

ROW MAPPING PROCEDURE MANUAL

Chapter 4 Highway Boundary and Property Line Determination

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CHAPTER 4

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HIGHWAY BOUNDARY AND PROPERTY LINE DETERMINATION

4.1 Chapter Overview

A function of the Regional ROW Mapping Units, or consultants when applicable, is to determine the location of the existing highway boundaries and property lines where required. This function is performed by or under the direction of a registered New York State Licensed Land Surveyor.

There is a lack of concise information located within one reference source that covers the various aspects of Highway Boundary Determination in New York State. This chapter has been written as a guide to assist those responsible for these determinations. It is intended to provide guidance and reference information that could be considered by the surveyor in making property line and highway boundary determinations. This chapter will also discuss the different philosophies used in the past for establishing highway boundaries, and how to incorporate them into today's determinations.

This manual is not intended to define the legal and preferred interpretations of surveying principles and practices used in determining property line and highway boundary locations. It is also not intended to set specific policy on the method by which highway boundaries are determined. Interpretations of surveying principles and practices, as well as methods utilized, are reserved for the professional judgment of the Licensed Land Surveyor.

The information in this chapter is also provided to encourage surveyors to consider all the many techniques by which highway boundaries can be created, also the need to include adequate historical reviews prior to making any right of way determinations.

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4.2 Title Searches

The Abstracts of Title, Certificates of Twenty-Year Search or the Last Owner Searches prepared for Department projects are required by the Attorney General's office for purposes of Title Certification. They are compiled by an abstractor from the Attorney General's office or by private Title Companies hired by the State to prepare these documents. These searches may or may not be available or useful to the Surveyor for preparation of the acquisition maps, but this data should be examined to ensure that the Surveyor is aware of the recorded title information used by the Attorney General's Office to prepare title certification.

As no property line should ever be positioned without a search against the property to be acquired and adjacent property, deed research must be performed by the Land Surveyor.

Generally, the Attorney General's Office will not request title data nor will it examine title to any lands owned by the People of the State of New York under the jurisdiction of an Executive agency of the State. Since title has been previously examined prior to its original acquisition, the Attorney General's Office assumes that the jurisdictional agency holding the property has an accurate understanding of the extent of its ownership interest, including boundary lines, existing occupancies and current use. Likewise, the Attorney General's Office may not examine title to beds of municipal streets and beds of waterways. Since Section 402(A)(4) of the EDPL shifts the burden to prove ownership of such property to the party making a claim, no searches or examinations are performed prior to such a claim being made. If the Department requests that searches or examinations be made for any of the above properties, the Attorney General's Office will complete such examination as a part of its service to the Agency.

4.2.1 Available Information Resources

Listed below are some of the various governmental agencies that may have on file maps, surveys, deeds and other related documents.

(Appendix F of this manual depicts the historical development of counties in New York State.)

Federal Agencies

- U.S. Army Corps. of Engineers - Maps and surveys related to waterways
- Library of Congress - Atlases, maps, and Early State Records

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State Agencies

- Department of Law - Law Library, Index to Session Laws referring to old turnpikes and plank roads
- Archives and Records Administration and State Library - Historic manuscripts, surveys, maps, land patents, Records of Letters Patents, deeds and records of New York's early history
- Office of General Services, Bureau of Surplus Real Property - Miscellaneous parcels owned by the State, Lands Underwater
- Department of Environmental Conservation, Albany and Regional Offices - Deeds and maps of patents and grants (land maps)
- Department of Transportation, Regional Offices - Highway Record Plans, Maps, Survey Notes
- Thruway Authority, Canal Corporation, Albany and Regional Offices - Canal Acquisition Maps, Water Grants, Canal Blue Line data

Municipal Offices

- County Real Property Office - Tax Maps, property owners name and deed Liber and Page
- County Clerk's Office - Property records and survey maps; city, town, or local subdivision maps, miscellaneous records
- County Surrogates Office - Indices of Wills and intestate deaths
- Municipal Highway Departments - Historic road records, road widths and boundary locations, maps
- Municipal Historian - Historic road survey records, deeds, maps, etc.
- Village Clerks Office - Historic road survey records, deeds, maps, etc.
- Town Clerks Office - Historic road survey records, deeds, maps, etc.
- Railroad and Utility Companies - Track maps, utility maps, valuation maps . . . etc.
- Building Inspector-s Office - Survey maps, site plans, . . . etc.

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Miscellaneous Records

- Historic County Atlases - Dating to about 1860, they show old turnpikes, lot boundaries.
- Mix's Catalog - Lists historic maps, patents, land grants, original boundaries.
- Private Surveying Firms - Recorded and unrecorded survey maps & related data
- Property Owners - Recorded and unrecorded survey maps, unrecorded deeds, land contracts, sketches and general information on property locations.
- College Libraries - New York State Session Laws, historic survey maps, historic property records
- Local Historical Societies - Turnpike information, survey maps, historic road survey records
- Utility Companies - Records of utility easements and utility locations

Private Survey Firms - Many surveys and maps prepared by surveying firms for various reasons are not filed with the County Clerk. Some of these maps are with the property owner. However, the surveyor should retain all the maps in his/her file. Most surveying firms cooperate with the Department by exchanging survey and map information.

Property Owners - Property owners have a vested interest in their property and have a reasonable idea where their property lines and corners exist on the ground. Insofar as the property owners and long-time residents of the area are concerned a good surveyor is a good listener. Not only are historic documents and sketches preserved by the local populace, but also information is retained by memory that can provide worthwhile clues to the surveyor.

4.2.2 Wills

Occasionally, while researching a title, the chain of title appears to be lost or broken. Often this is a result of the owner's death. Therefore, the title should be traced through the Surrogate's Office.

Testate Death - In the cases where there is a will, once the will is admitted to probate, the title to any real property passes in accordance with the provisions of the will. The executor may convey property, by means of an Executor's Deed, to any party, except that property specifically devised to a certain party or parties may not be conveyed to someone else by the executor.

Intestate Death - This occurs when there is no will. Real property of the estate goes to the heirs in accordance with the law of intestate succession of the jurisdiction in which the property is situated. Property may be conveyed by the court-appointed administrator and claims for a taking can be settled by a duly appointed Administrator or Administratrix.

4.2.3 Tax Deeds

The chain of title may appear lost or broken because the property was seized by a municipality for unpaid taxes. The city or county tax office might be able to provide title information for tax delinquent property. The property description shown on the tax rolls is usually an abbreviated form, such as Tax Map Number, Section Number, and Parcel Number only, and as such, clearly identifying the property boundaries may be a problem necessitating a grantor/grantee search to find a plottable description. The existence of a tax deed may also create a second chain of title for the property thereby clouding the title. The clouded title may require that court action, boundary line agreement, or other legal means be used to resolve the situation.

4.3 Property Line Determination

The definition of the practice of Land Surveying, according to Article 145 Section 7203 of the State Education Law, is "practicing that branch of the engineering profession and applied mathematics which includes the measuring and plotting of the dimensions and areas of any portion of the earth, including all naturally placed and man or machine made structures and objects thereon, the lengths and directions of boundary lines, the contour of the surface and the application of rules and regulations in accordance with local requirements incidental to subdivisions for the correct determination, description, conveying and recording thereof or for the establishment or reestablishment thereof."

Property line determinations must be performed by or under the direction of a licensed Land Surveyor currently registered to practice in New York State.

Insofar as the surveyor representing the Department of Transportation is concerned, the boundary lines at, which may be directly affected by or in close proximity to the acquisition, must be shown on the maps prepared. Property line evidence and monumentation must be shown. When a State acquisition is involved, the problem of title and associated releases are handled by the Attorney General's Office. It is the responsibility of the State's courts to adjudicate the location of boundary lines when land surveyors determine there is a discrepancy and the adjoining property owners cannot resolve the problem.

In addition, the surveyor with Department is required to write the "operative" portions of the deed always performed by the attorney in the private sector because of their legal skill and training. Because New York State law dictates the method and procedure to be used, the Department surveyor writes the "operative" portions of the deed as well as the "descriptive" portion directly on the survey map to make one legal document; not as suggestion for the State attorney's review, but as a completed document in the first instance. This area of surveying is quite complex because of the laws involved. The Department surveyor must have a knowledge of the land acquisition process performed by the Office of Right Way. They must have a knowledge of law as it relates to land acquisition and its effect on the property owner as well as the rights acquired by the State. They are involved directly with engineering decisions for design and construction concerning taking lines, degree of rights acquired or left to the owner, access control, sight distance. They must anticipate the engineering requirements for drainage, bridges, etc.

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4.3.1 Property Lines

The initial right to land ownership must be acquired by a written document. After the original right is established, land may be added to or subtracted from an owner's holdings by unwritten means. Nature through the force of water may alter the shape of land by erosion or accretions. People by their acts, conduct, and verbal statements may augment or diminish their land area. These methods of title transfer are questions of law which the surveyor must understand.

The presumed order of importance of conflicting elements that determine boundary location is as follows:

1. Right of Possession (Occupation-unwritten conveyance)
2. Senior Rights
3. Written Intentions of the parties

4.3.2 Right of Possession

Questions of title by right of possession (adverse possession) are complicated and are generally problems for the legal profession. For the right of occupation to prevail, the possession must be:

1. Actual
2. Visible
3. Exclusive
4. Hostile
5. Continuous for 10 years in NYS (statute)

Insofar as the surveyor with the Department is concerned, the limits of any possession as occupied on the ground must be shown on the maps prepared. Property line monumentation must be shown. When a state acquisition is involved, the problems of title and associated releases is handled by the Attorney General's Office.

4.3.3 Senior Rights

Deeds have a junior and senior consideration. A land owner in selling a portion of their holdings must fulfill their obligation to the buyer thus creating a senior (buyer's) deed and a junior (seller's) remainder deed. If later, subsequent parcels are sold, each new deed becomes senior to the owner's remainder, but junior to earlier conveyances. Thus, a junior grant in conflict with a senior grant yields to the senior grant. A call for an adjoiner's deed which has senior title would thus preclude any overlap or gore. However, a call to the adjoiner does not necessarily indicate senior title. If senior title does not exist, the call to the adjoiner is not valid. Many times a call for an adjoiner is inserted after the original conveyance is made. The criteria is the date of the conveyance and not the date of the recording of the deeds in the county clerk's office. However, unless a deed is recorded, it may not be considered valid as against the innocent rights of third parties.

With a subdivision, although in theory all lots are created at the same time upon the filing of the map with the County Clerk's Office, junior and senior rights do exist in the order of sale as conveyed and recorded. Senior rights once formed may be voided or eliminated by court decree, property line agreement between neighbors, and government appropriations only.

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4.3.4 Written Intention-Deeds

The written document by which title to property is transferred is a deed. It is a writing or document executed under seal and when delivered affects a conveyance of real property.

4.3.4.1 Deed Composition

The operative and descriptive portions make up the two basic parts of a deed. Attorneys, because of their legal skill, are qualified to compose the operative portions of deeds. Surveyors, because of their technical and mathematical skills, are best qualified to describe the size, shape and location of a parcel of land.

The descriptive portion of the deed is made up of a general descriptive paragraph and a particular descriptive paragraph or section. Should a conflict arise between the two paragraphs the particular thing described in detail is much less apt to be in error than a general statement written without detailed thought. An example would be a general description reading, "All that piece or parcel of land lying and being Lot #5 of... described as follows: " With the particular description clearly showing that the parcel also includes a portion of Lot #6 - senior rights excepted.

Fundamentally, two (2) methods are used to describe land:

- A. Metes and bounds descriptions. The word mete means to measure or to assign by measure. The word bounds means the boundary of the land or the limits and extent of property. A metes and bounds description is a perimeter description wherein each course is described in sequence, and the entire description has a direction of travel around the area described.

- B. Subdivision descriptions.

4.3.4.2 Intention - Fundamental Principle

In analyzing the deed and survey data found, the intentions of the parties of the deed, as gathered from the whole instrument, is the controlling factor. The intent must be from the written instrument itself and not from the ideas of one of the parties, (senior rights excepted). In the interpretation of the written instrument assume that the two parties looked at the site and had an idea of the lines on the ground when the deed was drawn. This is presumed true even though it is known that many deeds are drawn by attorneys without viewing the site. A call for an adjoiner whose deed refers to a map may be included as part of the description provided that the call for the adjoiner is valid. It is not legally necessary the map be recorded provided that the map referred to can be so identified.

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4.3.4.3 Conflicting Calls

The presumed order of importance of conflicting calls which express the written intention of the parties is as follows:

- A. *Call for a survey*
- B. *Call for monuments*
 1. *Natural*
 2. *Artificial*
 3. *Record*
- C. *Distance*
- D. *Direction*
- E. *Coordinate*
- F. *Area*

A. Call for a survey

Where a property description calls for a survey and map, it is presumed that the parties acted with reference to the survey map and the map becomes a part of the description as though it were recited directly in the deed. All monuments shown on the map have as much force as if mentioned in the writing itself. Also, a call for an adjoiner whose deed refers to a map dictates that the map be included as part of the description provided that the call for the adjoiner is valid. It is not legally necessary that the map be recorded provided that the map referred to can be so identified.

B. Call for monuments-original survey

The presumed order of importance for monuments is as follows:

1. *Natural monuments* - natural objects such as rivers, lakes, trees, mountains, etc.
2. *Artificial monuments* - man-made objects set such as stakes, fences, stones, etc.
3. *Record monuments* - street lines or adjoiner's property line. (Physical monuments may or may not mark a record monument).

Where lines are located and marked on the ground by the parties of the transaction at the time of the transaction, and are called for by the deed, the lines so marked clearly show the intentions of the parties. A survey run for this purpose is an original survey and original monumentation would be controlling provided the following conditions are met:

1. The lines monumented were established prior to or at the time of the execution of the deed.
2. The lines run and monumented were considered as the lines of the transactions.
3. The lines run and monumented were identified and called for in the deed. Again, any lines that encroach on senior rights must give way to those rights.

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Existing fence lines, blazed trees or any monumentation marking the original lines as surveyed or fences built at the time of the original survey may be controlling over other monuments or deed calls. However, if a monument is obliterated and its former position can be identified, the former position will hold. Artificial monuments set prior to a deed and considered part of the deed are presumed superior to record (adjoiner) monuments. Artificial monuments set after the deed is written are presumed subordinate to record (adjoiner) monuments. An unidentified monument cannot in most cases, be considered controlling when in conflict with other elements.

Monuments called for in a deed, either directly or by survey or by reference to a map by which the parties are presumed to have acted, are subordinate to senior rights, clearly stated contrary intentions, and original lines marked and surveyed. They are presumed superior to distance, angle, coordinates and area.

C. - F. Distances, Direction, Coordinates and Areas

Distance is presumed superior to bearings both which are presumed superior to coordinates since it is assumed that coordinates are derived from the former. Area is assumed subordinate to all other considerations. These presumptions are rebuttable and may be overcome by evidence.

4.3.5 Resurvey Determination

In establishing existing highway boundaries and property lines, the surveyor with the Department of Transportation is conducting a resurvey. In their search for data they probably will uncover maps which are the product of resurveys by other surveyors before them. The courts hold that in making a resurvey the surveyor must attempt to reestablish the property corners in their original location on the ground. The surveyor or anyone else cannot change the position of the corners by correcting original surveys. Thus, if a deed calls for a monument and the conditions stated for original monumentation are met, the location of the monument found or reestablished denote the property corner and not the location called for by deed bearing and distance or even as shown on a subsequent survey and map.

4.3.6 Degree of Estate

The surveyor must determine the location of all existing title lines whether fee or easement. A conveyance of an interest in real property less than fee has junior and senior considerations which must be understood by the surveyor in resolving conflicting elements. Certain principles are involved in interpreting the intent of the written document, some of which are included in the following definitions:

Conveyance - The term conveyance embraces every instrument in writing by which an interest in property is transferred from one person to another.

Fee Simple - The fee simple or fee is the absolute estate or ownership. A fee simple title is presumed to be the intent of a conveyance or grant of real property unless it appears from the deed that a lesser estate was intended. This is based on principle that a grant is to be interpreted in favor of the grantee (buyer).

However, a grant by a public official or body to a private party is to be interpreted in favor of the grantor (seller).

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Reservation - A reservation is a right retained by the grantor, and is to be interpreted in favor of the grantor. Usually it is perpetuated by having the right also reserved to the heirs, successors and assigns. In succeeding conveyance then, the reservation becomes an easement.

Easements - An easement is the right of one or several persons to use the property of another for a specific purpose. Several easements may be granted for the same parcel for different reasons, however, the right of the senior easement cannot be interfered with.

Encumbering Easement - Lies within the fee title and decreases the value of the fee property in question. An example is a right of way for others over the property in question.

Augmenting Easement - Lies outside the fee title and increases the value of the fee property in question. An example is a right of way to the property in question over the lands of others.

Appurtenant - One essential to the land such as a street and passes automatically with the fee whether recited or not.

Party Wall Easement - Party walls are those placed and erected so that they support floors and roofs of structures on adjoining lots of different ownership. In such cases, there is an easement on the part of each owner for support of that part of the wall which is placed upon the other party's property.

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4.4 Procedures for Determining Right of Way Widths

Generally, any highway right of way acquires its character as a public highway either by:

1. *Statute, dedication or appropriation* (by filed or recorded instrument) - Title is a matter of record; records usually contain descriptions of the boundaries and therefore the boundaries can be re- established.
2. *User rights* (prescriptive easement)- Title is an easement right that has ripened, over the underlying fee title; the boundary is limited to the area which is physically occupied and maintained as a highway.

Specifically, highways are created in one of four ways:

- A. By proceedings according to State statute or local law (see Section 4.4.1).
- B. By dedication through offer and expressed acceptance (conveyance accepted by municipality; see Section 4.4.2).
- C. By dedication through offer and implied acceptance (actually used and maintained by municipality).
- D. By prescription (“public use”) over a specific period of time mandated by statute (now 10 years) of which the owner had knowledge but to which explicit consent was not given (a type of public adverse possession; see Section 4.4.4).

4.4.1 Right of Way by Statute

Common or recorded roads, turnpikes, and certain plank roads, together with county acquisitions and state appropriations, are examples of right of way acquired under statutes. The laws under which these rights-of-way are/were acquired are derived from the doctrine of eminent domain. This is the right of the government to take property for public use.

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4.4.1.1 Common Roads

During the Dutch occupation of New York (known as New Netherlands) the Dutch sovereigns claimed they held title to the land based on conquest and the charter granted by the sovereign to the Dutch West India Company. Therefore, when settlers in the New Netherlands laid out roads, the sovereign retained title to the underlying land. As a result, the owner of either the land through which the road ran or the land against which the road abutted, could not claim title to the right of way. As a consequence, roads which were laid out or established during the period of Dutch rule between 1623 and 1664 are owned by the State of New York: the current "sovereign". In the succeeding period of British rule, title to roads created during the Dutch incumbency was vested in the Crown. However, as to roads laid out during British rule, English law held that title remained with the owner of the underlying land but was subject to easements in favor of the public for passage. The important consequence of the English legal concept of road ownership was if the government abandoned a road, or simply stopped using it, the abutting land owners thereafter held title free and clear of the easement in favor of the public. Thus roads created during the period when New York was a British colony are owned by the adjoining landowners or by the owners of the land over which the road passes, though still subject to the public easement. After New York became a state in 1776, a new legal concept of title developed in cases whereby the state acquired rights to a highway or street. The State is said to hold title as a public trust to provide for the public use of the right-of-way for ordinary general transportation and traffic.

(See Appendix "F" for a map depicting the historical development of all counties in New York State)

(See Appendix "G" for description of laws relating to common roads)

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4.4.1.2 Turnpikes and Plank Roads

Between 1797 and 1847, all turnpikes or plank roads were created by individual acts of the state legislature. Turnpike laws of 1807 & 1827 set up general provisions, and a minimum right of way width of 4 rods, which applied to all turnpikes created between 1807 and 1847, although each turnpike was still incorporated by an individual act. [L. 1807 c. 38 and L. 1827 c. 18¹]

After 1847 [L. 1847 c. 210] all turnpikes and plank roads could be incorporated without legislative action, but the turnpike and plank road companies were required to apply to the County Board of Supervisors for authority to construct the road and acquire the necessary real estate. By 1848 [L. 1848 c.360 amending L. 1847 c.210], all turnpikes and plank roads were limited to a maximum width of four rods, except that a greater width could be acquired through a voluntary sale. In 1890 [L. 1890 c.566 Section 127] all turnpikes and plank roads were at least four rods wide. Therefore, turnpikes and plank roads constructed before 1848 or after 1890 are a minimum of four rods wide (unless stated as less in the statute), and in a few cases five or six rods wide. Whereas, turnpikes and plank roads constructed between 1848 and 1890 had a maximum width of four rods unless a greater width was acquired by voluntary sale.

By various statutes (e.g. L. 1838 c.262; L. 1854 c. 87; L. 1883 c. 409; L. 1890 c. 566; L. 1896 c. 964, and Chapter 63 of the Consolidated Laws of 1909) whenever any turnpike or plank road corporation was dissolved or the road discontinued, the former turnpike or plank road property was to become a public highway. By Chapter 87 of the Laws of 1854, turnpike and plank road companies could abandon the whole or any part of their roads, at either or both ends, and the portions abandoned would “revert to and belong to the several towns” through which the road was constructed. Beginning with Chapter 409 of the Laws of 1883, the language was changed to the several “towns, cities and villages...”

4.4.1.3 County Acquisitions

Since 1944, the State has been allowed to acquire property directly for highway purposes under Section 30 of the Highway Law. Prior to 1944, counties were required to acquire property for state highways according to various session laws (L. 1898 c. 115; L. 1906 c. 468; and L.1936 c. 63) except for rights of way acquired for Public Service Commission projects (maps of which are stored in the State’s Archives) or parkways. The counties would acquire property by one of four types of transactions: Purchase, Condemnation, and Release or under an option to buy. If the county purchased the property or acquired it through condemnation the transaction should have been recorded and filed in the county clerk’s office. If the owner simply released the property to the county or granted the county an option to buy the property the county was not required to record the transaction.

¹ NY Chapter Laws cited as L. (year) c. (Chapter #)

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Form 6

When the counties acquired the right-of-way and before construction could begin, the counties had to certify to the State that the right-of-way was available for highway purposes. This certification was provided on Form 6 - a form letter which the county filed with NYSDOT's Main Office Right of Way in the Department's Main Office (see sample in Appendix "I"). The property being acquired was identified on the Form 6 by ROW map numbers and the county was asked to state which of the following transactions was used to acquire the property.

Land Purchase - When the county purchased property, the county's deed to the property should have been recorded with that county's clerk. The county clerk's records will show any fee or easement title shown on the ROW map and include a description of the property. Property descriptions on acquisition maps which begin, "Lands to be provided for the reconstruction . . .," are interpreted to be held in fee. Acquisition maps whose descriptions begin, "Lands to be released for the reconstruction. . .," or use such wording as "Lands to be provided for a drainage ditch. . .," are interpreted to mean that the State holds an easement to the property. However, the deed language (fee or easement) will control if it is clear.

Condemnation - When a county acquired property through a condemnation process, the county was deemed to hold either a fee title or an easement title as interpreted from the ROW map and description.

Lands Released or Put Under Option to Buy - When the only record of a county's acquisition of property is the Form 6, on file with DOT, the State's claim to the property is deemed to be an easement solely for highway purposes, regardless of any statement on the Acquisition Map that implies the type of acquisition. In other words the previous owner retains the fee title. However, if the project for which the property was acquired has never been built then no easement exists and the owner still holds title. If the owner or adjacent owners claim they are due some form of payment or wish to clarify their title, they must direct their concerns to the county.

Although not all the Forms 6 now on file with NYSDOT explain the method of acquisition, the fact that this form is signed and dated provides the State with the right to occupy the property.

The Land Surveyor is not actually concerned with the degree of estate acquired by the county as long as the land is available for highway purposes. Questions about the State's ownership and other property rights regarding particular parcels are often raised by adjacent property owners because of increasing land values, property restrictions or title insurance. Answering questions regarding maintenance jurisdiction and responsibility, transfer of use to another agency, renting the land or disposing of the property will require the Land Surveyor to understand the degree of estate held by the State.

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4.4.1.4 State Acquisitions

Chapter 544 of the Laws of 1944 (cite as L. 1944 c. 544) amended Section 30 of the Highway Law to authorize the State to acquire property for highway purposes. The next year Chapter 619 of the Laws of 1945 (L. 1945 c.619) established a procedure for cities (except New York City) to acquire property for highway purposes. L. 1945 c.619 requires the State to map the properties required by both the State and Cities for highway purposes. Under the law the cities reimburse the State for a portion of the costs the State incurs to map and acquire properties in cities for highway purposes.

Under the same laws, from 1945 to 1971, New York City was charged with mapping and acquiring property within the city which the State needed for highways and parkways. When title to the property was vested, the State reimbursed the City for a portion of the acquisition costs and expenses. In 1971 a new law was enacted (L. 1971 c. 617) whereby property acquired by New York City, pursuant to Section 349-C of the Highway Law (L.1945 c. 619), became vested with the State of New York. Since 1971, land in New York City, which is required for highway purposes, is mapped and acquired by the State in the same manner as in the rest of New York State.

Section 30 of the Highway Law, (revised by L.1944 c. 544; L.1945 c. 619) and Section 104 of the Eminent Domain Procedure Law (L. 1977 c. 839 Section 1), permit the State to acquire property necessary for constructing, reconstructing or improving highways, by the appropriation process. When the acquisition map is filed with the county clerk, the interest being appropriated passes immediately to the State free of encumbrances, except for any reserved or excepted rights.

Land Rights Acquired

The degree of the State's ownership acquired is shown on the acquisition map. (See Chap. 5 Acquisition Maps and Chap. 7 Transfer of Jurisdiction Maps).

The State may also acquire land by deed (D-Map, see Chapter 8 for a description and examples of D-Maps). This transaction is conducted the same way as private transactions are conducted by any two or more private parties. Accordingly, the estate acquired is limited to the estate held by the owner. Any "cloud on title" continues with the property under state ownership.

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4.4.2 Dedication through Offer and Expressed Acceptance

The definition of "Dedication" as defined in Black's Law Dictionary² is "the appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public." Black's further defines "Expressed Acceptance" as "where the intention to dedicate is expressly manifested by a deed or an explicit oral or written declaration of the owner, or some other explicit manifestation of his purpose to devote the land to the public use."

Municipal roads located within a subdivision exemplify accepted, dedicated roads. In typical subdivision procedures, after the municipality approves the subdivision plans, the subdivision map is filed with the County Clerk's Office. When someone purchases a lot in the subdivision the purchase implies an access easement over the roads proposed for the development. When the builder completes construction of the streets, within the subdivision, and the work is approved by the municipality's inspector, the developer gives a deed to the streets to the municipality.

Land Rights Acquired

The street boundaries are a matter of record on file with the County Clerk and are as shown on the filed subdivision map. The type of interest that the municipality holds (usually a fee) will be determined by the language of the deed to it.

4.4.3 Dedication through Offer and Implied Acceptance

The definition of "Dedication" as defined in Black's Law Dictionary is "the appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public." Black's further defines "Implied Acceptance" as "may be shown by some act or course of conduct on the part of the owner from which a reasonable inference of intent may be drawn, or which is inconsistent with any other theory than that he intended a dedication."

Existing roads shown on subdivision or property maps, filed with the County Clerk, are dedicated through an offer - i.e. designated by the developer on a map - and the municipality implies acceptance by maintaining the road. Once the map is on file and beginning with the sale of lots, the subdivision owner loses his/her exclusive rights to the land laid out as streets.

Land Rights Acquired

Although the fee title to the roads remains with the developer or may go with the lots sold, these fee rights are encumbered and continue to diminish as the land is used for road purposes by the traveling public (see 4.4.4 below). The public easement would be limited to transportation purposes within the ROW shown on the subdivision map.

² Blacks Law Dictionary, published by West Publishing Company, St. Paul Minn., 1979

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4.4.4 Highway by Use - Prescription

Under New York State law, a highway established by prescription gives the public only a limited right of easement over the owner's property for highway purposes. Title to the underlying roadbed remains with the owner of the adjoining property. As defined in the Fifth Edition of Black's Law Dictionary " Prescription" is the "acquisition of a personal right to use a way...by reason of continuous usage." Black's further defines a " prescriptive easement " as "a right to use another's property which is not inconsistent with the owner's rights and which is acquired by a use, open and notorious [or generally known], adverse and continuous for the statutory period, [but] . . . 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 statutory period. "

New York State's Highway Law, Section 189 states:

"All lands which shall have been used by the public as a highway for a period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town [highway] superintendent shall open all such highways to the width of at least three rods. "

However, before any municipality may deprive the landowner of the use of the property, the municipality must have substantial evidence demonstrating that a highway has been established by prescriptive use. Earlier versions of New York's statute specified twenty-year and fifteen-year periods of prescriptive use. A useful reference source is 64 NY Jur 2d Section 45 (See Appendix "L") that provides a concise discussion of prescriptive easements and a listing of relevant court cases.

In order for a municipality to claim an easement based on " prescriptive use", the municipality must substantiate that its claim to an easement meets the legal definition of a highway by use. Some of the numerous issues that the municipality must address are noted below:

- the nature of the use of the road
- definition of " private use "
- definition of the "period of use "
- the property owner's intentions
- the property owners' knowledge & consent to public use
- highway maintenance by a municipality
- width of the roadway
- current owners' rights

The Legislature did not intend Section 189 to allow municipalities to deny property owners' just compensation nor due process while appropriating private property for public use. The fifth and fourteenth amendments to the U.S. Constitution prohibit the government taking such actions.

When attempting to ascertain the correct boundaries of a "highway by use" the surveyor's first challenge is to determine where the municipality's easement rights end and the adjoining properties' rights begin, and to apply the correct legal precedents to the subject highway in order to determine the extent of the municipality's easement. To widen the road after establishing a highway by use requires the municipality to follow due process and make "just" compensation to the adjoining property owners. If the road was once opened to the maximum width allowed - three rods- then the municipality is not required to have continually maintained the

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roadway to a width of three rods, as there is no adverse possession against lands held in trust for the traveling public. In the opinion of the Attorney General, if the prescriptive use of the road has been limited to a width of less than three rods, the municipality may not widen the road without either the consent of the abutting owners or by following due process and compensating the owners. [1962 Opinions of the Attorney General page 210, 1995 Opinions of the Attorney General item 31 and 1999 Opinions of the Attorney General item 19] The public easement is limited not merely to the "beaten path" or traveled tract, but the easement is presumed to allow for the usual width of the municipality's highways plus the width reasonably deemed necessary for the travelers' safety and convenience and for ordinary repairs and improvements.

*(See Appendix "L" for discussion of prescriptive easements and a listing of relevant court cases)
(See Appendix "M" for full version of the above noted Opinions of the Attorney General)*

4.5 Methods for Establishing Highway Boundaries

4.5.1 Establishing Statutory Rights of Way

4.5.1.1 Common Road Rights of Way

A general description of an old road can sometimes be found in records kept by town or county clerks or there may be records kept in the State Archives or State Library in Albany. The descriptions may be in the form of centerline surveys recorded in town road books, minutes of town meetings, or miscellaneous records in the county clerk's office. Old maps might also depict roads that may have once existed. The laws of the early 1800's required the towns to record these descriptions and maps. If an early description or map of the road in question can be found, the surveyor must then try to determine, with reasonable certainty, that the existing highway follows the location of the common road according to the description provided by the records. This can be accomplished by referring to:

- The description of the common road
- Deeds of adjacent owners' properties - if referenced to the road
- Historical maps and documents
- Landmarks which monument the location of the road

When it has been ascertained that a highway once existed as a common road, the boundaries are determined by analyzing the following:

- If it contains a plottable centerline, the historic data may be used to determine if the existing road is on the same alignment as was the common road
- When record plans, survey field books, and cross-sections from past construction projects are available, they are to be used to help establish the earliest centerline of record.
- Field monumentation such as bridges, culverts and buildings
- Adjacent deeds positioned according to field monumentation
- Only as a last resort, the surveyor may survey the centerline of the existing highway and then assume it is the highway's original centerline.

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4.5.1.2 Turnpike and Plank Road Rights of Way

Evidence that is available to help determine whether or not a turnpike or plank road was built might be included in the following:

- In the Indexes to Session Laws, usually under Turnpikes, Plank Roads, or Roads, there are references to laws enacted by the State Legislature that incorporated turnpike or plank road companies. These laws may contain specific information regarding ROW. When a law states that the width of the Right of Way is to be not more than 6 rods or less than 4 rods, generally, the 4 rods will hold, unless by use the required Right of Way exceeds 4 rods in which case the actual use will determine the width of the Right of Way up to the maximum width of 6 rods.
- Articles of Association, on file with the Secretary of State, include "Notices of Incorporation" and can be a cross reference to the chapter laws or may contain ROW data not available in the chapter laws. The State legislature may have incorporated different companies at different times to build or operate the same turnpike. Cross-referencing the chapter laws and "Notices of Incorporation" may reveal that a corporation existed earlier and implies that a ROW was identified and that a road was constructed.
- If a county board of supervisors chartered a turnpike corporation, the minutes of the supervisors' meetings, on record in either the county clerk's office or the office of the county legislature, may contain specific information regarding ROW (Note: except in some counties the boards of supervisors have been replaced by county legislatures).
- The county clerk may have an "Index to Corporations." These records may contain specific information regarding ROW.
- County clerks may have a centerline survey on file. The records may be indexed according to maps or grantees.
- Town clerks may have records of town board meeting minutes, town road books or other types of records.
- The Education Department may have old maps, surveys, and town road books in the State archives.
- Newspaper notices often announced the formation of turnpike corporations.
- Minutes from a turnpike corporation's meetings confirm that a corporation existed and may contain specific information regarding ROW. Prior to 1847, turnpike corporations were required to file annual financial reports with the Office of the State Comptroller. Subsequently, annual reports were filed with the Secretary of State. The reports demonstrate that a corporation did exist.
- If a record owner could not be ascertained when a new turnpike was built, the turnpike company could petition a county judge to hold a hearing or trial to determine if any "owner" had to be compensated for the property. A record of the proceedings may be noted under "Inquisitions" in the Grantor index kept by the county clerk.

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- Municipalities sometimes turned public roads over to turnpike corporations. The turnpike company was allowed to acquire only the same degree of property right to the ROW which the municipality had held (i.e. easement or fee title). The municipality could have acquired these roads either from the adjacent owners or the roads were "highways by use." The turnpike corporation would reimburse the municipality for improvements made by the municipality. Records of these transactions may contain specific information regarding ROW.
- Patent maps or atlases (e.g. Beer's Atlas) may show locations of turnpikes, mile markers and tollgates. Some original mile markers may still be in place.
- Local historians may be able to help prove a turnpike existed in a particular area.
- Deeds to adjacent properties may refer to the turnpike abutting the property lines but in some instances a "turnpike" noted in a deed may actually refer to a local road, not an original turnpike.
- The oldest centerline of record can usually be determined from original centerline surveys, record plans, old survey maps, field notes, cross sections, field monumentation or topography and adjacent deed descriptions.

To determine the location of the oldest centerline of record, the surveyor should determine the total offset distance between today's centerline and the oldest centerline. This can be done by using contract plans and related documents from all previous projects for each state highway or county road designation within the project area. The first step is to determine the change in location from today's centerline location to a preceding project's centerline location. Next determine any change in the location of this centerline compared to any other preceding project centerline location, continue these steps for all previous contracts in the project area. The total of all the shifts from today's centerline location to the earliest reproducible centerline location will determine the location of the oldest centerline of record.

The surveyor might also find that previous surveys, done privately, may not have honored the statutory turnpike width and that the State did not claim the statutory width in earlier acquisitions. Therefore, the State may have reacquired part of a turnpike bed to which it already may have had a claim.

In New York State, there are some general, legal principles regarding turnpikes:

- There is no Adverse Possession against lands held in trust for the people of the State of New York for highway purposes.
- If evidence of a roadway exists today and there is proof the turnpike company existed, then it may be assumed that the company acquired land, either in fee or as an easement, to the maximum width prescribed by law.
- It is presumed that turnpike corporations complied with all procedures outlined in the governing statute, even if all documentation can't be found.

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- If the original centerline survey cannot be found, the oldest centerline of record is assumed to be the centerline of the original turnpike.
- The State bears the burden of proof when determining the termini and width of a turnpike.

4.5.1.3 Right of Way Established by Acquisition Maps (County Acquisitions, State Acquisitions)

Acquisition maps are required when additional or new ROW is needed on a highway project. The process for acquiring additional right of way adjacent to a highway requires that the existing highway boundaries be established according to all Right of Way and deed information available.

Map Errors

In cases when the surveyor has researched available records to determine a highway boundary location and the basic elements used to determine a highway boundary are inconclusive or contradictory, the surveyor should apply the rules that maintain there is no adverse possession against lands held in trust for the people of the State of New York for highway purposes and that all existing interests are extinguished when the government appropriates property.

Written Intention - Conflicting Calls

In accordance with Section 30 of the Highway Law the only land acquired by a municipality is the land necessary for highway purposes. It is generally assumed that the baseline stations and offsets depict the actual limits of the land that was acquired. Therefore, when certain individual acquisition maps and descriptions set forth contradictory descriptive elements, the calls for baseline stations and offsets will be the controlling terms. All other calls depicted or described on the acquisition map reflect the intent of the appropriation.

If ROW monuments are found in the field to mark an acquisition, the monuments do not control the surveyor's assumptions when the monuments' locations contradict the baseline stations and offsets. ROW monuments are set in the field when a construction project is completed. Monuments, in fact, are not called for in the plans, maps or descriptions of a project. If the original baseline cannot be reestablished, the ROW monuments may be used as evidence to help the surveyor re-establish the baseline.

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The ROW certified to be available for highway purposes is based on the recited baseline stations and offsets of the parcels mapped. The parcels are described and staked out relative to the survey baseline. The parcels may include portions of highway ROW already claimed by a municipality and/or adjacent property owner. The owners must contact Main Office Right of Way or file a claim against the State to initiate a resolution of the conflict.

An acquisition may cast a cloud on an adjacent owner's land if the stakeout of the stations and offsets to ROW corners fall inside his adjacent boundaries. The state is required to correct conditions of this type when they become known. The error is corrected by using quitclaim maps, claim maps, or additional acquisition maps.

The limits of a highway ROW, which the State has previously acquired by filing acquisition maps, could be determined by one or more of the following techniques, depending on the evidence available. In the order of their importance, the techniques are described below:

- The original baseline is used to describe previous acquisitions and represents the highest order of accuracy in reestablishing the limits of the acquisitions. Every attempt must be made to find and locate these original baseline points. If the actual points cannot be found, but the ties still exist, every effort will be made to locate the ties and reestablish the baseline points from the ties.
- Permanent survey markers (PSM) set within the project area are second in order of importance of evidence to be used for locating the ROW's original baseline. The PSM's can be used to recreate the original baseline by transforming the original baseline coordinates or as-built stations and offsets into the current project coordinates and thus create the existing ROW limits. The PSM's must be field verified to determine their reliability prior to holding them for control.
- ROW monuments located in the field are the third most important type of evidence. The distance and direction between field monuments shall be compared to the theoretical inverses computed using information provided by the acquisition maps to determine reliability of the field locations. The best fits would be held for small contiguous areas of acquisition. Clusters of ROW acquisitions separated by areas with no acquisitions or by intersecting roadways may be analyzed on separate ROW coordinate bases. It is not an acceptable NYSDOT practice to attempt to conduct a survey which relies on force fitting the entire project length into a ROW based on a single set of monuments. In some cases, the existing centerline or physical structures such as, building corners, bridges or walls can be held to coincide with ROW monuments to substantiate the appropriate hold points.
- The final, and least recommended, technique to reestablish ROW is to lay the original ROW maps over the project-based map taken from the field and determine the hold points for the best fit. A photogrammetry map, verified in the field, may also be used. These hold points may include the existing centerline, buildings, stone walls or similar fixed features on the map.

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After the baseline is re-established using any of the four techniques described above, the ROW limits must be computed from the stations and offsets shown on the acquisition maps. The surveyor should be aware that highway boundary prescriptive rights may extend beyond the ROW due to public use or maintenance responsibility extending beyond the ROW. Furthermore, the surveyor must keep in mind that the level of precision by which baselines, PSMs, and ROW monuments were set years ago has been exceeded by that which can be attained today with new technology. Sections of older control may only be reliable over limited lengths. Therefore, surveyors should try to reestablish control over reasonable distances and adjust for errors attributable to improved equipment at intersecting highways. This will help ensure that the boundaries of parcels acquired for ROW are not misrepresented as a result of applying new technology.

4.5.2 Establishing Highway User Widths

Land Rights Acquired

The minimum property right held by a municipality with maintenance jurisdiction is an easement for highway purposes. The fee title to the underlying land belongs to the original owner.

Ascertaining fee title is academic until such time as the ROW is to be transferred to another agency for other than highway purposes or quit claimed to a private owner.

Boundary Determination

The boundaries of a public easement for a "highway-by-use" can be determined based on the following information:

- Property descriptions in the abutting owner's deeds.
- Actual limits of the area currently or previously used for highway purposes. A discussion of these criteria follows:

Abutting Owners' Deed Descriptions

Deed boundaries may be construed to monument the easement limits of a user road. In an area where numerous deeds, maps and monumentation establishes a highway boundary width, consistent with the actual area maintained, the volume of documentation may be construed to monument the limits locally used for highway purposes. If a property is described in a deed as "bounded by", "fronting on", or "along" a certain highway for which the public has an easement, the grantee acquires the grantors underlying rights to the easement, unless the wording of the deed indicates differently.

Actual Area Maintained

The State's surveyor must determine the boundaries of a "highway-by-use". The public's prescriptive easement includes all traveled ways and shoulders, drainage and bridge structures, public sidewalks, roadside ditches, retaining walls and slope stabilization which support and protect the integrity of the highway. Highway Law-Sect. 189 allows for towns to claim de facto roadways exist based on public use for a time period greater than 10 years ". . . with the same force

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effect as if [the highway] had been duly laid out and recorded as a highway. "The boundaries of any public easement acquired under Section 189 are defined by the area needed for highway purposes by the traveling public - vehicular or pedestrian - as well as the area which is needed to maintain the ROW. Any privately owned structure, or a portion of one, standing within the boundaries of a highway ROW, built after the highway is claimed under the prescriptive use statute, constitutes an encroachment onto the highway ROW. There is no adverse possession against lands held in trust for the traveling public.

Sidewalks are "as much a part of the highway as the traveled wagon-way is, and it is under the care, superintendence and regulation of the same authorities", [Highway Law - Sect 2, Note 4].

(Refer to Chapter 18 of the Highway Design Manual for information on Acquiring Property for sidewalks)

4.5.3 Setting Minimum Highway Widths

Prior to the 1960's the minimum width of highways was assumed to be either 3 rods or delimited by topographic features such as stone walls, tree lines, fence lines . . . etc. The location of the features was determined by survey and the highway right of way was made to conform to the space available. Starting in the mid -1960's and through the 1970's, real estate values increased and the Department began an effort to determine more precisely the requisite, minimum ROW widths for its projects in order to contain the increasing costs of acquiring land for ROW. Land Surveyors needed to determine which highways were created by statute. Land Surveyors also needed to ascertain the minimum widths mandated by the laws that created the highways. This effort was applied to highways such as Great Roads, Turnpikes, Plank Roads, and some Common Roads. The roads created by statute generally required ROW's with minimum widths in excess of 3 rods.

To help surveyors determine the minimum width of a highway right-of-way, measurements should be made from either the earliest recorded centerline or the existing centerline, to the points farthest from the centerline, when measured according to the following criteria:

- **1 rod (16.5') minimum** from the oldest centerline of record. All town roadways opened before Section 189 was adopted were opened to a width of two or more rods according to the laws in force at the time the ROW's were opened, or to the width established by the town when the ROW was opened. Some exceptions to this minimum width have been found, but generally a two- rod minimum is appropriate. Researching the records and resources noted above in Section 4.1 can help the surveyor ascertain the width of the roadway as it was originally laid out. Any town roads that were opened after the adoption of Section 189 of the Highway Law had to be a minimum of three rods wide.
- The width of a highway by use may be defined in a particular area where numerous deeds delineate adjoining properties, and detailed maps of the area and monumentation in the field establish a consistent highway boundary. If the width of the highway has been determined by this method and most land surveyors who have surveyed the developed parcels bordering the subject highway concur this area is used for highway purposes, the surveyor fixes the boundary of the ROW by comparing the location of property corner markers to deed descriptions or private survey maps.

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- The original record plans will sometimes show the boundaries of a "highway-by-use" or depict the initial limits of the roadway. Although the information may not be complete, it may be the best information available regarding the width of the highway when the State first took jurisdiction under L. 1898 c. 115 and L. 1906 c. 468. The same situation may exist regarding a county road when a county originally opened a road under Highway Law - Section 115.

Over many years, a roadway may have "migrated" to one side as traffic adjusted to a condition of the roadway, such as on a sharp curve. This migrated boundary could be considered if in use for greater than 10 years.

Below is a list of the minimum widths established for dedicated highways at various times in the State's history:

[\(See Appendix "F" or a map depicting the historical development of all counties in New York State\)](#)

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<u>DATE</u>	<u>COUNTIES</u>	<u>ROAD WIDTH</u>
Prior To 1703	All Counties	4 Rods
1703 To 1772	Albany, Tryon	6 Rods
1703 To 1779	Ulster, Orange, Dutchess, Charlotte, Westchester	6 Rods
1772 To 1787	Albany, Tryon	Not more than 4 Rods or less then 2 Rods
1779 To 1787	Ulster, Orange, Dutchess, Charlotte, Westchester	Not more than 4 Rods or less then 2 Rods
1784 To 1787	Washington and Montgomery, formerly Tryon County	Not more than 4 Rods or less then 2 Rods
1787 To 1811	Westchester, Rockland, Dutchess, Orange, Ulster, Sullivan, now or formerly	Existing roads are to be 2 Rods at least, new roads are to be 4 Rods at least
1787 To 1826	All counties, except Westchester, Rockland, Dutchess, Orange, Ulster, Sullivan, now or formerly	Existing roads are to be 2 Rods at least, new roads are to be 4 Rods at least
1811 To 1828	Westchester, Rockland, Dutchess, Orange, Ulster, Sullivan, now or formerly	Not more than 4 Rods or less than 2 Rods
1826 To 1875	All counties, except Westchester, Rockland, Dutchess, Orange, Ulster, Sullivan, now or formerly	Not less than 3 Rods
1828 To 1875	Westchester, Rockland, Dutchess, Orange, Ulster, Sullivan now or formerly	Not less than 3 Rods
1830 To 1875	Suffolk, Queens, Kings, now or formerly	Not less than 3 Rods
1875 To 1890	All Counties	Roads could be a lesser width than 3 Rods
1890 To Date	All Counties	3 Rods

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PRIVATE ROADS

<u>DATE</u>	<u>COUNTIES</u>	<u>ROAD WIDTH</u>
1797 To 1813	For all counties, except Westchester, Rockland, Dutchess, Orange, Ulster, Sullivan, now or formerly	Not more than 4 Rods or less than 2 Rods
1797 To 1828	Westchester, Rockland, Dutchess, Orange, Ulster, Sullivan, now or formerly	Not more than 4 Rods or less than 2 Rods
1797 To 1830	Suffolk, Queens, Kings	Not more than 4 Rods or less than 2 Rods
1830 To 1890	Suffolk, Queens, Kings	Not more than 2 Rods
1813 To Date	For all counties, except Westchester, Rockland, Dutchess, Orange, Ulster, Sullivan, Suffolk, Queens, Kings, now or formerly	Not more than 3 Rods
1828 To Date	Westchester, Rockland, Dutchess, Orange, Ulster, Sullivan, now or formerly	Not more than 3 Rods
1890 To Date	Suffolk, Queens, Kings, now or formerly	Not more than 3 Rods

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4.5.4 Documenting Process for Existing Highway Boundary Location

When a project requires the surveyor to determine where the highway boundaries are located, it is important that the surveyor document their procedures and resources for future reference. Appendix "J" is a guide to help document how the location of the existing highway has been determined. When a new project is proposed for the same site in the future, documentation of the current highway boundary location will assist the next surveyors understanding of previous highway boundary determinations, thus resulting in highway boundaries which may be more consistent with historical information.

4.5.5 Chronology of Highway Boundary Laws

Appendix "H" is a chronological list of New York State laws which established the widths of public roads and turnpikes. For a detailed description of the laws that established the widths of public roads see Appendix "G".