

**STATUTES REGULATING EXPENDITURE OF TOWN FUNDS
ON PRIVATE WAYS**

The Town has no inherent power to spend municipal funds or use municipal resources to plow private ways or to make temporary repairs on private ways. Each type of action has particular statutory preconditions, but, unfortunately, the statutes that govern each type of activity are not parallel, either in the way the authority is acquired and the manner in which the power, once acquired, is exercised.

The following are the sections of the General Laws that control the most frequently asked questions concerning public and private roads:

Chapter 40: Section 6C. Removal of ice and snow from private ways; conditions

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.

Chapter 40: Section 6D. Removal of ice and snow from private ways; submission to electorate; ballot

Section six C shall be submitted for acceptance to the registered voters of a city at a regular city election if the city council thereof so votes, and of a town at an annual town election upon petition of two hundred registered voters or of twenty per cent of the total number of registered voters, substantially in the form of the following question, which shall be placed on the official ballot used for the election of officers at such city or town election:

Shall the city (or town) vote to accept the provisions of section six C of chapter forty of the General Laws, which authorize cities and towns to appropriate money for the removal of snow and ice from private ways therein open to public use?

YES.	<input type="checkbox"/>
NO.	<input type="checkbox"/>

If a majority of the votes in answer to said question is in the affirmative, then said section shall thereupon take full effect in such city or town, but not otherwise.

Chapter 40: Section 6N. Private ways; temporary repairs, ordinances or by-laws

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.

I. TEMPORARY REPAIR OF PRIVATE WAYS

A municipality has no obligation to maintain or repair a private way; however it may expend funds for the temporary repairs of private ways, pursuant to a by-law enacted pursuant to G. L. c.40, §6N, without affecting the status of the way. Various provisions are commonly seen in bylaws, such as a requirement that the private way have been opened to the public use for six years or more; however, these are not imposed by statutes, but are chosen as a matter of policy by each municipality and incorporated into the bylaw.

If a municipality should decide to make temporary repairs to a private way, after having enacted the necessary bylaw, it is recommended that the town take measures to limit its liability. These typically include posting a warning at the entry of such ways and obtaining agreements from abutters to indemnify and hold the town harmless from personal and property injury resulting from any defects in such ways. The town should also obtain a recordable agreement from abutters that requires future maintenance and repair by the abutters.

II. REMOVAL OF SNOW AND ICE FROM PRIVATE WAYS OPEN TO THE PUBLIC

A. What is required to authorize the Town to Plow Private Ways?

A municipality may expend public funds for the removal of snow and ice from private ways open to public use if Section 6C of Chapter 40 has been accepted in the manner provided by G. L. c.40, §6D. Section 6D requires that specific language be included within a town-wide ballot question placed before the voters at a City or Town election. Section 6C provides that the removal of snow and ice from a way does not constitute repair of that way.

B. Does the plowing of snow on private roads result in increased responsibility of the Town for such roads?

In my opinion, the plowing of private ways, as permitted by G. L. c.40, §6C, does not result in the road in question becoming “way . . . maintained and used as a public way,” as that phrase is used in the Subdivision Control Law, at G. L. c.41, 81L, nor in its becoming the permanent responsibility of the Town.

C. May the Board of Selectmen set standards which authorize snow and ice removal on some but not all private roads?

In my opinion, it is the clear intent of the statute to empower the Board of Selectmen, in the exercise of its reasonable discretion, to designate fewer than all the private ways for snow removal by the Town. G. L. c.40, §6D provides that, following the acceptance by the voters of G. L. c.40, §6C, the Town may fund private snow removal "from such private ways within its limits and open to the public use as may be designated

by the...selectmen..." [emphasis added] Clearly then, for the Town to choose to fund snow removal on a private way there are two necessary characteristics of any road in question:

1. The road must be "open to the public use;" and
2. The road must have been "designated" by the Board of Selectmen for snow and ice removal.

These prerequisites indicate that not every private road in any town will qualify for the expenditure of public funds for plowing, sanding and so forth.

As to the first requirement, "open to the public use" has been held by the Supreme Judicial Court of Massachusetts to mean that the way is "actually susceptible of use by the public other than for purposes that are merely incidental to the use of the way by the owner thereof, and also that the way is open to the public at large for purposes of travel, not merely incidental to its use by the owner thereof, in a manner similar to the ordinary use for purposes of travel of a public way of the same general nature." [emphasis added] Opinion of the Justices to the Senate, 313 Mass. 779, 783 (1943).

The two quoted phrases, in my opinion, indicate that, in order for the expenditure of public funds to meet the constitutional test relied upon the Opinion of the Justices, that "money raised by taxation can be used only for public purposes and not for the advantage of private individuals," the road must, at least for the period during which Town plowing occurs, be of such design and location (be "susceptible of use") that the general public is able to use the road, other than as a guest or invitee of an abutters to that road. Under this analysis, neither a dead end street nor a typical subdivision road would ordinarily be "susceptible of use by the public" as required by G. L. c.40, §6C.

To be "open to the public," in my opinion means that the owners of the road, which are ordinarily, but not always, its abutters, allow the general public to travel the road. This might be done by means of a temporary or permanent license or by oral or written permission. Although such permission may be informal or implicit, it would be inconsistent with the intent of the statute that a road be marked as "private" or "residents only" while public funds are expended for plowing or other snow and ice removal activities on such road.

The designation by the Board of Selectmen which G. L. c.40, §6C requires must, therefore, at the least, be based upon the determination that by design and in fact, the road is adequate to, and does, carry general public traffic. In addition, however, because public funds are finite and variable from year to year, a road which qualifies pursuant to Section 6C may nevertheless be excluded from plowing, even if previously plowed. The statute charges the Board of Selectmen with making choices among the total number of roads which qualify for plowing under the Section 6C standard.

D. What criteria may be or have been used to designate which private roads open to public use may be plowed by the Town?

Unlike the statute providing for temporary repair of private ways, G. L. c.40, §6N, which requires an authorizing by-law, Section 6C empowers the Board of Selectmen to choose among the qualifying roads. Standards, which are reasonable and consistent with the statute, are not susceptible to challenge, and may be put into effect by vote of the Board, to adopt a policy or regulations concerning the conditions under which the board will authorize snow plowing of any private way. In addition to the two standards set out in Section 6C, the Board's policy or regulations may consider many factors, relating to the degree to which a public purpose is served by plowing, as well as concern for public safety and efficient use of scarce Town funds. For example, reasonable conditions for a policy on qualification for private road snow plowing might include:

- Road design relative to safe plowing;
- Degree to which road handles public traffic, relative to other roads;
- Timing of request by petitioners, relative to Town funding decisions
- Relative number of residents using the road; and
- Length of road per resident or relative to its importance for maintaining traffic circulation or alternate routing.

Attached is a copy of the standards for snow removal from private ways as set out by the Town of Mashpee in its general by-laws. It is not necessary to employ a by-law, but this by-law sets very basic standards, which may be used in a regulation as well. Design standards, such as the speed bump prohibition or reference to standards set by another Town employee are also reasonable, if not necessary, factors which the Board of Selectmen may consider in its designation of private roads which may be plowed pursuant to G. L. c.40, §6C.

E. Does the Town incur liability for plowing private ways without benefit of proper authorization?

In my opinion, absent acceptance of G.L. c.40, §6C or suitable special legislation, the Town may expose itself to potential liability injuries resulting from any defect in a private way which is attributable to unauthorized snow removal. A plaintiff's attorney might consider naming Town officials as defendants.

As you are aware, the expenditure of funds for an unauthorized purpose may violate G.L. c.44, §53, which forbids the expenditure of funds for purposes for which there is no appropriation. The Inspector General of the Commonwealth has recently informed certain Massachusetts municipalities that they are in violation of that statute, by virtue of having plowed private roads without first complying with the statutory procedures. In addition, General Laws, chapter 44, §62 sets forth enforcement provisions. It provides, in pertinent part, as follows:

Any city, town or district officer who knowingly violates, or authorizes or directs any official or employee to violate, any provision of this chapter, or any other provision of general law relating to the incurring of liability or expenditure of public funds on account of any city, town or district, or any provision of special law relating to the incurring of liability or expenditure of public funds as aforesaid, shall, except as otherwise provided, be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both.

F. Does the Town incur liability for discontinuing snowplowing of private ways?

I know of no authority that would impose liability for discontinuing unauthorized plowing of any private way. You may of course give some form of public notice prior to cessation of any unauthorized snowplowing of private ways, but, since there is no requirement for such notice, any such notice may be minimal and in such form as you deem sufficient under the circumstances. The purpose of any such notification would be only to forestall surprise to any abutter to a private way who may be unaware of the road's status as a private way or unaware that any past plowing has been gratuitous or the result of mistake on the part of the Town.

In my opinion, neither performing temporary repairs to private ways, as permitted by G. L. c.40, §6N (assuming that the Town adopts the necessary bylaw) nor plowing of private ways, as permitted by G. L. c.40, §6C and Bylaw Section 9-64-050, creates a "way . . . maintained and used as a public way," as that phrase is used in G. L. c.41, 81L. General Laws c.40, §6C refers to "removal of snow and ice from such private ways within its limits and open to the public use as may be designated by the . . . selectmen. . . ." [emphasis added]. General Laws c.40, §6N provides that a town may by bylaw "provide for making temporary repairs on private ways." Such bylaw shall determine, among other matters, "if the ways shall have been opened to public use for a terms of years." The term "open to public use," used in these statutes, does not have the same meaning as "used as a public way," in my opinion. Furthermore, each of these statutes refers to "private ways." Plowing and repairing private ways under these statutes actually can serve to show that these ways have been treated by the Town as private ways.

G. May the Board of Selectmen submit the necessary ballot question as provided in G.L. c.40, §6D, without the petition of two hundred voters or 20% of registered voters as provided in G. L. c.40, §6D?

In my opinion, the Board of Selectmen may not cause a ballot question, in the form provided in G. L. c.40, §6D, to be submitted at "an annual town election. This opinion is based on the wording of §6D, which makes no reference to any procedure other than a voters' petition.