



PUBLIC AND PRIVATE WAYS

NAVIGATING YOUR WAY THROUGH THE LAWS ON HIGHWAYS AND BYWAYS

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By

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Public Ways

Public Ways



The term “highways” includes the following:

- State highways
- County highways
- City and town public ways



State Highways



- **Jurisdiction:** Laid out, constructed, altered, and discontinued by the Massachusetts Department of Transportation, Division of Highways (MassHighway)
- **Procedures:** Procedures for layout, alteration, relocation, discontinuance of maintenance, and discontinuance in G.L. c. 81; includes notice, public hearing, filing with county and city/town clerk
- **Responsibility:** State responsible for maintenance, repairs, snow plowing, and defects



State Highways (cont.)

● **Discontinuance** (G.L. c. 81, § 12)

- *How:* With consent of county commissioners (or, where no county exists, council of governments or regional adjudicatory board); filing of plan and a certificate of discontinuance with county and city/town
- *Effect:* Becomes a city/town way

● **Abandonment** (G.L. c. 81, § 12)

- *How:* By filing with county commissioners (or other bodies) and city/town clerk, and recording with the Registry of Deeds, plan and certificate of abandonment
- *Effect:* All rights and title held by the state re-vest in persons owning such rights at the time they were acquired by the state



County Highways



- **Status of County and County Commissioners:** Most counties abolished in 1996-2007; where no county exists, council of governments or regional adjudicatory boards act as county commissioners
- **Procedures:** Procedures for laying out, altering, relocating, discontinuing, and discontinuing maintenance of county highways in G.L. c. 82, § § 1-13
- **Jurisdiction:** Cities/towns have concurrent jurisdiction with county commissioners to alter, relocate, and make specific repairs to county highways. Cities/towns cannot discontinue or discontinue maintenance of county highways (G.L. c. 82, § 17)
- **Responsibility:** Cities/towns responsible for maintenance; costs could be borne by county or state



County Highways (cont.)

Discontinuance and Discontinuance of Maintenance

(G.L. c. 82, § § 3-5)

- *How*: Notice to abutters, posting, advertisement, view, and hearing
- *Effect of Discontinuance*: Unless petitioned by city/town, county highway is no longer a public way. If petitioned, county highway becomes a city/town way. Damages may be owed
- *Effect of Discontinuance of Maintenance*: County (city/town) no longer responsible for maintenance; public retains right of travel



City/Town Ways



How Does a Way Become a City or Town Way?

One of Three Ways:

- Laying out by public authority in the manner prescribed by statute, G.L. c. 82, § § 21-24;
- Prior to 1846, a permanent and unequivocal dedication by the owner to public use, and express or implied acceptance by the public; and
- Prescription



City/Town Ways (cont.)



Public ways by Prescription

- Very fact intensive, difficult to prove, and must be established in court of law
- Adverse and open use of way openly and continuously for a period of at least 20 years
- Must establish actual use by public for 20 year period and “corporate action,” that is, evidence that the city or town acknowledged way to be a public way, by use of public funds to maintain, repair or improve way
- Party seeking to establish way as town way has burden of proof



City/Town Ways (cont.)



Laying out City/Town Way

(G.L. c. 82, § § 21-24)

Initial Steps

- Prepare layout plan showing metes and bounds of road as built. Can use plan already recorded if dimensions of road as shown on plan match what is on the ground
- City Council/Selectmen vote intention to lay out road; refer layout to Planning Board, which has 45 days to make nonbinding recommendation (G.L. c.41, § 81I)
- After 7 days prior written notice to abutters (required only if a taking is needed), Selectmen adopt order of layout and file layout order and plan with Town Clerk at least 7 days prior to Town Meeting. Notice and filing not applicable to cities (but City Council adopts order of layout)





Laying out City/Town Way (Cont).

(G.L. c. 82, § § 21-24)

Next Steps

- City Council/Town Meeting votes to accept layout of road as public way, and authorizes acquisition of easements. Majority vote if plan shown on approved subdivision plan; 2/3rds vote otherwise
- 120 days to acquire easements. Deadline not applicable to cities
- Each step must be followed strictly
- Benefits of Layout: limitation on liability (G.L. c. 84, § 15)





Responsibility for Maintenance

- Required to keep public ways reasonably safe and convenient for travel (G.L. c. 84, § 1); no implied cause of action
- Limitation on liability for defects in way (G.L. c. 84, § 15)





Removal of Snow and Ice

- City/town must remove or trod down snow and ice so as to keep ways reasonably safe for travel (G.L. c. 84, § 7)



- A town is not liable for injury or damage sustained because of snow or ice on town way if the way is otherwise reasonably safe and convenient for travel (G.L. c.84, § 17)



City/Town Ways (cont.)

● Regulation of Traffic

- Can establish ordinance/bylaw and rules and regulations (G.L. c. 40, § 22), provided it complies with G.L. c. 85, § 2 and other state laws and regulations
- On roads without speed signs, speed limits are set by the state (G.L. c. 90, § 17)
- Can establish speed limits by vote of City Council/Selectmen, approval by MassHighway (which may require formal engineering study), and the Registrar of Motor Vehicles, and signs have been erected on the road. If not approved, speed limit is unenforceable (G.L. c. 90, § 18)
- Other special regulations – approved by MassHighway and published in newspaper



City/Town Ways (cont.)



● **Encroachments on Public Ways**

Authorization to remove what obstructs, hinders, or endangers public travel (G.L. c. 84, § 7)

● **Improvement of Public Ways by Others**

No obligation to allow others to improve way; but may allow, if sufficient safeguards

● **Betterments**

Betterments may be assessed upon property owners who specifically benefit from improvements by city/town (G.L. c. 80)



City/Town Ways (cont.)



Discontinuance

(G.L. c. 41, § 81-I, G.L. c. 82, § 21)

- *How:* Refer discontinuance to Planning Board, and majority vote at City Council/Town Meeting
- *Effect:* Way is no longer a public way, and public easement terminates. If city/town acquired easements, such easements terminate; if city/town acquired fee, further vote of City Council /Town Meeting and deed are required for city/town to convey the land
- *Damages:* Courts will review if property is rendered land-locked





Discontinuance of Maintenance

(G.L. c. 82, § 32A)

- *Who*: Board or officer having control of public ways (Selectmen in towns)
- *How*: Notice, advertisement, posting, public hearing, and postings on discontinued way
- *Standard*: Finding that town way has become abandoned and used for ordinary travel, and common convenience and necessity no longer requires maintenance in reasonably safe and open condition
- *Effect*: City/town no longer obligated to maintain way; public retains right of travel





Private Ways



Is the way public or private?

One seeking to show that a way is public has the burden of proof to show that the way was laid out and accepted as a public way, or created by prescription, or by dedication prior to 1846.





Closing off private way by owners

- Town not liable to those losing access if a private way is closed off by owners
- Owners cannot block off those with access rights or easements, but this is a private not a public dispute.
- Town cannot require a private way to be kept open unless the way is a statutory private way (these are laid out and accepted by the same process as public town ways, are open to the public, but are privately maintained)



Right of Access



Who owns/has right to use a private way?

- Derelict fee statute G.L. c. 183, § 58 – abutters own to middle of way unless deed stated otherwise, and have a right to use all of the way
- Easement for access by prescription requires adjudication of claim of open, adverse use for 20+ years (but no right to park unless also used for parking over 20+ years)
- Easements by implication
 - By rear lot conveyance – intention of parties is key issue
 - By reference to plan in lot deed
 - Does not necessarily include right to park



Private Way Concerns

When do private way rights concern towns?

- Dividing land with frontage on a way (subdivision approval not required under G.L. c. 41, § 81L & P):
- If way is private (including “statutory” private ways) -
 - was it in existence when the Subdivision Control Act was effective in the city/town?
 - Is it adequate for the creation of municipal services?
 - does it have adequate width, suitable grades, adequate construction?
- If way is public – does it exist “on the ground”? Access would be illusory via a public way accepted and shown on a plan but never constructed.



Private Way Concerns (cont.)

Planning Board approval of subdivision plans

Planning Board can rightly concern itself with whether an applicant for approval of a subdivision has adequate access to the subdivision over a private way



Planning Boards sometimes impose a condition requiring a way to remain private but condition cannot bind Selectmen or Town Meeting who have discretion to lay out a way as a public town way and accept the way



Spending on Private Ways

- General Principle of Law – no spending public funds for private purposes
- Statutory exceptions:
 - Snow removal from streets and sidewalks
 - Temporary repair of streets
 - Streets/sidewalks must be open to the public for public funds to be used for snow removal/repairs
- Drainage systems - improvements can be done within private ways under G.L. c. 83 if part of a municipal drainage system and an easement is obtained



Snow Removal



Snow Removal

- Private ways: Snow removal from private ways that are open to the public can be done if G.L. c. 40, § 6C is accepted
- Private sidewalks: Snow removal from sidewalks on private property can be done if G.L. c.40, § 7 is accepted and sidewalks are open to the public



Repairs



Repairs

- Adopt by-law under G.L. c. 40, § 6N to allow repairs
- Limitations that can be enacted:
 - Limit type and extent of repairs
 - Repairs only if Selectmen or Mayor determine necessary
 - Allow repairs only if a set percentage of abutters sign petition
- Avoid liability for defects:
 - Set liability limit by 6N by-law (can be zero)
 - Obtain written indemnification from owners
- Cost recovery
 - 6N by-law betterments
 - Require cash deposit



Utilities in Private Ways

Municipal Utilities

Water, sewer, drains – cannot install on private land or in private ways without easement



Private Utilities

A lot owner abutting on and having a right of access over a private way by deed, or by reference in a deed to a plan showing the way, has a right to install private utilities to serve the owner's property. G.L. c.87, § 5.



Private Way Traffic Regulation



Enforcing traffic restrictions

(G.L. c. 90, § 18)

- Board/officer responsible for traffic regulation may regulate speeds, use of vehicles, but only after application and written consent by all owners
- Regulation must be published in newspaper
- Certain regulations require MassHighway approval under G.L. c. 85, § 2 (e.g., state highway junction)



Traffic Regulation (cont.)

Installing traffic signs

- Need permission of owner for sign on property
- Signs must comply with MassHighway standards



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