Raboth Rd.

TOWN OF KINGSTON
INTER-OFFICE MEMORANDUM

TO: Carl G. Atwood, Supt. of Streets DEPT: HIGHWAY

FROM: Board of Selectmen DATE: 11/2/89

SUBJECT: RABOTH ROAD

As Follows:

It was voted at the meeting of September 30th that this Board would instruct you to look into the condition and repair of Raboth Road. If repairs are necessary, please go forward.

JMP:PAL:p

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NOV 7 1989

CARL G. ATWOOD
SUPT. OF STREETS

KINGSTON HIGHWAY DEPARTMENT

KINGSTON, MASS. 02364
TEL. 585-2735

PLEASE READ AND INITIAL

Board of Selectmen
23 Green St.
Kingston, Ma 02364

RE: Your memo dated 11/2/89 which instructs me to look into the condition and repair of Raboth Road and to go forward with any required repairs.

Gentlemen,

I have inspected Raboth Rd and find that the area from the Pyramid property to Smelt Brook, will require some additional gravel and grading. The area from Smelt Brook to Indian Pond Estates will however require extensive work and require large quantities of gravel as well as grading.

The Town of Kingston has in the past adopted MGL Ch 40, S 6D which states the town may appropriate money for the removal of snow and ice and liability is expressly waived under this statute. The Town has not to date, adopted MCL Ch. 40, S 6N which provides a method of making "Temporary Repairs" on private ways open to the public. Not only is it illegal for the town to maintain this private way, open to the public, but MGL Ch 84, S25 makes a community liable for injuries caused by a defect in such way, in which the Town has done work. Adoption of Ch. 40 S 6N would be safer than maintaining private ways on the pretext that they are public.

I urge the Board of Selectmen to seek the opinion of Town Counsel prior to making these temporary repairs on Raboth Rd., and if the Town wishes to aid the residents along this or any other private way to adopt the statute authorizing such work.

It is my understanding that both the Independence Mall and the Indian Pond Estates at the end of this road are still involved in litigation.

Carl G. Atwood
Supt. of Streets

THE WAYS AND MEANS OF PUBLIC WAYS

By Alexandra Dawson

In some areas of law, study produces clarity of thought and simplicity of resolution. Unfortunately, the law of municipal ways, hoary and inconsistent, is not one of these! Recent case law and a well-intentioned rewriting of two statutes of the Massachusetts General Laws have created new complexities and raised new questions.

This essay deals with why and how towns must handle the problem of substandard roads, what the consequences may be of discontinuing a road, and how bad effects may be minimized. Except where noted, these comments do not refer to those quasi-public roads called "statutory private ways."

MAINTENANCE AND UPGRADING

Many communities, even in urbanizing areas, have miles of old dirt roads that are narrow, winding, steep, washed out, and often traversable only by foot or four-wheel drive vehicle. These roads add a rural charm to the area and make excellent hiking paths. However, if the land along such a road goes into development, the customers will expect to commute as easily in January as in June. If the way is a town public way, the developer and/or residents will invoke their right to have it kept in repair at the expense of the town... so that (it) may be reasonably safe and convenient for travelers, with their horses, teams, vehicles and carriage at all seasons.

If this ancient law (MGL Ch. 84,s.1) is enforced, the town must not only upgrade such an old public way but also kept it plowed and repaired in all seasons. Or, the town can follow one of five alternate paths.

#1: FIND OUT IF THE WAY IS TRULY PUBLIC

A town is under no obligation to repair or maintain a private way (Lynch v. Town of Groton, 11 Mass. App. 1008 (1981)). A great many ways that seem to be public ways are not public at all. Mere maintenance by a town, references on plans or deeds, or even a certificate from a town clerk does not make a way public.

A HISTORY OF AMBIGUITY

In 1846, the legislature established that no ways could be chargeable upon cities or towns unless the municipalities used the formal process (dating back at least to 1786) that required a layout of the way to be filed with the town clerk and a town meeting vote to accept the way as public. In modern times, the formal process began to include notice to affected landowners and a review by the planning board under MGL ch. 41, s. 811. The courts have adhered strongly to these requirements for all ways not already public before 1846. For example, in Loriol v. Keene (353 Mass. 358 (1961)), the court held that where the required layout has not been field, a town cannot create public ways through a town vote alone, even if the legislature passes a special act later ratifying the town's action!

#1 cont:

Occasionally, someone tries to establish a town way through public prescriptive use, but this is very difficult to prove (see E.D. Cowls, Inc. v. Woicekoski, 7 Mass. App. 18 (1979)). Claims of private prescriptive rights of otherwise landlocked landowners have been more sympathetically received (see Carmel v. Baillargeon, 21 Mass. App. 426 (1986)), but such a private right does not make the way public.

If a way is not public, the lanowners have no claim on town services. Finding out the status of the road is thus a priority. A good place to start is with the town clerk's office and the records of town meeting votes. If the way runs through two towns, it may be a county way, which can be created or discontinued only by action of the county commissioners, who keep records of such ways.

#2: DISCONTINUE THE WAY

If the old dirt road turns out to be a public way after all, and the town wishes to avoid the cost of upgrading and maintenance, it may discontinue the way by majority vote of town meeting, with out notice to the landowners, under MGL Ch. 8s, s. 26. Discontinuance is legally easy, but a formal vote is necessary. The planning board must, however, be given a chance to comment on the discontinuance (MGL Ch. 41, s. 811). A recently passed law, Chapter 742 of the Acts of 1987, has limited severely the power of municipalities to discontinue ways connecting one city or town with another and requires that the "chief executive officer" of the other community or the state Department of Public Works approve the discontinuance. The owners of land along the discontinued way are permitted to sue the town, under the eminent-domain law, for "damages" caused by the discontinuance. These damages do not include the mere inconvenience and loss of land value that discontinuance can bring (see, for example, Willard v. Cambridge, 85 Mass. 574 (1862)). Some landowners along the discontinued way, however, may be damaged if other landowners "gate off" the road.

GATING OFF

"Gating Off" can result from the fact that the town seldom owns the soil under a road. Most town ways are only easements rights of way. When such a road is discontinued, it becomes, in effect, a private driveway running over the land of more than one owner.

Ownership of the underlying soil reverts to the abutters. However, only the landowners with a deed right, and their invitees, have the rights to use such a private way. Therefore, the continuing right of the landowners along the way to use it depends upon the deeds making up their chains of title. If no such right of use is asserted somewhere in the chain of title, then a "downstream" landowner nearer the adjacent public way may close the private way with a gate and effectively landlock the "upstream" owner(s). That this is no idle threat is shown by several major cases (including Loriol and Carmel), which arose from private initiatives in gating off ways.

#2 cont:

It is sometimes stated that a landlocked landowner has an implied right to continue to use the way, based upon an easement of "necessity" or one created by "implication." For complicated legal reasons, this is unlikely to be the case. If the landowner uses the way for twenty years after discontinuance, he or she may obtain an easement by prescription (see Carmel and Schuffels v. Bell, 21 Mass. App. 76 (1985)), bu the gate-happy abutter may not wait that long.

It can, of course, be argued that gating by a private landowner does not give rise to any damage claim against the town, because the town did not do the gating. There are no reported cases on this point. However, a sympathetic court might find that gating was a forseeable result of the town vote to discontinue.

Aside from the legal consequences, the landlocking problem is a serious political issue that is best addressed by ensuring a solution before discontinuance. For example, the owners may agree to give releases to the town.

#3: DISCONTINUE MAINTENANCE ONLY

Until recently, no town could discontinue the maintenance of a public way. However, in 1983, the legislature completely rewrote MGL Ch. 82, s. 32A, which had provided a means for the county to discontinue a town way upon petition of town officials. The new law provides that the selectmen may find that a way has become "abandoned and unused for ordinary travel." After a hearing, they may then declare that the town "shall no longer be bound to keep such way or public way in repair" provided both ends are properly posted.

This process either discontinues the way in the same manner as the town meeting vote or creates a hybrid animal, a town public way that the public is not obliged to maintain. In the latter case, the gating problem is solved, because the way is still open to everyone, and the cost problem is gone, because the abutters must upgrade and maintain it. However, this, this result has not yet been tested in a high court. In Municipal Law Memo No. 13, January 1984, the Executive Office of Communities and Development took the position that the law provides a second method for town discontinuance. But a decision of the Land Court (Carr v. Town of Sherborn, Mdsx. Misc. 12004, December 1986) ruled for the alternative interpretation.

Until the legislature clarifies section 32A, or a higher court rules upon it, no one can be assured of the legal results of using it.

#4: MAKE A STATUTORY PRIVATE WAY

In another method to avoid the problems of gating-off, the town votes first to discontinue the way under MGL Ch. 32 s. 21 and then immediately votes to lay it out again as a "statutory private way" for the benefit of all the abutting landowners. This in effect discontinues the way as to maintenance obligations, but ensures that all landowners have a right to use it, even if their deeds are silent. The method

is untried, however:

#4 cont:

is untried, however: no legal decision of record has interpreted the result. Moreover, this procedure requires that a layout be filed with the town clerk, bringing up the need for a new survey if the layout for the old road is unavailable.

#5: SOFTEN THE BLOW OF DISCONTINUANCE

Citizens may object strongly when the town stops plowing and maintaining a discontinued way. Yet the town must not work on private ways. Not only is it illegal, but MGL Ch. 84, s. 25 makes a community liable for six years for injuries caused by a defect in a private way in which the town has done work.the exact meaning of this law is far from clear (see Rouse v. Somerville, 130 Mass 361 (1875)); however, a trial court has recently upheld it (Gallagher v. Medford, Dt. Ct. Appellate). If the community wished to aid the residents along a private way (whether discontinued or historically never accepted), it may adopt a statute authorizing such work.

The simplest of these, MGL Ch. 40, 6D, states that a town which accepts the statute may appropriate money for the removal of snow and ice from disignated private ways. Liability for injuries is expressly waived under this statute. MGL Ch. 40, s. 6N provides different method for making "temporary repairs" on private ways: The town adopts a bylaw on such matters as whether the abutters should share the cost and the town's liability for damages caused by repairs. These statutes do not automatically solve all liability problems; however, they are safer than the current practice of plowing and maintaining private ways on the pretext that they are public. The Supreme Judicial Court has approved these statutes as reasonable in a 1943 advisory opinion (Opinion of the Justices, 313 Mass. 779). The high courts have not ruled on a third law, MGL Ch. 40, s. 5(68) which permits a town to appropriate money for "reconstruction of an unaccepted street" on petition of the owners of a least 50 percent of the lineal footage on the street.

CONCLUSION

The rules of the road game in Massachusetts are mysterious. However, with rural areas developing rapidly, big bucks are at state for landowners and for towns in deciding who bears the cost of improvement and maintenance. Towns should at least turn their headlights on and follow the curves.