

McGREGOR & LEGERE

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April 21, 2020

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Audrey Labrie, Chairwoman
Barbara Anderson, Vice-Chair
Mike Barbaro
Richard Ward
Amy Salter
Board of Selectmen
Town of Winchendon
109 Front Street
Winchendon, MA 01475

Wendy Stevens
Town Clerk
Town of Winchendon
109 Front Street
Winchendon, MA 01475

Keith R. Hickey
Town Manager
Town of Winchendon
109 Front Street
Winchendon, MA 01475

RE: **Mellen Road/ Our File No. 2911**

Dear Chairwoman Labrie and Members of the Board of Selectmen, Ms. Stevens, and Mr. Hickey:

This Firm represents ten families who live on Mellen Road, Winchendon, Massachusetts. We are writing to demand that the Town of Winchendon ("Town") resume repair and maintenance of the entirety of Mellen Road, including the portion where our clients live,¹ which the Town performed continuously for more than twenty years until changing its position in Spring 2018.

¹ This portion of Mellen Road is referred to as "Middle Mellen Road."

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The Town Repaired and Maintained Mellen Road Until Spring 2018

In March 1989, and April 1989, the Town and a developer, Mellen Brook Valley, entered into an agreement in which the developer agreed to upgrade Mellen Road to service new house lots to be developed on Mellen Road. Our clients' properties are among these. The Town agreed to install, design/size, and provide all drainage the Town Department of Public Works ("DPW") determined was appropriate and to cut surface crown and do final grading of the road with the DPW grader and personnel. As part of said agreement, the Town Planning Board agreed to sign Approval Not Required ("ANR") plans for all lots owned by the developer, provided the work required by the agreement was completed and the lots had the required minimum frontage and area.

In April 1989, the agreement was amended to provide that the Town agreed with the developer's proposal to remove designated trees.

Between 1989 and 2005, the developer divided and sold twenty-eight lots abutting Mellen Road. Many of the deeds to these properties stated that Mellen Road is a public way. All were accompanied by survey plans endorsed by the Town Planning Board as "Approval Not Required." Sixteen of those endorsed survey plans, signed by the Town Planning Board, clearly state that Mellen Road is a public way.

Beginning in 1992, new houses were built by our clients and others on ANR lots along the widened and improved Mellen Road on lots purchased from the developer. By way of example, one of our client families, David and Margaret Watkins, of 235 Mellen Road, in November 1998, purchased two adjacent lots on Mellen Road from the developer. At that time the roadway had an asphalt binder coat and recently-installed electric and telephone poles. They received building and driveway-cutting permits from the Town. Those permits made no mention that Mellen Road was not a public way or that the Town was under no obligation to maintain Mellen Road and would not maintain Mellen Road. They also received approval from the Town Conservation Commission to develop their property (because of wetlands in the back of their property). Again, the Conservation Commission, a Town board, made no mention that Mellen Road was not a public way.

The traffic on Middle Mellen Road increased in the 1990's and continues to be heavy to this day. In addition to the residents of Middle Mellen Road, it is used by state vehicles, hunters and hikers going to and from Winchendon State Forest, school buses, Town police vehicles, Town fire vehicles, Postal Service vehicles, and other vehicles. Huge commercial logging trucks with state-issued permits have made heavy and continuous use of Middle Mellen Road and did much damage over a considerable period of time and in three separate areas of Middle Mellen Road. The Town required one Mellen Road property owner to grant the Town two easements to allow Town Fire Department vehicles to turn around.

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The Town maintained Middle Mellen Road, including repair of potholes and snow plowing, from the time our clients purchased their properties until Spring 2018. The Town Manager notified our clients of the change in the Town's position in December 2018. The Town maintained Middle Mellen Road in the same manner and to the same degree that it maintained other public ways in Town. The Town repaved Mellen Road, including Middle Mellen Road, in 1998 and 1999. In 2017, the Town scheduled Mellen Road for repaving again before changing its position. The Town made no claim or communication to our clients that they were responsible for maintenance of the road until December 2018. The Town's reversal of position was a surprise to our clients.

In December 2018, our clients received a letter from Town Manager Keith R. Hickey, dated December 20, 2018, stating that the Town was changing its long-standing practice and would no longer maintain or repair the portion of Mellen Road on which they lived (Middle Mellen Road) because it was (allegedly) "unaccepted." Mr. Hickey said that it was up to the residents to keep the road in a drivable condition.

Middle Mellen Road has potholes that are dangerous to persons and property. In October 2018, a driver was forced off the road and into a tree because of a large pothole (copy of police report attached as Exhibit A). Mr. Hickey's December 20 letter acknowledged that the road was in a deteriorated condition and that repairs were needed.

Unsurprisingly, the Town's reversal of its long-standing practice prompted strong protests to the Town by our clients. They were among thirteen families owning property on Mellen Road who retained Attorney James M. Ermini, who wrote a five-page letter, with attachments, dated February 19, 2019, to the Town, explaining why the Town's reversal of its position was contrary to the reasonable expectations of the residents and inequitable (copy attached as Exhibit B).

The Town did not Comply With Required Procedure to Terminate Maintenance Obligation

Mr. Hickey submitted a Memorandum ("Memorandum") dated April 18, 2019 to the Town Board of Selectmen in which he stated his rationale for the change in the Town position he communicated in his December 2018 letter.

According to the Memorandum, Mr. Hickey's principal basis for his position is that the 1989 Town Meeting removed the obligation to maintain the "unaccepted" portion of Mellen Road (Middle Mellen Road) but retained the right of public access over that portion. He stated:

"One comment I have heard from people interested in Mellen Road is that their deed reflects that Mellen Road is a public way, and it is. The May 1989 Town Meeting confirmed this section of Mellen Road has its public access retained. However, the section of Mellen Road has never received any type of approval to make it a Town road."

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Mr. Hickey thus admitted that Middle Mellen Road is a public way. He admitted that the public has a right of access over it. As a matter of law, the Town is required to repair and maintain it. G. L. c. 84, sec. 1.

The 1989 Town Meeting cited by Mr. Hickey did NOT discontinue Mellen Road or any portion of it. It voted to discontinue a portion of Raymond Road from the house of Stephen Anderson to Old County Road and continuing through to Mellen Road. The discontinuance was “to” Mellen Road; it did not include Mellen Road.

Town Meeting has no authority to discontinue a Town’s maintenance obligation of a road and retain public access over it. Removal of the maintenance obligation must be accomplished by the procedures under G. L. 82, sec. 32A; Nylander v. Potter, 423 Mass. 158, fn. 7 (1996): “A legal discontinuance by town vote, of a road as a public way is to be distinguished from a discontinuance of maintenance under G.L. c. 82, sec. 32A.”

G.L. c. 82, sec. 32A sets forth the procedures that must be followed in order to terminate the Town’s maintenance obligation of a way. It must be accomplished by the Board of Selectmen, after a public hearing, with notice sent by registered mail, return receipt requested, to all property owners abutting the way. It requires a determination by the Board of Selectmen finding that the way has been abandoned and unused for ordinary travel and that common convenience and necessity no longer require the way to be maintained in a condition reasonably suited for public travel. Warning signs that the way is no longer maintained must be posted at both ends of the way.

The Town did not comply with any of the procedures and requirements of c. 82, sec. 32A. Mr. Hickey acknowledged in the Memo that Mellen Road “has its public access retained” and therefore is not abandoned. To the contrary, the Town had contracted with the developer in the weeks preceding the May 1989 Town Meeting to improve and widen Mellen Road for the development of houses along Mellen Road, including an agreement by the Town to approve ANR plans for the house lots. The Town remains obligated to repair and maintain Mellen Road.

Mr. Hickey gave no explanation in the Memorandum as to why the Town maintained and repaired Middle Mellen Road for more than twenty years before December 2018 and then reversed its position. Nor did the Memorandum describe any change in circumstances at that time.

Mellen Road Was Laid Out and Accepted in the 1700’s

Mr. Hickey said in the Memorandum: “The section of Mellen Road in question has never received any type of approval to make it a town road.” This is incorrect. According to a letter dated September 12, 2008 from Town Clerk Lois A. Abare to Mary J. Galat, of 54 Mellen Road (copy attached as Exhibit C), Mellen Road was laid out by the Selectmen between 1735 and

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1768 and “It is certain that Mellen Road has always been considered a Town way.” The Town Clerk is the Town official who holds the official records of public ways in the Town.

Mary Galat owns property near the northern end of Mellen Road, just south of the former residence of J.Q. Mellen and north of Middle Mellen Road. This letter from the Town Clerk to Mary Galat informed her that her property is served by a Town way as of 2008 and that said Town way has been in continuous use since the 1700’s.

The Winchendon State Forest is across the street from Middle Mellen Road. Middle Mellen Road has been in continuous use for considerably longer than twenty years and continuing to the present by the public, including state employees, hunters and hikers and others, for access to and from Winchendon State Forest. The University of Massachusetts at Amherst uses the State Forest as an active biological study site for survey of black bears.

The September 2008 letter (Exhibit C) from the Town Clerk shows that Mellen Road was laid out by the Selectmen in the 1700’s and that it was dedicated to public use and accepted and used by the public since the 1700’s.

A Public Way by Prescription Has Been Established on Middle Mellen Road

Attorney Ermini’s letter (Exhibit B) described the three ways in which a way can become a public way in Massachusetts: 1) laying out by public authority in the manner described by statute, G.L. c. 82, sec. 1-32; 2) by prescription, and 3) prior to 1846, by dedication by the owner by public use, permanent and unequivocal, coupled with an express or implied acceptance by the public.

The opinion from Town Counsel referred to in the Hickey Memorandum (copy attached as Exhibit D) is an email that described the same three ways in which a way can become a public way that Attorney Ermini described. He also stated that “municipal treatment of a way as public may be evidence that it has become public by prescription” and “it is possible that Mellen Road was laid out as a county way or town way.” He said it is possible that there has been adverse public use sufficient to establish Mellen Road as public by prescription, but he had not seen enough evidence to form an opinion on that question. He specifically declined to reach a conclusion, one way or the other, as to whether there was sufficient proof to determine whether Mellen Road had become a public way by prescription or otherwise.

The Hickey Memorandum says that the 1914 Town Meeting discontinued Mellen Road from the residence of J.Q. Mellen to that of J. Shaw. This is Middle Mellen Road. This did not prevent Middle Mellen Road from becoming a public way by prescription thereafter, which it did. It continued to be used by the public, including for access to and from Winchendon State Forest, for access to and from the land of Mary Galat, and for other purposes.

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In addition, the Town entered into a written agreement in 1989 and used its funds, equipment, and personnel for the widening and improvement of Mellen Road. It also used its funds, equipment, and personnel for the continuous and systematic maintenance (e.g., snow plowing) for 29 years until Mr. Hickey's December 2018 letter, which establishes the Town's corporate action with respect to Middle Mellen Road.

The Town's corporate action with respect to Middle Mellen Road and the public's open, notorious, and continuous use of Middle Mellen Road for far more than twenty years establishes a public way by prescription over Middle Mellen Road.

As noted above, Mr. Hickey admitted in the Memorandum that Middle Mellen Road is a public way and that the public has a right of access over it. It follows as a matter of law that the Town is responsible for the repair and maintenance of it. G. L. c. 84, sec. 1

The Town is Liable for Damages Caused by its Failure to Repair and Maintain All of Mellen Road

The Town is required to keep Middle Mellen Road in repair at its expense so that it may be reasonably safe and convenient for travel. G.L. c. 84, sec. 1. Its failure to do so exposes it to liability.

The Town is liable for personal injuries and property damage caused by defects in a way caused by the Town's failure to repair it. G.L. c. 84, sec. 15, 24.

The Town may be fined if it neglects to repair any way it is obligated to repair. G.L. c. 84, sec. 22.

The Town's failure to repair and maintain Middle Mellen Road renders it liable for personal injuries and property damage, such as damage to motor vehicles, caused by its failure to repair and maintain it. It is liable for any personal injuries or property damage caused by accidents caused by the potholes on Middle Mellen Road.

The Town's abrupt cessation of repair and maintenance may also give rise to applications for abatement of real estate taxes.

The Town Has Arbitrarily Treated Similarly Situated Property Differently

The Commonwealth of Massachusetts, Department of Conservation and Recreation ("DCR"), owns the Winchendon State Forest, across Middle Mellen Road from our clients' properties. Mr. Hickey's December 20 letter requesting the abutters to assume the responsibility for maintenance and repair of Middle Mellen Road stated that it was being sent to "all the property owners" along Middle Mellen Road.

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However, our clients have learned that the Town did not send the December 20 letter to DCR, or at least did not do so initially. On June 17, 2019, only after our clients asked the Town to send a copy of the December 2008 letter to DCR, the Town finally did so. When our clients followed up with DCR, DCR told them that DCR had nothing to do with the matter and that it was a matter between the resident abutters and the Town.

It appears that the Town is making no actual effort to require DCR to assume responsibility with the other abutters for maintaining Middle Mellen Road in a drivable condition and is treating the resident abutters neighbors differently than DCR. There is no rational basis for the Town's unequal treatment of our clients, compared with its treatment of DCR.

This is unequal, arbitrary treatment of similarly situated parties for no rational reason. This is further evidence of the Town's arbitrary actions in disregard of our clients' rights.

In my opinion, the Town's actions in this entire matter have been illegal, inequitable, arbitrary, and capricious.

Conclusion

Middle Mellen Road is in urgent need of repair, immediately. We hereby respectfully request and demand that the Town respond in writing within ten (10) days: 1) confirming that the Town will repair, maintain, and plow Middle Mellen Road; and 2) providing the schedule for the repair of the potholes and other repairs on Middle Mellen Road.

Thank you.

Sincerely,

A handwritten signature in black ink that reads "Michael J. O'Neill". The signature is written in a cursive style with a large, stylized initial "M".

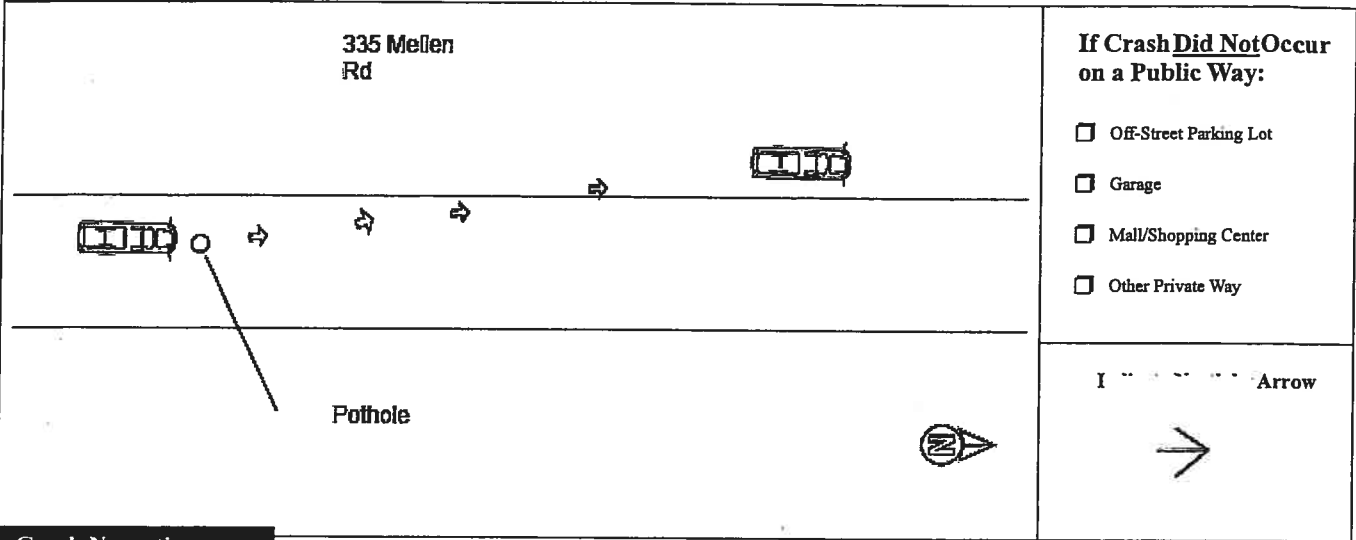
Michael J. O'Neill

A.

Police Use Only			Commonwealth of Massachusetts				RMV Document Number								
Date of Crash 10/14/2018	Time of Crash 1149 24HR	City/Town WINCHENDON	Motor Vehicle Crash Police Report				Number Vehicles 1	Number Injured 1	Speed Limit <u>40</u>	Latitude _____	Longitude _____	State Police <input type="checkbox"/>	Local Police <input checked="" type="checkbox"/>	MBTA Police <input type="checkbox"/>	Other: <input type="checkbox"/>
AT INTERSECTION:			< LOCATION >				NOT AT INTERSECTION:								
1 Route# _____ Direction _____ Name of Roadway/Street _____ At _____			Route# _____ Direction _____ Address # <u>335</u> <u>MELLEN RD</u> Name of Roadway/Street _____				2 Feet <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> of _____ or _____ Mile Marker _____ Exit Number _____								
2 Route# _____ Direction _____ Name of Intersecting Roadway/Street _____ Also at Intersection with _____			Route# _____ Direction _____ Name of Intersecting Roadway/Street _____				1 Feet <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> of _____ Route# _____ Intersecting Roadway/Street _____								
3 Route# _____ Direction _____ Name of Intersecting Roadway/Street _____			Route# _____ Direction _____ Name of Intersecting Roadway/Street _____				Landmark _____								
Please Select One of the Following: <input checked="" type="checkbox"/> Vehicle <u>1</u> #Occupants _____			<input type="checkbox"/> Hit/Run <input type="checkbox"/> Moped				Crash Report ID# 18-205-AC								
License # <u>S25025788</u> St <u>MA</u> DOB/Age <u>12/17/1968</u>			Reg # <u>6512AY</u> Reg Type <u>PC</u> Reg State <u>MA</u>				Sex <u>F</u> Lic. Class <u>D</u> <u>19</u> <u>19</u> Lic. Restrictions <u>1</u> <u>20</u> CDL _____ Endorsement _____								
Operator <u>ALMQUIST, TERI E</u> Last First Middle			Owner <u>GALLANT, STEVEN J</u> Last First Middle				Veh Year <u>1999</u> Veh Make <u>FORD</u> Veh Config. <u>2</u> <u>21</u>								
Address <u>265 MELLEN RD</u>			Address <u>265 MELLEN RD</u>				City <u>WINCHENDON</u> State <u>MA</u> Zip <u>01475-0000</u>								
City <u>WINCHENDON</u> State <u>MA</u> Zip <u>01475-2026</u>			City <u>WINCHENDON</u> State <u>MA</u> Zip <u>01475-0000</u>				Insurance Company <u>COMMERCE INSURANCE</u>								
Vehicle Travel Direction: <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> Responding to Emergency? <u>2</u>			Event Sequence <u>23</u> <u>23</u> <u>23</u> <u>23</u> <u>41</u> <u>27</u> <u>21</u> <u>23</u>				Vehicle Action Prior to Crash <u>1</u> <u>22</u> Damaged Area Code: <u>7</u> <u>27</u> <u>27</u> <u>27</u>								
Citation # (If Issued) _____			Most Harmful Event <u>27</u> <u>24</u>				Test Status: <u>28</u>								
Viol. 1: Ch/Sec/Sub _____ Viol. 2: Ch/Sec/Sub _____			Driver Contributing Code <u>97</u> <u>25</u> <u>25</u>				Type of Test: <u>29</u>								
Viol. 3: Ch/Sec/Sub _____ Viol. 4: Ch/Sec/Sub _____			Driver Distracted by <u>99</u> <u>26</u>				BAC Test Result: <u>30</u>								
							Susp. Alcohol: <u>31</u> Susp. Drug: <u>32</u>								
							Towed from scene? <u>2</u> <u>33</u>								
Please fill out for operator and all occupants involved															
Name (Last First Middle)		Address		DOB/Age	Sex	34 Seat Pos.	35 Safety System	36 Airbag Status	37 Eject Code	38 Trap Code	39 Injury Status	40 Transp. Code	Medical Facility		
<u>Operator</u>		<u>See Above</u>		<u>1</u>	<u>99</u>	<u>4</u>	<u>0</u>	<u>0</u>	<u>3</u>	<u>1</u>					
Please Select One of the Following: <input type="checkbox"/> Vehicle <u>2</u> #Occupants _____															
<input type="checkbox"/> Non-Motorist A			Type <u>15</u> Action <u>16</u> Location <u>17</u> Condition <u>18</u>				<input type="checkbox"/> Hit/Run <input type="checkbox"/> Moped								
License # _____ St _____ DOB/Age _____			Reg # _____ Reg Type _____ Reg State _____				Sex _____ Lic. Class <u>19</u> <u>19</u> Lic. Restrictions <u>20</u> CDL _____ Endorsement _____								
Operator _____ Last First Middle			Owner _____ Last First Middle				Veh Year _____ Veh Make _____ Veh Config. <u>21</u>								
Address _____			Address _____				City _____ State _____ Zip _____								
City _____ State _____ Zip _____			City _____ State _____ Zip _____				Insurance Company _____								
Vehicle Travel Direction: <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> Responding to Emergency? _____			Event Sequence <u>23</u> <u>23</u> <u>23</u> <u>23</u> <u>24</u>				Vehicle Action Prior to Crash <u>22</u> Damaged Area Code: <u>27</u> <u>27</u> <u>27</u>								
Citation # (If Issued) _____			Most Harmful Event <u>24</u>				Test Status: <u>28</u>								
Viol. 1: Ch/Sec/Sub _____ Viol. 2: Ch/Sec/Sub _____			Driver Contributing Code <u>25</u> <u>25</u>				Type of Test: <u>29</u>								
Viol. 3: Ch/Sec/Sub _____ Viol. 4: Ch/Sec/Sub _____			Driver Distracted by <u>26</u>				BAC Test Result: <u>30</u>								
							Susp. Alcohol: <u>31</u> Susp. Drug: <u>32</u>								
							Towed from scene? <u>33</u>								
Please fill out for operator/non-motorist and all occupants involved															
Name (Last First Middle)		Address		DOB/Age	Sex	34 Seat Pos.	35 Safety System	36 Airbag Status	37 Eject Code	38 Trap Code	39 Injury Status	40 Transp. Code	Medical Facility		
<u>Operator/Non-Motorist</u>		<u>See Above</u>		<u>1</u>	<u>1</u>										

→ = Direction 1 = Vehicle 1 2 = Vehicle 2 ○ = Pedestrian ☹️ = Bicycle

Crash Diagram:



Crash Narrative:

Op of Veh1 stated she struck a pothole and it caused her to drive off the left side of the road and crash into the trees and embankment. There was a deep pothole approximately 50 yards before where Veh1 ended up off the side of the road. Op had a minor cut on her calf and refused medical treatment or transport. Owner of the veh made arrangements to get the vehicle removed.

Witnesses:

Name (Last,First,Middle)	Address	Phone #	Statement

Property Damage:

Owner (Last,First,Middle)	Address	Phone #	41-Type	Description of Damaged Property

Truck and Bus Information:

Registration # _____ (From Vehicle Section)

Carrier Name _____ Bus Use 42

Address _____ City _____ St _____ Zip _____

US DOT # _____ State Number _____ Issuing State _____ MC/MX/ICC # _____

Interstate 43 Cargo Body Type Code 44 GVWR/GCWR 45

Trailer Reg # _____ Reg Type _____ Reg State _____ Reg Year _____ Trailer Length 46

Hazmat Information:

Placard 47 Material 1 digit # 48 Material Name _____ Material 4 digit # _____ Release code 49

Patrolman **DEREK J BLAIR** Signature **DJB** ID/Badge # Winchendon Police Department Department 10/14/2018 Precinct/Barracks Date

B.

JAMES M. ERMINI
ATTORNEY AT LAW

VIA CERTIFIED MAIL:

February 19, 2019

Town of Winchendon
Office of the Town Manager
109 Front Street, Dept. 1
Winchendon, MA 01475-1758

RE: Mellen Road

Dear Mr. Hickey,

This office represents 13 families abutting Mellen Road in Winchendon. I am in receipt of your December 20, 2018 letter indicating that Mellen Road has not been accepted by the Town. I also reviewed the January 30th article in the Gardner News where you indicate that "the people living on the road expressed that they never knew it was incumbent on them to do repairs and maintain the road." There is obviously a great deal of confusion regarding the present status of matters and this letter should provide some clarification.

An existing way in a city or town in the Commonwealth is not a "public way" (i.e., one which a city or town has the duty to maintain free from defects) unless it has become public in character by one of three ways:

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

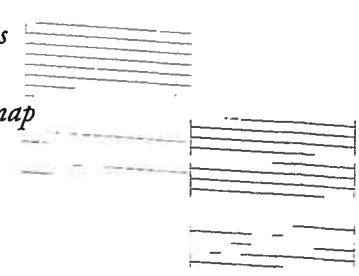
In this regard I call your attention to the Town Clerk's letter dated September 12, 2008 (Exhibit A) in which she addresses the history and status of Mellen Road in response to an inquiry of the same:

"Whether or not we can identify the actual layout of Mellen Road, it is certain that it has always been considered a town way. It is referred to in deeds dating back to the 1700's, although of course was not called Mellen Road at the time. It is also clearly shown on a map which was included in Marvin's History of Winchendon, which was published in 1868. Although the book was published in 1868, it was Marvin's intent to show the town as it

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PETERSHAM, MA 01366
978/724-3500 TEL
941/799-1717 CELL

146 NORTH MAIN STREET
LEOMINSTER, MA 01453
978/724-3500 TEL
941/799-1717 CELL

ERMINI@VERIZON.NET



existed in its earliest days. This is evidenced in his references to old cellars, old mill sites, and discontinued reads. The numbers on the map correspond to a list of the earliest settlers, showing where they lived."

This letter is indicative of Mellen Road's continuous, public character and use. No one individual has the power to close, alter, widen or control it, or has a right in it, except in common with all others who have occasion to pass over it.

It is also my understanding that the citizens of Winchendon voted to discontinue a portion of this public road at the 1914 annual town meeting. I have attached a 1993 survey map prepared by Szoc Engineering (Exhibit B) bearing the notation "*Mellen Road was discontinued from the Lane to J. Shaw's northerly to the Mellen House according to 1914 Annual Town Meeting (Article 25).*" The survey map depicts the location of J. Shaw's lane.

The above referenced Gardner News article also indicates that: "A portion of Mellen Road was discontinued in 1989 and was reflected in a town meeting vote" which is most concerning. As I am sure you realize, on March 23, 1989 (1.5 month's prior to the aforesaid vote) the Town, through its Department of Public Works and Planning Board entered into an agreement (Exhibit C) with the developer (David M. Richards of the Mellen Brook Valley Company) for the alteration, expansion, improvement, and revised layout of Mellen Road. The developer agreed to mark all trees to be retained, remove all trees not so marked, and to purchase, deliver, and spread gravel for the improvement of the road. The Town agreed to cut the crown surface, grade the expanded layout (with the DPW grader and personnel), size, design, and install the appropriate drainage. Additionally, the Addendum of even date states that purpose of the tree removal is to facilitate the DPW's future efforts to upgrade the road.

This Agreement touches and concerns the southerly and northerly portions of Mellen Road, and as far we know, was performed by the developer and the DPW. No mention was made as to why the developer and this public authority jointly expanded the layout, whether the Town undertook this improvement in express recognition (or ratification) of Mellen Road's public character. But there is obviously "corporate action" of a municipality here with the expenditure of public funds for improvement. This can also be said of the Town's continuous and systematic maintenance (e.g., snow plowing) of Mellen Road over the past 29 years. It is only upon the present state of disrepair that the public status of Mellen Road has come into question and thus your letter.

Perhaps the most troubling aspect of the above Agreement is the Planning Board's carte blanche covenant to "*sign ANR plans for all lots owned by Mellen Brook Valley Co. with frontage on Mellen Road, provided road upgrading agreed herein is completed by Mellen Brook Valley Co. and provided each such lot satisfies at least the minimum frontage and area requirements in the R-1 zone*", (emphasis added).

As a general rule, the Massachusetts courts impose three standards on a planning board's endorsement of ANR status:

- The lots *shown on such plan* must front on one of the three types of ways specified in Chapter 41, §81L (i.e., public way, subdivision, way in existence at the time of acceptance of the subdivision control law) -- emphasis added;
- The lots *shown on such plan* must meet the minimum frontage requirements as specified in Chapter 41, §81L -- emphasis added; and,
- A Planning Board's determination that the vital access to such lots as contemplated by M.G.L.c. 41, §81M, otherwise exists. To this end there must be adequacy of the: (i) way on which the proposed lots front; and (ii) access from the way to the buildable portion of the lot.

All three standards presuppose an objective, unbiased planning board actually making this determination for each proposal submitted. "The adequacy of the way is determined *at the time* each ANR plan is submitted to the Planning." Centore v. Town of Georgetown, 11 LCR 1 (2003) (Misc. Case No. 245882, emphasis added). An agreement binding the Planning Board to do otherwise (i.e., a carte blanche ANR endorsement for all future plans abutting Mellen Road) violates M.G.L.c 41, §81M.

Winchendon's Planning Board is charged with implementing the subdivision control law,

"enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants . . . by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein . . .". M.G.L.c 41, §81M.

This carte blanche negation of the Planning Board's statutory duty leaves many questions unanswered. Did the Planning Board determine that, on March 23, 1989 (date of the Agreement), Mellen Road was not subject to subdivision? That was Mellen Road a public way or a way in existence at the time the subdivision control law's adoption? And what of vital access? Was a determination made as to the adequacy of Mellen Road and whether the buildable portion of the lot had access to it – despite that fact that no plans were submitted to rule on?

What is certain is that after this Agreement was executed, the developer divided and sold twenty-eight lots abutting Mellen Road (from 1989 through 2005). All of them were accompanied by survey plans endorsed by the Planning Board as "ANR" as per the Agreement. **More importantly sixteen of those endorsed survey plans clearly state that Mellen Road is a public way, with nine of them situated after J. Shaw's lane (see attached survey plans – Exhibit D).**

Do you now understand why the abutting residents never knew it was incumbent upon them to repair and maintain the road? Their survey plans indicate that Mellen Road is a public way, endorsed by the Planning Board. All 16 families, their banks, and title insurers relied on this "public" representation in purchasing their realty. We believe if the notations and endorsements are false then joint and several liability arises, inter alia, under the Massachusetts Consumer Protection Act. M.G.L.c 93A as unfair and deceptive practices on the part of the developer and the Town, if not outright fraud.

You may want to contact town counsel to discuss the implications of:

- Whether the Agreement between the Town and developer constitutes a joint enterprise with joint and several, if not vicarious liability?
- The legality of the Planning Board's covenant (to certify ANR status for all future lots) and whether this voids each subsequent lot and ultimate conveyance?
- The Planning Board's failure disclose the "unaccepted" road status constitutes an encumbrance which violates the disclosure requirements of M.G.L.c. 184, § 21? Note M.G.L.c. 266, § 80:

Whoever conveys land, knowing that an encumbrance exists thereon, without informing the grantee, before the consideration is paid, of the existence and nature of such encumbrance, so far as he has knowledge thereof, shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars.

- Whether this negation of maintenance and repair devalues the properties and an appraisal is required? Note, where an encumbrance is a permanent encumbrance that cannot be removed by the grantee (such as a private way) the measure of damages is "just compensation to the [grantee] for the real injury resulting from the encumbrance." Richmond v. Ames, 164 Mass. 467, 476-77 (1895); Batchelder v. Sturgis, 57 Mass. (3 Cush.) 201, 206 (1849); Harlow v. Thomas, 32 Mass. (15 Pick.) 66, 69 (1833).
- Whether the town can be estopped from withholding maintenance and repair due to the Agreement, ANR endorsement, and subsequent reliance by the residents abutting Mellen Road, their respective mortgagees and utility providers?
- Whether the Planning Board can waive strict compliance with the Massachusetts subdivision control laws under M.G.L.. C. 41, § 81R, its subsequent judicial construction, and not merely its own internal rules and regulations?
- The implications of M.G.L.c. 84, § 24's imposition of liability for failure to maintain . . . barriers between a public way and an unsafe dedicated way. Note, M.G.L.c. 84, § 25 imposes liability if it can be proven that the town maintained the dedicated way at any time within six years prior to an accident.
- Whether the Agreement between the developer, the DPW, and the Planning Board setting forth the obligations of each in order to build upon or subdivide lots should have been recorded so as to provide public notice?

In our view, all of the above issues are easily resolved by accepting Mellen Road as per M.G.L.c. 82, §§ 21-23. Here, the selectmen would formally lay out Mellen Road, with acceptance of the same made by vote at the next annual or a special town meeting. This can be done without disruption of the road's maintenance during the interim. And note, most of the survey work has already been completed.

The abutting residents appreciate your reference (in the Gardner News article) to M.G.L.c. 40, §§ 6C and 6D, where public monies can be expended on private ways for the removal of snow and ice and that temporary repairs of private ways may be authorized in municipalities adopting a bylaw pursuant to M.G.L.c. 40, § 6N. However, we believe this will only prolong the problem and that an immediate, permanent solution is required.

It is our sincere hope that this matter can be resolved without resort to litigation as the status quo is untenable for all parties involved.

Very truly yours,

A handwritten signature in cursive script that reads "James Ermini".

James M. Ermini, Esq.
cc: David Watkins
enc(as stated)

C.

TOWN OF WINCHENDON



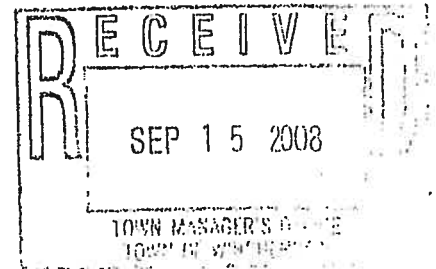
Town Clerk

109 Front Street
Winchendon, Massachusetts 01475-1758

Telephone (978) 297-2766
Facsimile (978) 297-1616
clerk@town.winchendon.ma.us

September 12, 2008

FILE



Mary J. Galat
54 Mellen Road
Winchendon, MA 01475

Dear Mrs. Galat:

In reply to your letter of August 25, I will attempt to provide answers to your three questions:

1. Under what circumstances did Mellen Road become a town road?
2. When did the town accept Mellen road as a public way?
3. How did the town accept Mellen Road as a public way?

As we discussed in your visit to my office, Mellen Road is one of the earliest roads in the town which is still in existence. In the town's earliest days, roads usually were little more than paths leading from one farm to another. A bit later, the Selectmen undertook to lay out roads for the convenience of several farms, which would give them the ability to connect to county roads (of which there were several) and also allow them easier access to the center of town. Once this was done, those earlier pathways were abandoned.

These roads were not given names at the time they were laid out and accepted. Many of them later took on the names of the families who lived in that area. I have in my office layouts of fifteen roads which were laid out in the years between 1735 and 1768. I believe that Mellen Road is one of these.

Although I have studied these layouts, I cannot definitely identify Mellen Road. The main problem being the way in which the beginning and ending points were identified. As an example, the following town way was accepted on March 2, 1767 :

"A road laid out from Daniel Goodridge's house to the town way in Amos Merriam's land, to a hemlock mark X".

The Proprietors records show that the town was divided into lots. There were two divisions of lots which occurred several years apart. Some of the earliest settlers acquired lots in the first division, and later, for whatever reason, also acquired lots in the second division. Therefore, for example, Amos Merriam might have lived on the first lot he acquired, but later bought, or traded for, a lot in a different area which he might have needed for a woodlot, or pasture. It is, therefore, nearly impossible to determine what piece of Amos Merriam's land is being referred to in the layout.

Whether or not we can identify the actual layout of Mellen Road, it is certain that it has always been considered a town way. It is referred to in deeds dating back to the 1700's, although of course was not called Mellen Road at the time. It is also clearly shown on a map which was included in Marvin's History of Winchendon, which was published in 1868. Although the book was published in 1868, it was Marvin's intent to show the town as it existed in its earliest days. This is evidenced in his references to old cellars, old mill sites, and discontinued roads. The numbers on the map correspond to a list of the earliest settlers, showing where they lived.

1

I have included a copy of this map, including a list of the names which correspond to the numbers on the map. I have also included a partial copy of a deed from 1785, which references a road which later became known as Mellen Road.

I hope this information is helpful to you. If I can be of any further assistance, please let me know.

Sincerely,



Lois A. Abare
Town Clerk

(3) enclosures

Cc: James M. Kreidler Jr.
Keith Barrows

2

D.

Keith Hickey

From: Jonathan D. Eichman <JEichman@k-plaw.com>
Sent: Saturday, March 16, 2019 5:15 PM
To: Keith Hickey
Cc: Brian Riley
Subject: RE: Mellen Road
Attachments: KP-#660719-v1-WINC_Mellen_Road_-_Letter_to_homeowners_re_maintenance_DOCX

Keith:

As you requested, attached is a draft letter for your use in replying to the letter of Attorney Ermini on behalf of certain residents of Mellen Road. I'm not sure if the attorney represents all the residents of Mellen Road, but it is probably easiest to address the letter to all.

You also asked me to summarize the issues and options for the Board of Selectmen in this matter. As we discussed, the Board of Selectmen may, but may not be compelled to, lay out any private way in the Town for the purpose of submitting it to Town Meeting for acceptance as a public way. A layout is simply a plan or description of the boundaries of a way. Town Meeting may not vote to accept a layout of a way as public until the Selectmen decide, in their sole discretion, what the layout will be and place it before Town Meeting. There is no legal standard governing what the Selectmen may take into account in deciding whether to lay out a way, and they may refuse to lay out a way for any or no reason. Typically, however, the chief considerations for selectmen in determining whether to act on a layout request are the condition of the way and the Town's financial capacity to assume responsibility for the way.

By law there are only three ways in which a way can become public:

- 1) Layout and acceptance by a town, county, or state pursuant to G.L. c.82, s.1-17 (county); G.L. c.82, s.21-24 (town/city), and G.L. c.81 (State);
- 2) Prescription (continuous use of a way by the public as a matter of right for at least 20 years and adverse to the owner(s) of the land on which the way is located); or
- 3) Dedication (prior to 1846).

Option #1 can be shown by reference to town, county or state records showing layout and acceptance. For towns, Town Meeting records are generally the best source of this information. Option #2 generally requires a through way used by the public for purposes other than accessing the properties abutting the way. The status of a way made public by prescription must be proven in court by factual evidence if challenged. Option #3 is very rarely seen. The legal burden of proof with respect to the status of a way is on the person or entity asserting it is public.

In my opinion, actions and agreements by the Planning Board or the Department of Public Works cannot, in and of themselves, make a way public or obligate the Town to treat a way as public. Municipal treatment of a way as public may be evidence that it has become public by prescription, or that it has been laid out and accepted as public, but without adverse use of the public or layout and acceptance such evidence is not enough, in and of itself, in my opinion, to make a private way public.

Here, it is possible that Mellen Road was laid out as a county way or town way, although I understand that direct evidence of that has yet to be found. It is also possible that there has been adverse public use sufficient to establish Mellen Road as public by prescription, although I have not seen enough evidence to form an opinion on that question. There is no evidence of dedication to this point. Where the Town cannot find evidence of layout and acceptance by an appropriate authority, in my opinion it may treat the way as private. It may also, however, where there is good evidence of prescription or dedication, treat a way a public notwithstanding that a layout and acceptance

cannot be located. Ultimately, the question of how to treat ways for which a definitive record of layout and acceptance cannot be found is a question of policy for the Town, and it may be necessary to evaluate each such way separately.

I'm happy to advise further on the issues raised by this matter, which I understand can be complex. Please contact me if you have any questions concerning the above.

Jonathan D. Eichman, Esq.
KP | LAW
101 Arch Street, 12th Floor
Boston, MA 02110
O: (617) 654 1727
F: (617) 654 1735
jeichman@k-plaw.com
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From: Keith Hickey [<mailto:KHickey@townofwinchendon.com>]
Sent: Thursday, March 07, 2019 10:33 AM
To: Jonathan D. Eichman <JEichman@k-plaw.com>
Subject: RE: Mellen Road

Attorney Eichman,

Attached is the letter you requested yesterday.

Thanks for your help.

Keith

Keith R. Hickey, Town Manager
Town of Winchendon, Massachusetts
109 Front Street, Winchendon, MA 01475
khickey@townofwinchendon.com
(978) 297-0085

From: Jonathan D. Eichman [<mailto:JEichman@k-plaw.com>]
Sent: Wednesday, March 6, 2019 9:55 AM
To: Keith Hickey <KHickey@townofwinchendon.com>
Subject: Mellen Road

Keith:

Sorry I missed your call yesterday. I had a lot of overflowing municipal toilets on my plate. I'm in today and can talk when you have a minute. If you call and don't get me let me know a good time to reach you. Please call the number below as opposed to the cell number I gave you earlier. Thanks,

Jonathan D. Eichman, Esq.
KP | LAW
101 Arch Street, 12th Floor
Boston, MA 02110