



**Town of Arlington
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To: Board of Selectmen

Cc: Adam Chapdelaine, Town Manager
Michael Rademacher, Director of Public Works

From: Douglas W. Heim, Town Counsel

Date: July 13, 2018

Re: Maintenance and Repairs of Private Ways

Members of the Board, I write at your request to report the findings of my examination of some of the assertions made by James Street residents regarding the Town's responsibilities relative to their private way, as well as to provide a more comprehensive examination of the Town and residents' respective rights and responsibilities relative to all private ways throughout Arlington.

Summary

The distinctions between public and private ways in Arlington and throughout much of the Commonwealth were created by operation of a complex mixture of common law, state statutes, and how residential areas were subdivided, developed, and approved prior to

construction of the roadways and homes therein. When larger tracts of land were divided into smaller lots to build homes, the roadways accessing those homes were themselves typically part of the previously larger tracts of land. The distinct rights and responsibilities of private way residents flow from the mechanisms by which they were established (and therefore the shared ownership interests of private way abutters and the fact that private ways were not generally planned or constructed to the same standards as public ways.

While “private” in ownership, the vast majority of private ways required approval for construction by the Town’s Board of Survey for purposes of frontage, public safety, and travel.¹

As such, most private ways must be open for public travel, but remain private for the purposes of parking and some other limited traffic regulations, as well retaining exemptions from certain requirements with respect to drainage, sidewalks, etc. depending upon the date of each private way’s approval.

Generally, the Town is not permitted to expend public financial resources on private property.² With respect to private ways, courts have approved only limited exceptions to this rule for local option statutes passed by Legislature, namely G.L. c. 40 §§ 6C, 6N (snow removal and temporary repair “betterments”).³ The Town has adopted both of these limited exceptions, and as such, the Board of Selectmen has discretion to provide a low-interest loan to mitigate the cost of repairing qualifying private ways.⁴ Indeed, if not for Town Meeting’s approval of §6C, the Town would not be permitted to expend resources to plow and sand private ways.⁵

Accordingly, I affirm the Town’s long-held position, clear in “black letter” law, that it is not responsible for maintenance or repairs to private ways, which were not built to the standards of public ways and on which the Town may not spend money absent an authorized vehicle of

state law. Rather, as further detailed in this memo, private way residents are responsible for maintaining their ways and may be liable for failure to do so.⁶

Furthermore, with respect to the application by James Street abutters and their suggestion that the Town of Arlington assumes a duty of care under c. 84 §§ 23 and 24 for private ways unless it (the Town) either posts warning signs about the condition of a private way or closes the private way, I have also confirmed that such position is incorrect. While §24 references town liability for “defects in *dedicated* ways,” within such context “dedicated ways” is a specific term of art.⁷ “Dedicated” specifically refers to certain paths or roadways expressly opened by their owners (and accepted by the municipality) for the purpose of connecting public ways *prior to 1846*, when St. 1846, c. 203 was passed (essentially a prototype version of c. 84).⁸ Hence, for any private way to be eligible for the “dedicated ways” exception described in c. 84, it must have been in existence and dedicated (both given and accepted) prior to 1846.⁹ James Street, was approved (but not accepted) in 1950.¹⁰

For any roadway built after 1846, the only means by which a private way may become “public” for the purpose of maintenance or liability under c. 84, is for the way to either be accepted by the Town following the statutory process,¹¹ or for it to be established as a public way via prescription.¹² Thus, making repairs to private ways outside of a statutorily authorized process is not a mere matter of policy decision. It is prohibited. Moreover, with specific respect to arguments raised by James Street residents, rather than mitigating the Town’s liability by repairing private ways, the Town would be inviting more liability by repairing private ways outside of the parameters of its betterment bylaw.¹³

Public, Statutory Private Ways & “True” Private Ways

Arlington’s roadways predominantly consist of three types of “ways,” public ways, statutory private ways, and “true” private ways. It must be stressed that these terms are often times used with varying meanings in distinct contexts. For example, in some contexts “public ways” or “town ways” simply connote any roadway on which the general public may travel. However, within the specific contexts of road layouts, maintenance responsibility, and liability under G.L. c. 84 such terms have a far more restrictive meaning. For the purposes of this memo, the primary context in which public and private ways will be discussed is relative to control and responsibility to maintain such ways.

Public Ways

The majority of roadways in Arlington are public ways, for which the Town has a duty to maintain free from defects (among other responsibilities such as ADA compliance).¹⁴ As previously noted, public ways can only be created by (a) approval and acceptance in keeping with state law¹⁵; (b) prescription; or (c) prior to 1846, dedication.¹⁶

The Town is responsible for caring for these roadways, and in conjunction with the state, has the authority to regulate them extensively with respect to traffic direction, parking, speed limits, signage, etc. These roadways must meet standards for width, grade, curvature, design, and other criteria. Some of our earliest public ways were laid out by Middlesex County in the early late 1700s, while handfuls were accepted as recently as the 1970s and 1980s.¹⁷

With respect to public ways created by dedication – the “dedicated ways” of c. 84 §§ 23 and 24 – any way created after the passage of Chapter 203 of the Acts of 1846 cannot feasibly be

established as a “dedicated way.” The purpose of St. 1846 c. 203 (later recodified in the general laws as c. 84 in relevant parts) was to detail and limit the responsibility of cities and towns to only those ways which were either laid out and accepted as public ways by their respective local authorities in compliance with the general laws, or those ways which were in existence at that time and could be fairly conflated with public ways because they were “dedicated” by their owner/s to public use.¹⁸ In plain language, dedicated ways were streets, drives, and paths clearly given to cities or towns by their owners to the public’s benefit, likely to connect public streets at time when land was not as subdivided or developed as it is now.

Hence c. 84, § 23 crafted a narrow exception to the general notion that a town is only responsible for its laid out and accepted public ways, stating “[a] way opened and dedicated to the public use, which has not become a public way, shall not, except as provided in the two following sections, be chargeable upon a town as a highway or town way unless laid out and established in the manner prescribed by statute.” However, the vast majority of roadways in Arlington, both public and private were laid out later than 1846.

Statutory Private Ways

Most private ways in Arlington are streets which were approved by the Board of Survey, but not accepted by the Town for a variety of reasons.¹⁹ Unlike public ways, these “statutory private” ways were not constructed to public way standards of their time, and as such, can vary greatly in width, grade, drainage and overall quality. Residents may note that private ways are not required to have sidewalks or storm drains.

Statutory private way residents are often advised that they “own” to the centerline of the way. Indeed, in some cases they do have a property interest that extends to the centerline of the

way or even the entire width of the roadway, but more often than not, such ownership is not reflected in their deeds (and therefore their property assessments or taxes). Rather, their interest is provided by G.L. c. 183 §58 – the Massachusetts “derelict fee statute.” In such cases, §58 dictates that absent clear deeds to the contrary, property owners abutting any roadway have a “fee interest” from their original grantor (often whomever laid out and developed the private way) to the centerline of such ways.²⁰ In these instances, all of the owners of a statutory private way have the collective responsibility to maintain the roadway.²¹ In instances where ownership is outright, the duty to maintain the roadway and any liability for failure to do so is likely the same.

Despite their duty to maintain these ways, statutory private way abutters “[have] no power to close, alter, widen, or control it; and [have] no right in it, except in common with all others who have occasion to pass over it.”²² The public’s right of access to such a way is the same as if it were a public way that had been accepted by the Town.²³ The fact that the public has a right of access over a statutory private way does not impose upon the Town the obligation to maintain the way.²⁴ Furthermore, the fact that the Town expends public funds to remove ice and snow does not make the private way become public, because it may only do so pursuant to the limited exceptions authorized by local options statutes discussed above.²⁵ Statutory private way residents do however have some rights that public way residents do not. Most noticeable in Arlington is that because the Town cannot regulate statutory private ways to the same extent as public ways, the overnight parking ban does not apply to private ways.²⁶

Based on the foregoing, it should be clear why statutory private ways have been the subject of periodic concern and confusion.²⁷ However, the law is quite clear that:

- The Town does not have any responsibility to maintain statutory private ways;

- The Town cannot expend public monies on their maintenance absent those vehicles provided by state law for betterments and plowing; and
- The Town does not possess liability for the conditions on statutory private ways.

True Private Ways

“True” private ways, sometimes known as “subdivision ways” among surveyors and real estate professionals) are truly private property. In some instances, they are driveways leading to a limited and defined number of homes or properties. In others, they may be the connective ways within a large residential or commercial development. They are accessible by users only at the consent of their owner or owners.

Described by the Court in *W.D. Cowsls, Inc. v. Woicekoski*, 7 Mass. App. 18 (1979), true private ways are instances where there has never been dedication, acceptance, or even lay out approved by public authority or public access established by any other means.²⁸ Like statutory private ways, cities and towns have no liability for true private way maintenance or repairs even if they permit public access. As remarked by the *W.D. Cowsls* Court, “[i]f any road could be made public solely by acts of the landowners, with no accompanying act by public authorities, the municipality would be responsible for the maintenance and repair of countless roads.”²⁹

Because this type of private way is not open to the public, owners may put up a barrier to exclude the general public, although emergency service access must be accommodated. Moreover, the Town likely has less basis to govern alterations to true private ways. However, for these same reasons, public funds may not typically be used for maintenance of, or snow removal from, true private ways. Thus, in sum, the Town’s rights and responsibilities as to “true” private ways are even less than its rights and responsibilities relative to statutory private ways.

Conclusion

The Town is presently offering all of the legal means by which it can contribute to the maintenance of private ways in Arlington. The private way temporary repairs bylaw is purely discretionary, and recognizes many of the points raised by residents of such way by prioritizing those ways which need improvement for public safety, are utilized by the general public, and the length of time they have been open for public use.³⁰ With sympathy for private way residents facing the costs of significant repairs to their way, I confirm that the only lawful alternative to the betterment process available is far more expensive and extensive process of converting private ways to public ways, the cost of which must also be carried by abutters as well as the consent of not only the Board of Selectmen, but also Town Meeting. I note that there are pending revisions to our betterment bylaw, which clarify private way residents' responsibilities consistent with this memo, and further authorize emergency repairs for public safety purpose, but do not and cannot change the fundamental landscape of the public and private ways. As such, in my opinion, the Town's long-standing position on private way maintenance and repairs not only should remain, but must.

I look forward to discussing these findings with you further.

¹ The term "private way" itself can be particularly unwieldy. As noted by the Supreme Judicial Court, "[t]he words 'private ways' are susceptible of different meanings." *In re Op. of Justices*, 313 Mass. 779, 781 (1943). Indeed, the Court stated "the words 'private ways' may occasionally be used in the statutes with a different meaning." *Id.* at 782. For many purposes, private ways are nearly identical to public ways' functional predecessor "town ways." *Denham v. County Commissioners of Bristol*, 108 Mass. 202, 204 (1871)

² "It is a fundamental principle, conforming to constitutional requirements (see Constitution, Declaration of Rights, art. 10; Part II, c. 1, §1, art. 4; c. 2, §1, art. 11) and frequently declared, that 'money raised by taxation can be used only for public purposes and not for the advantage of private individuals.' *In re Op. of Justices*, 313 Mass. 779, 783, (1943)(quoting, *Opinion of the Justices*, 231 Mass. 603, 611 (1919)).

³ See generally, *In re Op. of Justices*, 313 Mass. 779 (1943)(validating c. 40 §§ 6C and 6D local options because private ways are open to public travel, but explicitly noting that municipalities are not responsible for repairs and maintenance).

For betterments, note that a “betterment” or “special assessment” is a special property tax that is permitted where real property within a limited and determinable area receives a special benefit or advantage, other than the general advantage to the community, from the construction of a public improvement. If properties abutting or nearby the improvement are specially benefited, all or a portion of the cost of making that improvement may be assessed on those properties. *Union Street Ry. v. Mayor of New Bedford*, 253 Mass. 304 (1925).

⁴See Town of Arlington Bylaws, Title III, Article “Repairs to Private Ways.”

⁵See e.g. Rebhan, Jaime, “Oops! Town Finds it shouldn’t be plowing private roads.” Wareham Week, 26, June, 2013 <https://wareham-ma.villagesoup.com/p/oops-town-finds-it-shouldnt-be-plowing-private-roads/1022980>

⁶ For example, while the well-established principle is that the duty of maintaining an easement rests upon the holder of the easement, *Shapiro v. Burton*, 23 Mass. App. Ct. 327, 333, 502 N.E.2d 545, 549 (1987). As a basic principal of tort law, the parties who bear the duty of care (maintenance in this context) bear the potential liability for a breach of same causing a harm.

⁷Dedication is described by Courts to be “the gift of land by the owner, for a way, and an acceptance of the gift by the public, either by some express act of acceptance, or by strong implication arising from obvious convenience, or frequent and long continued use, repairing, lighting or other significant acts, of persons competent to act for the public in that behalf.” *Hemphill v. Boston*, 62 Mass. 195 (1851).

⁸ “It is to be observed that the ‘way’ referred to in §23 is one ‘opened and dedicated to the public use,’ which has not become a public way as described in the section. Since the enactment of 1846, c. 203, a public highway or town way cannot be created in this Commonwealth by dedication and acceptance. *Longley v. City of Worcester*, 304 Mass. 580, 585, 24 N.E.2d 533, 536 (1939). See also, *Hayden v. Stone*, 112 Mass. 346, 348 (1873). *Rouse v. Somerville*, 130 Mass. 361, 365 (1881). *Dakin v. Somerville*, 262 Mass. 514, 515 (1928).

⁹ The presentation of the “dedicated ways” exception in what I presume to be an excerpt from a Randall & Franklin “Municipal Law Practice,” guide provides occasion for understandable confusion. However, it should be noted that in that excerpt as attached by the petitioner, it is noted “Because an 1846 statute put an end to the creation thereafter of public ways by dedication and acceptance, it has only been possible since that time to create a public way by a laying out in the statutory manner or by prescription.” See James Street Petition, annexed hereto as Attachment “A,” at page 3.

¹⁰ See James Street Plan and Profile, annexed hereto as Attachment “B.”

¹¹ As set forth in c. 84 §§21 -24.

¹² *McLaughlin v. Town of Marblehead*, 68 Mass. App. Ct. 490, 495 (2007).

¹³ While a party seeking to impose liability upon a city or town via prescription has a high burden to meet, making repairs to a private way is ironically one piece of evidence that may be used to establish that a private way has become public. *See e.g. Fenn v. Town of Middleborough*, 7 Mass.App.Ct. 80, 83-84 (1979); *Schulze v. Huntington*, 24 Mass.App.Ct. 416, 417(1987).

¹⁴ G.L. c. 84 §§1, 15, 22.

¹⁵ Relevant provisions of G.L. c. 82.

¹⁶ *McLaughlin*, 68 Mass App. Ct. 490 at 495.

¹⁷ For the purposes of control, maintenance, and liability under c. 84 public ways include state highways, town ways, and any other roadway which were approved and accepted by the Town.

¹⁸ *See e.g., Oliver v. Worcester*, 102 Mass. at 495-496; *Longley*, at 587 (noting that the primary purpose of c. 84 is to eliminate municipal liability for defects in streets which have not been formally laid out and established in the statutory manner).

¹⁹ For the most comprehensive legal descriptions and discussions of statutory private ways, *see* Smithers, Sydney, “Massachusetts Streets and Ways for Surveyors” 2011; and Smithers & Lapham, Streets and Ways, Chapter 16, Real Estate Title Practice in Massachusetts, MCLE, 1st Supp. 2006, § 16.1.2.

²⁰ Note that the derelict fee statute is a rare example of a retroactive law. It applies to every property regardless of the its legal status at the time of its passage. *See Tattan v. Kurlan*, 32 Mass. App. Ct. 239, 243 (1992). However, the statute merely creates a rebuttable presumption *Hickey v. Pathways Ass'n, Inc.*, 472 Mass. 735, 37 N.E.3d 1003 (2015)(inland landowners rebutted common law presumption and had right of access over the way).

²¹ *See, United States v. 125.07 Acres of Land More or Less*, 707 F.2d 11 (1st Cir. 1983); *Popponesset Beach Association, Inc. v. Marchillo*, 39 Mass. App. Ct. 586 (1996), review denied, 422 Mass. 1104 (1996). In fact, private way abutters are granted authority under G.L. c. 84 §12 to call a “proprietor’s meeting” to facilitate repairs under their share responsibility.

²² *Denham v. County Comm’rs of Bristol*, 108 Mass. 202, 204 (1871).

²³ *Id.*

²⁴ *125.07 Acres of Land More or Less*, 707 F.2d at 14.

²⁵ *See, Coon v. McCabe*, 22 LCR 622, 649 (Mass. Land Ct. 2014)(“Notwithstanding the foregoing, however, the defendants have presented no compelling legal theory and supporting

decisional law that would permit this court to conclude that use of private ways by members of the public for a prolonged period of time coupled with snow plowing and maintenance by the town ‘somehow transformed a private way into a public way’ or at least into a way permanently open for use by the public”); *see also*, *Bruggeman v. McMullen*, 26 Mass. App. Ct. 963 (1988), *Rivers v. Warwick*, 37 Mass.App. Ct. 593, 597 (1994).

²⁶ While a complete accounting of those rights is beyond the scope of this memo, for example, residents may exercise exclusive parking rights on private ways, including having trespassing vehicles towed so long as they follow the process outlined in G.L. c. 266, § 120D. They may also erect signage which complies with state traffic laws, and in theory establish speed limits. It should be noted however, that under c. 90, the Arlington Police Department has limited authority to enforce violations on private ways. For example, they cannot issue tickets for non-residents parking on private ways.

²⁷ Statutory private ways are the periodic subject of news and media inquiries, which often note the difficulty in understanding the rights and responsibilities of abutters, the public, and local governments. *See e.g.*, Demarco, Peter “Private Ways, Public Access” Boston.com, 10, Feb. 2008, http://archive.boston.com/news/local/articles/2008/02/10/private_ways_public_access/

²⁸ *W.D. Cows*, 7 Mass. App. Ct. at 19.

²⁹ *Id.*

³⁰ *See* Town of Arlington Bylaws, Title III, Art. 3, Section 3 “Criteria.”