



MURPHY HESSE  
TOOMEY & LEHANE LLP

Attorneys at Law

***PRIVATE ROADS: POLITICAL  
NIGHTMARE,  
LEGAL REALITY***

*January 20, 2023*

*Presented by: Karis L. North*

# LEGAL REALITY

---

- Definitions
- Legal Authority
- Conflicts



# DEFINITIONS

---

- Way – a street, road, or highway which includes all publicly traveled ways.
- Public Way – a way which a City or Town has a duty to maintain free from defects.
  - M.G.L. c. 84, sections 1, 15, and 22.
  - Generic term, which includes state and county highways, and town ways.

# DEFINITIONS (cont).

---

- Private Way – a way which has not been accepted by a City or Town, or otherwise established as a public way. This can include defined ways for travel, which are wholly privately owned (typically ownership of or easements over the land on which the way is laid out)
  - BUT NOTE:
    - A Private Way may be accessible to public traffic and used by the general public.
    - Typically, roads within a subdivision are private ways.
- State Highway – a way laid out and maintained by the Massachusetts DOT.

# DEFINITIONS (cont).

---

- Road Commissioners – M.G.L. c. 41, section 64
  - “If road commissioners be chosen, they shall exclusively have the powers, perform the duties and be subject to the liabilities and penalties of selectmen and surveyors of highways relative to public ways, monuments at the termini and angles thereof, guide posts, sidewalks and shade trees, and, if sewer commissioners be not chosen, relative to sewers and drains.”

# LEGAL AUTHORITY

---

- General Rule:
- 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 a duty to maintain free from defects -- unless it has become public in character in one of three ways.

# LEGAL AUTHORITY (cont.)

---

- (1) a laying out by public authority in the manner prescribed by statute (M.G. L. c. 82, sections 1-32);
- (2) prescription;
- or (3) prior to 1846, a dedication by the owner to public use, permanent and unequivocal, coupled with an express or implied acceptance by the public.

# LEGAL AUTHORITY (cont.)

---

- Prescription – complex to prove and time consuming
- Dedication – ended in 1846
- Laying out – Most public ways assume their public character by laying out by a public authority, under the statute.



# Laying Out A Public Way

---

- M.G.L. c. 82, The Laying Out, Alteration, Relocation And Discontinuance Of Public Ways, And Specific Repairs Thereon
  - Section 21- “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.

# More About Public & Private Ways

---

- A Public Way is typically limited to an easement for passage over the entire way, and is not the fee interest in the land, unless there is a taking.
- A Public Way continues as a public way until legally discontinued.
- Public Ways are maintained at public expense.
  - M.G.L. c. 84, Section 1 - Highways and town ways, including railroad crossings at grade with such highways and town ways, shall be kept in repair at the expense of the town in which they are situated, so that they may be reasonably safe and convenient for travelers, with their horses, teams, vehicles and carriages at all seasons.

# More About Public & Private Ways (cont.)

- Obligations of a Municipality for Public Ways:
  - Maintenance and repair
    - Failure to maintain or repair results in imposition of liability
  - Snow and Ice removal
    - Required on Public Ways
    - Optional for Private Ways. M.G.L. c. 40, section 6C – “A city or town which accepts this section in the manner provided in section six D may appropriate money for the removal of snow and ice from such private ways within its limits and open to the public use as may be designated by the city council or selectmen; provided, that, for the purposes of section twenty-five of chapter eighty-four, the removal of snow or ice from such a way shall not constitute a repair of a way.”

# More About Public & Private Ways (cont.)

---

- Municipalities may also make temporary repairs of private ways, if there is a bylaw or ordinance, adopted pursuant to M.G.L. c. 40, section 6N
  - Cities and towns may by ordinance or by-law provide for making temporary repairs on private ways. Such ordinance or by-law shall determine (a) the type and extent of repairs; (b) if drainage shall be included; (c) if the repairs are required by public necessity; (d) the number of percentage of abutters who must petition for such repairs; (e) if betterment charges shall be assessed; (f) the liability limit of the city or town on account of damages caused by such repairs; (g) if the ways shall have been opened to public use for a term of years; and (h) if a cash deposit shall be required for said repairs.

# More About Public & Private Ways (cont.)

---

- Snow removal or temporary repairs does not make the private way public, or make the municipality liable for the private way.

# Conflicts

---

- Public ways are maintained at the expense of the municipality; private ways are maintained at the expense of the abutters.
- Abutters often ask for improvements to the private way by the Town.
  - BUT-- not authorized by the General Laws since it's a private way (other than snow removal or temporary repairs), AND --

# Conflicts (cont.)

---

- Such expenditures by the municipality may run afoul of the Anti-Aid Amendment – Art. CIII - which is a prohibition against the giving of money or property by a municipality to or in aid of any individual, association or corporation embarking upon any private enterprise.
- DLS guidance also states, “Since public money can only be expended for public purposes, cities and towns have no power to appropriate money for gifts or gratuities to persons whose situations may appeal to public sympathy.”

# Conflicts (cont.)

---

- M.G.L. c. 50, section 5 - A town may at any town meeting appropriate money for the exercise of any of its corporate powers; provided, however, that a town shall not appropriate or expend money for any purpose, on any terms, or under any conditions inconsistent with any applicable provision of any general or special law.
- Cities and towns can spend only for public purposes. Public funds cannot be used for private purposes. Thus, cities and towns have the right to spend money for any purpose where the public good will be served but not where the expenditure of money is directly for the private benefit of certain individuals.



# Resolution of Conflicts?

---

- Street Acceptance
  - Municipalities may create policies establishing a priority for acceptance of private ways.
    - Usage
    - Quality
    - May require Planning Board involvement (M.G.L. c. 41, section 81I).
- Special Legislation may provide for faster process for acceptance.

# Resolution of Conflicts?

---

- Betterments
- M.G.L. c. 80, section 1 - Whenever a limited and determinable area receives benefit or advantage, other than the general advantage to the community, from a public improvement made by or in accordance with the formal vote or order of a board of officers of the commonwealth or of a county, city, town or district, and such order states that betterments are to be assessed for the improvement, such board shall within six months after the completion of the improvement determine the value of such benefit or advantage to the land within such area and assess upon each parcel thereof a proportionate share of the cost of such improvement,
  - Assessable for water and sewer improvements, temporary repairs, and for sidewalks.

# Resolution of Conflicts?

---

- Asking for Town Meeting authority (via citizens petition) to spend public money on work to improve a private way does not cancel out the potential Anti-Aid Amendment issues.
  - The Select Boards/Road Commissioners control decisions about which ways to improve and/or accept, and which to not improve.
  - Town Meeting's authority is fiscal, it cannot direct a Select Board to undertake its statutory duties.



# MURPHY HESSE TOOMEY & LEHANE LLP

Attorneys at Law

## Quincy

Crown Colony Plaza  
300 Crown Colony Drive  
Quincy, MA 02169

## Boston

75-101 Federal Street  
Boston, MA 02210

Tel: (617) 479-5000  
Tel: (888) 841-4850  
Fax: (617) 479-6469

## Braintree

50 Braintree Hill Office Park  
Suite 410  
Braintree, MA 02184