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ROBERT S. TROY

TO: WILLIAM R. GRIFFIN  
TOWN ADMINISTRATOR

FROM: ROBERT S. TROY *RST*  
TOWN COUNSEL

DATE: JULY 11, 2002

RE: MUNICIPAL SERVICES ON PRIVATE WAYS

RECEIVED  
JUL 15 2002  
TOWN COUNSEL

This Memorandum serves to respond to your request for my Opinion as Town Counsel with respect to the question of whether there are any statutory provisions that limit non-emergency municipal services to those streets and ways that are open to public use.

In a previous Opinion, I advised that authority to remove snow and ice from private ways by the Town is limited to those private ways that are "open to public use." That Opinion was predicated upon M.G.L. c. 40, § 6C which specifically provides that a Town which accepts the statute "may appropriate money for the removal of snow and ice from such private ways within its limits and *open to the public use* as may be designated by the ... selectmen." (Emphasis added).

M.G.L. c. 40, § 6C is a specific statute that serves at least two statutory purposes. First, it confirms that a Town can utilize public funds to remove snow and ice from private ways that are "open to public use." Second, it provides that the removal of snow or ice should not be construed to be a repair to a public way. This second part of the statute shields the Town from liability that could arise from the performance of services to a private way. Indeed, without this statutory protection, the Town would be exposed to liability arising from any injury that resulted from the snow removal. See, M.G.L. c. 84.

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Pursuant to a somewhat related statute, M.G.L. c. 40, § 6N, Towns are empowered to enact By-laws that authorize the making of temporary repairs to private ways. Bourne has adopted such a By-law. *See*, Bourne General By-laws Section 3.1.28. Both the statute and the By-law similarly limit the Town's authority to make such repairs to those private ways that are "open to public use." Bourne's By-law further provides that "the Town shall be held harmless on account of any damages whatever caused by such repairs by agreements executed by the abutters ...."

These statutes reflect public policy concerns (1) about public funds being utilized for the benefit of private individuals and (2) that the "repair" of a way can be the basis for assertion of a claim of municipal liability.

Other than these two statutes, there are no other statutes that address the provision of municipal services to private ways.

In making the request, you explicated the purpose underlying the request with a specific example regarding collection of trash. You wrote: "For instance, may the Town collect trash on private ways not open for public use? Is the Town obligated to collect trash on private ways that are open to public use?"

The example raises questions that are different from the initial question regarding limitations on municipal authority with respect to provision of services to private ways. Indeed, the example raises questions regarding the provision of municipal services to individuals situated on private ways which are or are not open to public use.

The authority of a municipality to provide particular services to its residents is limited by two fundamental maxims. First, municipalities are restricted in the expenditure of public funds raised by taxation to public purposes sanctioned by the legislature. The collection of trash is such a public function. Baumgardner v. City of Boston, 304 Mass. 100 (1939). Accordingly, the Town may provide trash collection services if it elects to do so.

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Second, the United States Constitution mandates that, when a municipality provides services, it must do so on a non-discriminatory basis. *See*, 18 Mass. Prac. § 412 (Randall and Franklin, Municipal Law, 1993). Thus, if the Town elects to provide trash collection, it must provide the service to Bourne residents in a non-discriminatory manner.

This Constitutional requirement does not mean that the Town is prohibited from making any distinctions between residents. The Town may discriminate so long as the discrimination is rationally related to a legitimate State interest. This principle was affirmed in the recent case of Flatley v. Malden, 40 Mass. App. Ct. 38 (1996).

In Flatley, the Appeals Court affirmed the city of Malden's works commission's classification system of incrementally increasing rates to consumers for higher consumption of water. The plaintiff – who owned thirteen apartment buildings – challenged the classification system by arguing that it was impermissibly discriminatory to determine the rate for apartment buildings by measuring the total consumption of all units while, for an individual homeowner, the rate was set by measuring flow to just one house. The Appeals Court determined that, in order to prevail, the plaintiff was required to show that the discrimination was “unreasonable.” The Appeals Court ruled that the plaintiff failed to make the required showing because the city had a legitimate basis for creating a tiered system of water rates – water conservation.

In my Opinion, as Town Counsel, there is not a rational distinction or a legitimate basis to distinguish between public ways and private ways open to public use in the context of municipal trash collection. However, there is a rational distinction between public or private ways open to the public and ways which are closed to the public and which contain impediments to access. The Town is entitled to make distinctions based upon these practical, tangible considerations. For example, the Town could develop a set of criteria for eligibility for trash collection service based upon accessibility to the particular property. Such criteria could include:



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- minimum road width
- minimum road grade
- minimum road conditions
- accessibility (i.e., no locked gates)

These criteria are objective and non-discriminatory since they are based upon considerations of being able to provide service in a safe, efficient and cost effective manner.

In summary, whether the Town has authority to provide services to residents on streets and ways is subject to a determination whether the service is a legitimate public function and whether the service will be provided in a non-discriminatory manner. Such an analysis is highly fact dependent and thus, specific questions regarding such municipal activities must be reviewed on a case by case basis.

RST:bjw

Cc: Board of Selectmen