



Discontinuing Town and County Roads

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EXECUTIVE SUMMARY

This manual was originally prepared in 1990 through a grant from the Massachusetts Department of Public Works, by the Franklin County Planning Department, for the purpose of providing town officials with a comprehensive guide to the issues surrounding town and county road discontinuance. It was updated in 2003 by The Trustees of Reservations' Highland Communities Initiative, to reflect changes in recent years.

The discontinuance of town and county roads has increasingly become a topic of interest and concern to town boards, and there have not been adequate resources available to answer their questions. This manual attempts to fill that need for basic information and guidance. It presents the current state of the law, as well as the issues and decisions with which towns are presented when considering road discontinuance. It also attempts to clarify areas of confusion that commonly arise.

We caution that road discontinuance, while technically simple, is a complex and often ambiguous area of the law. Be sure to consult town counsel early in the process of considering road discontinuance.

I. INTRODUCTION

Discontinuing roads has become a popular pastime in many towns, and with good reason. Once a road is duly laid out, by either a town or county, and thus a public way, it continues to be public until legally discontinued. (MAHAN V. TOWN OF ROCKPORT, 287 MASS. 34 (1934), CARMEL V. BAILLARGEN, 21 MASS. APP. 426 (1986)). This is true even if the road has not been used or maintained for decades. Layout of a road created by eminent domain and never constructed may be void if entry was not made in two years (MASSACHUSETTS GENERAL LAWS (M.G.L.) CHAPTER 82, SECTION 7), but discontinuance is the safest course.

Among the advantages of discontinuing a town or county road are: 1) the town is no longer responsible for the maintenance of the road, 2) the town is relieved of liability for harm to people using the road, and 3) depending on local zoning and specific circumstances, it may not be possible to build on a lot with frontage on a discontinued road. Thus, discontinuing a road can be an important tool in controlling town road costs and for managing residential growth.

Of course, there can also be disadvantages associated with discontinuing roads: 1) because the way ceases to be public or maintained, people who rely upon it for their travel may be severely inconvenienced, 2) abutters to roads that are discontinued may be "locked out" by other abutters if there are no legal agreements for rights of passage, 3) what was a building lot may no longer be one, 4) a town may experience a decrease in state and federal highway funds because of the decrease in road mileage, 5) an unmaintained road can cause environmental damage, and 6) in certain unusual cases, the town may be liable for damages for discontinuing the road.

Discontinuing a road can be an important tool in controlling town road costs and for managing residential growth.

From a procedural perspective, discontinuing a town road at town meeting is quite simple. From a “political perspective” it may not be quite so straightforward.

The discontinuing of roads is a complex and controversial subject. Please be sure to discuss the discontinuation process and its implications with counsel before proceeding. It is also important to verify whether the road is a town or county road, or a public way at all, by consulting town records and Registry of Deeds plans.

In addition, it is important to determine whether the town has a fee or easement interest in the public way. In many cases, the town simply has an easement to travel across the land while the underlying land is owned by the abutters. If the town owns the road in fee, then it owns both the right of travel as well as the land beneath the road. Once it is determined whether the interest is a fee or easement it must be determined HOW the town acquired this interest. If it was by eminent domain – which is likely – there are specific requirements for discontinuance.

2. DISCONTINUING TOWN ROADS

2.1 How to Discontinue a Town Road

The phrase “discontinue a town road” is often used interchangeably in two different ways. The most commonly understood meaning is to make the road no longer public, thereby ceasing maintenance and eliminating the public right of passage. The other meaning is simply to cease responsibility for maintenance. The second use of the word is not correct. Discontinuing a road means that it is no longer a public road. Maintenance is a separate issue. Because the word is commonly understood in both ways, however, we will discuss both usages in this document.

Whether you want to discontinue the road or simply to cease maintenance will determine the legal route for action. The first case, both ceasing maintenance and eliminating the public right of passage, requires town

meeting action. (M.G.L. CHAPTER 82, SECTION 21) Ceasing responsibility for maintenance, but continuing the public right of passage can be accomplished by the Board of Selectman action pursuant to M.G.L. Chapter 82, Section 32A.

2.2 Discontinuing At Town Meeting

M.G.L. Chapter 82, Section 21 states that “a town, at a meeting...may discontinue a town way...” There are no requirements that abutters be notified, that a public hearing be held (except if the road to be discontinued lies within 500 yards of an abutting town) or that there be any particular reason for the discontinuance. All that is required is a vote of town meeting to discontinue a certain town road.

If the town way takes the form of an easement, or if the road passes over town land acquired for other purposes, then a simple majority vote accomplishes the discontinuance, as set out in Section 21. However, some roads were established by eminent domain vote, taking the actual land as well; and another law, M.G.L. Chapter 40, Section 15, seems to require a two-thirds majority vote for “abandoning” land or easements in land so acquired. Section 15 makes no reference to roads. Whether it applies at all to discontinuances was apparently raised only in one legal decision of our higher courts (MACDONALD V. BOARD OF STREET COMMISSIONERS OF BOSTON 268 MASS. 288 (1929)). The state supreme judicial court declined to rule upon it. The law about discontinuing state highways (M.G.L. CHAPTER 81, SECTION 12) clearly distinguishes between “discontinuing” existing roads and “abandoning” unused easements. It can certainly be argued that the same distinction should govern town ways. If the land was acquired in fee by eminent domain, and if the road is simply discontinued, public access is extinguished but a strip of publicly owned land will remain.

Procedural steps for discontinuing a road at town meeting are:

- Placing a warrant article on the town meeting warrant (SAMPLE IN APPENDIX).
- Following regular warrant article posting requirements (M.G.L. CH. 39, SECTION 10).
- If your town does NOT have an Official Town Map (discussed below), then the Planning Board must be allowed 45 days before town meeting, if they need it, in which to comment and report to the meeting concerning the advisability of discontinuing the road in question (M.G.L. CHAPTER 41, SECTS. 81-G, I).
- Vote at town meeting.

As can be seen, from a procedural perspective, discontinuing a town road at town meeting is quite simple. From a “political perspective” it may not be quite so straightforward. While the law does not require notice to abutters or a public hearing, it is wise to provide these in advance of town meeting. This type of outreach is important because the rights of abutters will be seriously affected by discontinuance.

2.3 Effects of Discontinuance

There are two particularly important possible results of discontinuing a town road: 1) loss of the ability to build on undeveloped land, and 2) being “locked out” by other abutters.

2.3.1 Loss of the Ability to Build on Undeveloped Land

A possible result of the discontinuance of a public road is the loss of the ability to build on undeveloped land that abuts the discontinued road, on account of local zoning. It may not be possible to get a building permit or to further divide the land.

Municipal zoning ordinances and bylaws often require that a lot have frontage on a public way in order to qualify as a building lot eligible for a building permit. This is not required by state law, but has been upheld in court decisions. This is commonly done by defining “frontage” as frontage on a public way, access as access on a public way, and a road as a public road. The court decision in *Recore v. Town of Conway*, 59 Mass. App. 1 (2003), for example, depended on the public status of a county road. In addition, the Subdivision Control Act provides exceptions for the division of land on public ways, and requires adequate access for subdivision development. (*BALL V. PLANNING BOARD OF LEVERETT*, 58 MASS. APP. 513 (2003) is a recent case.)

2.3.2 Local Zoning

Once a road is discontinued at town meeting it is no longer a public way. Thus, if local zoning by-laws require frontage or access on a public way, what was once a legal building lot will lose that status when the road is discontinued. There is no grandfathering protection from this change of status.

If local zoning is silent about the definition of a road, access, and frontage, then discontinuance of a road will not affect the ability of the road to be developed. However, most towns require that frontage for approval-not-required endorsement be on a public way.

Obviously, the consequences to individuals of the loss of building lot status can be quite dramatic and this should be carefully considered by the town and town counsel.

2.3.3 Subdivision Regulations

If a lot loses its status as a building lot because of local zoning by-law requirements, it is possible (but unlikely) that with enough land, subdivision may be a possible route for development. M.G.L. Chapter 41, Section 81L

If local zoning by-laws require frontage or access on a public way, what was once a legal building lot will lose that status when the road is discontinued.

defines “subdivision” so as to require that a planning board must rule that a division of land on any road in existence when the town adopted subdivision law is not a subdivision, provided the road provides “adequate” access (as some discontinued ways may do). However, approval under Chapter 41, Section 81P simply establishes that the proposed division of land is not a subdivision; it does not make the lots buildable if they do not meet the zoning code. In any case, if local subdivision regulations require that the subdivision road have access or frontage on a public way, then this loophole will not apply. If the planning board chooses to waive this regulation under Chapter 41, Section 81R, that action will still not make the lots buildable in itself if the zoning code states otherwise. (*ARRIGO V. PLANNING BOARD OF FRANKLIN*, 12 MASS. APP. CT. 802 (1981)). In addition, many roads proposed for discontinuance do not provide adequate access in terms of modern subdivision regulations. A “paper road”, a road that exists only on paper, certainly cannot qualify. Thus, local subdivision regulations may restrict the ability of the land to be developed or divided as well.

2.3.4 Subdivision Control Act

A subdivision of land is defined as “the division of a tract of land into two or more lots” which do not have frontage on 1) a public way or a way certified by the town clerk as used or maintained by the town, 2) an approved subdivision road, or 3) a road which existed prior to subdivision control which in the opinion of the planning board is adequate for vehicular access. (M.G.L. CH. 41, SECTION 81L). Section 81M of the Subdivision Control Act requires that subdivisions have “adequate access,” but this need not be on a public way. However Section 81M does require compliance with local zoning.

Sections 81L and 81P of the Act, read together, mean that land with sufficient frontage and adequate access on a public way or the other types of roads mentioned above, may be divided with “approval not required” endorsement, creating so-called “ANR lots.”

By discontinuing a town road, the frontage for land abutting that road, ceases to be on a public way. If land abutting a road which is discontinued is undeveloped and undivided, the ANR and subdivision processes for dividing the land appear to be ineffective, as described above. This may be a source of frustration for some abutters and should be addressed before proceeding.

Because road discontinuance is likely to result in the loss of the ability of abutting land to be developed, it can play an important role in growth management. Strip or frontage development may not be possible once a road is discontinued. New development, if available under local zoning bylaws and subdivision regulations, will be forced into subdivision, over which towns have much more control. It is also this consequence of road discontinuance that is likely to most affect abutters, and most anger them. This issue needs to be carefully considered and addressed before towns proceed with discontinuing town roads.

2.3.5 Being Locked Out

Case law has demonstrated that when a road is discontinued and no right of passage is reserved in deeds or by prescriptive use for abutters, landowners nearer the public way have the right to bar abutters further up the road from passage over their land. (*SCHUFFELS V. BELL*, 21 MASS. APP. 76 (1985), *COWLS V. WOICEKOSKI*, 7 MASS. APP. 18 (1979)). This is not a desired result of discontinuance and the town should work with abutters to be sure that such an easement for the right to travel is in place for landowners abutting the road before discontinuance. As an alternative, the town may want to consider the creation of a statutory private way to provide this access. For more information about how this is done, see the discussion below.

2.3.6 Other Consequences of Discontinuing a Road at Town Meeting

In addition to restricting the ability of land to be developed, towns are also released from responsibility to maintain the road once it is discontinued. (M.G.L. CH. 84, SECTION 1). The town is also relieved from the legal liability for use of the road. (M.G.L. CH. 84, SECTION 15). Furthermore, M.G.L. Chapter 71, s. 68 states that school bus service cannot be compelled on a private way. These results can have significant financial benefits to a community. It should be noted, however, that there may be a slight adverse financial impact as well: there will be fewer road miles in town and thus less state and federal monies for road reconstruction and repairs.

2.4 Damages for Discontinuing a Town Road

M.G.L. Chapter 82, Section 24, provides that “any person sustaining damage...by the discontinuance of a town way...shall be entitled to recover...under said chapter seventy-nine.” However, in the late 19th century, case law established that there are no damages to abutters of town roads that are discontinued unless they suffer damage unique to themselves, and not to the rest of the public. For example, a landowner who owned undeveloped land on a road which was discontinued and converted to a railroad did not suffer compensatory damage. In this case, the landowner had access to the lots from another route and was suffering the same type of inconvenience as everyone else. (SMITH V. CITY OF BOSTON, 61 MASS. 254 (1851)). Similarly, in Willard v. City of Cambridge, 85 Mass. 574 (1862), the owner of a business which suffered

because the city removed a drawbridge was not entitled to damages because “the damage...are not special or peculiar to him.”

In a 1996 Warwick decision, Nylander v. Potter, 423 Mass. 158, the state’s highest court ruled that monetary recompense (not access) is the only relief a plaintiff can seek in this case. The court stated plainly, “A claim for monetary damages is only available if a parcel is rendered landlocked by the discontinuance of a public way.” This ruling reversed a decision by the Appeals Court that the landowner on the discontinued road retained some kind of right to use it. The Warwick doctrine was confirmed by the Appeals Court in Kiernan v. City of Salem, 58 Mass Appeals Court 181 (2003).

2.5 Official Map

If a town has adopted an Official Map pursuant to M.G.L. Chapter 41, Section 81E-I, then a planning board review of the proposed discontinuance is not required. In addition, any discontinuance must be reflected on the official map. (M.G.L. CHAPTER 41, SECTION 81H). However, the inclusion or omission of a way from an official map does not make it public or private or discontinue it. (M.G.L. CHAPTER 41, SECTION 81G).

2.6 Misconceptions About Discontinuing Roads

A misconception of road discontinuance is that the act of discontinuing a road conclusively establishes that it was a public road. This is not true. Witteveld v. City of Haverhill, 12 Mass App. 877 (1981) states: “The discontinuance may have signified no more than an abundance of caution against the possibility that a public way did exist.” Id.

Discontinuing maintenance results in a cessation of responsibility for maintenance and liability for damage for use of the road, but the road remains a public way with a public right of passage, presumably with the potential for approval-not-required development.

2.7 Discontinuing Maintenance by Action of Board of Selectmen

M.G.L. Chapter 82, Section 32A, gives the Board of Selectmen the authority to discontinue maintenance of a town road. This 1983 law has not yet received much interpretation by the courts. The Nylander court ruled that discontinuing maintenance pursuant to Section 32A results in a cessation of responsibility for maintenance and liability for damage for use of the road (if the road is adequately posted as not maintained), but the road remains a public way with a public right of passage, presumably with the potential for approval-not-required development.

Unlike town meeting action under Section 21, town roads can only be discontinued under Section 32A if the Board of Selectmen finds that the road in question has become “abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said town way...to be maintained in a condition reasonably safe for travel...” In other words, the Selectmen act as judges in determining that the road is not generally used and that there is no reason to continue to maintain it. This may be a hard standard to meet.

“Abandon” as used here can cause confusion since the law does not define it. In addition, “abandon” is often confused with “discontinue.” In this section, abandon does not mean that the town has taken a legal position on the status of the road, or that the town has evinced any particular policy concerning the road. It just means that it is not generally used (if at all) for travel.

In order for the Board of Selectmen to discontinue maintenance of a town road under Section 32A, there are several important procedural requirements.

2.7.1 Procedural Requirements For Discontinuing Maintenance

- The Board of Selectmen calls a public hearing to discuss the proposed discontinuance of maintenance.
- Individual notice by registered mail, return receipt requested, is sent to all property owners abutting the affected road.
- Notice of the public hearing is published in a newspaper of general circulation in the town once in each of two successive weeks, the first publication not less than fourteen days before the hearing.
- After the public hearing, the Board of Selectmen determines that the road has become “abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said town way...to be maintained in a condition reasonably safe and convenient for travel...”

This determination is not a subjective decision, but one made on the basis of the limited standard provided by the statute.

If the Selectmen make such a finding and vote to discontinue, the road must be clearly posted that it is no longer maintained and that travel is at the individual's risk. The road remains open to the public for travel, however:

2.8 Other Ways to Discontinue Town Roads

In addition to town meeting and action by the Board of Selectmen, town roads may be discontinued by:

- a) action of the County Commissioners upon petition of an aggrieved party, or
- b) relocation or alteration of the layout of the road. The status of counties and the new bodies replacing them has radically changed since 1995, as explained later in this manual.

2.8.1 County Commissioners

County Commissioners have the authority to discontinue town roads. This is an avenue rarely pursued. M.G.L.

A Town meeting could discontinue the road as a statutory private way; thereby and then vote separately to lay it out relieving the town of the obligation of maintenance, but retaining public access.

Chapter 82, Section 30, gives the Commissioners the authority to discontinue a town road upon the written petition of the individual "aggrieved by the refusal of a town to discontinue a town way..."

Section 31 provides that in such a case the county may assess the costs of the discontinuance procedure to the applicant, and that the same notice requirements apply as for a viewing or public hearing on the matter.

2.8.2 Alteration or Relocation

When the layout of a road is altered or relocated by town meeting action, the portion of the road which is no longer part of the substituted official layout automatically becomes discontinued without separate action. (M.G.L. CHAPTER 82, SECTION 21, BOWLEY V. WALKER, 90 MASS (8 ALLEN) 2 (1864) 1, RECORE V. TOWN OF CONWAY, 59 MASS. APP. I (2003)).

2.9 Statutory Private Ways

Unique to Massachusetts is the statutory private way. (M.G. L. CHAPTER 82, SECTION 21). This type of way is actually a privately financed road, with a public right of passage, but without town responsibility for maintenance. Maintenance, improvement, and damages may be provided by the abutters.

There are two mechanisms, however, for town maintenance of a statutory private way. M.G.L. Chapter 40, Section 6D provides for a town ballot vote to allow the town to snowplow private ways therein open to public use. Chapter 40, Section 6N provides for a town by-law setting up standards and requirements for minor maintenance of such private ways town wide. The standards can include a limit to the liability of the city or town on account of "damages caused by such repairs."

2.10 Town Roads Which May Not Be Discontinued

Statutory town ways are not considered to be public ways under the Subdivision Control Act. In *Casagrande v. Town of Harvard*, 387 Mass. 703 (1979), the Massachusetts Supreme Judicial Court determined that statutory private ways are not public ways within the meaning of the Subdivision Control Act, and therefore cannot be used as frontage for Approval Not Required lots, unless they otherwise qualify. See the discussion above of the complex relation of the zoning and subdivision laws.

A statutory private way is laid out by the Board of Selectmen and then accepted at town meeting, as is any public road. It can be an important tool in those cases where Selectmen would like to cease maintenance on a town road, but cannot reach the decision under M.G.L. Chapter 82, Section 32A, that the road has been "abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said town way...to be maintained in a condition reasonably safe and convenient for travel..." In such an instance, town meeting could discontinue the road and then vote separately to lay it out as a statutory private way; thereby relieving the town of the obligation of maintenance, but retaining public access. M.G.L. Chapter 86, Section 1 requires the town to install permanent markers at the termini and angle points of a road layout. Absent these monuments, a new survey will be required for the new laying out.

This tool could also be used when it is not possible to ensure a right of passage for abutters when discontinuance by town meeting is being considered. By discontinuing the road at town meeting and having the Board of Selectmen lay it out as a statutory private way accepted at

the same town meeting, it is possible to achieve the desired ends of release from responsibility for maintenance, for liability for use, and from the possibility of Approval Not Required, or strip development of undeveloped land.

2.10.1 Roads within 500 Yards of Another Town

A town may not discontinue a town road within 500 yards of an adjoining town without meeting certain requirements. (M.G.L. CHAPTER 82, SECTION 1). This rule only applies to discontinuance through the town meeting process, and does not apply to Section 32A votes to cease to maintain.

In order to discontinue a town road within 500 yards of an abutting town, the abutting town must give written approval of the discontinuance. This would come from the Selectmen. In addition, a public hearing must be held on the proposed action, with written notice given to the abutting town's Selectmen and published in a newspaper of general circulation in the abutting town.

If within 90 days of the public hearing the abutting town does not concur with the proposed discontinuance, the initiating town may make a written request to the Commissioner of the state Highway Department requesting approval of the proposed discontinuance. If the Commissioner approves of the proposal, the discontinuance may proceed without the approval of the abutting town.

2.10.2 Public Cemeteries

While the law is not clear on this point, towns should avoid a discontinuance which could block access to a public cemetery.

M.G.L. Chapter 114, Section 17 states that "a town shall not alienate or appropriate to any other use than that of a burial ground, any tract of land which has been for more than one hundred years used as a burial place..." Discontinuing public access to a public cemetery could be construed as "alienating" the use of the burial ground. In addition, the doctrine of implied public dedication suggests that ancient burial grounds have been dedicated to the perpetual use by the general public. In this case, it would be a violation of public dedication to cut off public access to the site. In either instance the problem could be cured by obtaining from the abutters to the discontinued road an easement of passage to the cemetery.

3. LIABILITY

At the heart of many disputes about discontinuing local roads is the issue of liability for accidents. Although government liability for accidents is limited to "defects in the way" and the damages permitted are capped at \$5,000 by M.G.L. Chapter 84, Section 15, it is not impossible to get around these limitations. (*KRUMHOUT V. COMMONWEALTH*, 398 MASS. 687 (1986)). It is therefore important for communities to understand that discontinuance of a public way by town vote, or discontinuance of maintenance under Chapter 82, Section 32A, will reduce town liability for accidents as well as town maintenance costs. However, Section 25 of Chapter 84 provides a trap for the unwary: If the town pays for repairs on a private way open to public use without any agreement on liability (such as a town vote under M.G.L. CHAPTER 40, SECTION 6N, discussed earlier in this manual), it will be barred from "denying the location thereof" for six years thereafter. Presumably this phrase means the town could not avoid liability for six years.

Road discontinuance can be a valuable tool for communities when considering how to manage their future growth and finances.

4. COUNTIES AND COUNTY ROADS

The status of county roads has been made more complex by legislative changes since 1995 abolishing most county government. This is important to discontinuance, because M.G.L. Chapter 84, Sections 1 and 7 continue to state that towns may not discontinue county roads, nor may they vote to cease to maintain such roads. Because they continue to be responsible for maintenance, they are liable for harm to travelers for failure to maintain.

The story of the abolition of county government in Massachusetts is a long and confusing one, especially with regard to its legal handling of county roads. A large number of special acts are involved, beginning in 1996, when Acts 1996 Chapter 151, Section 567 abolished Franklin County. They are generally codified in M.G.L. 34B, Sections 1-22. Amendments are still being passed to clean up some of the confusion.

Seven counties are definitely abolished: Berkshire, Franklin, Hampshire, Hampden, Worcester, Essex, and Middlesex. The other seven continue to exist, although Barnstable has submitted a proposed charter to the legislature. In essence Chapter 34B transfers all “real property” of the abolished counties to the Commonwealth. That this category includes county roads is indicated by the requirements of a 1998 special act (now much amended) for a committee, never created, to inventory county roads. However, neither the Massachusetts Highway Department nor the state’s Division of Capital Assets Management and Maintenance have assumed any responsibility.

Meanwhile, the “functions, duties and responsibilities” of the abolished counties were to be transferred to “Councils of Government” (COG) to be created by charter, voted by the former county’s cities and towns under M.G.L. Chapter 34B, Section 20. The scope of

Section 20 was unclear until 2003. As of that year, only Franklin and Hampshire counties had created such “COGs.” The Franklin COG has the longest track record, having been separately established in 1996. The advice of the Franklin Regional Council of Governments’ Engineering Program is useful in these complex matters.

Although it has no COG, Berkshire County got special treatment through s. 364 of c. 159 of the Acts of 2000, which transferred all former county ways to the cities and towns where they are located.

The other former counties not now served by a COG are not legally capable of petitioning discontinuance or any major repairs on former county ways, although this has not prevented their doing so in some cases. When the COGs are established, all the laws still on the books applying to county powers over county ways will apply to the COGs, including the right to repair, improve and discontinue them, although state ownership of the underlying land (if any) will still be an issue. The rest of this manual assumes this will happen.

4.1 How to Discontinue a County Highway or Road

4.1.1 Authority

A county highway can only be discontinued by the county (or successor agency). Towns may not discontinue county roads, although they have some power to alter, repair and relocate them. (M.G.L. CHAPTER 82, SECTION 17, AND COOMBS V. BOARD OF SELECTMEN, 26 MASS. APP. 379 (1988)). They also lack the authority to cease to maintain them. In practice however, towns often cease maintaining county roads and over time the roads stop being used.

The County Commissioners (or successor agency) cannot discontinue county ways on their own motion. A written petition to the Commissioners requesting discontinuance is the only vehicle for discontinuing a county highway or road.

The law does not provide requirements concerning who the petitioner(s) for discontinuance must be, nor any for the number of signatures, nor for the text of the petition. The County Commissioners, however, do have the authority to require "surety...for the payment of all costs and expenses to the county which shall arise by reason of the proceedings, if the petitioners do not prevail." (M.G.L. CHAPTER 82, SECTION 2).

In order for the County Commissioners (or COG) to decide to discontinue a county road, they must act as judges and find that "common convenience and necessity require...discontinuance of an existing highway..." (M.G.L. CHAPTER 82, SECTION 2). This is the only rationale available for discontinuance.

4.1.2 Procedure for Discontinuing a County Road

19 VIEWING. Once there has been a petition for discontinuance of a county road and any required surety obtained, the Commissioners may schedule a viewing, also known as a site visit, if so requested by any interested party, or if they deem it to be necessary. (M.G.L. CHAPTER 82, SECTION 4).

PUBLIC HEARING. A public hearing concerning the proposed discontinuance is required by statute. (M.G.L. CHAPTER 82, SECTION 4). This hearing can be held concurrently with a viewing or at a regular or special meeting of the County Commissioners.

PUBLIC NOTICE. Before a viewing or public hearing is held, there must be adequate public notice. The requirements of this notice are defined in M.G.L. Chapter 82, Section 3.

1. At least fifteen days before the view or hearing, notice must be provided to the town clerks in the towns where the road is petitioned to be discontinued. The notice must include the time and place for the view or hearing, as well as a copy of the original petition for discon-

tinuance. The County Commissioners are responsible for providing this notice.

2. At least seven days before the view or hearing, copies of the petition, or a summary of it, and a copy of the notice to the town clerks must be posted in two public places in each affected town.

3. In addition, there must be a legal notice in the newspaper published at least seven days before any view, hearing or adjudication on the petition. This legal notice shall include the time and place of the view or hearing as well as the petition or a summary of it.

DECISION. In order to discontinue the county road, the Commissioners must adjudicate that "common convenience and necessity" actually "require" that the road be discontinued. This is a difficult standard to meet. The Commissioners, acting as judges, determine that the towns would be better off without the road than with it – almost like proving a negative.

If the Commissioners determine that discontinuance is "not required," then they dismiss the petition. M.G.L. Chapter 82, Section 5 provides that the Commissioners may decide and adjudicate at a viewing – without separate public hearing – that the road ought to be discontinued. In this case, the Commissioners announce this decision at their next regular meeting, vote on it, and the discontinuance goes into effect.

It is also possible for the Commissioners to rule on one part of the road and leave the petition open pending further review and decision. (M.G.L. CHAPTER 82, SECTION 5). It is worth noting that before it was amended in 1983, M.G.L. Chapter 82, Section 32A (which now applies only to discontinuance of maintenance of local ways) also allowed the county to discontinue town (not city) ways. The effect was to turn the county road into a statutory private way, open to the public without requirement of town maintenance. This change in law was discussed in *Coombs v. Board of Selectmen*, 26 Mass. App. Ct. (1988).

4.2 Effects of Discontinuing a County Road

As with town roads, when a county road is discontinued, the right to public passage is erased. If the county owned the land under the roadway in fee, the county – or the state if the county has been abolished – continues to own a strip of land. If the roadway was merely an easement of travel, the abutting landowners can exercise their full rights over the former road. The town is no longer responsible for maintenance, nor liable for harm from its use. The same disadvantages can also arise as may arise with discontinuing town roads, including loss of access, building lot status, and a reduction in state road monies.

Often towns are the entity petitioning for a county highway to be discontinued because they want to cease responsibility for maintaining the road. On the other hand, it is also common that the road is still important to abutters and other users. A recommended strategy is to simultaneously (or as close in time as possible) have the county discontinue the road and the Board of Selectmen lay out the road and at town meeting accept it as either a town road or statutory private road. In this way, assuming the layout plan of record and the required monuments can be found, public access is secured without a new survey, but the town need not maintain the road.

4.3 Damages

Persons who suffer loss due to the discontinuance of a county highway may recover damages under M.G.L. Chapter 79, Section 6. M.G.L. Chapter 82, Section 7. As discussed above, it is difficult to demonstrate damage that would qualify for compensation. The same standard of unique damage applies to county roads as in the case of town roads. In the unlikely case that damages are awarded, the county can (and will) assess both current and subsequent damages to the town in which the land lies. (M.G.L. CHAPTER 82, SECTION 12).

4.4 Cost of Proceedings

If a decision is made not to discontinue the road, the costs of the proceedings may be borne by the petitioner(s). As discussed above, M.G.L. Chapter 82, Section 1 provides for a surety to the county to cover such expenses. If, however, the county did not require or collect surety in the beginning of the process, or if the costs exceeded the surety, the costs will still be assessed to the unsuccessful petitioner(s). The county is authorized to institute proceedings against such individuals (or towns) if they do not willingly pay. (M.G.L. CHAPTER 82, SECTION 13). The Franklin Regional Council of Governments' Engineering Program has worked out a detailed scheme for cost reimbursement.

5. JUDICIAL REVIEW

Judicial review of adjudicatory decisions by Boards of Selectmen under M.G.L. Chapter 82, Section 32A, and County Commissioners under Sections 1 and 30 is available but limited. As long as the Selectmen or Commissioners act "honestly, without abuse of discretion, and within the scope of delegated power and law," the courts will not re-examine their decisions. (MACDONALD V. BOARD OF STREET COMMISSIONERS OF THE CITY OF BOSTON, 268 MASS 288 (1929)). Thus, the county and Boards of Selectmen have a great deal of responsibility and authority in making the adjudicatory decision to discontinue, or discontinue maintenance.

6. CONCLUSION

Road discontinuance can be a valuable tool for communities when considering how to manage their future growth and finances. In addition, it is a relatively easy tool for towns to use. It is much more difficult for counties (or their successor COGs) to discontinue county roads or for the Board of Selectmen to determine to cease maintaining a road because of the standard of review.

Of particular importance is understanding the distinction between ceasing to maintain and truly discontinuing a road: one keeps the road a public way and the other does not. In addition, the use of statutory private ways might be considered to address community needs. Each has its implications and appropriate use. Be sure to consult town counsel early in the process of considering road discontinuance. Counsel's advice and guidance will be essential in preventing community anger or future lawsuits about damages.

REFERENCES

- Mahan v. Town of Rockport, 287 Mass. 34 (1934)
- Carmel v. Baillargen, 21 Mass.App. 426 (1986)
- Schuffels v. Bell, 21 Mass.App. 76 (1985)
- Cowls b. Woicekoski, 7 Mass.App. 18 (1979)
- Smith v. City of Boston, 61 Mass. 254 (1851)
- Willard v. City of Cambridge, 85 Mass. 574 (1862)
- Witteveld v. City of Haverhill, 12 Mass.App. 877 (1981)
- Bowley v. Walker, 90 Mass (8 Allen) 21 (1864)
- Casagrande v. Town of Harvard, 377 Mass. 703 (1979)
- Coombs v. Board of Selectmen, 26 Mass.App. 379 (1988)
- MacDonald v. Board of Street Commissioners of the City of Boston, 268 Mass. 288 (1929).
- Nylander v. Potter, 423 Mass. 158 (1996)
- Recore v. Town of Conway, 59 Mass.App. 1 (2003)
- M.G.L. Chapter 34, Section 9
- M.G.L. Chapter 39, Section 10
- M.G.L. Chapter 40, Sections 6D, 6N, 15
- M.G.L. Chapter 41, Section 81-E-I, L, M
- M.G.L. Chapter 79, Section 6
- M.G.L. Chapter 82, Section 1- 32A
- M.G.L. Chapter 84, Section 1, 7, 15
- M.G.L. Chapter 114, Section 17

An electronic version of this brochure is available at www.highlandcommunities.org.

A related booklet, *ANRs and Ancient Ways* by Alexandra Dawson is available at www.thetrustees.org/PutnamConservationInstitute.cfm.



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The Highland Communities Initiative (HCI) is a program of The Trustees of Reservations that promotes land conservation and community preservation in rural western Massachusetts. HCI encourages conservation of the natural and cultural landscapes of the "Highlands" region, the 38 towns that lie between the Housatonic and Connecticut River Valleys, and the Vermont and Connecticut borders.