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Municipal Law and Practice
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Chapter
23. Highways and Streets

§ 23.5. Public and private ways—Generally

West's Key Number Digest

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Since 1846, the establishment of a public way has required public action as prescribed by statute[1] or public, adverse, and continuous use for the prescriptive period.[2]

A way is not public unless it has become such in one of three ways: (1) a laying out by public authority in the manner prescribed by statute; (2) prescription; or (3) prior to 1846, a dedication by the owner coupled with acceptance by the public.[3]

Whether a way is public or **private** is based on the use of the way, not solely on who owns it.[3.1] A prescriptive easement is established by showing the continuous, open, notorious, and adverse use of another's land, conducted under a claim of right, for a period of twenty years.[3.5] Where the entity asserting the right to a prescriptive easement is a town, corporate action is required. There is sufficient corporate action when the municipality has expressed dominion and control over the land in its corporate capacity through authorized acts of its employees, agents or representatives to conduct or maintain a public use thereon for the general benefit of its inhabitants.[3.10] The town bears the burden of proving a public way by prescription.[3.15]

Selectmen or road commissioners of a town, or the city council of a city, may lay out, relocate or alter public ways within the city or town, and private ways for the use of one or more inhabitants, or they may order specific repairs to be made on any such way.[4] A town meeting or a city council may vote to discontinue a public or a private way.[5]

Non-use or apparent abandonment of a public way by a town does not result in a discontinuance of the public status of the way.[6]

The selectmen or road commissioners of a town or the city council of a city must, at least seven days before laying out, relocating or altering a town way or private way cause written notice of their intention to be left at the regular places of abode of the owners of land which will be taken for the purpose, or delivered in hand to each such owner, his tenant or agent.[7]

No town way or private way which has been laid out, relocated or altered by the selectmen or road commissioners shall be established until the laying out, relocation or alteration, with the boundaries and measurements of the way, is filed in the office of the town clerk and, not less than seven days thereafter, is accepted by the town at a town meeting.[8]

Within one hundred twenty days after the termination of a town meeting at which a laying out, alteration or relocation is accepted by the town, the selectmen or road commissioners must either acquire the necessary land by purchase or otherwise, or adopt an order for the taking by eminent domain of such land as is required for the purposes of such way.[9] A person sustaining damage by reason of a taking may recover under the eminent domain statute.[10] A person sustaining damage by reason of the discontinuance of a way or of specific repairs may also recover under the eminent domain statute.[11] If no entry is made on land taken or the location for any reason has become void, a person suffering loss or put to expense by the proceedings may recover indemnity.[12] Persons applying for the laying out, relocation, alteration or discontinuance of, or the making of specific repairs upon, a private way, or for the discontinuance of a public way, will be required to give the city or town security to indemnify it for all damages and charges which it may be obliged to pay as a result of such laying out, relocation, alteration, discontinuance or specific repairs, and such security must be given before entry is made upon such way for the purposes of construction or such way is closed up. All such damages and charges must be repaid to the city or town by such applicants except in the case of the discontinuance of a public way when the city council or selectmen may order a part of the damages paid by the city or town.[13] In towns accepting the applicable statutory section, the selectmen, road commissioners or sewer commissioners may enter and lay sewers and water pipes in town ways which are laid out, relocated or altered and this may be done before construction of the particular way has been commenced.[14]

When a city or town way or private way is laid out, relocated or altered, the city council, selectmen, road commissioners, or county commissioners, as the case may be, must record their action, with a description of the location and bounds, with the city or town clerk. No city or town may later contest the legality of a way laid out by it, accepted and thus recorded.[15]

A city or town may purchase, receive or take by eminent domain easements or other rights or interests in land adjacent to a public way for the purpose of erecting and maintaining snow fences.[16]

Town ways are open equally to all members of the general public, residents and nonresidents alike. Use of town ways by nonresidents under a claim of right for over twenty years will not transform town ways into highways by prescription. All of the public have the right to use town ways at their pleasure. The exercise of that right cannot change the nature of the way or withdraw it from the jurisdiction of the town.[17]

Access to a public way is one of the incidents of ownership of land bounding thereon, and this right is appurtenant to the land.[18]

An existing way in a city or town is not a public way unless it has become public in character by: (1) a laying out by public authority in the manner prescribed by statute; (2) by prescription; or (3) dedication prior to 1846 by the owner to public use, permanent and unequivocal, coupled with an express or implied acceptance by

the public.[19] There can be private ways, which are defined ways for travel, not laid out by public authority or dedicated to public use that are wholly the subject of private ownership, which are open to public use by license or permission of the owner.[20]

The words "private way" include defined ways for travel, not laid out by public authority or dedicated to public use, that are wholly the subject of private ownership, either by reason of the ownership of the land upon which they are laid out by the owner thereof, or by reason of ownership of easements of way over land of another person.[21]

The only three methods by which one can acquire the right to pass over private land are: adverse user, grant, or act of public authority.[22]

A declaratory action may be brought to determine if a road is a public way.[23]

[FNa0] Of The Massachusetts Bar.

[FNa1] Of The Massachusetts Bar.

[FN1] See M.G.L.A. c. 82, §§ 21 to 24.

See, special act relative to layout and acceptance of certain ways in Agawam, St.2000, c. 45.

See discussion of historic layout of public and private ways, Moncy v. Planning Board of Scituate, 50 Mass.App.Ct. 715, 741 N.E.2d 82 (2001).

[FN2] See Commonwealth v. Coupe, 128 Mass. 63, 64 (1880) and Fenn v. Town of Middleborough, 7 Mass.App.Ct. 80, 83, 386 N.E.2d 740, 742 (1979).

That there was continued use by the public for more than twenty years does not in itself raise a presumption that such use was adverse. Town of Boxborough v. Joatham Spring Realty Trust, 356 Mass. 487, 490, 253 N.E.2d 335, 337 (1969).

[FN3] Fenn v. Town of Middleborough, 7 Mass.App.Ct. 80, 83–84, 386 N.E.2d 740, 742–743 (1979).

From the time of the Province Laws of 1693–1694, c. 6, § 3, "town ways" or "town roads" have carried the connotation of public ways laid out and usually paid for by the town. United States v. 125.07 Acres of Land, 707 F.2d 11, 14 (1st Cir.1983). See Newburyport Redevelopment Authority v. Commonwealth, 9 Mass.App.Ct. 206, 223, 401 N.E.2d 118, 132 (1980), dating the term back to 1639. But, see, W. D. Cowls, Inc. v. Woicekoski, 7 Mass.App.Ct. 18, 20, 385 N.E.2d 521, 522 (1979), doubt expressed whether the use of such terms as "town land" in all deeds suffices by itself to establish a laying out.

Evidence did not support determination that discontinued roads were "public" ways. Rivers v. Town of Warwick, 37 Mass.App.Ct. 593, 641 N.E.2d 1062 (1994).

Finding that road was laid out in manner prescribed by statute was not clearly erroneous. Martin v. Building Inspector of Freetown, 38 Mass.App.Ct. 509, 649 N.E.2d 779 (1995).

[FN3.1] See Fenn v. Town of Middleborough, 7 Mass.App.Ct. 80, 83–84, 386 N.E.2d 740 (1979); Haugh v. Simms, 64 Mass.App.Ct. 781, 835 N.E.2d 1131 (2005), road which Commonwealth purchased was a private way.

[FN3.5] Daley v. Town of Swampscott, 11 Mass. App. Ct. 822, 827, 421 N.E.2d 78 (1981).

[FN3.10] Daley v. Town of Swampscott, 11 Mass. App. Ct. 822, 829, 421 N.E.2d 78 (1981).

See Rivers v. Town of Warwick, 37 Mass. App. Ct. 593, 597, 641 N.E.2d 1062 (1994) (sporadic use of discontinued roads, even for more than twenty years, was not continuous or necessarily adverse).

See also Gower v. Town of Saugus, 315 Mass. 677, 681–82, 54 N.E.2d 53 (1944) (use by police, fire and town officials, combined with some evidence that road was used by private automobiles, was insufficient to make way public by prescription).

Town failed to exercise the requisite corporate action and failed to demonstrate open, notorious and adverse use for a continuous period of twenty years. McLaughlin v. Town of Marblehead, 68 Mass. App. Ct. 490, 863 N.E.2d 61 (2007), review denied, 449 Mass. 1103, 865 N.E.2d 1141 (2007).

[FN3.15] See Bullukian v. Inhabitants of Town of Franklin, 248 Mass. 151, 155, 142 N.E. 804 (1924).

[FN4] M.G.L.A. c. 82, § 21. It should be noted that “private ways”, as used in this section, mean “ways of a special type laid out by public authority for the use of the public”. Such “private ways” are private only in name, but in all other respects public. See Opinion of the Justices, 313 Mass. 779, 47 N.E.2d 260 (1943).

Where a petition calls for a “relocation”, selectmen can not order an “alteration.” See Holbrook v. Selectmen of Town of Douglas, 200 Mass. 94, 85 N.E. 854 (1908).

The land damages occasioned by the laying out of a private way for the use of one or more of the inhabitants of a city or town are assessed in whole or in part upon the person or persons for whose benefit the way is constructed. However, the road, once laid out, is subject to be used by the public generally. See Denham v. Bristol County Commissioners, 108 Mass. 202 (1871).

For a case upholding the discontinuance of a public way by vote of the town, see Boyce v. Town of Templeton, 335 Mass. 1, 138 N.E.2d 276 (1956).

Selectmen lacked jurisdiction to lay out town ways below high water mark where there was no legislative authorization and town did not own the flats itself. Newburyport Redevelopment Authority v. Commonwealth, 9 Mass.App.Ct. 206, 401 N.E.2d 118 (1980).

Where selectmen of town closed public way without first securing from Department of Public Works certification in writing that regulation closing public way was consistent with public interest, and without having published regulation in one or more newspapers (M.G.L.A. c. 90, § 18), owners of businesses and realty along public way were entitled to preliminary injunctive relief prohibiting closing of public way. Nabhan v. Board of Selectmen of Salisbury, 12 Mass.App.Ct. 264, 423 N.E.2d 1023 (1981)
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The Laws of the Province of Massachusetts for the years 1693–94 and 1713–14 describe three kinds of "public roads" that existed in eighteenth century Massachusetts. First, there were highways laid out and paid for by the county. Prov.Laws 1693–94, ch. 6, § 3. Second, there were town ways, laid out and paid for by the town. Prov.Laws 1693–94, ch. 6, § 4. Third, there were certain "particular and private ways" necessary for access to "the lands of particular persons or proprietors". These were also laid out by the town, but they might be paid for by either the town or the "inhabitants or proprietors who desire and reap the benefit of the same." Prov.Laws 1713–14, ch. 8, § 1. Such a road is public in the sense of providing access (Denham v. Bristol County Commissioners, 108 Mass. 202 (1871); Flagg v. Flagg, 82 Mass. (16 Gray) 175 (1860)), but its later day descendant is the "statutory public way" (M.G.L.A. c. 82, § 21. See Casagrande v. Town Clerk of Harvard, 377 Mass. 703, 387 N.E.2d 571 (1979)), a kind of road for which neither town, county nor Commonwealth bears upkeep responsibility. See Opinion of the Justices, 313 Mass. 779, 47 N.E.2d 260 (1943).

Contract by which mayor allegedly agreed to assist in construction of retail shopping mall was not enforceable where it involved making necessary improvements and additions to streets adjacent to mall and garage, as city charter required city council approval on laying out, locating a new or discontinuing of, or making specific repairs in all streets and ways, and city council did not subsequently approve the contract. Ungerer v. Smith, 765 F.2d 264 (1st Cir.1985).

[FN5] M.G.L.A. c. 82, § 21.

City council's order, which discontinued all public rights in all ways lying within locus was not invalid where alleged ways were not highways, but town ways whose discontinuance was governed by another statute which contained no notice requirements (M.G.L.A. c. 82, § 21). Newburyport Redevelopment Authority v. Commonwealth, 9 Mass.App.Ct. 206, 401 N.E.2d 118 (1980). There is no constitutional requirement that a city council give notice of its intention to discontinue a town way or hold a hearing before doing so.

Though a town meeting may properly vote to discontinue a town way, it may not legally vote to alter it, alteration requiring specific procedure. See Lincoln v. Inhabitants of Warren, 150 Mass. 309, 23 N.E. 45 (1889).

Property owner was not entitled to damages for discontinuance of public street abutting his property, where he suffered the same loss as the community at large, and still had access to property from another street. Kiernan v. City of Salem, 58 Mass.App.Ct. 181, 788 N.E.2d 992 (2003).

Discontinuance of a public way can only be accomplished by a vote of the town or city. Mahan v. Rockport, 287 Mass. 34, 37, 190 N.E. 810, 811 (1934); Carmel v. Baillargeon, 21 Mass.App.Ct. 426, 428, 487 N.E.2d 867, 869 (1986).

[FN6] Martin v. Building Insp. of Freetown, 38 Mass.App.Ct. 509, 511, 649 N.E.2d 779, 780 (1995).

[FN7] M.G.L.A. c. 82, § 22. See this section for the mode of notice if no person is found in the city or town upon whom notice may be served. Note that no such notice is required for a discontinuance of a way, except the required notice of the warrant for the town meeting. Bigelow v. City Council of Worcester, 169 Mass. 390, 48 N.E. 1 (1897). In Merrill v. Selectmen of Saugus, 334 Mass. 151, 134 N.E.2d 128 (1956), it was held *certiorari* was not the proper method for challenging the legality of a

way.

This section does not apply to cities. Newburyport Redevelopment Authority v. Commonwealth, 9 Mass.App.Ct. 206, 401 N.E.2d 118 (1980).

[FN8] M.G.L.A. c. 82, § 23. This section does not apply to cities. The filing with the town clerk need not necessarily be before the town meeting warrant is issued, so long as it is filed seven days before the meeting. See Revere Water Co. v. Town of Winthrop, 192 Mass. 455, 78 N.E. 497 (1906).

A majority of selectmen may act to lay out a town way. See Inhabitants of Dartmouth v. County Commissioners, 153 Mass. 12, 26 N.E. 425 (1891).

The requirement for filing with the town clerk is mandatory, and noncompliance renders a vote on the layout of no effect. See Inhabitants of Town of Greenfield v. Burnham, 250 Mass. 203, 145 N.E. 306 (1924) (In this case, the plan was placed in a vault in the town building but not in the clerk's office; this was not “filing” with the town clerk).

See Loriol v. Keene, 343 Mass. 358, 179 N.E.2d 223 (1961), filing of layout is indispensable condition.

See St.2000, c. 376 authorizing Tewksbury to accept certain streets.

A vote of a town meeting to indefinitely postpone a vote on “accepting” a street as laid out by the selectmen was held to be a final rejection of the layout in Wood v. Town of Milton, 197 Mass. 531, 84 N.E. 332 (1908).

[FN9] M.G.L.A. c. 82, § 24. This requirement does not apply to cities. The order may be under either chapter 79 or chapter 80A of the General Laws.

[FN10] M.G.L.A. c. 79 or c. 80A, whichever applies.

[FN11] In this case, M.G.L.A. c. 79.

[FN12] Again, under M.G.L.A. c. 79.

[FN13] M.G.L.A. c. 82, § 24. It was said in Inhabitants of Watertown v. Dana, 255 Mass. 67, 150 N.E. 860, 44 A.L.R. 1374 (1926) that as the establishment of a building line is a taking of property by eminent domain, the procedure outlined in this section must be followed.

Note that under M.G.L.A. c. 82, § 32B, a city or town authorized to take by eminent domain under chapter 79 of the general laws for the purposes of a public way may take slope easements in land adjoining the location of the public way.

Drainage easement held not to have arisen by implication. Van Szyman v. Town of Auburn, 345 Mass. 444, 188 N.E.2d 453 (1963).

Statute allowing a landowner to recover damages pursuant to the laying out, alteration or relocation of a town way did not apply. Soeder v. County Comm'rs of Nantucket County, 60 Mass.App.Ct. 780, 805 N.E.2d 1026 (2004).

[FN14] M.G.L.A. c. 82, § 25. Until the way is constructed, sewer assessments will be levied only on the estates of persons connecting their drains to such sewers. If the laying out, relocation or alteration becomes void for any reason, the sewers and pipes so laid will nevertheless be deemed to have been legally laid and placed. In such case, a right to damages under chapter 79 of the general laws will accrue when the laying out, relocation or alteration becomes void. This section does not apply to cities.

[FN15] M.G.L.A. c. 82, § 32. The procedure required under this chapter 82 must have been followed. The object of this § 32 is to give public notice, in detail, of the action being taken. See Inhabitants of Brookline v. County Commissioners of Norfolk, 114 Mass. 548 (1874).

[FN16] M.G.L.A. c. 82, § 32C. Snow fences may not be erected prior to November first of each year. They must be removed by May first of the following year.

A taking of any interest in land by eminent domain under this section will be deemed a taking for highway purposes under M.G.L.A. c. 79, § 5B.

[FN17] Newburyport Redevelopment Authority v. Commonwealth, 9 Mass.App.Ct. 206, 401 N.E.2d 118 (1980).

[FN18] See Anzalone v. Metropolitan Dist. Com'n, 257 Mass. 32, 36, 153 N.E. 325, 327 (1926). Access to the public way exists when the fee of the way is in the municipality as well as when it is in private ownership.

See Anderson v. Healy, 36 Mass.App.Ct. 131, 629 N.E.2d 312 (1994), landowners, as members of public, had right to access cul-de-sac, a public way.

[FN19] Fenn v. Town of Middleborough, 7 Mass.App.Ct. 80, 386 N.E.2d 740 (1979), ways held to be private. In the absence of evidence that the ways have been laid out by public authority or by dedication prior to 1846, there must be conclusive proof of adverse non-permissive use by the general public continuous and uninterrupted for a period of twenty years or more. Use for the requisite period cannot be found by inference from the age of the ways, the fact they connect to public ways, or the presence of street signs. Age by itself is a neutral factor, there being ancient private, as well as ancient public ways.

Facts fell short of showing that road had become a public way through prescription. The fact that town listed the road as a public way on its annual estimate to the Commonwealth for assistance under M.G.L.A. c. 81 did not cure deficiencies in the case. Lynch v. Town of Groton, 11 Mass.App.Ct. 1008, 418 N.E.2d 1281 (1981).

Whether an overgrown trail abutting landowner's property was a public way entitling landowners to building permit for house on the property was question of fact. W.D. Cowls, Inc. v. Woicekoski, 7 Mass.App.Ct. 18, 385 N.E.2d 521 (1979). The burden of proof lay with plaintiffs. Witteveld v. Haverhill, 12 Mass.App.Ct. 876, 421 N.E.2d 783 (1981). The fact that a road connects to public ways at both ends does not require a conclusion that it is itself a public way. Fenn v. Town of Middleborough, 7 Mass.App.Ct. 80, 386 N.E.2d 740 (1979).

Evidence did not mandate conclusion that overgrown trail abutting property owner's land was public way entitling landowners to building permit.

Town record of vote in 1737 indicating that town accepted certain ways, coupled with proprietor's vote, satisfied pre–1846 requirement for creation of "public way" of permanent and unequivocal dedication by owner coupled with acceptance by public. Sturdy v. Planning Bd. of Hingham, 32 Mass.App.Ct. 72, 586 N.E.2d 11 (1992).

Layout was voided by town's failure to take possession of the property within the requisite two year period provided by statute (St. 1917, c. 344, part 2). McLaughlin v. Town of Marblehead, 68 Mass. App. Ct. 490, 863 N.E.2d 61 (2007), review denied, 449 Mass. 1103, 865 N.E.2d 1141 (2007).

[FN20] In such a case, use may be terminated at any time at the will of the owner. W.D. Cowls, Inc. v. Woicekoski, 7 Mass.App.Ct. 18, 385 N.E.2d 521 (1979).

[FN21] Opinion of the Justices, 313 Mass. 779, 782–783, 47 N.E.2d 260, 263 (1943).

See Haugh v. Simms, 64 Mass.App.Ct. 781, 788, 835 N.E.2d 1131 (2005), court in Opinion of the Justices, 313 Mass. 779, 47 N.E.2d 260 (1943), did not set out an exclusive definition of private way.

[FN22] Dolan v. Board of Appeals of Chatham, 359 Mass. 699, 700–701, 270 N.E.2d 917, 918–919 (1971).

[FN23] Martin v. Building Inspector of Freetown, 38 Mass.App.Ct. 509, 649 N.E.2d 779 (1995).

18B MAPRAC § 23.5

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