which in turn could place landowners and/or the Town liable for further expenses.¹⁸ This increases the cost of road expansion and raises the bar for its justification.
- The technical burden of a significant traveled way expansion on Paine Road would likely require more space than is within a 3-rd width.
- The Easton Master Plan states: "Sugar Hill Road and Paine Road were designated as local scenic roads in 1977. This designation means that a public hearing and written permission of the Planning Board are required prior to road or utility work in the right of way if that work will require cutting trees over 15 inches in circumference or removal of stone walls."¹⁹ The local scenic road statute increases the technical and legal burden of a major Paine Road expansion and raises the bar for its justification.

The reestablishment of ROW boundaries on Paine Road will not do away with these constraints, regardless of who is on the Select Board.

Next Steps

- Hear resident's comments regarding Paine Road Right-of-Way at a public meeting. (October 17, 2022 Select Board Meeting)
- Decide the width of ROW.
- Generate and file map according to NH RSA 228:35.

¹⁸ Right of Easement Kiedaisch to NHEC 1974, see reference file on town website

¹⁹ Easton Master Plan, p. 35