

Written Arguments for the Estabrook Lawsuit Conclude

Oct 10, 2021

The parties have submitted written legal arguments to the court. This follows years of discovery and a two-week trial in June of 2021. In late November, the parties will provide oral arguments. By mid 2022, a decision will be rendered. Appeals may follow. The basis of the case has been changed many times by the Town Counsel which has caused the increasing cost to the taxpayers to pass \$1,600,000.

The documentary evidence and trial testimony have resolved many uncertainties regarding the history of the Estabrook Trail. The parties differ in their interpretation of some historic facts.

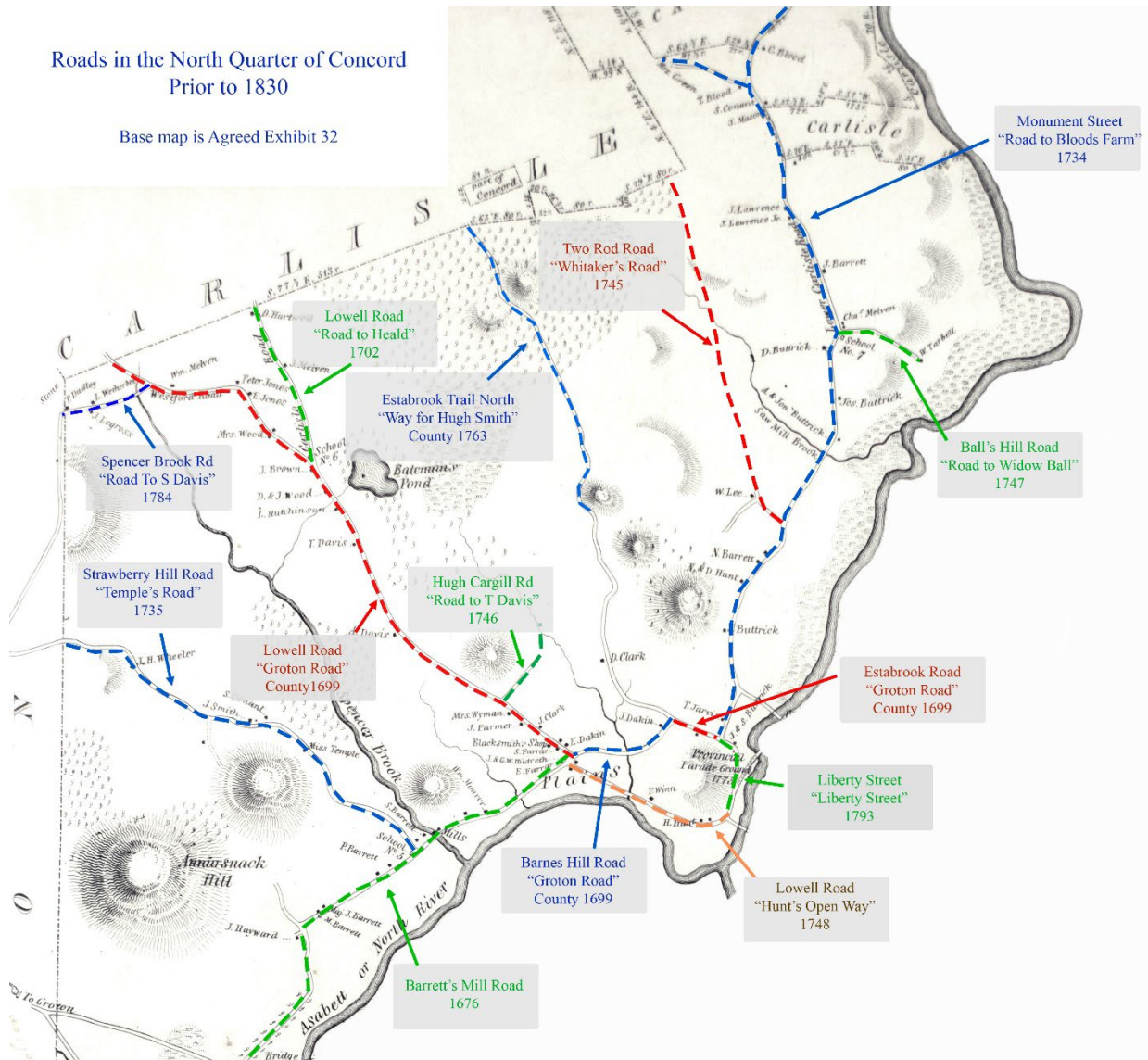
There is no dispute that the disputed and discontinued Estabrook Trail (the Trail) is a private trail leading only to private land. There is no dispute that the Town Counsel must demonstrate two things to make their case: that the Trail was once a public way with public rights, and further that it was **not** discontinued as a public way in 1932.

There is no dispute that the Trail was discontinued in 1932 and ordered to be henceforward a private way, and to be posted “to warn the public against entering thereon.” There is no dispute that many old roads have been discontinued in the same manner in the Commonwealth, and no such road has ever been found by a court to have public rights. The Town Counsel argues that the required posting to “warn the public against entering” means “the public is invited to enter but notified that the road is not maintained.” The Town Counsel asks the court to interpret the now-obsolete discontinuance laws to have granted the public rights to use the old Trail for all purposes which would include automotive use today.

The history of the old Trail is disputed by the parties. Some facts are not disputed. Old documents show the Trail was used as an old logging road dating back to the mid 1700s. Deeds describe the southern part of the Trail as created by the owners on their own land. There is no record that the Town ever established the southern part of the Trail as a public way as was done for all of the other old roads in the north of Concord. The northern portion of the Trail is different as it was proposed to be made a public way in 1763 but it was voted down at the Town meeting. Subsequently some citizens appealed that decision to the county and asked it be made a private way, but there are no records that the conditions to establish the way were ever completed. The Town Counsel argues that at some point in the 1700s the Town presumably followed the statutory process to establish the Trail as a public way, but that all the various records relating to the Trail must have been lost, even though the records for all the surrounding roads have been found (see figure below).

Roads in the North Quarter of Concord
Prior to 1830

Base map is Agreed Exhibit 32



Trial Exhibit showing records of roads in the north are not missing

Concord has the most complete records of any Town in the Commonwealth, dating back to the 1600s, long before the Trail ever existed. If there were evidence of loss of records, as the Town Counsel contends, the law provides a means for demonstrating a public way, by proving, over a twenty-year period, use of the way for general public travel combined with records of maintenance by the municipality. The few known cases where a way in the Commonwealth has been proved in this manner all were based on testimony regarding extensive *current* use and maintenance. In this case, the Town Counsel suggests that the twenty-year period of public use and maintenance occurred at an indeterminate time *around two centuries ago*. Yet the only old documents regarding the road describe it as both unused and unusable, as a “wood (logging) road...little better than ruts through a piece of woodland” used for “teaming of wood,” and “this road has little travel excepting that which is caused by the owners of land near it.” Thoreau walked on trails throughout Concord and described the Estabrook Trail as “unknown to the uninitiated” and “not accepted by the Town or the traveling world.” There is no record of anyone residing on it. It was omitted from early maps, traffic census measurements, and had no street signs. There is not a single record of anyone

traveling the length of the Trail by foot, by horse, by automobile, or with a cart. Despite these undisputed facts, the Town Counsel will ask the court to presume extensive travel and maintenance during prior centuries, as part of the argument that the records must have once existed but are now lost.

In theory, the law says that owners of land have a right to decide who can use it and for what purpose. In this case, the owners began in the 1990s to allow public use of some of their lands as “neighborly accommodation.” By 2015, the owners’ hospitality was overwhelmed and the growing number of visitors on their Trail was compromising the owners’ common goal to keep the land as a nature preserve. The owners sought the help of the Town to fix the problem, but were sued. Some visitors expressed entitlement, a mistaken belief that the land was public, and demanded the Town seize control of the owner’s land. This case reminds landowners of the extreme risks of allowing the public on private land.

Additional information available at www.estabrookfacts.org