Dear Selectboard,

I am writing to you about the legal trails in Tunbridge and the potential for damage to the trails by some trail users. During recent meetings of the Planning Commission, Chair Laura Ginsburg has repeatedly asserted that there are at present no legal restrictions on the permitted public uses of the legal trails in Tunbridge. I believe that position is wrong as a legal matter and I am concerned that the chair's repeated assertion of this mistaken legal position will encourage destructive uses of the trails.

On the legal issue, I asked Jack Candon, an experienced land use lawyer in the Upper Valley, to look into this matter, and he has provided an opinion letter to me and my wife. I attach a copy of his opinion letter to this email. In brief, he explains that the selectboard has an affirmative legal duty under the Vermont statutes to adopt a regulation in order to establish authorized public trail uses. He further explains that because the Tunbridge selectboard has not adopted any such regulation there are no authorized public uses for the town's trails. Thus, according to Jack's analysis, Chair Ginsburg's position is incorrect.

My immediate concern is that Chair Ginsburg's repeated assertion of this mistaken legal position will encourage destructive uses of the trails. To my knowledge, no other official of the town has staked out this position, or at least done so in this public fashion, meaning that these statements create a new threat to the trails by endorsing the view that "anything goes," to use Jack Candon's phrase, on the Tunbridge trails. Today, under Chair Ginsburg's position, in the middle of mud season, operators of all manner of wheeled vehicles, including bicycles, motorcycles, jeeps and ATV's, could use the trails whenever they want. The trails on the Dodge Farm are very wet and muddy, and wheeled vehicles would seriously damage the trails. Thankfully, I have seen no evidence of wheeled vehicles using the trails on the Dodge Farm so far this season and hopefully that will not change. Nonetheless, I am concerned that some members of the community and others will attempt to act on Chair Ginsburg's words.

To appreciate the potential magnitude of the threat to the Tunbridge trails, consider the recently announced proposal to train Ford Bronco drivers at the Suicide Six Ski area on off terrain driving and then send them off to explore local "real trails."
See https://www.roadandtrack.com/new-cars/future-cars/a33026428/2021-ford-bronco-off-roadeo-driving-school/. Under Chair Ginsburg's position, the organizers of a Ford "Bronco Off-Roadeo" based in Woodstock could lead caravans of Ford Broncos down the legal trails on the Dodge Farm.

Pending further developments, my wife Carin Pratt and I intend to continue to permit only pedestrian uses (and limited horseback riding when the land dries up) on the Dodge farm trails and to do our best to protect the trails from damage by explaining to users what we understand to be allowed and not allowed under Vermont law.

If you have any questions or concerns, please let me know.

Best wishes,
John Echeverria

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GARFIELD H. MILLER (1946-2001)
JOHN C. CANDON

April 6, 2021

John Echeverria and Carin Pratt
232 Justin Morrill Highway
Strafford, Vermont 05072

Re: Tunbridge, Trail Uses

Dear John and Carin:

You have asked for my legal opinion on the scope of authorized public uses of a trail as defined in 19 VSA § 301(8) in the event a Vermont town has not adopted a regulation defining authorized public uses of a trail, and on whether it is correct to suggest, in the absence of a town regulation governing the use of trails, a trail is open to any mode of transportation whatsoever.

My conclusion is that the Vermont statutes require a town's select board to take affirmative action to adopt a regulation defining authorized public uses of a trail, specifically Title 19 V.S.A. § 304(a)(5) calls for the town "to make regulation governing the use of ....trails and to establish penalties not to exceed $50 for noncompliance". In the absence of such a regulation, the town has not authorized public uses of a trail. It necessarily follows that in the absence of a regulation, any and all modes of transportation are not authorized public uses of a trail.

Background.

The Vermont statutory definition of trail is found at Title 19 VSA § 301(8), which states:

> "'Trail' means a public right-of-way which is not a highway and which:
>
> (A) previously was a designated town highway having the same width as the designated town highway, or a lesser width if so designated; or
>
> (B) a new public right-of-way laid out as a trail by the selectman for the purpose of providing access to abutting properties, or for recreational use."

Four legal trails appear on the Tunbridge official road map. I understand that one of these trails (Falls Hill Trails) was created as a result of the ancient roads process. I also understand that

the other three trails, including the two trails on the Dodge Farm owned by the two of you, were previously designated as town highways. Thus, the trails on the Dodge Farm fall within the definition of trails as set forth in 19 VSA § 301(8)(A).

So far as I am aware, the select board has not adopted an ordinance or official policy governing public uses of the trails in the town. The town *plan* states, in relevant part:

> "Bicycles and Pedestrians. Many residents bike or walk on town roads in Tunbridge. The rural nature of most of Tunbridge's roads makes bike and pedestrian travel reasonably safe. However, bike and pedestrian travel along the Route 110 is less safe due to higher traffic volume and speed and a lack of available shoulders. *Tunbridge has 2.45 miles of legal trails, all of which can be used by the public for hiking.* Additional recreational opportunities can be found using trails maintained by VAST."

The statement in the plan that trails are "for hiking" represents an important expression of the town's current position regarding the appropriate uses of the trails, but it does not represent a municipal action of "regulation" governing trail use within the meaning of 19 V.S.A. § 304(a)(5).

Analysis

The plain language of section 304(a)(5) – "the select board has the duty and responsibility . . . to make regulations governing . . . the use of trails" – imposes an affirmative obligation on the select board to adopt a "regulation" defining authorized public uses of trails. The text plainly imposes a mandatory duty on the town. The broad phrase "regulations governing" logically encompasses rules addressing what public uses are allowed – as well as what uses are not allowed – on the trails. In the absence of a regulation, the select board has not defined authorized public uses of the trails and there are no authorized public uses.

This conclusion is reinforced by other provisions of Title 19. As discussed, 19 V.S.A. § 301(8), while affirming that a trail is not a "highway," states that a trail is "a right of way." In the most general sense, a right of way is a right to cross the land of another. However, the statutory language makes clear that the term "right of way" as used in this provision has no defined meaning relating to the permitted scope of uses in the absence of a properly adopted regulation. Section 301(8)(B) indicates that a trail right of way may be established by the town solely for the purpose of providing access to abutting properties or, alternatively, for "recreational purposes." The specific trail uses mentioned in section 301 may not exhaust the possibilities for public trail use; we presume, for example that a town could create a trail to provide school children a path from their homes to their school. The critical point for present purposes, however, is that the term "right of way" cannot be read to create, of its own force and in the absence of a regulation, a public right to use a trail for any and all transportation purposes.

In addition, the mandate in 19 V.S.A. § 304(a)(5) to select boards to adopt regulations in order to authorize public trail uses makes perfect good sense in the context of Title 19 considered as a whole. Significantly, Title 19 contains no comparable language directing the select board to issue regulations governing the uses of "highways." This is understandable because it is implicit in Title 19 that Vermont highways are open for motorized travel as well as other transportation uses. By contrast, the authorized public uses of trails are, in the absence of regulation, inchoate and undefined. It made sense for the legislature to mandate that select boards adopt regulations defining authorized public uses of trails because, in the absence of a regulation, the appropriate public uses of a trail are not identified.

The conclusion that a town's select board must take affirmative action to authorize public uses of trails obviously does not mean that a town cannot authorize public trail uses. To authorize public trail uses the town needs to adopt an appropriate regulation by ordinance or otherwise. *See Demarest v. Town of Underhill*, 195 Vt. 204, 206 (2013) (referring to the town's adoption of a "Trail Travel Ordinance"). For present purposes, however, the important fact remains that, in absence of a regulation, there are no authorized public uses of a trail in Tunbridge.

The position that, in the absence of a town regulation, "anything goes" on the town trails, is contradicted by other relevant statutory provisions addressing trails. A trail occupies the lowest rung in the Vermont hierarchy of transportation routes, below class 1 roads, class 2 roads, class 3 roads, and class 4 roads. 19 V.S.A. § 302(a) (5) states that "the town shall not be responsible for any [trail] maintenance including culverts and bridges" and, in the same vein, 19 V.S.A. § 310 (c) states that "A town shall not be liable for construction, maintenance, repair or safety of trails." Given that towns have no responsibility to maintain, repair or otherwise ensure the safety of trails, it would not be logical to read the Vermont statutes as authorizing all modes of transportation on town trails whenever a town has failed to adopt a town trail regulation. Under this position, completely unmaintained and often fragile trails would be at risk of unlimited degradation by all kinds of intensive public uses, including motorcycles, ATV's and every other conceivable type of motorized vehicles. In addition, under this position, trail users would be exposed to unmitigated and potentially serious risks to their personal safety. Finally, property owners whose lands are subject to trails would suffer serious degradation of their lands, including not only their lands subject to the trails but their adjacent lands as well, due to erosion, pollution of watercourses, and degradation of wetlands. It is inconceivable that the legislature intended to encourage this kind of natural resource destruction, create these kinds of public safety hazards, and impinge on private property in this fashion, simply because a select board has not exercised its responsibility to adopt a regulation governing the use of town trails.

Finally, the position that "anything goes" on legal trails in the absence of a town trail regulation would have the perverse effect of converting town trials into highways, because they would be open to the same uses as highways. This would contradict the general understanding

that trails, whatever their specific authorized uses, are intended to be used to be used for r4elatively limited purposes. See Department of Transportation Orange Book (at page 13-5) ("Trails are public rights-of-way which are not highways and are *generally* used for recreational purposes.") (emphasis added). The fact that trails are intended for limited use is also confirmed by the provision indicating that towns have no responsibility to maintain, repair or otherwise ensure the safety of trails. The "anything goes" viewpoint, by effectively converting trails into highways, is inconsistent with the basic nature and purpose of a trail.

To suggest a public right of way on a trail has *unlimited* scope until select board action would not make sense for anyone. (Pedestrian only? Bicycles? Motorized bikes? ATV'S? AWD vehicles?) While the bicyclists may feel an inherent right to use the trails, how would *their* claim of right be *different* under this theory from a claim by operators of ATV or AWD vehicles? There is no basis in the argument for unlimited scope for making any distinctions among these different trail uses. It does not make sense to accept the position "It's a public right of way. I am a member of the public. Therefore, I may use it as I please." This is not the intent of the statute which places the obligation for establishing authorized trail uses on the select board's table.

In sum, in the absence of a regulation adopted by the select board governing the uses of the Tunbridge trails, there are currently no authorized public uses of the trails. It is certainly not correct to say that the trails are open to any and all modes of transportation no matter how potentially dangerous and destructive.

Respectfully,
MILLER & CANDON, LLC

By: Jack Candon
John C. Candon

JCC:bhs
Encl.