MASSACHUSETTS STREETS AND WAYS FOR SURVEYORS

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MASSACHUSETTS STREETS AND WAYS FOR SURVEYORS
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1. DEFINITIONS AND CLASSIFICATION OF MASSACHUSETTS STREETS AND WAYS.

1.1 PUBLIC WAYS

"Public ways" as a generic term includes state highways, county highways, town ways and statutory private ways.

Generally speaking an existing way in a city or town in the Commonwealth is not a "public way" - that is, one which a city or town has the duty to maintain free from defects (see Massachusetts General Laws ("G.L." hereafter) c. 84, §§1, 15 and 22 and First National Bank of Woburn v. Woburn, 192 Mass. 220 (1906)) - unless it has become public in character by one of three ways: (i) a laying out by public authority in the manner prescribed by statute (for example, M.G.L. c. 82, §§1-32); (ii) prescription; and (iii) prior to 1846, a dedication by the owner to public use, permanent and unequivocal (see Longley v. Worcester, 304 Mass. 580 at 587-589 (1939)), coupled with an express or implied acceptance by the public. McLaughlin v. Town of Marblehead, 68 Mass. App. Ct. 490, 495 (2007); Fenn v. Town of Middleborough, 7 Mass.App.Ct. 80, 83-84 (1979).

For the creation of a public way by prescription, see G.L. c. 187, §2, Carmel v. Baillargeon, 21 Mass.App.Ct. 426, 429-31 (1986); . Fenn v. Town of Middleborough, 7 Mass.App.Ct. 80, 83-84 (1979); Schulze v. Huntington, 24 Mass.App.Ct. 416, 417 (1987). For the creation of public ways by dedication, see G.L. c. 84, §23, 1846 Mass. Acts 203, §1; Loriol v. Keene, 343 Mass. 358, 360-61 (1961). Given the unavailability

of dedication as a means of establishing a public way after the effective date of 1846 Mass.Acts 203, §1 and the difficulties in establishing a public way by prescription, most public ways now assume their public character by laying out by a public authority under statute.

Public ways in Massachusetts consist of state highways, highways/county ways, town ways and statutory private ways, each of which is governed by statute.

The manner of layout, alteration, acquisition of land and easements, discontinuance, construction, maintenance and repair of state highways is set forth in G.L. c. 81, which dates from 1893. G.L. c. 82 (which dates to 1693) governs the method of layout of town and county ways. Unlike the usual situation in state highways, a town or county way is usually a mere easement. This is so because of a long standing judicial doctrine that there will not be created a greater interest or estate than is essential for the public use. Thus an easement for travel is to be presumed unless otherwise stated.

> When a public street or highway is laid out and constructed under the general laws of this Commonwealth, the public acquires an easement in the land, which includes a right to occupy it for every kind of travel and communication of persons and every movement of property, that is reasonable and proper in the use of a public street. [Citation omitted]. Subject to this paramount right, the owner of the fee retains his ownership of every valuable interest in the land, and he may use it in any way that does not interfere with the right of the public to the enjoyment of its easement.
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> Opinion of the Justices, 208 Mass. 603, 605 (1911).

It has been the presumption of the courts that a public way is limited to an easement. In City of Boston v. Richardson, 95 Mass. (13 Allen), 146, 159 (1866), the court made a declaration of public policy by stating:

> "the right of the public in a highway, even when so ancient that its origin is unknown, is ordinarily limited to an easement for the purposes of travel; and upon the taking of land for a highway by authority of the

> legislature, very clear words are necessary in order to vest in the public the fee in soil."

This theory of law was explained in Smith v. Slocomb, 75 Mass. (9 Gray), 36, 37 (1857) as follows:

> "in this commonwealth,...by taking land for a highway the public take an easement only, and not a fee; and that the fee must be in somebody, and not in abeyance, and remains in the abutter; and that the public easement so completely takes all that can be made serviceable to the owner, that what remains cannot be considered of much value;..."

It should also be noted that the term "highway" in Massachusetts is an expansive term, including not only the paved surfaces of a roadway but areas other than and outside of those surfaces, so long as the purpose of the area is to assist in travel.

> The term 'highway', as generally understood, does not have a restrictive or static meaning. It denotes ways laid out or constructed to accommodate modes of travel (and other related purposes) that change as customs change and as technology develops. [Citations omitted.] 'In the most primitive state of society the conception of highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals. . . And thus the methods of using public highways expanded with the growth of civilization until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired.' [Citation omitted].
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> Because of this view of the scope of the term 'highway', a footpath has been considered to be a part of a highway [citation omitted], and a sidewalk beside a roadway has been deemed part of that way [citation omitted] . . . The same reasoning has led to the inclusion of bicycle paths along roadways within the scope of those ways. [Citation omitted.]

Opinion of the Justices, 370 Mass. 895, 901-902 (1976). [This case held that highway trust fund moneys could be expended on the construction and maintenance of bicycle pathways in Massachusetts].

Thus, "the word 'highway' in a popular sense includes all public traveled

ways, whether county or town ways [citation omitted]. So, of the word 'road.'" Clark v. Hull, 184 Mass. 164, 166 (1903). But see the technical distinction between "highways" and town ways in Newburyport Redevelopment Authority v. Commonwealth, 9 Mass. App. Ct. 206, 223 (1980) where it is stated:

> The distinction between highways and town ways, which has existed since at least 1693, lies in the fact that the former are and have been laid out under G.L. c. 82, Section 1, or its statutory predecessors, while the latter are and have been laid out under G.L. c. 82, Section 21, or its predecessors. [While now a city council or board of aldermen may, if their city charter so provides, lay out highways, previously G.L. c. 82] Section 1 provided for the laying out of highways by authorities having jurisdiction throughout a county [now county commissioners], while the predecessors of Section 21 provided for the laying out of town ways by a board of selectmen with the approval of the town meeting.

An important distinction between highways and town ways is that highways may not be discontinued without notice to towns and abutters and concurrence of the county commissioners (G.L. c. 82, Sections 1 and 3), while town ways may be discontinued by town meeting vote or vote of a city council without notice to abutters (G.L. c. 82, Section 21). Upon discontinuance, a state highway becomes a town way. As to the effect of a discontinuance, see Section 6 herein on Discontinuances and the discussion of Nylander v. Potter, 423 Mass. 158 (1996).

1.1.A STATE HIGHWAYS

A state highway, as distinguished from other streets and ways, is laid out and maintained by the Massachusetts Department of Transportation, Division of Highways ("MDT"). See G.L. c. 6c. The layout or assumption of maintenance of a state highway can be by petition of county commissioners or selectmen (G.L. c. 81, Section 4) or on MDT's own determination that the public convenience and necessity require the

layout (G.L. c. 81, Section 5). Although MDT may abandon any land or rights in land which may have been taken or acquired by it provided that it follow the procedures required under G.L. c. 81, Section 12, after layout and construction of a state highway, MDT has no authority to abandon any portion of such highway once the same has been committed to the charge of the Commonwealth. See 2 Op.Atty. Gen. 378 (1902). See also, general discussion in Gillis v. Bonelli-Adams Co., 284 Mass. 176, 178-79 (1933).

The statute also provides for limited access ways (G.L. c. 81, Section 7C) and grants to the MDT very expansive powers, to acquire needed land outside the existing way (G.L. c. 81, Section 7), alteration of connecting ways, be they town or county ways (G.L. c. 81, Section 7A), to dispose of excess lands or rights in land (G.L. c. 81, Section 7E), to enter on private property for surveys and test borings (G.L. c. 81, Section 7F), to relocate public utilities and to acquire land and easements to do so (G.L. c. 81, Section 7G) and the right to acquire land to provide road building materials (G.L. c. 81, Section 11).

When the MDT lays out a limited access highway it is sometimes necessary, in order to provide access to a public way for abutting properties whose access has been cut off by the limited access highway, for it to take land, not needed for the highway itself but rather to provide private access to a public way (G.L. c. 81, Section 7A). While originally not viewed as constitutional by some because such a taking was viewed as the expenditure of public funds for private benefit, a challenge to this aspect of the law failed in the case, Luke v. Massachusetts Turnpike Authority, 337 Mass. 304 (1958). In the Luke case, the Court acknowledged that the eminent domain power may not be exercised for private purposes but found that the public purpose was served by taking easements for

private use, because to do otherwise the Turnpike might have had to be laid out "over a length of miles" to avoid a taking which would otherwise landlock a parcel of land.

Landowners who had frontage on a state highway have a cause of action for damages for diminution in value of their holdings if the highway is thereafter made a limited access highway. Petitioners in such a situation are entitled to recover the damage to what remains of their real estate after the appurtenant easement is taken away from them and as a result of losing the easement. G.L. (Ter. Ed.) c. 79, §12. Nichols v. Commonwealth, 331 Mass. 581 (1954). "Nothing turns on the fact that the petitioners' acreage was the same before the taking [citations omitted]." Wenton v. Commonwealth, 335 Mass. 78, 80-81 (1956).

Section 12 of G.L. c. 81 deals with discontinuances or abandonment, about which there is later discussion at Section 6 et seq of these materials.

Sections 13-21 of G.L. c. 81 set forth the obligation of the state to maintain its highways including snow removal, at its expense and, for the purposes of maintenance, "state highways" includes "such public roads in state forests, parks and reservations outside of the metropolitan parks district, and such public roads within the limits of any property [under the control of the Commonwealth] as may . . . be designated . . . as roads for public use . . . ." (G.L. c. 81, Section 13). The Commonwealth is liable to motorists damaged by its failure to maintain its highways (G.L. c. 81, Section 18). Section 21 of G.L. c. 81 was amended in 1975 to add a new provision, as follows:

> In the case of a driveway opening on a state highway, the said department shall not grant a permit for a driveway location or alteration if the board or department in a city or town having authority over public ways and highways has notified the department by registered mail, return receipt requested, of their objection to the

driveway; provided, that such objection shall be based on highway safety and accepted by the said department.

In April, 1988 G.L. c. 81, Section 21 was substantially revised, creating a further requirement for state highway access. Prior to such amendment, the section had provided that an abutting land owner wanting to build or expand a business or residential use which would generate a substantial increase in or impact on traffic, could be required to bear the expense of up to 75% of the cost of necessary highway improvements.

Now Section 21 of G.L. c. 81 requires an abutting landowner, whether intending to use an existing or a new access to a state highway ("curb cut"), to obtain a permit from the state before building or using the access and the landowner can be required to bear 100% of the cost of improvements installed by the department.

Depending upon the administration then in office, the MDT has on occasion had a very expansive view of its powers under this amendment to the extent of imposing a year long curb cut moratorium on at least one highway and strictly regulating the number and location of curb cuts in many other locations.

Section 22 of G.L. c. 81 was amended in 1985 and now provides in part: "No length of possession, or occupancy of land within the limits of a state highway, by an owner . . . of adjoining land shall give him any title thereto . . . [and any encroaching objects] other than a building used for residential purposes [may be removed by the state if not removed by the owner]." This amendment is designed, obviously, to protect dwellings against summary removal to the nearest MDT maintenance area; presumably a dwelling may be removed only after further process.

By G.L. c. 81, Sections 24-28 the MDT is given the right to expend public funds on town or county, as opposed to state, highways.

Under G.L. c. 85, Section 2, municipalities must seek the approval of MDT with reference to (1) a way which intersects a state highway; (2) any project which is or was federally aided, in whole or in part; (3) any traffic control signal or flasher in any city or town which does not employ a registered professional engineer to design, redesign or change the timing and sequence of signal or flasher; (4) any sign excluding heavy commercial vehicles; (5) any school zone establishment or signing in relation to which a city or town intends to seek reimbursement from the Commonwealth; and (6) certain one-way street signs.

If any city or town installs and maintains any of the above control devices without requesting and obtaining the required approval, MDT may withhold or withdraw the unexpended balance of any funds assigned to the city or town for certain highway purposes.

G.L. c. 81A established the Massachusetts Turnpike Authority and authorized it to issue revenue bonds for the purpose of constructing a "toll express highway" from Boston to the New York State line and this was later amended to permit the take over of the Sumner Tunnel and the construction of the Callahan Tunnel, and now the Third Harbor Tunnel under Boston Harbor. Chapter 81A of the General Laws has been repealed by Chapter 3 of the Acts of 1997 and the operations formerly of the Turnpike Authority are now vested in the Department of Transportation.

Nowhere in G.L. c. 81 is it required that the state acquire the fee in land over which it lays out the state highway, and in earlier times, it may be some state highways were mere easements, where the fee remained in the land owner over whose land the

highway was laid out. It is now usual, however, that the MDT makes an eminent domain (G.L. c. 79) taking of the underlying fee for the purpose of state highway construction.

1.1.B COUNTY WAYS/ HIGHWAYS

G.L. c. 82, Section 1 gives authority to the county commissioners, councils of governments or other duly authorized councils committees or boards to "lay out, alter, relocate and discontinue highways and order specific repairs thereon . . . ." Such highways are commonly known as “county ways”. Section 1 of c. 82 was amended to provide jurisdiction to additional entities as follows: "A council of governments shall have authority to designate the powers of the council with relation to county roads to a subgroup of the council, duly constituted under its charter. In counties abolished in Chapter 34B or by Section 567 of Chapter 151 of the Acts of 1996 where no council of governments exists, the designated regional planning agency shall create a regional adjudicatory board comprised of four members of the regional planning agency advisory board and the district highway director of the Department of Highways or his designee, to act as county commissioners under this Chapter. County roads in Berkshire County shall be exempt from the foregoing provisions and shall be subject to Section 364 of Chapter 159 of the Acts of 2000."

The commissioners may on their own motion (G.L. c. 82, Section 1) or on a petition by others (G.L. c. 82, Section 2), after hearing (G.L. c. 82, Section 3) and a view (G.L. c. 82, Section 4), adjudicate that public convenience and necessity requires the layout, alteration, relocation or discontinuance of a highway. Inhabitants of Pembroke v. County Commissioners of Plymouth, 66 Mass. 351 (1853). A court cannot overturn a factual determination of common convenience and necessity. Denman v. County of

Barnstable, 346 Mass. 412, 415 (1963), citing Blackstone v. County Comm’rs., 108 Mass. 68, 69 (1871).

As is the case with state highways, specific statutory authority is given to the commissioners (G.L. c. 82, Section 11A) and their agents, including surveyors, to enter on private land without creating a trespass, for the purposes of "reconnaissances, surveys, soundings, inspections or examinations to obtain information for the layout and construction of highways".

G.L. c. 82, Section 1 highway construction is performed by towns, the county apportions the expense between the county and the town or towns within which the highway is constructed, or with the state as well (G.L. c. 82, Section 8).

Towns thereafter have the responsibility to maintain highways and can be required to make specific repairs (G.L. c. 82, Section 10) in addition to routine maintenance, repairs and snow removal.

If a town refuses to construct a highway laid out by the commissioners, the commissioners may contract with another party to have it constructed, at the expense of the town (G.L. c. 82, Section 14), and prior to 1917, commissioners could be compelled, in a mandamus action, to complete a highway laid out by them (Richards v. County Commissioners of Bristol, 120 Mass. 401 (1876)). Section 14 of G.L. c. 82 was subsequently amended to provide that the commission "may" complete a highway and mandamus will not lie (Marcus v. County Commissioners of Norfolk, 344 Mass. 749 (1962)) to compel construction of a highway.

Prior to Chapter 276, Acts of 1985, which repealed Sections 26 and 27 of G.L. c. 82, the county commissioners could override the refusal of the selectmen to lay out a

town way (G.L. c. 82, Section 26) or the refusal of the town meeting to accept such a way (G.L. c. 82, Section 27). Interestingly, the county still has the power (G.L. c. 82, Section 30) to override the will of a town and discontinue a town way or statutory private way.

It should be noted that with the abolition of certain county governments pursuant to G.L. c. 34B, and in particular, Section 6(d) thereof, responsibilities for the maintenance, method of layout, relocation and discontinuance of ways laid out by those counties shifted to either a council of governments or, if none, to the towns within which such county way is located.

1.1.C TOWN WAYS

The selectmen of a town or city council of a city may lay out a town way in accordance with G.L. c. 82, Sections 21-23 and, upon acceptance by the city council or town meeting, the way becomes a city or town way. Only a town meeting may discontinue a town way (see further discussion, at Section 6 herein).

Each step of the process must be followed or the layout or acceptance is invalid. In Loriol v. Keene, 343 Mass. 358 (1961), Mrs. Loriol owned land at the end of a way known as Fairfax Street. The Keenes owned land adjoining Mrs. Loriol, on either side of Fairfax Street. The Keenes blocked off Fairfax Street so Mrs. Loriol could not use it to get to her property and she sued.

A map of Fairfax Street leading to plaintiffs' property had been recorded in 1913, and in 1929 the Town voted to "accept" Fairfax Street without stating which portions or whether all of it was to be accepted. No plan of Fairfax Street was filed with the town clerk prior to the acceptance vote in accordance with Section 23 and no "notice of intention" was given defendants in accordance with Section 22.

> The giving of notice and filing of a layout required by the provisions of G.L. c. 82, Sections 22 and 23 are not mere procedural technicalities. [Citation omitted]. The requirement that a layout be filed '. . . was manifestly not intended to prescribe a mere formality, but to lay down the indispensable conditions upon compliance with which the right of appropriating private property to public uses of this kind can lawfully be exercised. As one [safeguard . . . . against inconsiderate or capricious action on the part of municipal authorities, it establishes a rule to secure precision and exactness of description on the part of the selectmen as to the changes which they propose to make.
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> Loriol v. Keene, 343 Mass. at 361 (emphasis supplied). But see, Reed v. Mayo, 220 Mass. 565 (1915), discussed below.

1.1.D STATUTORY PRIVATE WAYS

Note that Sections 21 through 24 of G.L. c. 82 refer as well to "private ways." Massachusetts is alone, so far as the authors know, in having this anomalous creature called a "private way" which is laid out by public authority. The existence, in the statutes, of this creature has been the cause of much litigation and uncertainty.

A statutory private way is open to use by the public. It is laid out by the selectmen by the same procedure as a town way, although usually on the petition of one or more persons to whom the way will be of most benefit. The costs of the layout, necessary land acquisition, construction, maintenance and repairs are chargeable to "the persons upon whose application such way is laid out, relocated, altered or discontinued or upon whose application specific repairs are made . . . ." (G.L. c. 82, Section 24). The town has no obligation to maintain a statutory private way and, while such a way is laid out upon the petition of individual(s), it is not only he (they) who have the right to use the way; the public likewise has an easement of passage over statutory private ways.

A private way laid out across land of Denham from a public way to land of Slade, which Denham alleged to be for the "use of a single individual, and not for any public use; that the effect [of the layout was] to compel them to sell an easement in their land [to

Slade, and was therefore an unconstitutional action]" led to the Supreme Judicial Court in Denham v. County Commissioners of Bristol, 108 Mass. 202, 204 (1871) to say:

> It is true that ways of this description are denominated 'private ways' [by the predecessor statute, and they are allowed] to be laid out for the use of one person, who may be, and in this case is, ordered to pay the whole amount of land damages thereby incurred. It appears to us however that such a way is not distinguishable in any other respect from a town way, properly so called. The easement or right of passage, created by laying it out, is not the private right of the individual whose for special accommodation it may have been laid out, nor is it meant exclusively for his individual travel. It is laid out on his petition; but it is not his way, in the sense of belonging to him personally, or as one of the appurtenances or easements of the farm or estate with which it communicates. He has no power to close, alter, widen or control it; and he has no right in it, except in common with all others who have occasion to pass over it. The public easement is exactly the same as it is in all other ways laid out by public authority.
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> All the different ways, which towns are authorized by law to lay out, are in truth public highways, for the public without discrimination has the right to use them. It is wholly immaterial by what name they are called [citation omitted]. Our system for the laying out and establishment of public roads recognizes three different kinds: 1. Highways, technically and properly so called, which are laid out by county officers, and in which the land damages are paid from the county treasury; 2. Town ways, which may be laid out by town authorities, and in which the town is required to pay the land damages; and 3. Private or particular ways, in which the selectmen (or in case of appeal, the county commissioners) may order the whole or part of the land damages, as they deem reasonable, to be paid by the persons or persons specially and peculiarly benefited by the laying out. In all these different kinds of ways, the towns are to pay all the expense of construction with their respective limits; and as has been shown, all are public roads.

A distinction has existed between three types of “public roads” since the laws of the Province of Massachusetts for the years 1693-94 and 1713-1714. It has been claimed that the statutory private way “descends” from the third of these type of ways.

> First, there were highways, laid out and paid for by the county. Prov. Laws 1693-1694 ch. 6 §3. Second, there were town ways, laid out and paid for by the town. Prov. Laws 1693-1694 ch. 6 §3. Third, there were certain “particular 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 1713-1714 ch. 8 §1. Such a road is public in the sense of providing access, but its latter day descendant is the "statutory private way", a kind of road for which neither town, county nor Commonwealth bears upkeep responsibility.

United States v. 125.07 Acres of Land, More or Less, 707 F.2d 11, 14-15 (1st Cir. 1983).

Thus, a "statutory" private way is a way laid out by a town, but the land damages occasioned by the layout, are charged to the petitioner (G.L.c. 82, Section 24). In other words:

> The "private way" known to the modern statutes differs from a "town way" only in the fact that the selectmen may assess the whole or a portion of the damages of laying out, altering, or discontinuing such way upon the individuals for whose use it is laid out or altered, or by whose application it is discontinued. In other respects, it is a part of the system of town ways.

Butchers Slaughtering and Melting Ass'n v. Boston, 139 Mass. 290, 292 (1885), citing Flagg v. Flagg, 82 Mass. (16 Gray) 175, 178-179 (1860).

A "statutory" private way is not a "public way" or a way "maintained and used as a public way" for the purposes of the subdivision control law (G.L. c. 41, Sections 81L and 81P), Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979), and hence the division of land abutting on a statutory private way requires compliance with the definitive subdivision process and frontage on a statutory private way does not qualify for an ANR endorsement.

In passing upon whether the legislature could pass a law permitting the expenditure of public funds to remove ice and snow from "private ways open to the public use" the Supreme Court said, in Opinion of the Justices, 313 Mass. 779 (1943) that while the words "'private' may occasionally be used in the statutes with a different

meaning [citing G.L. c. 84, Sections 12-14], they commonly mean ways of a special type laid out by public authority for the use of the public [citing G.L. c. 82, Sections 21-32A and Denham]. Such 'private ways' are private only in name, but are in all other respects public." The Court then went on to discuss ways open to the public use by virtue of dedication (discussed infra) and then added to the confusion by saying:

> But the words 'private ways,' as commonly understood and as sometimes used in the opinions of this court, have a broader meaning than either of the meanings here mentioned [citations omitted]. The words may well mean or 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 be the owner thereof [citations omitted] or by reason of ownership of easements of way over land of another person.
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> Opinion of the Justices, 313 Mass. at 782.

1.2 DETERMINING WHETHER A WAY IS "PUBLIC"

As discussed at the outset of this chapter, a way does not become public unless (1) by layout by a public authority in the manner prescribed by statute, (2) by prescription, or (3) by dedication, if prior to 1846. McLaughin v. Town of Marblehead, 68 Mass. App. Ct. 490, 495 (2007), Fenn v. Middleborough, 7 Mass.App.Ct. at 83-84 (1981). Determining whether a way has become public under the first of these three methods can require a great deal of circumstantial evidence where direct evidence only establishes that the way in question was laid out as a "highway" under the colonial laws.

The courts are unwilling to merely assume that ways are "public" and require a quantum of proof that such is the case to avoid the consequences attendant to a way being

public, such as liability for failure to maintain, the expense of maintenance and snow removal and, not coincidentally, ready divisibility of land by ANR plans.

In Reed v. Mayo, which was a registration petition in the Land Court, there was no laying out of the way and no plan showing the boundaries and measurements of the way prior to the 1852 town meeting which voted to accept Mayo Road as petitioned by James Roy.

> It does not necessarily follow, however, that the provisions of the statute were not complied with. The main purpose of giving seven days' notice of the intention to lay out the way was to inform the landowner as to what portion of his land was to be taken. [Citation omitted.] In this instance the only owner interested was James Roy who had petitioned the town to lay out Mayo Road and had given the land needed for the purpose. Even though evidence of notice and filing does not appear in the town records, it may be presumed or inferred after 60 years that the statutory requirement was complied with. All reasonable presumptions are to be taken in favor of such ancient records.
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> Reed v. Mayo, 220 Mass. at 568.

It should be noted that the Land Court found that since 1852 Mayo Road had been used by the public and had been maintained by the town. It may have been that uninterrupted adverse use of Mayo Road since 1852 was enough to establish a way by prescription.

The distinction between the Loriol case discussed earlier, and its requirement for exactly following the statutory scheme, and the Reed and Clark v. Hull cases, cited above, deserves mention here.

Both the Reed and Clark cases found a public way on evidence which would not now be sufficient. In Reed there was no evidence of notice and filing of the layout but its

existence was "presumed." In Clark, based upon "ancient records" and "ancient deeds referring to the 'road'" the Court found a public way.

Loriol is the first case where strict evidence of compliance with the statute was required, but not the last. The burden of proof is on the party claiming a public way who must show that the way:

> has become public in character in one of three ways: (1) a laying out by public authority in the manner prescribed by statute (see G.L. c. 82, Sections 1-32); (2) prescription; and (3) prior to 1846, a dedication by the owner to public use, permanent and unequivocal [citations omitted], coupled with an express or implied acceptance by the public.
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> Fenn v. Town of Middleborough, 7 Mass. App. Ct. 80, 83-84 (1979); See also Schulze v. Huntington, 24 Mass. App. 416, 417 (1987), and Rivers v. Town of Warwick, 37 Mass. App. Ct. 593, 594 - 95 (1994).

The trial lawyer in the Fenn case had obviously read the Clark case as he put into evidence the same type of evidence as had satisfied the Supreme Court, in 1903, that the "road leading to Jeffries Neck" was a public way. The same evidence was insufficient in 1979 to convince the Appeals Court that Tispaquin and Short Streets in Middleborough were public. The Court observed rather acidly that "[a]ge by itself is a neutral factor, there being ancient private, as well as ancient public ways . . . ." Fenn, 7 Mass. App. Ct. at 85.

Reference is made to a helpful small pamphlet by Attorney Alexandra Dawson, ANRs Ancient Ways and the cases selected therein at Appendix A. This helpful pamphlet is available at www.thetrustees.org/putnamconservationinstitute.cfm and was prepared for the Putnam Conservation Institute of The Trustees of Reservations.

A 1995 Appeals Court decision confirms that although mere age and use are insufficient, the courts may nonetheless show some leniency in their interpretations of the

types of evidence that will satisfy the statutory requirements, even where the court acknowledges that the evidence may support "different and possibly contrary inferences." Martin v. Building Inspector of Freetown, 38 Mass. App. Ct. 509, 512 (1995). In Martin, the court found that a public way was validly established where the evidence included (1) plans dating back to June 7, 1763, (2) testimony of an experienced local surveyor who was also director of the town's historical society, (3) minutes of a town meeting in 1764 including as among those items of business that required action the decision as to "what they think proper in respect of highways laid out by the selectmen of Freetown on June 7, 1763" and a notation in the margin stating "voted", and (4) a high degree of congruence between the 1763 plans and the town's assessors maps and the 1979 U.S. Geological Survey map. Martin; 38 Mass. App. at 511.

In Moncy v. Planning Board of Scituate, 50 Mass.App.Ct. 715 (2001), which upheld a Land Court decision by the same name, 6 LCR 322 (Lombardi, J., Nov. 18, 1998), the bar was raised substantially concerning the quantity and quality of evidence required of those parties claiming a way to be public. Although both the judge in the lower Land Court decision and the appeals court had found that the way in question had been laid out as a “highway” by the town selectmen in 1725, this evidence was inconclusive as to the public status of the way. Moncy, 50 Mass.App.Ct. at 716.

Despite the fact that the plaintiff had produced evidence that (1) the way in question, Bates Lane, was laid out as a “highway” by the selectmen in 1725, (2) the town had voted to accept the layout in 1726, (3) Bates Lane was shown on an 1831 map as a highway in Scituate, and (4) all town ways in Scituate were historically public ways during that time period; the Court in Moncy found that Bates Lane, as a matter of law,

could be deemed to constitute a statutory private way, thereby disqualifying it as a "public way" under the Subdivision Control Law. Moncy, 50 Mass.App.Ct. at 720.

In reaching this finding, the court analyzed each of the forms of evidence submitted by the plaintiff. The first of such evidence discussed by the Court was actually evidence that the plaintiff had failed to submit; evidence addressing why the way had been laid out in the first place. This type of evidence can be shown, according to the Court in Moncy, by proving who paid for the layout. Id. at 716, citing United States v. 125.07 Acres of Land, More or Less, 707 F.2d at 14. Without proof that damages were paid to anyone for the layout of the way, the Court in Moncy upheld the Land Court's conclusion that "it was just as probable that the 1725 layout was intended as a private way." Id. at 716.

Evidence that the Town had appointed someone in 1858 to ascertain if Bates Lane belonged to the Town and evidence that the Town assessed fees for the rental and use of Bates Lane during the 1800's were also pieces of circumstantial evidence that the Court found as being "inconsistent with its use as a public way." Id. at 717, citing Cohasset v. Moors, 204 Mass. 173, 176-177 (1910).

Because acceptance by the Town was required for both private and public ways under a 1718 Town meeting vote, the Town's acceptance of Bates Lane in 1726 was discounted by the Court as being insignificant evidence in proving whether the way was private or public. Id. at 717-718. The depiction of the way on a map, by itself, was also held by the Court as failing to prove that the way was public. Id. at 718.

The Court in Moncy further found that "the mere fact that the selectmen in the 1725 layout stated that they "laid out a high way in Scituate" does not in and of itself

denote a public way….the term 'highway' is susceptible of many meanings. It can refer generally to a road or way, including a county, town or private way." Id. at 718, citing Jones v. Andover, 6 Pick 59, 60 (1827).

The application of the colonial laws in place at the time Bates Lane was laid out received much discussion in Moncy. The Land Court had stated in its decision the it "consider[ed] Bates Lane to have been laid out as a 'particular or private way'; now known as a statutory private way." 6 LCR 322, at 326. The plaintiff in Moncy, on appeal, argued that a "private way" did not exist before 1836, and that Bates Lane could not, therefore, have been laid out as a private way. The appeals court held, however, that because there was "no difference in the power granted to the selectmen to lay out town and private ways by the Revised Statutes of 1836, §§66-69, and by the Province Laws 1693-1694, c. 6, §4, and 1713-1714, c. 8, §1," the Land Court could properly conclude that "Bates Lane constituted a private way, now known as a statutory private way." Id. at 719-720.

Therefore, in order to establish that a way laid out prior to the enactment of the Revised Statutes of 1836 is public, several types of evidence should be shown. First, it should be proven that the way was laid out by the selectmen and accepted by a vote at a town meeting. If the actions taken by the selectmen and the town are ambiguous as to whether the intention was to lay out a public or private way, "evidence of use, construction, or repair, from which a court could infer whether the road was laid out as a town or private way" should be gathered. United States v. 125.07 Acres of Land, More or Less, 707 F.2d at 15. In addition to submitting maps depicting the way as a public way, survey work should be done to show the exact location of the way, identifying (a) owners

of the land traversed by the way over its course during the time period in which the way was laid out, and (b) any important location likely to have been frequented by the public to which the way in question provides access. Such evidence would be helpful in establishing why the way was laid out. Any evidence of attempts to discontinue the way could also be helpful in proving whether or not a way is private or public in nature.

In any event, the law has shown that it is wise for a party seeking to prove that a way is public to gather as much direct and circumstantial evidence as possible in its favor if that party hopes to establish that the party's land does in fact have frontage on a public way.

1.3 PRIVATE WAYS

In distinguishing the "statutory" private ways from the more commonly understood private way last referred to in the Opinion of the Justices, supra, it can be seen that there is also in Massachusetts a "private way" which is not available for public use.

In W.D. Cowls, Inc. v. Woicekoski, 7 Mass. App. 18 (1979), the plaintiff sought to enjoin the defendants from interfering with its use of Old Stage Road in Belchertown, claiming that Old Stage Road was a public way and defendants could not maintain a barrier across it.

> "If a road has never been dedicated and accepted, laid out by public authority, or established by prescription, such a road is private [citations omitted]. If 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."
>
> W.D. Cowls, 7 Mass. App. Ct. at 19.

After reviewing the facts in the case including words in deeds describing the way as a "town road" and "the highway" and an 1830 map showing Old Stage Road, the Court held "no conclusive evidence was presented which would have shown that the road came, under the 'public', rather than the 'private' designations . . ." Id., at 20. See also Witteveld v. City of Haverhill, 12 Mass. App. Ct. 876 (1981).

The W.D. Cowls case and several of its progeny, including Fenn v. Town of Middleborough, 7 Mass. App. Ct. 80 (1979), Casagrande v. Town Clerk of Harvard, 377 Mass. 703 (1979), Rivers v. Town of Warwick, 37 Mass. App. Ct. 593 (1994), Moncy v. Planning Board of Scituate, 50 Mass.App.Ct. 715 (2001), and McLaughlin v. Town of Marblehead, 68 Mass. App. Ct. 490 (2007), make it clear that: (1) the burden of proof as to whether a way is public or private can no longer be met, as it was in 1915 in Reed v. Mayo, by a "presumption" that all necessary public actions were accomplished; (2) that there can be ancient private ways as well as public ways; (3) that the burden of proof as to the status of the way as public or not is on he or she who claims it is public (Rivers v. Town of Warwick, 37 Mass. App. Ct. 593 (1994), Witteveld v. City of Haverill, 12 Mass. App. 876 (1981)); (4) that the proponent that a way is public must prove it "conclusively"; and (5) that a statutory private way (G.L. c. 82, Section 21) is not a "public way" or a "way maintained and used as public way" under the Subdivision Control Law, G.L. c. 41, Sections 81K-81G.

Private ways most commonly known to us in our practice are subdivision ways; private ways are in all respects private, being laid out, constructed and maintained by private individuals for their private purposes. The public uses such ways only with the consent of the owner, although such consent is so often given in the case of residential

subdivisions it is often assumed by laymen that subdivision roads are "public" long before they area accepted by town meetings.

2. ESTABLISHMENT AND ACCEPTANCE OF STREETS AND WAYS

2.1 STATE HIGHWAYS

G.L. c. 81, Section 4, permits the county commissioners, aldermen or selectmen to petition the MDT to lay out a highway to be taken charge of by the Commonwealth," and Section 5 provides that the MDT may, on its own motion, lay out a state highway after a public hearing and a determination that the public necessity and convenience require it.

The MDT then files with the appropriate county commissioners' and town clerks' offices a certified copy of the highway plan and a certificate to the effect "that it has laid out and taken charge of said way" whereupon the proposed highway becomes a state highway. "[T]hereafter said way . . . shall be constructed at the expense of the Commonwealth [unless] abandoned or discontinued as provided in section twelve."

2.2 COUNTY HIGHWAYS

The procedure for layout of county highways is more cumbersome (see generally G.L. c. 82, Sections 1 through 7). The commissioners (G.L. c. 82, Section 1) or another party by petition in writing to the Commissioners (G.L. c. 82, Section 2) start the process to layout, alter, relocate or discontinue highways. If a petition commences the process the commissioners may require a suitable bond to assure reimbursement of the county's expense if the petitioners do not prevail (G.L. c. 82, Section 2). The procedures by county commissioners can be exercised by other boards and commissioners. G.L. c.82, §1, G.L. c.34B.

The commissioners must hold a hearing regarding the layout to "adjudicate" whether common convenience and necessity require the layout (G.L. c. 82, Section 4). On their own motion, or if requested by any party interested, the commissioners will hold a "view" of the premises (G.L. c. 82, Section 4).

Notice of the hearing (and view, if applicable) must be given to the town clerk 15 days before the date of each, together with a copy of the petition, and also publish and post notice of the proceeding seven days before the hearing or view (G.L. c. 82, Section 3).

G.L. c. 82, Section 3 also requires notice by regular mail to the "recorded owners of land subject to a taking" seven days before the hearing, with copies of the layout plan, if prepared, or if not prepared, copies must be provided at least seven days before the final approval of plans.

After hearing, G.L. c. 82, Section 5 provides that if "no person interested objects, the commissioners may, within twelve months thereafter, lay out" the highway, but if such a person objects another hearing, with new notice, must be held.

Obviously, if the layout is the subject matter of private petition the expense, if the petitioners do not prevail, can be substantial.

If it is adjudicated that public convenience and necessity do require the layout, the commissioners must make the requisite takings (G.L. c. 82, Section 7) and determine the sharing of expenses thereof (G.L. c. 82, Sections 8 and 12) and shall order the construction to be undertaken by the respective towns within which the layout is made "unless other provision is made."

Finally, the commissioners must file with each town clerk description and a plan of the location and bounds of the highway (G.L. c. 82, Section 8).

2.3 TOWN WAYS AND STATUTORY PRIVATE WAYS

G.L. c. 82, Sections 21 through 24 set forth the manner in which selectmen (and certain other parties if authorized) lay out and have the town meeting accept town ways and statutory private ways, which can be on their own motion or upon petition.

Chapter 41, Section 81I provides (in towns not having adopted an official map) that "no public way shall be laid out, altered, relocated, or discontinued" unless the proposed action has been referred to the planning board for its report or the passage of 45 days without a report.

Seven days prior to adopting a layout the selectmen must give notice of their intention to do so to land owners whose land will be taken for such purpose (G.L. c. 82, Section 22).

After the selectmen vote to accept the layout, it is not established until the layout, with the boundaries and measurements of the way, if filed with the town clerk "not less than seven days thereafter", is accepted by the town meeting (G.L. c. 82, Section 23).

The town meeting vote to accept a layout requires only a majority vote, but if funds for construction are to be appropriated, or land taken, those votes require a two-thirds vote.

Section 24 of G.L. c. 82 requires that the selectmen adopt an order of taking for the layout within 120 days of the town meeting vote accepting the layout; obviously, this is not required if the way is to be given to the town as would be the case with a private subdivision way.

NOTE: There is no statutory requirement for the MDT, county or towns, to record highway plans at the registry of deeds!

2.4 PRIVATE WAYS

Private ways, if they are intended to constitute frontage for zoning purposes, must be laid out and constructed in accordance with the provisions the Subdivision Control Law, G.L. c. 41, Sections 81K-81GG, otherwise a landowner may create such private ways crossing his property as he wishes.

A landowner whose interests will be served by the layout and acceptance of a public way may make a voluntary gift of the land or an easement in the land over which the way is constructed or to be constructed. All governmental entities are authorized to accept gifts of land or interests in land, but must do so by some objective, overt act (such as accepting a deed of the land at the time the layout is accepted by the town meeting or city council); mere acquiescence to a purported gift is insufficient. A common form of voluntary transfer is the conveyance to a town of an approved subdivision way and the town's acceptance of the developer's layout of such way by town meeting vote.

A town clerk's certificate that a parcel of land is maintained and used as a way pursuant to G.L. c.41, §81L, twelfth par (of the subdivision control law; an endorsement, "subdivision approval not required" pursuant to c.41, §81P shall not be withheld unless the plan shows a subdivision and the word "subdivision" is defined to exclude a parcel if, inter alia, "every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way." c.41, §81L twelfth par) is not conclusive, irrebuttable evidence that a parcel is maintained and used as a public way for purposes of obtaining an ANR Endorsement. Facts in the

clerk's certificate may be genuinely disputed and susceptible of different interpretations; the clerk's records do not necessarily reflect how a particular parcel is maintained and used. Such a certificate is merely prima facie evidence that a parcel of land is so maintained. Matulewicz v. Planning Board of Norfolk, 438 Mass. 37 at 44 (2002).

3. MAINTENANCE

Public ways are maintained at public expense. Chapter 81 state highways must be maintained by the state and G.L. c. 82 highways and town ways must be maintained at town expense (some of which may be reimbursed by the state). For taking gravel for roads, see G.L. c. 82, Section 38; G.L. c. 81, Section 11.

Failure to maintain a state highway results in the imposition of liability on the state (G.L. c. 81, Section 13) and such is also the case as to G.L. c. 82 highways and town ways for a town (G.L. c. 84, Sections 1, 15, 22).

G.L. c. 84 sets the obligations of a town, not only to maintain, repair and remove snow and ice from highways and town ways, but also dedicated (see discussions infra) ways (G.L. c. 84, Sections 23-25) in certain circumstances.

Section 23 of G.L. c. 84 states in part: "A way opened and dedicated to the public use, which has not become a public way, shall not except as provided in the following two sections, be chargeable upon a town as a highway or town way unless laid out and established in the manner prescribed by statute."

G.L. c. 84, Section 24 imposes liability for failure to maintain dedicated ways where the town fails to maintain barriers between a public way and an unsafe dedicated way, and Section 25 imposes liability if it can be proven that the town maintained the dedicated way at any time within six years prior to the accident.

Private ways and statutory private ways are maintained at the expense of abutters (G.L. c. 84, Section 12 and see, United States v. 125.07 Acres of Land More or Less, 707 F.2d 11 (1st Cir. 1983); and see Popponesset Beach Association, Inc. v. Marchillo, 39 Mass. App. Ct. 586 (1996), review denied, 422 Mass. 1104 (1996), which suggests that c. 84, Section 12 is the proper and adequate legal remedy for a homeowners' association to collect road maintenance costs from reluctant non-members) but public monies may, if the town so votes, be expended on private ways for removal of snow and ice (G.L. c. 40, Sections 6C and 6D) and temporary repairs of private ways may be authorized in municipalities adopting a bylaw pursuant to G.L. c. 40, Section 6N. The expenditure of public funds to remove ice and snow does not make the private way become public. Bruggeman v. McMullen, 26 Mass. App. Ct. 963 (1988), Rivers v. Warwick, 37 Mass. App. Ct. 593, 597 (1994).

United States v. 125.07 Acres of Land More or Less, 707 F.2d 11 (lst Cir. 1983) assists in understanding the distinctions among ways. There, the issue was whether the Town of Truro or private parties had the burden of maintenance of a way (the estimated cost of upgrading Pond Road was subtracted from an eminent domain damage award in a Cape Cod National Seashore taking). The Court said that the fact that Pond Road is public for purposes of access, does not show that Truro has an obligation to maintain it. The court observed that a statutory private way (G.L. c. 82, Section 21) is a kind of road for which neither town, county nor Commonwealth bears upkeep responsibility.

> The ancient statutes make clear that whether a road is public or private for upkeep purposes depends, not just upon whether it was laid out, but upon why it was laid out. The 'why' of it is best indicated by who paid for it, [the town or the private petitioner] . . . ."
>
> 125.07 Acres of Land, 707 F.2d at 14 (emphasis added).

The court went on to state:

> Whether the town has an obligation to pay for its upkeep, however, depends, at a minimum, upon whether the layout was made under [present G.L. c. 82 town and county ways statutory authority] and, if under the [latter] who was meant to pay for it. The landowners presented no . . . evidence [on this issue] [citations omitted]. Since the landowners had the burden of showing that the town had an upkeep obligation, the District Court correctly ruled against them.
>
> Id at 14.

4. INSTALLATION OF UTILITIES IN WAYS

The installation of utility lines in public ways is not often a matter of controversy as such installations have been made since the advent of such utilities. Installations are governed by G.L. c. 82, §§40 through §40E governing installation of underground utilities, G.L. c. 166, §22, and §§22A through 22N relative to the removal of overhead lines and G.L. c. 166, §25 relative to underground utility lines and are largely under control of local government.

The matter of installation of utilities in private ways is governed by G.L. c. 187, §5 and the right to install utility lines in private ways depends upon how the parcel of land along the private way in question was conveyed to the property owner seeking such installation. Where a lot bounded on private ways is conveyed "together with the right to use 'Private Street' for all purposes for which streets or ways are now or may hereafter be used in the 'Town of Locus'", this conveys a perpetual, non-exclusive appurtenant easement to use the entire width and length of "Private Street" for the installation and maintenance of pipes, wires and lines for all commonly used utilities, including cable TV and cable modem. See Hovey, William V., Utility Lines In Private Ways: An Overview, Massachusetts Lawyers Weekly, September 25, 2000, p. B3, 29 MLW 215.

If the lot abutting a private way is simply conveyed with "a right of way to use 'Private Street'", the property owner would have to utilize G.L. c. 187, section 5 in order to get the necessary utility lines to the parcel. Section 5 of G.L. c. 187 provides, in relevant part, that:

> The owner or owners of real estate abutting on a private way who have by deed existing rights of ingress and egress upon such way or other private ways shall have the right by implication to place, install or construct in, on, along, under and upon said private way or other private ways pipes, conduits, manholes and other appurtenances necessary for the transmission of gas, electricity, telephone, water and sewer service.

G.L. c. 183, section 5 is retroactive in its application. Nantucket Conservation Foundation, Inc. v. Russell Management, Inc., 380 Mass. 212 (1980).

Therefore, in order for this statute to apply: (1) the rights of ingress and egress must be "by deed"; (2) the way must be a "private way"; and (3) the property must be "abutting" the private way.

The term "abutting" as used in the statute has been defined to mean "to touch at the end; … end at; … reach or touch with any end." Barlow v. Chongris, 38 Mass.App.Ct. 297, 299 (1995); quoting Black's Law Dictionary 11 (6th ed. 1990). Compare G.L. c. 183, Section 5 and Emery v. Crowley, 371 Mass. 489, 494 (1976), where the term "abutting" property means property abutting along the length of the way.

Accordingly, if an abutter to a paper street which is definitely laid out on a recorded plan is granted easement rights over such way in a deed then such abutter has the authority to install utilities in such way pursuant to G.L. 183, Section 5, provided that such utilities do not unreasonably obstruct or interfere with the way or are not inconsistent with the use thereof. See Ciejka, Gerald P., Paper Streets, Feb. 18, 1998. It also appears that a holder of an express driveway easement would likewise be entitled to

the benefit of G.L. c. 187, Section 5. See Barlow v. Chongris, 38 Mass.App.Ct. 297 (1995).

As case law has developed to date, both an easement in a private way arising by implication or necessity (Adams v. Planning Board of Westwood, 64 Mass. App. Ct. 383, 392 (2005)) and by estoppel (Lane v. Zoning Board of Falmouth, 65 Mass. App. Ct. 434, 439 (2006), and Post v. McHugh, 76 Mass. App. Ct. 200, 206-207 (2010)) have been held to be easements "by deed" as required by c.187, §5. Only an easement by prescription is not an easement "by deed." Cumbie V. Goldsmith, 387 Mass. 409 (1982).

Where a grantee of lots abutting on a private way has an easement by estoppel due to the fact that the lots were conveyed with a description bounding on a way, or by reference to a plan depicting a boundary on a way, such grantee would be deemed to have rights of access by deed whereby G.L. c. 187, Section 5 would apply to provide an implied easement for utility lines. See Hovey, Supra. Any prescriptive access rights, however, can never be transferred into “deeded rights” and accordingly cannot benefit from G.L. c. 187, Section 5. Id., see also Cumbie v. Goldsmith, 387 Mass. 409 (1982).

5. OBTAINING FEE TITLE OR EASEMENTS OF PASSAGE FOR PUBLIC WAYS

5.1 EMINENT DOMAIN

Usually, common convenience and necessity requires the lay out or alteration of a public way where a voluntary transfer is impossible, either because the landowner is unwilling to make a gift or because of the numbers of landowners who have to be dealt with. In this situation, the Massachusetts Constitution, Pt. 1, Art. 10, amend. Art. 39 authorizes takings for highway purposes:

> "Art. X. . . [A]nd whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.
>
> "The legislature may be special acts for the purpose of laying out, including or relocating highways or streets, authorize the taking in fee by the commonwealth, or be a county, city or town, of more land and property than are needed for the actual construction of such highway or street . . . ."

G.L. c. 79 provides the mechanism by which a landowner is paid compensation for the taking. A landowner is entitled to recover the market value of the property taken at the highest and best use to which the land could reasonably be put. The Nantucket County Superior Court has found that damages may be awarded under G.L. c. 79 even where the plaintiff is unable to prove that she is the owner of a way taken by a town provided that the plaintiff has suffered "special and peculiar injuries" that differ from those "of the general public" as a result of such taking. Soeder v. DeSrocher, Sup. Ct. Civ. Action No. 97-018, J. Volterra, Sept. 1, 1999.

Although several plaintiffs who have had portions of their property taken have attempted to claim an easement by necessity over the taken portion where the remainder of their land has become landlocked due to a taking by eminent domain, the Massachusetts courts have essentially held that the only relief such a plaintiff may receive is in the form of monetary damages. See Darman v. Dunderdale, 362 Mass. 633 (1972); Morse v. Benson, 151 Mass. 440 and New England Continental Media, Inc. v. Town of Milton, 32 Mass.App.Ct. 374 (1992). See also Mugar v. Massachusetts Bay Transportation Authority, 28 Mass.App.Ct. 443, 445 (1990), where it was held that "[t]he principles of interpretation designed to give effect to the express or implied intent

of parties contracting for or acquiring an interest in land…are, in general, inapplicable to eminent domain proceedings."

But see, Flax v. Smith, 20 Mass.App.Ct. 149 (1985), further review denied, 396 Mass. 1102 (1985) where the court found that property adjacent to a parcel which has been taken for nonpayment of taxes was burdened by easements for water and sewer lines in favor of an adjacent parcel. The court in Flax stated that where there are such involuntary conveyances as those resulting from a taking, "the degree of necessity required must be greater than in the case of a voluntary conveyance." Id. at 154. Because the court believed that continued water and sewer services to occupants of residential property constituted the required higher degree of necessity, an easement of necessity was found despite the taking for nonpayment of taxes.

A full discussion of G.L. c. 79 and damages is beyond the scope of these materials, but it should be pointed out that there are restrictions on the taking of land already dedicated to other public purposes for highway purposes (G.L. c. 79, Section 5) and, fortunately, a taking cannot be made without recordation of the order of taking at the appropriate registry of deeds (G.L. c. 79, Section 3). (But see Boston Water & Sewer Commission v. Commonwealth, 64 Mass. App. Ct. 611 (2005) where special legislation authorized the University of Massachusetts to take land by eminent domain for its campus and "fulfill all other requirements of Chapter 79…." An order of taking of a parcel of land on Columbia Point, Boston, was not recorded with the Suffolk Registry of Deeds within thirty days of taking, but the Court found title had already vested in the Commonwealth, Id., at 616-617.) The state's power of eminent domain as to state highways is set forth in G.L. c. 81, Sections 7, 7A, 7C, 7G and 7M. Where parcels of

land are deprived of all or some means of access to an existing public way by construction of a turnpike, the taking authority has the power to take easements over other parcels for the purpose of access. See Luke v. Massachusetts Turnpike Authority, 337 Mass. 304 (1958). Damages can be awarded to the owner of a parcel of land not taken if there is "special and peculiar injury to such parcel" (G.L. c. 79, Section 12. Compare this statute with Nylander v. Potter, 423 Mass. 158, at 163, fn. 10 (1996), discussed infra).

G.L. c. 40, Section 14 permits municipalities to take land, not already appropriated to public use, for any municipal purpose. See also G.L. c. 82, Section 7 for authority for county commissioners to make eminent domain takings and G.L. c. 81, Section 24 for similar authority for towns. Under G.L. c. 40, Section 14, the taking must be approved by the city council or town meeting, the appropriation of money damages must be approved by a two-thirds majority of the city council or town meeting and a taking for highway purposes must be for the "public convenience and necessity."

5.2 DEDICATION

In Hemphill v. Boston, 62 Mass. 195 (8 Cush. 195) (1851), dedication was described as "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, at 196. The gift must also be permanent. Hobbs v. Lowell, 19 Pick. 405 (1837). The burden of establishing that a way is public as the result of a dedication by a land owner and

acceptance by the municipality is upon he who avers the way is public. Witteveld v. City of Haverhill, 12 Mass. App. Ct. 876.

Since St. 1846, G.L. c. 203, now appearing as G.L. c. 84, Sections 23 and 24, "a public highway or town way cannot be created in this Commonwealth by dedication and acceptance." Longley v. Worcester, 304 Mass. 580, 585 (1939). The reason for the statute is to prevent municipalities from being charged with the responsibilities of maintenance of ways which may not be laid out and constructed in a manner prescribed by law.

Cases decided construing the state of the law prior to 1846 (Hemphill v. Boston, supra, and Morse v. Stocker, 83 Mass. 150 (1 Allen 150) (1861)), approved the dedication of land by a landowner where he prescribed terms and limitations on his gift and, if it were given for a special and limited use or purpose, as for a footway, it must be accepted and held for that purpose only. See Longley v. Worcester, supra, at 587.

Obviously such a set of circumstances would be unthinkable now, for to permit a landowner to subject the municipality to liability for failure to maintain a way (particularly where conditions limiting the way's usefulness to the public are present) would soon bankrupt municipalities.

But dedication is one of the means by which public ways can exist and, particularly with ancient ways, this should not be dismissed where one wishes to prove, for ANR divisions of land or other purposes, that a way is "public". Unlike prescription, proof of a public highway by dedication requires no minimum period of time. Abbott v. Cottage City, 143 Mass. 521 (1887).

5.3 ADVERSE POSSESSION/PRESCRIPTION

> It is well settled that the creation of a public way by adverse use depends upon a showing of 'actual public use, general, uninterrupted, continued for [the prescriptive period].' Jennings v. Tisbury, 5 Gray, at 74 (1855) [other citations omitted]. It is sometimes said that 'to establish such a use the further fact must be proved, or admitted, that the general public used the way as a public right; and that it did must be proved by facts which distinguished the use relied on from a rightful use by those who have permissive right to travel over the private way. ' Bullukian v. Franklin, 248 Mass. 151, 155 (1924) [other citations omitted] . . . Other cases indicate that the necessary adversity and lack of permissiveness may be inferred by the finder of fact from the uninterrupted use by the public, unexplained for the prescriptive period. See, Bassett v. Harwick, 180 Mass. 585, 585, 587 (1902).
>
> Fenn v. Town of Middleborough, 7 Mass. App. Ct. 80 (1979).

The common law relating to prescriptive use is reviewed in detail in Edson v. Munsell, 92 Mass. 557 (1865).

The party seeking to establish that a way is public by virtue of prescriptive use of the way by the public has the burden of establishing the same. "When the fact of a public way is disputed, the burden of proof falls on the party asserting the fact. [citations omitted]" Witteveld v. City of Haverhill, 12 Mass. App. Ct. 876, at 877 (1981).

Establishing a public way by prescription is extraordinarily difficult: to meet her burden of proof a claimant must show not only that the use of the way was open, continuous and notorious for 20 years but also that the use was non-permissive and by the public generally - not simply by users who may have gained their own prescriptive rights but whose use did not constitute a "public" use. See Rivers v. Warwick, 37 Mass. App. Ct. 593 (1994).

The public adverse use must constitute the corporate action of the municipality, which usually takes the form of some kind of ratification, expenditure of public funds for improvement, or other corporate acknowledgment that the way in question is public. See Cerel v. Framingham, 342 Mass. 17 at 21 (1961), Reed v. Inhabitants of Northfield, 30

Mass. 94 (1832) (maintenance and repair of the way) and Teague v. City of Boston, 278 Mass. 305 (1932) (maintenance of utilities within the way).

> That a highway may be proved by long and continued use and enjoyment by the public, upon the ground that a conclusive presumption arises from such use that it had been originally laid out or established by competent authority, is well settled in the Commonwealth.
>
> Commonwealth v. Coupe, 128 Mass. 63 (1880).

While St. 1846, c. 203 prevented the creation of public ways by dedication, that statute (now G.L. c. 84, Section 23) has no application to the creation of public ways by prescription. See Coupe, 128 Mass. 63.

It should be noted that in each of the cases of eminent domain, dedication and adverse possession/prescription, the quality of title, whether it is fee simple or a mere easement of passage, is a separate and distinct question.

As stated earlier, unless there is clear evidence to the contrary, an easement of passage (which comprehends within it expansive rights to use and occupy the way for every kind of travel) is to be presumed. In the Coupe case, cited above, it is clear that the Court focused on the distinction when it held that "[w]ays by prescription . . . [are] established upon evidence of user by the public, adverse and continuous for a period of twenty years or more; from which use arises a presumption of a reservation or grant, and the acceptance thereof, or that it has been laid out by the proper authorities, of which no record exists." Id. at 65.

5.4 BOUNDARY ON A WAY

5.4.A Fee Interest In A Way

G.L. c. 183, Section 58, or the “derelict fee statute", was enacted as an aid in the construction of deeds bounding on a way (and water courses, walls, fences and other linear monuments). This statute provides that such conveyance will include any fee interest of the grantor in such way unless (a) the grantor retains other real estate abutting the way, in which case (i) if the retained real estate is on the same side of the way, the division line between the conveyed land and retained land extends into the way to the extent the grantor owns the fee, or (ii) if the retained estate is on the other side of the way between the division lines extended, the title conveyed shall be to the center line of the way, if the grantor owns so far, or (b) the instrument evidences a different intent by an express exception. The statute is retroactive. See e.g., Tattan v. Kurlan, 32 Mass. App. Ct. 239 (1992), review denied, 412 Mass. 1105, where the way was as yet unconstructed.

As subsequently amended, the derelict fee statute reads:

> Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, water-course or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, water-course or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.

Section 2 of c. 684 provides in part:

> [The Derelict Fee Statute] shall apply to instruments executed on and after said effective date and to instruments executed prior thereto, except as to such prior executed instruments this act shall not apply to land registered and confirmed under the provisions of chapter one-hundred and eighty-five before said effective date or to the extent that any person or his predecessor in title has changed his position as a result of a decision of a court of competent jurisdiction.

> The Derelict Fee Statute is thus retroactive in its application, as well as prospective, governing the construction and interpretations of deeds whenever executed, with the exceptions noted.

The statute was adopted to end confusion which existed as a result of generations of judicial decisions construing the effect of deeds employing words such as “bounded by" a way and “bounded on" a way as contrasted with bounded on or by the "side line" of a way. The common law was that a parcel described as bounding "on" or "by" a way, without restricting words conveyed title to the center line of the way if owned by the grantor, but a parcel boundary on or by a "side line" of the way conveyed no fee interest in the way. Casella v. Sneierson, 325 Mass. 85, 89 (1949). The statue was also adopted to “clarify ownership and ease the difficulty of identifying the owners of the small strips of land that lay beneath highways, streams, walls, and other similar boundaries” and to “quiet title to sundry narrow strips of land that formed the boundaries of other tracts.” Rowley v. Mass. Elec. Co., 48 Mass. 798, 799, 803 (2003).

The derelict fee statute constitutes a rule of construction of deeds and other instruments. As was said in Tattan v. Kurlan, 32 Mass. App. Ct. 239, at 242-243 (1992),

> “General Laws c. 183, §58, establishes an authoritative rule of construction for all instruments passing title to real estate abutting a way, whether public or private and whether in existence or merely contemplated (so long as it is sufficiently designated, see Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 677-678 (1965); Brennan v. DeCosta, 24 Mass. App. Ct. 1968 (1987) (Footnote and additional citations omitted). Section 58 mandates that every deed of real estate abutting a way includes the fee interest of the grantor in the way-to the center line if the grantor retains property on the other side of the way or for the full width if he does not-unless ‘the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.’ The statute incorporates the basic common law principle of presumed intent with regard to conveyed land abutting an actual or contemplated way owned by the grantor. The common law presumed that the grantor intended to pass title to the center of the way.”

Similarly, the effect of the derelict fee statute is to "strengthen 'the common law … presumption that "a deed bounding on a way conveys the title to the centre of the way if the grantor owns so far.' (citations omitted.)" Hanson v. Cadwell Crossing, LLC, 66 Mass. App. Ct. 497, at 499 (2006).

In a case decided not long after the adoption of the derelict fee statute, the Supreme Judicial Court, Smith v. Hadad, 366 Mass. 106 (1974), was called upon to determine the beginning point of a deed of parcel of land excepted from a conveyance where the excepted parcel was bounded in part as follows:

> Thence turning southerly by Main Street to a point on Main Street distant eight hundred (800) feet north of the junction of Main and Short Streets; thence turning at a right angle to said Main Street and running westerly one hundred seventy five (175) feet; thence turning and running southerly and parallel to Main Street and distant one hundred seventy-five (175) feet therefrom, eight hundred (800) feet more or less to said Short Street.
>
> Nichols thus reserved a 175 foot-wide parcel fronting on Main Street to the east, which was later conveyed to the respondents' common predecessor in title. Left ambiguous in the deed was whether the 175 foot measurement begins at the western edge or in the center of Main Street. Since the street is sixty-six feet wide, the answer affects a 33-foot wide strip at the boundary between petitioners' and respondents' land. It is the dispute over the ownership of this strip has brought the issue to this court. Id.,at 107.

Main Street, a state highway, was taken as an easement and thus the fee to the underlying land remained in the adjoining private owners but, as the court observed, unless the way were discontinued, the fee ownership rights underlying the easement were "effectively useless".

The Court restated the common law as follows:

> The presumption has long been that, even where the specified boundary line is clearly at the side of the way (as where it runs between two stakes, each of necessity at the side rather than in the center), the deed was intended to transfer the abbreviated rights to the fee of the way as well [citations omitted]. The rationale of such decisions is apparently that the grantor is unlikely to want to

> reserve title to the fee of the way; if he does, he may avoid the effect of the presumption by contraindicating.
>
> The ultimate issue here the distinct question of the starting point for a measurement, which was dealt in Dodd v. Whitt, 139 Mass. 63, 65-66 (1885); 'A majority of the court is of the opinion, that it is a common method of measurement in the country, where the boundary is a stream or a way, to measure from the bank of the stream or the side of the way; and that there is a reasonable presumption that the measurements were made in this way, unless something appears affirmatively in the deed to show that they began at the centre of the stream or way.' We believe this is dispositive of the instant case. That a grantor probably had no intention to retain the fee under the adjoining way does not make it at all likely that he would therefore make a measurement from the center of the way affecting the placement of the boundary at the opposite end of the property….
>
> the Dodd case clearly implies that the presumption shall be operative in the absence [of evidence of the grantor's contrary intent.] It is significant that the Dodd case recognized that such a presumption was widely made. It has been ever since. To change it now would create chaos in land titles, defeat the reasonable expectations of conveyancers, and cause substantial financial hardship to may innocent landowners….
>
> Accordingly, we hold that in the absence of a clear showing of a contrary intent, a measurement given from a stream or a public or private way shall be presumed to begin at the side line of that stream or way. Id., at 437-438.

The derelict fee statute first came to the Supreme Judicial Court in the 1976 case of Emery v.Crowley, 376 Mass. 489 (1976). There the Emerys petitioned the Land Court to register title to three parcels of land in North Weymouth pursuant to G.L. c. 185, §1. The defendant Crowley took issue with the petitioners' claims with respect to two of the parcels sought to be registered and, when he lost at trial at the Land Court, took an appeal to SJC. His appeal required that the Court construe the derelict fee statute for the first time.

At issue were the property rights in a paper street running perpendicular to a public way, known as North Street. The paper street was labeled on one plan as "Parcel 2" and on another "Mount Vernon Road East." At the time of trial, plaintiff Crowley was

the sole owner of land abutting the paper street and claimed that the derelict fee statute operated to give him fee ownership of the paper street.

Emery's predecessor in title had conveyed to Crowley's predecessor in title land abutting the paper street, but in the deeds of conveyance described the paper street not as a way or street but as "other land of the grantor" and "land of Elsie C. Emery."

Not only did Crowley's property abut the "other land of the grantor" and "land of Elsie C. Emery" but it abutted the paper street at its end and indeed, Crowley owned the fee in an extension of the paper street labeled "Mount Vernon Road East" extending from the end of Parcel 2 easterly. The Court stated that the derelict fee statute "sets out an authoritative rule of construction for instruments passing title to real estate abutting a way" (Id. at 492) but pointed out that the statute didn't define the terms "abutting" and "way" so it turned to the established rules of judicial definition to do that.

The Court held:

> We conclude that parcel 2 did not constitute a 'way' in the instruments passing title to the property abutting its north and south boundaries from grantor Emery to [Crowley's predecessor in title]. Both the metes and bounds descriptions of the lots conveyed and the plans incorporated in the deeds clearly delineate the property now known as parcel 2 as belonging to the grantor or his spouse. The parties obviously intended and understood that this land was retained by the grantor….A prospective purchaser examining the deeds to the land abutting parcel 2 on its north and south boundaries would have no reason to think he would acquire any interest in parcel 2 beyond the express easements [stated elsewhere in the deeds]. Thus, §58 does not apply to those instruments.

One of the deeds to Crowley's predecessor in title conveyed land that abutted parcel 2, the paper street, at its end. The Court held:

> By its terms [the derelict fee statute] includes, in 'abutting' real estate, land 'on the same side' of the way in question, see G.L. c. 183, §58 (a)(i) and land 'on the other side of such way,' see G.L. c. 183, §58(a)(ii). The statutory silence with regard to real estate at the end of the way signifies that such real estate does not 'abut' the way in the traditional or statutory sense of the word. Indeed, logically

> the owner at the end of way cannot acquire any fee interest in the way without encroaching on the property rights, if any, of the abutting side owners. The term 'abutting' in the context of fee ownership of ways after conveyance of property bounded on a way, thus refers to property with frontage along the length of the way (emphasis supplied). Id., at 494.

See Boudreau v. Coleman, 29 Mass. App. Ct. 621, at 622, fn. 3. See also, McGovern v. McGovern, 77 Mass. App. Ct. 688 (2010).

Most important case construing the Derelict Fee Statute to date is Tattan v. Kurlan, 32 Mass. App. Ct. 239 (1992).

Tattan owned a substantial parcel of land which abutted two older subdivisions. The original subdivision developers had designated connector streets, as many subdivision regulations required, providing possible access from internal subdivision roads to adjacent properties which might be subdivided in the future. Tattan had acquired the two connector strips described in the opinion as they were described on plans of record, one being referred to as a "future roadway" and the second as a "prospective street", for $500.00 from the original subdivider. Shortly afterward Tattan informed the defendants that he intended to build connector streets over the reserved streets to connect his adjoining tract of land with the public way. In determining that the lot owners abutting the two "future streets" owned those future streets to the center line thereof the Court held, at 242-243:

> "General Laws c.183, § 58, establishes an authoritative rule of construction for all instruments passing title to real estate abutting a way, whether public or private and whether in existence or merely contemplated (so long as it is sufficiently designated [interior citations omitted]. §58 mandates that every deed of real estate abutting a way includes the fee interest of the grantor in the way…." (emphasis supplied)

In discussing the common laws presumption that in such circumstances a grantor intended to pass title to center of the way, the Court stated: "this presumption was strong

but could be overcome by clear proof of a contrary intent of the parties….[interior citations omitted]

Section 58's mandate that title in the way is conveyed to the abutting grantee, however, is stricter than the common law rule which it codified and superceded. The statutory presumption is conclusive when the statute applies, unless (for the purposes of this case) the 'instrument passing title' evidencing a different intent (by an express…reservation.' Other 'attended' evidence of the parties' intent is no longer probative." Id., at 243-244.

A rescript opinion from the Appeals Court in Brennan v. DeCosta, 24 Mass. App. Ct. 968 (1987) arose in the context of a paper street and a dispute among neighbors abutting on the paper street as to who had the rights to use it. The Court stated "as a general rule, the title of persons who acquire land bounded by a street or way runs to the center line of the way, G.L. c.183, §58, and carries with it the right to use the way along its entire length. Goldstein v. Beal, 317 Mass. 750, 755 (1945). Casella v. Sneierson, 325 Mass. 85, 89 (1949). Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 677-678 (1965). The rule is applicable even if the way is not physically in existence, so long as it is contemplated and sufficiently designated. Id. at 968.

For many years Brennan occasioned some confusion among practitioners arising out of its brief statement of the law, quoted above.

Adams v. Planning Board of Westwood, 64 Mass. App. Ct. 383 (2005) put to rest confusion as to the effect of the Derelict Fee Statute on title and easement rights. In Adams, a confusing case arising out of the exchange of a number of deeds among three landowners adjoining a private way which created varying ownership rights in the way

under the Derelict Fee Statute the parties contested one lot owner's easement rights in the disputed way for the purposes of access to and utilities for his interior, otherwise landlocked, parcel. The Adams court held:

> "while it is true that since passage of the derelict fee statute…'extrinsic evidence may not be used to prove the grantor's intent to retain [a] fee in [a] right of way,' Rowley v. Massachusetts Elec. Co., 438 Mass. 798, 804 (2003), extrinsic evidence is available to determine the existence, nature, scope and extent of easement rights in a way; the Derelict Fee Statute pertains only to the question of ownership of the fee. With respect to the existence of an easement, we look, rather, to the intention of the parties regarding the creation of the easement or right of way, determined from 'the language of the instruments when read in light of the circumstances intending their execution, the physical condition of the premises, and the knowledge which parties had or with which they are chargable,' Boudreau v. Coleman, 29 Mass. App. Ct. 621, 629 (1990), to determine the existence and attributes of a right of way." (emphasis added)

See also BTR Ventures, LLC v. Raptopoulos 18 LCR 73 (2010), fn. 24, at 76, where Justice Sands observed:

> "I am aware of the general rules stated in Brennan v. DeCosta [citation omitted], stating that:
>
> > 'the title of persons who acquire land bounded by a street or way runs to the center line of the way, G.L. c.183, § 58, and carries with it the right to use the way along its entire length [citations omitted].
>
> I read Brennan's rule as two separate assertions based on two distinct doctrines. The first is grounded in Section 58, and relates only to the title of a street or way to its center line. The second assertion involves rights appurtenant to land bounded by a way or street and is grounded in the doctrine of easement by estoppel. It is noteworthy that Goldstein, Casella, and Mart Realty, as cited above in Brennan, all involve easements by estoppel and not easements by Derelict Fee. In some, I do not read Brennan as stating that Section 58 automatically confers easement rights. Rather, I agree with Adams, which states that Section 58 applies to fee ownership only.

Silva v. Planning Board of Somerset, 34 Mass. App. Ct. 339 (1993) involved the application of the derelict fee statute in the context of a definitive subdivision plan where

the subdivider proposed to construct a definitive subdivision road over a strip of land title to one-half of which was in an abutter, Silva, who did not join in the definitive subdivision application. As such, he claimed that the Board's approval of the subdivision was a nullity because he was not an applicant or named as an owner of the premises being subdivided.

The Silva court found that Silva did indeed own to the center line of the strip of land proposed to be developed as a definitive subdivision road and as such he either should have been named in the application as a "subdivider" or the Planning Board should have waived strict compliance with its regulations requiring that all owners of record to the proposed site be subdivided be named in the application, which it did not do. That didn't mean that the subdivider couldn't use the strip of land for its proposed street. The Court held "[I]n this case, unlike the Bachelder case, where the abutter challenges the applicant's title to the entire locus, the plaintiff claims an interest only in the proposed street. Even if the plaintiff owns a fee simple interest in the proposed street, at the very least the [subdividers] as grantees of land abutting the proposed street would have an easement in the way and the right to make reasonable improvements in the way without the consent of plaintiff."

Rowley v. Massachusetts Elec. Co., 438 Mass 798 (2003) is another important case in the line of cases construing and applying the derelict fee statute.

In Rowley, the plaintiffs were owners of land abutting a former railroad location, later acquired by the defendant, Massachusetts Electric Company.

When Massachusetts Electric Company proposed to permit the railroad location be used as a bicycle trail, plaintiffs sued alleging ownership rights in the former railroad location and sought to prevent the use of the former railroad as a public bicycle path.

The former New Haven and New Hampton Railroad Company had obtained legislative authority to extend its tracks from New Hampton to Williamsburg, Hampshire County, and filed "location plans" with the County Commissioners identifying the location for its new tracks. The railroad acquired some of its track layout by deeds from abutters but most of the railway location was acquired by filing location plans for the County Commissioners which automatically result in the railroad obtaining an easement over the land required to extend the route with the fee interests in the land remaining in the owners of the parcels affected by the taking. Hazen v. Boston & M.M.R., 68 Mass. 574 (1854) and Agostini v. North Adams Gas Light Co., 265 Mass. 70, 72-73 (1928).

In the Rowley case, the determination of the case turned on two issues: whether a railway location is such a "way" or "other similar monument" as will implicate the application of the derelict fee statute and, secondly, whether the plaintiffs deeds, which would described their respective properties as either bounded by "land of the [railroad]" or as "land now or formerly of said [railroad]," is the same as deed descriptions describing the lands as bounded by the "railroad". Expressed another way, the Court stated: "the only issues we must decide are whether G.L. c. 183, §58, applies to property which in fact abuts a 'way' or 'other similar linear monument' even if the language in the deed does not specifically describe it in those terms; and, if so, whether a railway is a 'way' or 'other similar monument' within the meaning of §58." After restating the Emery v. Crowley rule that "abutting" means "property with frontage along the length of the

way" the Court stated, "a plain reading of the statute is that it applies to instruments that convey real estate that in fact that has frontage along the length of a way or other similar monument. There is nothing in the statutory language itself that suggests its effect is limited only to instruments that describe the real estate conveyed as bounded by 'way' or 'other similar linear monument'. If that was the legislative intent, the wording of the statute could have easily reflected it [fn. 9 Language such as '[e]very instrument passing title to real estate *described in such instrument as* abutting a way' would have been adequate to accomplish such a purpose (emphasis added).] It does not.

Stating again that the derelict fee statute embodies an even stronger presumption in favor of vesting title in ways in abutters than did the common law, the Court stated, at 804:

> "If we were to construe §58 not to apply to instruments conveying real estate parcels abutting ways or similar linear monuments that failed to describe their boundaries as such, the ownership of the small strips that make up such ways and linear monuments which would once again be derelict. In the present case, that would mean that the fee interests in the railway would reside with the unknown heirs of those who owned the parcels when the railroad filed its location plans more than 125 years ago. Such a result would defeat the very object of the statute and leave in place the imperfection it intended to remedy."

The Court went on to hold, at 805:

> "We conclude that the plain meaning of G.L. c.183, §58, consistent with the words used and considered in connection with the imperfection to be remedied, applies to real estate, such as the plaintiffs' that in fact abuts a 'public or private [way]…or other similar monument,' regardless of how it is described in the instrument of its conveyance."

The Court had little difficulty in determining that a railroad is a "way" or "other similar monument" for the purposes of the derelict fee statute, finding that railroads had long historically been akin to highways and turnpikes in Massachusetts providing for

"similar means for linear travel along a defined course, for the convenience of the public and private parties alike." Id., at 805. See also, McGovern v. McGovern, 77 Mass. App. Ct. 688 (2010).

The case of Hanson v. Cadwell Crossing, LLC, 66 Mass. App. Ct. 497 (2006) discusses another variation on the Rowley theme, that is that the derelict fee statute applies to every deed conveying property which in fact is bounded by a way, "regardless of how it is described in the instrument of its conveyance."

In Hanson, a dispute arose as to the ownership of Lot A as shown on a definitive subdivision plan known as Falcon Heights in Wilbraham, Massachusetts. Lot A was a narrow strip of land between abutting Lots 3 and 4 on the subdivision plan extending from a cul de sac on that plan to the boundary line of an adjacent parcel of land later owned by Cadwell Crossing, LLC. The strip of land, 50 feet in width, was labeled on the plan "not a building lot."

The deeds of Lots 3 and 4 to abutting owners, conveyed those lots by reference to the lot number and subdivision plan of record and made no reference to Lot A.

Defendant Cadwell Crossing, LLC acquired title to Lot A and used it as a connector road from the Falcon Heights subdivision into its new subdivision for which it obtained definitive subdivision approval in August 2004. Immediately the plaintiffs filed suit claiming ownership to Lot A pursuant to the derelict fee statute.

Finding no ambiguity in the deeds and plans of record the Land Court held did not permit the plaintiffs to introduce extrinsic evidence that in fact Lot A was intended to be used as a street or way even though it was not so identified on the plan. The plaintiffs, had they been permitted to do so, would have introduced evidence from surveyors that

Lot A had been shown as a connector road from the Falcon Heights subdivision to a new subdivision to the north on office work plans, that the chairman of the Planning Board had described Lot A as a strip "put there with the potential of becoming a road," and that the Wilbraham subdivision regulation required an inference that Lot A was intended to be a street because those regulations provided that satisfactory provision for access to property not yet subdivided shall be shown on each subdivision plan.

The Appeals Court upheld the Land Court's determination that extrinsic evidence should not be admitted, that there was no ambiguity in the relevant plans and documents, that none of the relevant plans and documents referred to Lot A as a proposed way and therefore the plaintiffs did not own Lot A under the Derelict Fee Statute and could not prevent its use as a connector road to a new subdivision road.

The plaintiffs claimed that the derelict fee statute applies to every deed conveying property which is in fact bounded by a way, "regardless of how it is defined in the instrument of its conveyance." (Rowley, 438 Mass. at 805) Quoting then from Rowley, the Hanson Court stated, at

> "a plain reading of the statute is that it applies to instruments that convey real estate that in fact has frontage along the length of a way or other similar monument. There is nothing in the statutory language itself that suggests that its effect is limited only to instruments that describe the real estate conveyed as bounding on a 'way' or other similar linear monument." Rowley, 438 Mass. at 802 (Hanson, at 501).

> "For G.L. c.183, §58, to apply, the way need not be in existence on the ground, as long as it is contemplated and sufficiently designated. Contrary to the plaintiffs' contention, it is not enough that the metes and bounds of a strip are described; 'the strip has [to be] sufficiently defined as a proposed street.' Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 678 (1965). In making that determination, 'reference may be made to the plan.' Ibid. In contrast to the record evidence in Rowley, the documents of record here (deeds and plan) designate no proposed way. They do not indicate that Lot A was intended as anything other than a small lot

> retained by the developer for any number of possible purposes such as open land, additional parking, a road, or other permissible use."

Hanson, 66 Mass. App. Ct. at 502

That the derelict fee statute relates only to determination of title in streets, ways and other linear monuments, but not easement rights or compliance with zoning, is pointed out by the case of Sears v. Building Inspector of Marshfield, 73 Mass. App. Ct. 913 (2009).

There, Sears, the owner of a 4,800 square foot parcel of land, appealed the denial by the town's building inspector of his application for designation that his lot was a residential lot of record which, under the town's zoning bylaw, required a minimum lot area of 5,000 square feet. There was no doubt that Sears owned the fee to the center line of a private way abutting his land to the southeast. If the land underlying the private way could be counted as his minimum lot area his lot would have totaled 5,700 square feet in area.

In holding that the Derelict Fee Statute could not operate to provide the plaintiff with additional buildable area the Court pointed out that ownership of the fee underlying a private way did not include the right to build thereon. Indeed, since there could be rights of passage in others to use the full width of the private way. Further, the Court held that the plaintiffs construction conflicted with the purpose of the statute which is to clarify ownership of small strips of land underlying highways, streams, walls and other similar boundaries. A statute designed to deal with enforcement of property rights was not intended by the legislature to apply to add lot area for zoning purposes. The Court held that the Marshfield Zoning Board of Appeals acted reasonably in construing the bylaw to exclude from the calculation of minimum lot size, fee ownership interest

underlying private ways. The Court did not, but could have pointed to the definition of "lot" in G.L. c. 41, §81L, the Subdivision Control Statute, where a lot is defined as "an area of land in one ownership, with definite boundaries, used, or available for use, as the site of one or more buildings." The requirement that lot area be available to be used as the site of a building would obviously preclude lot area underlying private ways as being included in the calculation of minimum lot size.

G.L. c. 183, Section 58 is retroactive in its application and applied to paper street provided that the street has been sufficiently designated on a recorded plan. Tattan, 32 Mass.App.Ct. at 240, fn 2; Silva v. Planning Board of Somerset, 34 Mass.App.Ct. 339, 341-43 (1993); and Brennan, 24 Mass.App.Ct. at 968. This is true as long as the grantor has not reserved his or her right in the fee of the roadway. Note however that reference on a plan marked “reserved for a future roadway” does not constitute a sufficient reservation of rights to prevent the application of G.L. c. 183, Section 58. Tattan, 32 Mass.App.Ct. at 245. The reservation must be contained in the deed. Id. at 247.

Application of G.L. c. 183, Section 58 creates obvious difficulties in the event of a discontinuance. It is not at all certain that G.L. c. 183, Section 58 improves the situation too much, since the underlying title at the time of the layout and the extent of the property interest taken by the laying out authority will still have to be determined.

5.4.B Easements by Estoppel and by Implication

The early case, Farnsworth v. Taylor, 75 Mass. 162 (1857) stands for the proposition that an appurtenant right of way is created by necessary implication where a parcel of land is conveyed by a deed description bounding on a way or by reference to a plan which shows a boundary on a way. That case established the doctrine "that where

land is conveyed which is situate on a street or way, and reference is made in the deed of conveyance to a plan on which said street is delineated, the plan exhibited at the sale, and subsequently recorded by the grantor in the registry of deeds, is made a part of the deed, and estops the grantor and those claiming under him to deny the existence of the street as delineated on the plan, is well maintained by authority and sound in principal." Farnsworth, 75 Mass. at 166.

Such an easement exists even if there are other streets or ways providing access to the land (Hill v. Taylor, 296 Mass. 107 (1936)), and there is created by implication, or estoppel, a perpetual easement appurtenant to the premises conveyed providing the owner of such premises with a right of passage over such streets or ways as shown on the plan for the entire distance of the way, as it is then actually laid out or clearly indicated and described. See Oldfield v. Smith, 304 Mass. 590 (1939). The easement by implication is created even if the way is not then in existence, so long as it was clearly contemplated and sufficiently designated. See Murphy v. Mart Realty of Brockton Inc., 348 Mass. 675 (1965). In the Murphy case, the way shown on the plan was, in fact, treed and overgrown, stoney and rocky; it was not passable by motor vehicle or on foot and was entirely undeveloped. The court found that the way had been sufficiently delineated as a proposed street on a plan and was thus "adequately designated" and the owner of the adjacent parcel had the right to develop the formerly unusable way for ingress and egress by blacktopping it.

Therefore, an easement by estoppel can apply where (1) a property description contains a course either bounding on a way or refers to a plan showing that the property

bounds on a way; (2) the way is laid out or clearly indicated on a plan; (3) the chain of title is out of the same grantor; and (4) rights in the way are not reserved by the grantor.

A property description which describes the property bounding along “other land of the grantor” when such “other “ land is a paper street is not a sufficient course description to invoke the principle of easement by estoppel. Emery, 371 Mass. At 495. Easements in "paper streets" can be abandoned. See, e.g., Sindler v. William M. Bailey Co., 348 Mass. 589 (1965).

Not only may there arise an implied easement to use a street abutting upon a parcel of land, but by further implication a property owner can use other streets and ways shown on a plan to the extent that such use is necessary to reach a public way. See Fox v. Union Sugar Refinery, 109 Mass. 292 (1872). In a case which probably would not now be decided in the same way, the Supreme Judicial Court held in l909, in Downey v. H.P. Hood and Sons, 203 Mass. 4 (1909), that an owner whose property is bounded by a way which connects at each end with a road leading to the highway, is entitled to have access going in either direction if all roads appear on the plan. Later cases have limited the doctrine established by Downey which is, in essence, that a property owner, although having access (by virtue of an implied easement arising by conveyance of a lot by reference to a plan) can elect to take either of two means, including a less convenient one, to reach a public way. Now, it is the general rule that an implied easement of this type will be implied only to the extent necessary for the enjoyment of the land conveyed, in the absence of a clear intent to the contrary. See, e.g, Prentiss v. City of Gloucester, 236 Mass. 36 (1920) and, Wellwood v. Havrah Mishna Anshi Sphard Cemetary Corp., 254 Mass. 350 (1926)

More recent cases, Murphy v. Donovan, 4 Mass. App. Ct. 519, 527 (1976) and Boudreau v. Coleman, 29 Mass.App.Ct. 621, 628 (1990), have held, notwithstanding the doctrine of implied easements arising by virtue of conveyance by reference to a plan, that the intent of the parties is determined from (1) the language of the instrument "when read in light of the circumstances attending" at the time the deed was given; (2) the physical condition of the premises; (3) knowledge of the parties; (4) reasonably necessity of the easement; and (5) whether there existed open and obvious use of the street prior to conveyance.

A mere reference in a deed to a plan and a lot number which bounds on a street or roadway does not give the grantee an easement in all ways shown on the plan. Walter Kassuba Realty Corp. v. Akeson, 359 Mass. 725, 727 (1971). Nor does it prevent the grantor of the property from utilizing his or her property or making changes as long as such use or changes are not inconsistent with the rights of the easement holders. Id.

Prentiss v. Gloucester also held that no easement can arise by implication where the rights of way appurtenant to the premises conveyed are expressly described and defined in the deed of conveyance. Further, an easement by implication, as it is appurtenant to the parcel conveyed, may not be used for the benefit of other land adjacent to the original tract without overloading the easement. See Murphy v. Mart Realty of Brockton Inc., 348 Mass. 675 (1965).

Anderson v. Healy, 36 Mass. App. Ct. 131 (1994) reveals an interesting dilemma for the defendant who abuts a town highway layout and had a right of access to the town way which, at that point was not wrought on the ground and existed only as an easement,

on plaintiff's land; the defendant was found to have exceeded his easement rights in constructing a driveway to his land.

6. DISCONTINUANCE OF STREETS AND WAYS

6.1 STATUTORY

Section 12 of G.L. c. 81 sets forth the procedure for discontinuance of state highways as requiring concurrence of the county commissioners and the filing by the MDT of a plan of the way so discontinued and a certificate of discontinuance with the commissioners and town clerk; "and thereafter the way or section of way so discontinued shall be a town way."

Assume the Commonwealth had taken the fee in the way, then discontinued it. Does the fact that the way thereafter is a town way mean that the town now owns the fee? We think not; the town now has the maintenance obligation, but not the fee interest.

G.L. c. 81, Section 12 goes on to provide that the MDT "<u>may</u> also abandon any land or rights in land which may have been taken or acquired by it . . ." by the same filing of plans and certificates procedure, and <u>also</u> by filing in the registry of deeds "a description and plan of the land so abandoned; and said abandonment shall revest the title to the land or rights abandoned in the persons in whom it was vested at the time of the taking, or their heirs or assigns."

In the event of the discontinuance a state highway resulting from an alteration in the state highway layout, it would be better practice that the discontinuance be accompanied by an abandonment of the former layout if the two routes substantially parallel each other, as where the new layout straightens and widens the former layout. Many such new layouts, in our experience, are not coupled with an abandonment,

however, which has the legal effect of leaving a town liable for maintenance of portions of the former layout. A town by its meeting vote may discontinue a way which became a town way be virtue of a state highway discontinuance, and may do so without notice; it is not an "alteration" requiring a layout. See Boyce v. Town of Templeton, 335 Mass. 1 (1956).

Chapter 82, Section 1 gives authority to the county commissioners (and now other entities) to discontinue (note, not "abandon") highways, and G.L. c. 82, Section 21 gives the same authority to town meetings. In Mahan v. Rockport, 287 Mass. 34 (1934) where the Land Court judge found the Town of Rockport had taken an easement for layout of a highway forty years previously but never entered on the portion of the land in question nor constructed a way thereon, and consequently ruled the Town had abandoned its easement, the Supreme Judicial Court held,

> It is settled that a public way once duly laid out continues to be such until legally discontinued. . . A town way may be discontinued by vote of the town and not otherwise . . . The rights of the public in the whole width of the way as laid out by the selectmen, and accepted by the town in town meeting, were not lost by using less than the whole width of the way.
>
> Mahan, 287 Mass. at 37. Contrast this holding with Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983) discussed infra. Nylander v. Potter, 423 Mass. 158 (1996).

An alteration of a county highway or town way automatically constitutes a discontinuance of the portions of the former layout no longer needed. Inhabitants of Cohasset v. Moors, 204 Mass. 173 (1919)[1]; Commonwealth v. Westborough, 3 Mass. 406 (1807). The fact that specific portions of the old road are officially discontinued by

[1] The Moors case cited above is one of only a very few cases holding that an individual can obtain title as against the Commonwealth or its political subdivisions by adverse possession. See generally G.L. c. 260, Section 31, as most recently amended by G.L. c. 654 of the Acts of 1987. Massachusetts is in the distinct minority on this rule.

direct action of the county commissioners will not save the remaining portions of the old road from discontinuance as well. Recore v. Town of Conway, Land Court Misc. Case No. 248455 (Sept. 18, 2000) (Green, J.) upheld on appeal in Recore v. Town of Conway 59 Mass. Ct. 1 (2003).

In Recore, the plaintiffs attempted to meet the Town's frontage requirements by utilizing a certain road which they claimed was a public way. In 1845, a new road was laid out by the county commissioners which essentially replaced the portion of the road being utilized by the plaintiffs, and in 1847, other portions of the old road were officially discontinued by the county commissioners. The Land Court held that the "subsequent actions of the county commissioners to discontinue portions of the old road do not establish that it remained an active county highway at the time of such discontinuance," and that whether or not the portion of the old road utilized by plaintiffs was within the portion specifically discontinued by the 1847 discontinuance, the construction of the new road "just to the west of the locus effected a discontinuance of that portion of [the old road] by operation of law." Id. The Land Court further held that an official discontinuance action on the part of the county commissioners was not necessary to effect a discontinuance by law, that the old road could no longer be considered a public way, and that the plaintiffs could not employ the old road to meet frontage requirements. Id.

Better practice, however, would require an actual discontinuance of the unneeded portions.

It is obvious that there remains much confusion about the distinction between a "discontinuance" and an "abandonment." Many towns vote to "discontinue and abandon"

town ways; some do one, some do the other. At least one Berkshire County town has voted to "close" town ways. The town which voted to "close" a town way, a 1946 vote of the Town of Hancock to close Tower Mountain Road from the driveway of Norman McVeigh to the Hancock-Pittsfield town line, was held by the Appeals Court, in an unpublished decision (Meudt v. Dus, 75 Mass. App. Ct. 1109 (2009)), not sufficient to discontinue the way as a town road. The Land Court trial judge had found the use of the word to "close" to be ambiguous and thus admitted extrinsic evidence in the form of other town meeting votes where the Town of Hancock voted properly to "discontinue" town roads pursuant to G.L. c.82, §21. Because the town had employed the word "discontinuance" in other votes, its vote to "close" the road was insufficient to discontinue Tower Mountain Road.

It is helpful to contrast three statutory sections, G.L. c. 81, Section 12, G.L. c. 82, Section 21 and G.L. c. 82, Section 32A.

G.L. c. 81, Section 12 relates to state highways reads as follows:

> Discontinuance or abandonment. The department, with the concurrence of the county commissioners, may discontinue as a state highway any way or section of way laid out and constructed under the provisions of section five by filing in the office of the county commissioners for the county and in the office of the clerk of the town in which such way is situated a certified copy of a plan showing the way so discontinued and a certificate that it has discontinued such way; and thereafter the way or section of way so discontinued shall be a town way. Said department may also abandon any land or rights in land which may have been taken or acquired by it by filing in the office of the county commissioners for the county and in the office of the clerk of the town in which such land is situated a certified copy of a plan showing the land so abandoned and a certificate that it has abandoned such land, and by filing for record in the registry of deeds for the county or district in which the land lies a description and plan of the land so abandoned; and said abandonment shall revest the title to the land or rights abandoned in the persons in whom it was vested at the time of the taking, or their heirs and assigns.

This section was originally enacted in 1900 and has not been amended since 1931; it speaks of discontinuing state highways as ways which the state is obliged to maintain and, secondarily (and not always) to the process of relinquishing the Commonwealth's interest in land.

G.L. c. 82, Section 21 reads as follows:

> Authority to lay out ways. The selectmen or road commissioners of a town or city council of a city may lay out, relocate or alter town ways for the use of the town or city, and private ways for the use of one or more of the inhabitants thereof; or they may order specific repairs to be made upon such ways; and a town, at a meeting, or the city council of a city, may discontinue a town way or a private way.

This section was originally enacted in 1693 and has not been amended since 1917; it speaks of laying out and discontinuing town ways, generally easements.

Section 32A of G.L. c. 82, prior to a 1983 amendment, read as follows:

> Discontinuance of public ways. Upon petition in writing to the board or officers of a town having charge of a public way, the county commissioners may, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for travel, adjudicate that said way shall thereafter be a private way and that the town shall no longer be bound to keep the same in repair, and thereupon such adjudication shall take effect; provided, that sufficient notice to warn the public against entering thereon is posted where such way enters upon or unites with an existing public way. This section shall not apply to ways in cities.

This section was adopted in 1924 and remained the same until amended, first in 1983, and then in 2006, so it now reads:

> The board or officers of a city or town having charge of a public way may, after holding a public hearing, notice of which shall be sent by registered mail, return receipt requested, to all property owners abutting an affected road and notice of which shall be published in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of hearing and by posting in a conspicuous place in the office of the city or town clerk for a period of not less than fourteen days

> before the day of the hearing, upon finding that a city or town way or public way has become abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said town way or public way to be maintained in a condition reasonably safe and convenient for travel, shall declare that the city or two shall no longer be bound to keep such way or public way in repair and upon filing of such declaration with the city or town clerk such declaration shall take effect, provided that sufficient notice to warn the public that the way is no longer maintained is posted at both ends of such way or public way, or portions thereof. Upon petition in writing of the board or officers of a city or town in which a county highway is located, the county commissioners, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for public travel, after giving notice in the manner prescribed in section 3, and after viewing the premises and hearing the interested parties in the manner prescribed in section 4, may adjudicate that the town shall no longer be bound to keep the way in repair, and thereupon the adjudication shall take effect; provided, that sufficient notice to warn the public that the way is no longer maintained is posted at both ends of the way, or portions thereof.

The use of the word "abandonment" in the caption of G.L. c. 82, Section 32A may simply be a mislabelling of the statute.

Because of the presumption that only an easement for public passage is acquired by towns and counties (See Opinion of the Justices, 208 Mass. 603 (1911)), there is no provision in G.L. c. 82 (except for the misleading section heading in Section 32A) relating to "abandonment." A discontinuance does three things: first, the public's easement of passage disappears and the underlying fee reverts to the owners thereof, free of such easement. Nylander v. Potter, 423 Mass. 158 (1996)). Second, the town's obligation of maintenance ceases. And third, abutting owners on the former highway have a cause of action for damages to the value of their land occasioned by the fact that they have lost a valuable bundle of rights (G.L. c. 82, Section 24. Rivers v. Warwick, 37 Mass. App. Ct. 593 (1994)). Damages consist, obviously, of the loss of subdivisability of land, the loss of assurance of town maintenance and snow plowing and

the attendant increase in private expenditure and the probable loss of access by emergency vehicles, together with any particular loss which they may be able to show.

Coombs v. Board of Selectmen of Deerfield, 26 Mass. App. Ct. 379 (1988), review denied, 403 Mass. 1104 (1988) contains a helpful discussion of the statutory history and application of G.L. c. 82, Section 32A in holding that Section 32A does not permit the selectmen of a town to discontinue maintenance of county highways.

Prior to Nylander v. Potter, 423 Mass. 158 (1996), a practitioner had to assemble several cases to satisfy oneself that there was no private easement of passage over a discontinued road. Now we know, absent a private easement of passage in the road location which predates the layout of the way, by grant, prescription or implication, upon discontinuance of a way an interior landowner has no so-called "abutters easement" to travel over the discontinued road. Id. at 162.

In deciding Nylander the Court upheld long settled Massachusetts law and struck down a novel right of passage which was argued would have been very disruptive to real estate titles and, not unimportantly, to long settled municipal practice. In the latter connection, for example, it was pointed out in an amicus brief (Brief Amici Curiae, The Massachusetts Conveyancers Association, Inc. and the Abstract Club, p. 18), that if the Appeals Court was correct in finding an "abutters' easement" in a discontinued town way,

> municipalities now must do something more than a simple discontinuance if they wish to insure that what was a public way will not be used for passage by abutters. In the case of a new discontinuance, the municipality presumably must both discontinue the way (under M.G.L. c. 82, §21), and take, under M.G.L. c. 79, the subsisting private right of passage that otherwise still would exist in favor of the abutters. In the case of a discontinuance made years ago, the municipality may well need to act anew to take the abutters' right of passage, if the municipality desires to complete a process it felt it had been done with long ago. Doing so would reopen municipalities to damages for this later taking, a prospect few municipalities will have anticipated or contemplated in their budgets.

The novel right of passage fashioned by the Appeals Court in its decision, Nylander v. Potter, 38 Mass. App. 605, at 609 (1995), was that although a "discontinuance of a public way terminates the public easement of travel, we hold that the discontinuance does not terminate the private easement of travel which abutters enjoy."

The Supreme Judicial Court disagreed "and conclude[d] that Potter does not have an easement of travel over the Nylander stretch of [the discontinued] road. We reject both the Appeals Court's theory of a so-called 'abutters easement' and the Superior Court's theory of a 'public access' private way as contrary to settled Massachusetts law." Nylander, 423 Mass. at 162.

Although the Supreme Judicial Court's decision is viewed as a vindication of what had long been thought settled law, several features of the Court's decision leave a few questions unanswered. For example, in footnote 7 at 161 of the decision, the Court states in dicta that "a discontinuance of maintenance under [G.L. c. 82] §32A would create a 'public access' private ways" (emphasis added). However, it could be argued that a discontinuance under G.L. c. 82, Section 32A of maintenance does not change the status of the way as a public way, it merely avoids town liability for maintenance.

Although it is true that the Nylanders owned the fee in the first 100 foot stretch of the disputed Bachellor Road, but they also owned the fee in the westerly half of the next 788 feet of the road (Nylander, 423 Mass. at 161)the Court's remand to the Superior Court, dealing as it does with only the first 100 feet of the road also appears to leave some issues unresolved. It may have been more helpful to have a clear enunciation of the principle that Potter couldn't travel over any part of Bachellor Road owned by Nylander.

Finally, the Court stated, again only in dicta in fn. 10, at 163 of the decision that "[a] claim for monetary damages is only available if a parcel is rendered landlocked by the discontinuance of a public way" (emphasis added). Under G.L. c. 82, Section 24 and G.L. c. 79, Section 12, it appears that an action for damages lies for a taking which does less than landlock a parcel.

While not explicitly holding that abutting landowners continue to have some easement of passage over a discontinued town way, the Land Court and later the Appeals Court in Schuffels v. Bell, 21 Mass. App. Ct. 76 (1985), preserved for such landowners a right of access to parcels without other frontage on the ground that the plaintiff's predecessors in title had gained prescriptive rights to use "Old County Road" for access. The Land Court in its decision clearly reached very far to come to the conclusion; there was none of the usual detailed evidence of continuous and uninterrupted adverse use of the way discussed in Judge Randall's decision. The Appeals Court merely noted "in stating the facts, we avoid details. The opinion of the Land court, with which we agree in substance, has a fuller and more graphic statement." Id. at 77. It is probable that both courts were offended by the defendants efforts to impede plaintiff's efforts to reach their land and even though plaintiff's could not (and did not) prove adverse use by persons in the 1840s and '50s, the courts said they had. Contrast Lynch v. Town of Groton, 11 Mass. App. Ct. 1008 (1981).

If a town acquired the fee in the location of a town way or county highway prior to its discontinuance, and if the fee interest in land were considered surplus and unnecessary to the municipality after discontinuance, affirmative action by town meeting

(M.G.L. c. 40, §15) is required before that interest in land can be abandoned and conveyed .

6.2 ADVERSE POSSESSION/PRESCRIPTION

The simple answer to a claim that a public highway can be lost by adverse possession or prescription is that such is not the law in Massachusetts, with the exception hereafter noted. See G.L. c. 81, Section 22 as to state highways, discussed above, and G.L. c. 86, Section 3 as to public ways, both providing in essence that if the boundaries of the way are known or can be established, no length of possession within the limits of the way gives any title in the way to an abutter except in the case of a building used as a residence (G.L. c. 81, Section 22). It is interesting to note that there is no comparable exception for dwellings in c. 86, §3. We conclude that the residential exception in G.L. c. 81, Section 22 is not authority to continue to maintain the encroachment represented by the dwelling, but rather protection against summary removal.

A certain few cases arising before the 1917 enactment of the latter statute, and turning, it seems to me, more on a difficulty in determining the location of the way, did allow a claimant to establish a street line by the location of his abutting fence. See, e.g., Holt v. Sargent, 81 Mass. 97 (1860).

Another early case which permitted adverse possession of a "highway" as against a town, was Cohasset v. Moors, 204 Mass. 173 (1919). There, in the original division of lots in Cohasset in 1670 there was a reservation of land for highways in various places, and, among others, along the shore, between the nearest lot laid out for an individual, and the sea, which reservation covered locus. Cohasset sought to register title to locus (a thirty acre parcel described by the Court as being "the rough, rocky, irregular indented

shore of the sea") while Mrs. Moors claimed title to it by adverse possession. In 1867 the county commissioners altered, improved and directed repairs on Jerusalem Road and defined it on a plan (containing much less than 30 acres of land). The court held that by so doing the county commissioners automatically discontinued so much of any highway as might have been reserved previously and that "at least since 1867, the title of the town [to the area reserved for a highway in 1670] has been like that of any other private owner" and went on to hold that Mrs. Moors had disseized the Town.

6.3 DAMAGES FOR DISCONTINUANCE

Because a state highway discontinuance creates a town way, it is only upon the subsequent discontinuance of the town way that a right to damages vests in an abutter (G.L. c. 82, Section 24). An action for monetary damages is the exclusive remedy for a landowner damaged by the discontinuance of a public way. Nylander v. Potter, 423 Mass. at 163, n. 10. G.L. c. 82, Section 7 provides for damages in the event of the discontinuance of a county highway. Note that a person damaged by a G.L. c. 82, Section 24 discontinuance of a private way is entitled to damages and an indemnity can be required by the town prior to discontinuing.

Damages for discontinuance, like damages for a taking, are governed by G.L. c. 79 and vest upon recordation of the discontinuance order.

In the first instance, a determination must be made as to whether the public convenience and necessity requires that a way be discontinued as no longer needed for the public use or convenience. See Newburyport Redevelopment Authority v. Commonwealth, 9 Mass. App. Ct. 206 (1980), "the question whether to discontinue a town way is political or legislative rather than adjudicatory." (Emphasis supplied.) (we

think a G.L. c. 82, Section 32A decision is adjudicatory in nature as certain findings must be made before maintenance can be discontinued).

Because the closing of a public highway is a "taking" of some portion of the value of an abutter's land he becomes entitled to damages (G. L. c. 82, Section 24, G.L. c. 79, §12). It has been held that damages are not allowed if the plaintiff's land "does not abut on the portion of the way discontinued if there is access by any public way, because in such a case the damage suffered is only from loss of the enjoyment of a public right which is also suffered in greater or less degree by every member of the community." Harte v. Town of Dartmouth, 45 Mass.App.Ct. 779, 782 (1998); quoting Rand v. Boston, 164 Mass. 354, 363 (1895) (Knowlton, J., dissenting). Compensability in such cases turns on "the distinction between, on the one hand, impairment of access which if substantial may figure as a special and peculiar injury deserving compensation, and on the other hand, diversion of traffic which lies outside the compensable category even if it results in a decline in the property's market value." Harte, 45 Mass.App.Ct. at 781, quoting Malone v. Commonwealth, 378 Mass. 74, 78 (1979).The measure of damages is outside the scope of these materials.

6.4 TITLE TO DISCONTINUED PORTIONS

Since the beginning of reported cases in the Commonwealth, it has been black letter law that an easement for public travel over a person's land leaves the underlying soil in the individual. "By the location of a way over the land of any person, the public have acquired an easement, which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and freehold remain in the owner although

encumbered with a way." Perley v. Chandler, 6 Mass. 454, 455 (1810). Nylander v. Potter, 423 Mass. 158, 161 (1996).

A natural corollary to this proposition is that if the way is discontinued, the freehold, free of the encumbrance of the highway, reverts to the owner. Title revests in abutters to the center line of the way.

But if the authority laying out the way took the fee, upon discontinuance, title remains in the public. Hence the necessity, in G.L. c. 81, Section 12 for an abandonment by the state in the event of a discontinuance of a state highway.

A discontinuance relieves the laying out authority of its obligation to maintain a way; an abandonment relinquishes the interest of the authority in any rights to land.

It is curious that no words of "abandonment" are used in G.L. c. 82 relating to county highways and town ways except, as noted previously, in the section caption of Section 32A. An important distinction between highways and town ways is that highways may not be discontinued without notice to towns and abutters and the concurrence of county commissioners (G.L. c. 82, Sections 1 and 3), while town ways may be discontinued by town meet or city council vote without notice to abutters (G.L. c. 82, Section 21).

Before a town can discontinue a town way it must refer the contemplated action to its planning board for its recommendation and give the board 45 days to respond (G.L. c. 41, §81I). In those few municipalities that have not established a planning board under G.L. c. 41, Section 81A, and that have a board of survey, see G.L. c. 41, Section 73, which regulates the opening of private ways for public use.

Previously, a town way could be converted to a private way by the county commissioners by G.L. c. 82, Section 32A; as amended, I suggest that Section 32A leaves the way a public way, but absolves the town of its maintenance obligations.

Pursuant to G.L. c. 40, Section 15 a town may vote to abandon "any land, easement or right taken for such . . . town, otherwise than by purchase . . ." upon a two-thirds vote of the town, and authorize its conveyance upon such terms and conditions as the town may fix.

7. SUBDIVISION CONTROL, PLANS AND PUBLIC WAYS

Under G.L. c. 41, Section 81L, an endorsement of “Approval Under Subdivision Control Law Not Required” will only be given to a division plan where all of the lots which result from the division of a tract of land have frontage on a “public way or a way which the clerk of the ….town certifies is maintained and used as a public way.” The question of what constitutes legal frontage on a public way has become quite complex to resolve.

The Subdivision Control Law, G.L. c. 41, Sections 81K-81GG, was enacted as a "comprehensive statutory scheme", Nantucket Land Council, Inc. v. Planning Board of Nantucket, 5 Mass. App. Ct. 206 (1977), requiring "adequate access" (G.L. c. 41, Section 81M) to lots within a subdivision and lots having frontage on an inaccessible way (limited access highway) do not have frontage on a "public way" as those words are used in the Subdivision Control Law. Hrenchuk v. Planning Board of Walpole, 8 Mass. App. Ct. 949 (1979).

It was always assumed, until the Tristam's Landing case, Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978), Hrenchuk, Casagrande (discussed previously)

and Perry, discussed hereafter, that a "public way" was a public way, for the purposes of considerations of title, status, laying out, etc., and for Subdivision Control Law. Such is not the case (and see, LeBlanc v. Board of Appeals of Danvers, 32 Mass. App. Ct. 760 (1992) which holds that an unconstructed, paper street can provide the necessary "frontage" to afford a lot abutting thereon a G.L. c. 40A, §6 zoning dimensional freeze).

Whether a way provides the required legal frontage for lots which may be divided without planning board approval ("ANR Plans") is no longer the sole question.

Rather, the question has become, by a series of decisions, whether the way provides vital access to the buildable area of the lot. The transition from a mere question of frontage to a much more subjective issue of actual accessibility can be traced in the following cases: Rettig v. Planning Board of Rowley, 332 Mass. 476 (1955), Malaguti v. Planning Board of Wellesley, 3 Mass. App. Ct. 797 (1975), Casagrande (supra), Spalke v. Board of Appeals of Plymouth, 7 Mass. App. Ct. 683 (1979), Perry v. Planning Board of Nantucket, 15 Mass. App. Ct. 144 (1983), and Hutchinson v. Planning Board of Hingham, 23 Mass. App. Ct. 416 (1987), Sturdy v. Planning Board of Hingham, 32 Mass. App. Ct. 72 (1992), Ball v. Planning Board of Leverett, 53 Mass. App. Ct. 513 (2003), all dealing with the adequacy of the way; and Cassani v. Planning Board of Hull, 1 Mass App. Ct. 451 (1973), Gifford v. Planning Board of Nantucket, 376 Mass. 801 (1978), McCarthy v. Planning Board of Edgartown, 381 Mass 86 (1980), Gallitano v. Board of Survey and Planning Board of Waltham, 10 Mass. App. Ct. 269 (1980), DiCarlo v. Planning Board of Wayland, 19 Mass. App. 911 (1984), Fox v. Planning Board of Milton, 24 Mass. App. Ct. 572 (1987), and Corcoran v. Planning Board of Sudbury, 406 Mass. 248 (1989) and Stefanick v. Planning Board of Uxbridge, 39 Mass.App.Ct. 418

(1996), review denied, 422 Mass. 1104 (1996), to adequacy of access from the way to the buildable portion of the lot. [We are greatly indebted to Donald J. Schmidt, Editor of the Land Use Manager, a publication of the Executive Office of Communities and Development for his insightful analysis entitled "THE ANR HANDBOOK", May, 2000, Department of Housing and Community Development].

The Perry court added an additional, judicial, requirement for approval of ANR plans, saying "we conclude that whatever status might be acquired by ways as 'public ways' for the purposes of other statutes by virtue of their having been 'laid out' . . . such ways will not satisfy the requirements of the 'public way' exemption in Section 81 . . . unless they in fact exist on the ground in a form which satisfies the previously quoted goals of Section 81M." Perry, 15 Mass. App. Ct. 392.

In effect, two categories of access on public ways come into focus out of this decisional history. "There is the 'could be better but manageable' category and the 'illusory' category. The first category warrants an [ANR] endorsement; the second does not." Gates v. Planning Board of Dighton, 48 Mass.App.Ct. 394 (2000), review denied 726 NE 2d 414 (2000). In Gates, notwithstanding technical compliance with frontage requirements, the planning board could deny an ANR endorsement where access to lots is "nonexistent" for the purposes of the statute.

An example of the first category of cases is Sturdy v. Planning Board of Hingham, 32 Mass.App.Ct. 72 (1992). In this case, Robert Sturdy was confronted with a not uncommon dilemma; his land fronted on a way which had not been maintained by the town and was not passable. He proposed an ANR division of land abutting Side Hill Road. Whether Sturdy was entitled to the endorsement depended upon whether Side Hill

Road was a public way and whether the access it afforded was illusory. The Hingham Planning Board denied the endorsement. On appeal to the Superior Court the judge found Side Hill Road to be a public way but in its then condition it did not afford safe access to the lots in question and thus the Board's decision was not in excess of its authority.

Sturdy moved for a new trial and, relying on G.L. c. 84, Sections 1 and 4, brought an action in the nature of mandamus seeking to compel the town to make Side Hill Road accessible. The two cases were consolidated and the Superior Court judge reconsidered his earlier ruling, now ruling that Sturdy was entitled to the ANR endorsement, not withstanding deficiencies in Side Hill Road and allowed the town's motion for summary judgment in the mandamus action. Both sides appealed.

After restating the Fox v. Planning Board of Milton (24 Mass. App. Ct. 572, 574 (1987)) test as to whether or not access provided by a public way is "illusory in fact" (Sturdy, at 75), the Court held:

> Deficiencies in a public way are insufficient ground for denying the endorsement. The ANR endorsement for lots fronting on a public way, provided for in G.L. c. 41, Section 81L (note 3, supra), is a legislative regulation that ordinarily 'lots having such a frontage are fully accessible, and as the developer does not contemplate the construction of additional access routes there is no need for supervision by the planning board on that score.' Gifford v. Planning Board of Nantucket, 376 Mass. App. Ct. 807. Moreover, since municipal authorities have the obligation to maintain such ways, there is already public control as to how perceived deficiencies, if any, in such public ways are to be corrected.
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> Sturdy, 32 Mass. App. Ct. at 76.

The Appeals Court affirmed the trial court's denial of mandamus. In doing so, it noted that public officials are presumed to do their duty, particularly when it is pointed

out to them (Sturdy, 32 Mass. App. fn.15 at 78) but if not, there is at least the possibility of criminal sanctions (Sturdy, 32 Mass. App. at 77).

An example of the second category of cases is Poulos v. Planning Bd. of Braintree, 413 Mass. 359 (1992) where the owner presented a plan that showed twelve lots with the required frontage along an existing paved public way. Parallel to that way was a guardrail installed by the Department of Public Works to keep vehicles from pitching down a steep slope. Practical access was barred until the DPW took down the guardrail which it would not do unless the owner filled in the grade that produced the dangerous slope. Although removal of the guardrail and regrading might occur, in the sense the neither was an impossible task, the court held that "in absence of present adequate access from the public way of each of the plaintiff's lots," the planning board had rightly refused endorsement under G.L. c. 41, Section 81P. Id. at 362.

A case similar to Poulos was decided by the Appeals Court in 2000 with a different result. In Hobbs Brook Farm Property Company Limited Partnership v. Planning Board of Lincoln, 48 Mass.App.Ct. 403 (2000), review denied, 726 N.E. 2d 414 (2000), the planning board denied ANR approval to the plaintiff's plan because frontage on a state highway for 4 out of 5 proposed lots was partially obstructed by a metal guardrail or concrete Jersey barrier and curb cut permits had not been obtained from MHD. The court found that "it is simply not correct…that the entire frontage required for a lot under [the town's] zoning by-law must be unobstructed….As to guardrails, Jersey barriers, and Cape Cod berms, those partial obstructions do not have the physical barrier effect described in Poulos v. Planning Board of Braintree." Hobbs, 48 Mass. App. Ct. at 406.

The court in Hobbs also went on to state that "the requirement that one obtain permission from the commission to make a curb cut and to build a driveway across the green did not constitute a physical or legal barrier to access. Securing permission is a necessary step to be taken in the development process, but it is not the business of the planning board to anticipate that the grant of the requisite permit by the responsible governmental body would be improvident or might not occur." Id. at 405. Likewise, as MHD has exclusive authority to regulate driveway openings on a state highway, a town planning board may not, as a condition for its approval of a definitive subdivision plan, prohibit curb cuts on a state highway, Sullivan v. Planning Board of Acton, 38 Mass. App. Ct. 918 (1995).

It should also be noted that a "public way" properly laid out, is not necessarily a "public way" for Subdivision Control Law purposes. Proving that a way is in fact public can be extremely difficult for an applicant seeking subdivision approval.

In Matulewicz v. Planning Board of Norfolk, 438 Mass. 37 (2002), the Supreme Judicial Court dealt at some length with the provisions of M.G.L. chapter 41, section 81L which permits a planning board to grant an ANR endorsement for a lot having frontage on "a public way or a way which the clerk of the city or town certifies is maintained and used as a public way."

In Matulewicz, a landowner sought an ANR endorsement for two parcels of land shown with frontage on Frederickson Road in Norfolk. The applicant accompanied the ANR plan to the planning board with a town clerk's certification to the effect: "that according to the records of Norfolk, Frederickson Road from Grove Street to the dwelling

of…Matulewicz as shown on assessor's map 13, a total distance of 2,415 feet, more or less, is maintained and used as a public way in the Town of Norfolk."

The planning board declined to issue it's ANR endorsement on the basis that the town had only accepted 1,953 feet of Frederickson Road at town meeting with the remaining 462 feet being a driveway to the Matulewicz home which had never been accepted as a public way.

The applicant appealed to Superior Court and, unusually, the planning board filed its own action in Superior Court seeking the annulment of the clerk's certificate and a declaration by the Court that the plaintiff's plan in fact showed a subdivision.

The town clerk's certification was based upon a conversation with the town highway department superintendent who apparently confirmed that the town maintained the road by paving, snow removal and repair. The Superior Court judge concluded, based on the certificate, that the road was maintained and used as a public way and thus ordered the board to make the ANR endorsement.

The applicants argued to the Supreme Judicial Court that the town clerk's certificate, absent fraud, misrepresentation, or duress, should be considered conclusive, irrebuttal evidence that the way in question was used and maintained as a public way. Holding that the plaintiff had established a prima facie case that the way in question was used and maintained as a public way by introducing the clerk's certificate, the Court held that the planning board may rebut the prima facie affect of the certificate by introducing evidence and warranting a finding that the way was not so maintained and used.

While the Court held that the clerk's certificate should be rebutted, it found that the Superior Court's decision that Frederickson Road was, in fact, maintained and used as

a public way was warranted by the evidence which she heard at trial including that the town's maintenance of the road was uniform throughout and that the way had significant width for its entire length and that the town maintained it in all seasons of the year. The matter was remanded with an order that the plaintiff's plan did not require approval under the subdivision control law and that the planning board should issue that endorsement.

In Duddy v. Mankewich, 66 Mass. App. Ct. 789 (2006) it was determined that an ANR endorsement by two members of a five member board was insufficient to constitute an endorsement even though those two members constituted a majority of the three members of a five member board who were present at the planning board meeting. This was so because the statute contemplates action by a full majority of the board's members.