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BY FACSIMILE - (508) 228-7272

Ms. C. Elizabeth Gibson
Town Manager
Nantucket Town Hall
16 Broad Street
Nantucket, MA 02554



Re: Maintenance of Eroding Roads; Limitation on Liability

Dear Ms. Gibson:

You have requested an opinion with regard to the maintenance of Town ways and/or County highways that suffer from water erosion. You have informed me that there are several public ways that may sooner or later be subject to erosion, such as Baxter Road in Sconset. You have asked if the Town is responsible for shoring the eroding roads and/or taking other measures to ensure that abutters to such roads continue to have access to their properties. You have also asked if the Town may discontinue such public roads or discontinue maintenance of such roads to minimize the Town's liability for maintaining the roads. For the purpose of this letter, the term "public ways" refers to both Town roads and County highways, and the term "Town" includes the County, unless expressly distinguished.

In my opinion, although property owners using the eroding roadways cannot by legal action require the Town to repair the roads, the Town could be liable for injuries, damage, or death resulting from defects in such public ways. The Town could relieve itself of its obligation to maintain such roadways by discontinuing such eroding public ways or by discontinuing their maintenance, but if any of the lots served by such ways become landlocked as a result, the Town could be liable for damages. To avoid such claims, I recommend that the Town consider laying out new public ways to provide access to such lots and assess a betterment on benefited lot owners to recover its costs, as was done for Sheep Pond Road Extension.

A. Town's Responsibility for Maintenance of Public Ways

Note, as a threshold matter, that municipalities are required under G.L. c. 84, §1 to maintain public ways in a condition that is "reasonably safe and convenient for travelers." Concomitantly, municipalities are liable for defects in the way or lack of repair that result in bodily injury or property damage, but such liability is limited to \$5,000.00 under G.L. c. 84, §15. A wrongful death

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claim, however, is not subject to this limit. Gallant v. City of Worcester, 383 Mass. 707, 714 (1981). Although property owners cannot by legal action compel municipalities to improve or maintain a public way to a particular standard, injured persons, by claiming damages for defects in a public way, have the effect of inducing municipalities to keep their public ways in good repair. The standard for maintenance required in each instance depends on the character of the way and the amount and kind of travel on it. Callagy v. City of Boston, 297 Mass. 53, 54 (1937); Sturdy v. Planning Bd. of Hingham, 32 Mass. App. Ct. 72, 77-78 (1992).

In my opinion, the Town has an obligation to maintain and repair the eroding roads in a safe and passable condition, and could be liable for injuries or death to persons and harm to property resulting from defects due to erosion. The extent of the repairs required would depend on the condition of the particular road at issue, the extent to which said road is used for access, and the standard to which it has been maintained historically.

B. Limitation on Liability

The Town could limit its liability for the condition of the eroding roads by discontinuing the maintenance of such roads under G.L. c. 82, §32A or by discontinuing such roads as public ways under G.L. c. 82, §21, which I discuss in turn below.¹

1. *Discontinuance of Maintenance*

G.L. c. 82, §32A sets forth the procedures by which a municipality may “abandon” or “discontinue the maintenance of” public ways. Similarly, a county has the authority under G.L. c. 82, §1 to discontinue the maintenance of county highways. Once the procedures to discontinue maintenance of an eroding road have been completed, the Town will no longer be liable for the care and condition of the way, and, consequently, will not be responsible for injury or harm caused by defects in such road after the discontinuance of maintenance.² The roadway will, however, remain subject to the public’s right of travel over such roadway. Nylander v. Potter, 423 Mass. 158, 162 (1996).

Note, however, that the Town may be able to discontinue the maintenance of only certain roads. To discontinue a public way, the Board of Selectmen must make a “finding that a...town way or public way has become *abandoned or unused* for ordinary travel and that common convenience and necessity no longer requires such town way or public way to be maintained in a condition reasonably safe and convenient for travel.” G.L. c. 82, §32A (emphasis added). Similarly, if any of the eroding roads is a county highway, the County Commissioners must determine that the highway

¹ This letter does not fully address all of the steps that must be followed to effectuate a discontinuance or a discontinuance of maintenance. I will advise on such steps upon request.

² The Town must post signs on either end of the eroding ways, warning that the roadway is not maintained by the Town.

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has become unused or abandoned and “common convenience and necessity no longer require such way to be maintained” in safe condition. If any of the eroding roads is used by members of the public or by abutters, and/or is reasonably necessary for access, the Town and/or the County may not be able to discontinue the maintenance of such road, and will continue to be liable for its maintenance.

2. *Discontinuance as Public Ways*

Alternatively, the Town could relieve itself of responsibility for the maintenance of the eroding ways by discontinuing such roads as public ways. A discontinued roadway is no longer a public way, and the Town has no obligation to maintain the way. Discontinuance of a Town way terminates the rights of the public to use the way, but does not terminate private easements held by others to use the way. Town Meeting must vote to discontinue a Town way and terminate the public’s right of access (G.L. c. 82, §21). The County may discontinue a county highway by a vote of its Commissioners, after a public hearing (G.L. c. 82, §3), but, upon the discontinuance of a County highway, such way would become a Town way ((G.L. c. 82, §5); a further vote of Town Meeting would be necessary to discontinue the former County highway as a Town way.

3. *Damages*

The Town could be liable for monetary damages for discontinuing the eroding roads as public ways or for discontinuing the maintenance of such roads. G.L. c. 82, §24 provides that “any person sustaining damage in his property by the discontinuance of a town way...shall be entitled to recover the same under said chapter seventy-nine,” and G.L. c. 79, §9 provides that “[w]hen injury has been caused to the real estate of any person by the...discontinuance of a public improvement which does not involve the taking of private property,...he is entitled to compensation by law for such injury.” With regard to county highways, G.L. c. 82, §7 provides that “any person sustaining damages in his property by the...discontinuance or discontinuance of maintenance of a [county] highway, shall be entitled to recover the same” under G.L. c. 79.³

According to G.L. c. 79, §12, in determining damages where no property is taken, “regard shall be had only to such injury as is special and peculiar to such parcel.” Massachusetts courts have reluctant to find that a property owner has suffered “special” or “peculiar” injury resulting from a discontinuance of a road. See Soeder v. County Commissioners of Nantucket County, 60 Mass.App.Ct. 780 (2004); Malone v. Commonwealth, 378 Mass. 74, 79 (1979). Damages are not recoverable for the diminution in the value of property, without more. Smith v. Boston, 61 Mass.

³ The person seeking damages for a discontinuance or a discontinuance of maintenance has the burden of establishing that the discontinued roadway was a public way in the first instance. See Rivers v. Warwick, 37 Mass.App.Ct. 593 (1994).

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254 (1851). Inconvenience occasioned by discontinuance is also not recoverable. Natick Gaslight Co. v. Natick, 175 Mass.246 (1900).

In Nylander v. Potter, 423 Mass. 158, 162 (1996), the Supreme Judicial Court considered if damages were due to a property owner where a discontinuance of a public way terminated the lot owner's access to a public way on one end of the owner's property, but the lot had frontage on and could access a public way at the other end of the property. The Court denied the owner's claim for damages, holding that "a claim for monetary damages is *only available if a parcel is rendered landlocked* by the discontinuance of a public way." Id. at 62 (emphasis added). Since a discontinuance of a way as a public way terminates all public rights of access over the way, a lot physically abutting the way could become "landlocked" if the lot owner does not have a private legal right, such as a pre-existing easement, to use the discontinued way to access the owner's lot.⁴ Courts have refused to grant damages where a lot affected by a discontinuance of a way can be accessed using other public ways. See Smith v. City of Boston, 7 Cush. 254 (1851); Davis v. Commissioners, 153 Mass. 218 (1891). In instances where a lot does not have access through public ways, but has access to a private way that leads to a public way, it is my opinion that damages may not be due if the lot owner has a legal right to use the private way to reach the public way.

In my opinion, the Town would not be liable for discontinuing a public way if a property owner has other means of accessing his or her property, particularly if the way is a public way. However, the Town would be liable for damages if persons owning lots served by the way are unable to access their lots by any other means. Since lack of access could greatly diminish the value of such properties, the damages could be considerable. I recommend that the Town prepare a list of the lots served by each eroding way. The Town should determine if each affected lot is accessible by other roadways, whether the alternate access ways are public or private, and whether the lot owner needs access through the eroding way to reach the alternate way. The Town should determine if the owner has the legal right to use the eroding way (if it were discontinued) or the alternate private way for access and, if applicable, for installing utilities within such way. If the lot owner has a private easement to use the eroding way for access and utilities, the Town could discontinue the way as a public way. If a lot owner needs access through the eroding way to reach the other access way, but does not have a private easement to use the eroding way, the Town may want to discontinue maintenance of the eroding way, as such discontinuance will preserve the right of the public, and the right of the lot owner as a member of the public, to access the eroding way.

The statutes provide that damages may be due for a discontinuance of maintenance of a public way. However, because a discontinuance of maintenance transforms the way into a statutory private way as to which the public still has rights of access (Coombs v. Board of Selectmen, 26 Mass. App. Ct. 379 (1988)), abutting lot owners and others needing the road for access will still have

⁴ See also Natick Gaslight Co. supra (suggesting that damages may also be recoverable if a lot owner has utilities within the public way but no private right to maintain such utilities)

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the right to use this now-private way to access their lots. In my opinion, such property owners also have a right to repair and maintain such private ways themselves. Thus, it is my opinion that a successful claim for damages is unlikely, but I have not found any appellate cases on this issue and the statutes do provide for the possibility of damages.

C. Creating New Public Ways

In circumstances where a lot owner would be rendered landlocked by a discontinuance of an eroding road, I recommend that the Town consider laying out new public ways that would provide such access, similar to the County's layout of Sheep Pond Extension, and, after the new road has been constructed, discontinuing the eroding way as a public way. Property owners, faced with the option of having no physical access to their lots, may be amenable to granting the Town easements on other portions of their property. The Town could recover the cost of constructing a new public way by assessing betterments on lots benefiting from the new way under G.L. c. 80.

Please contact me if you have any further questions on this matter.

Very truly yours,



Shirin Everett