SJC-13721

TOWN OF CONCORD vs. NEIL E. RASMUSSEN & others.[1]

Suffolk. May 7, 2025. – August 15, 2025.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Dewar, & Wolohojian, JJ.

Way, Public: what constitutes, establishment, access, discontinuance; Private. Statute, Construction. County, Commissioners.

Civil action commenced in the Land Court Department on October 24, 2017.

The case was heard by Howard P. Speicher, J.

After review by the Appeals Court, 104 Mass. App. Ct. 831 (2024), the Supreme Judicial Court granted leave to obtain further appellate review.

Gwen Nolan King (Lisa C. Goodheart & Dylan S. O'Sullivan also present) for the defendants.

Austin P. Anderson (Melissa C. Allison also present) for the plaintiff.

The following submitted briefs for amici curiae:

[1] Anna Rasmussen; Brooks S. Read; Susannah Kay; Russell Robb, III, Leslee Robb, and Thomas Wray Falwell, trustees of the Pippin Tree Land Trust; and President and Fellows of Harvard College.

Adam B. Ames, pro se.
Peter F. Durning & Peter M. Vetere for Trust for Public Land.
Christopher J. Donnelly & Robert A. DiSorbo for Holly M. Salemy & others.
Christine P. O'Connor, Town Counsel, for town of North Andover & others.
Nicholas P. Shapiro, Joseph F. Konopka, & Miranda P. Cecil for Real Estate Bar Association for Massachusetts, Inc., & another.
Heather M. Gamache for Massachusetts Association of Land Surveyors and Civil Engineers.

KAFKER, J. We proceed here in the footsteps of the naturalist and philosopher, Henry David Thoreau, along a road and route he described as follows:

> "What shall this great wild tract over which we strolled be called? Many farmers have pastures there, and wood-lots, and orchards. . . . The old Carlisle road, which runs through the middle of it, is bordered on each side with wild apple pastures, where the trees stand without order . . . . It is a paradise for walkers in the fall. . . . Shall we call it the Easterbrooks Country?"

H.D. Thoreau, The Journal of Henry D. Thoreau 238 (B. Torrey & F.H. Allen eds., 1962).

Public access to a disputed portion of the "old Carlisle road," now known as Estabrook Road (road), is at the center of the case before us.[2] We consider the road in three contiguous parts: (1) the northern disputed section, which the parties

[2] The Land Court judge found that "Thoreau's description of a walk on the 'old Carlisle road' . . . describes a walk on Estabrook Road . . . with many of the same landmarks still evident today, including the lime kiln, the limestone quarry, the Kibby (or Kibbe) place, and Oak Meadow, which is now Mink Pond."

agree was the subject of county layout proceedings in 1763; (2) the southern disputed section, for which no formal layout documents have been discovered; and (3) an undisputed section that continues south towards Concord Center.

Landowners whose property abuts the road (abutters) sought to bar the public from entering the disputed sections of the road, to which they contend the public has no right of access or travel. The abutters argue, first, that there is insufficient evidence to conclude that the southern disputed section of the road was ever made a public way. Second, the abutters contend that when the road was discontinued by the Middlesex county commissioners (county commissioners) in 1932 pursuant to G. L. c. 82, § 32A (§ 32A), the public lost any right to enter the resulting "private way." In response, the town of Concord (town) argues that the disputed sections of the road constituted a public way, and that when the road was discontinued in 1932, the adjudication as a "private way" served only to terminate the town's obligation to maintain the road and did not extinguish the right of the public to use the road. A Land Court judge ruled in favor of the town, as did the Appeals Court, and we allowed the abutters' application for further appellate review.

We hold that the Land Court judge did not abuse his discretion in finding that the disputed portion of the road was made a public way by 1763 and hold that the discontinuance under

§ 32A terminated the town's maintenance obligation but left the public's rights undisturbed.[3]

1. Factual background. We briefly summarize the facts as found by the Land Court judge, reserving certain facts for later discussion.

The portion of Estabrook Road in dispute is an unpaved, thirty-foot wide road running for approximately 1.8 miles north-south in Concord. Bounded by centuries-old stone walls, the road passes by the remnants of colonial-era homesteads (including the Kibbe or Kibby place and the Estabrook place), pastures, and a limestone kiln and quarry. Proceeding south towards Concord Center it passes wetlands and Mink Pond (formerly Oak Meadow), before connecting to the paved portion of Estabrook Road not in dispute. Title to the lands along the disputed stretch of the road is held by individual landowners, land trusts, and Harvard College.

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[3] We acknowledge the amicus briefs submitted by Adam B. Ames; Trust for Public Land; Holly M. Salemy, Musketaquid Sportsman's Club, Inc., Florence Aldrich-Bennett, H. Larue Renfroe, Rashmi Vasudeva, 235 Hanover Street LLC, 247 Hanover Street LLC, William T. Stinson, Susan L. Stinson, Allen-Chase Foundation, doing business as Eaglebrook School, Dennis C. Roof, and Congregation Beth Elohim; town of North Andover, Franklin Regional Council of Governments, Barnstable County, Plymouth County, Berkshire Regional Planning Commission, and Central Massachusetts Regional Planning Commission; Real Estate Bar Association for Massachusetts, Inc., and the Abstract Club; and Massachusetts Association of Land Surveyors and Civil Engineers.

The disputed portion of Estabrook Road was laid out in two parts. The northern disputed section, from the town border with Carlisle to the southern end of Mink Pond, was laid out by the county authority in 1763 in response to a petition by abutting residents who sought a more direct route south to the center of Concord. The layout of the northern disputed section accomplished this goal, because at its southern end it connected to an already-existing "Town Way" -- the southern disputed section of Estabrook Road. The southern disputed section, which runs from Mink Pond south to the undisputed portion of Estabrook Road, had been laid out at some point prior to the northern disputed section, although the exact date is unknown, as actual records of the layout are lost.

From the late Eighteenth Century to the early Twentieth Century, the road was used by the public to travel between what is now Carlisle and Concord Center. At times the road saw commercial use, including for hauling limestone and timber. The public also used it for recreation. Thoreau's commendation of the road as a "paradise for walkers" was echoed by Ellen Tucker Emerson, daughter of Ralph Waldo Emerson, who wrote in 1886 that she found picnicking along the road to be "the greatest pleasure imaginable," 2 E.T. Emerson, The Letters of Ellen Tucker Emerson 572-573 (E.E.W. Gregg ed., 1982), and by an 1897 travel guide, which described Estabrook Road as "one of the favorite summer

drives." The founder of the Massachusetts Audubon Society, William Brewster, also recorded two trips on Estabrook Road in 1892, one a wintertime sled ride to the lime kiln and the other a spring visit to collect plants. There was evidence that the town maintained the road during this period, albeit intermittently, and even improved it, voting to install signage in 1888 and telephone poles in 1899. An 1890 report by the town's road commissioners, however, suggested that the cost to maintain the road was not justified by the use it saw.

In 1932, individuals whose property abutted the road requested that the town's road commissioners petition the county commissioners to "clos[e]" the road "as a public way" because "the road is now almost impassable and is used only by picknickers and is a serious fire hazard." The road commissioners agreed and stated the following in their petition to the county commissioners:

> "[T]hat they are the duly elected and acting [r]oad [c]ommissioners of the [town] . . . , and have charge of the public ways therein; that Estabrook Road, so-called, in said [town], is a public way, and that common convenience and necessity no longer require that such way shall be maintained in a condition reasonably safe and convenient for travel . . . ; that said way . . . has for a long period ceased to be in general public use; that there are no residences served by that portion of said way sought to be discontinued as a public way; and that it would be an inordinate and unreasonable expense upon the said [town] to keep said way in a condition reasonably safe and convenient for travel."

In response, the county commissioners "adjudicate[d] that said way [should] [t]hereafter be a private way, and that the town [should] no longer be bound to keep the same in repair," provided that "sufficient notices to warn the public against entering on said way [were] posted" pursuant to G. L. c. 82, § 32A, inserted by St. 1924, c. 289.

2. Procedural history. On October 24, 2017, the town filed a complaint against the abutters seeking a judgment declaring that the public had access and use rights to the road, regulated by the town,[4] and a permanent injunction preventing the abutters from interfering with the public's access.

In April 2020, while the action was pending, four of the abutters locked a gate they had previously erected at the southern end of the disputed portion of the road and another gate three hundred yards to the north, thereby closing off the portion of the road abutting their two properties to the public. The four abutters cited increased usage during the coronavirus lockdown and unsafe behavior by some road users. They also posted signs at both gates stating that the road was private, one of which stated that the road was closed "by order of

[4] Initially, the town argued that, in the alternative, the road had become public by prescription and that the town had a prescriptive easement to use the road for trail purposes. Ultimately, the town elected not to pursue this argument at trial.

[c]ounty [c]ommissioners." In response, the town moved for a preliminary injunction. After a hearing by video conference, the Land Court judge allowed the town's motion.

The Land Court judge held a six-day bench trial by Zoom (an online video conferencing platform) and ultimately entered judgment for the town. In a detailed, eighty-five—page decision, he found that the northern disputed section was laid out in 1763 by the Middlesex County Court of General Sessions of the Peace, and that circumstantial evidence showed that the southern section had been laid out at some point prior to the northern section, although the records had been lost. The Land Court judge also concluded that the 1932 discontinuance terminated the town's obligation to maintain the road in a condition reasonably safe and convenient for travel but did not affect the public's rights to use the road.

The abutters appealed, and this court denied their application for direct appellate review. The Appeals Court affirmed the judgment after modifying it "to declare that the disputed northern and southern sections of Estabrook Road were laid out as a public way prior to 1932 and that the 1932 order of the county commissioners did not terminate the public's access to the disputed sections of the road." Concord v. Rasmussen, 104 Mass. App. Ct. 831, 842-843 (2024). The abutters sought further appellate review, which we granted.

3. Discussion. The abutters raise two principal arguments before us. First, they contend that the Land Court judge erred in concluding that the disputed portion of Estabrook Road was ever a public way. Second, they argue that, even assuming it was a public way, the 1932 adjudication by the county commissioners extinguished the general public's right of access. We address each argument in turn, reviewing the Land Court judge's conclusions of law de novo, while leaving his factual findings undisturbed unless they are clearly erroneous. See Nylander v. Potter, 423 Mass. 158, 159 n.5 (1996).

a. Status of disputed land prior to 1932. Our law recognizes three means of creating a public way: (1) layout by a public authority in accordance with statute,[5] (2) prescription, and (3) if done before the method was abolished in 1846, dedication and acceptance. See G. L. c. 82, §§ 1-32; Loriol v. Keene, 343 Mass. 358, 360 (1961); Carson v. Brady, 329 Mass. 36, 39-41 (1952). "Once duly laid out, a public way continues to be

[5] The current statutes governing the laying out of public ways contain numerous requirements. See, e.g., G. L. c. 82, § 1 (coordination with neighboring municipalities), § 22 (written notice by town to abutters), § 23 (filing of plan in town clerk's office). Their historical predecessors had far fewer. Chapter 6 of the Province Laws of 1693-1694, for example, titled "An Act for highwayes," permitted town selectmen to lay out a public way simply upon a finding that such was "thought necessary," so long as the town compensated anyone harmed by the laying out; the requirement that the action be approved by the town meeting was not added until 1727, see St. 1727-1728, c. 1, § 2.

such until legally discontinued." Carmel v. Baillargeon, 21 Mass. App. Ct. 426, 428 (1986), citing Preston v. Newton, 213 Mass. 483, 485 (1913). The party claiming the existence of a public way -- here, the town -- bears the burden of proof, and whether that party has met that burden is a question of fact to be resolved by the fact finder. See Clark v. Hull, 184 Mass. 164, 166 (1903).

The Land Court judge found that the entire disputed portion of the road had been properly laid out as a public way, albeit in two different stages. He determined that the northern portion of the road, from the Concord-Carlisle border to the southern end of Mink Pond, was laid out in 1763 in response to a petition by abutters, who sought a more convenient route to Concord Center to the south. This finding was supported by contemporaneous records from the county and town documenting the process of laying out the road; the county's records describe this northern portion as terminating at "a Town Way." In addition to this direct evidence, the judge also relied on various forms of circumstantial evidence -- among them, town payment records, surveyor assignments, town meeting warrants, and testamentary and conveyancing instruments -- in finding that the layout lawfully complied with required conditions.[6]

[6] Specifically, the laying out was conditioned on the abutters granting the land needed for the road to the town. At

The Land Court judge made separate findings on the laying out of the southern disputed portion of the road, which runs from the end of the northern disputed section (at the southern end of Mink Pond) south to the intersection with the paved, undisputed section of Estabrook Road. Crediting testimony from the town's clerk, the judge found that, beginning in 1654, layout records for that part of Concord would have been kept in a specific "North Quarter book." That book could not be located at the time of trial, meaning that any direct evidence expressly documenting the laying out of this southern portion of Estabrook Road had been lost. Nevertheless, the judge found that the laying out of the southern disputed section as a public way had occurred, relying on a collection of circumstantial evidence: (1) the reference in the 1763 layout documents to the already-existing "Town Way" connecting to the northern portion of the road; (2) the evidence of the road's physical condition in the 1700s, "which was conducive to travel in comparison to alternate neighboring trails"; (3) the town's assignment of surveyors to maintain the southern disputed portion of the road as early as 1757; (4) use of the road by the general public for well over a century; and (5) the fact that Estabrook Road, including the

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trial and before the Appeals Court, the abutters argued that this condition was not satisfied, and that the laying out was therefore invalid. They do not press that argument before us.

southern disputed portion, was the subject of the 1932 adjudication by the county commissioners, which would have had no effect on a purely private way.

In so concluding the judge relied on a discussion in Fenn v. Middleborough, 7 Mass. App. Ct. 80, 87 (1979), wherein the Appeals Court recited, albeit in dictum, that it could find "no principle which would bar the proving of a public way on [only circumstantial] evidence." The abutters now contend that the Fenn court was incorrect, and that the Land Court judge could not have found the southern disputed portion of the way to be public without direct evidence of its layout. We disagree.

As a general matter, our law permits facts to be proved by circumstantial evidence in all manner of cases. See, e.g., Adams v. Schneider Elec. USA, 492 Mass. 271, 280-281 (2023) (circumstantial evidence sufficient to prove employment discrimination); Commonwealth v. Bush, 427 Mass. 26, 30 (1998) ("circumstantial evidence is competent to establish guilt beyond a reasonable doubt"); White v. Loring, 24 Pick. 319, 322 (1837) (contents of deed "may be proved . . . by circumstantial evidence"). Proof of a public way is no exception, as shown in a number of our historical cases, and one modern Appeals Court case, on the subject.[7] See, e.g., Reed v. Mayo, 220 Mass. 565,

[7] Although not cited by the parties, some of the few treatises on the law of roads and highways posit that we

568 (1915) (affirming Land Court judge's finding that way was public "[e]ven though evidence of notice and filing does not appear in the town records"); Commonwealth v. Matthews, 122 Mass. 60, 63-64 (1877); Commonwealth v. Belding, 13 Met. 10, 16 (1847) ("with the proper evidence it would seem reasonable that a town way might be shown, as well as a public highway, without, in all cases, producing a record of its establishment as a town way"); Martin v. Building Inspector of Freetown, 38 Mass. App. Ct. 509, 511-512 (1995).

Allowing such proof makes eminent sense, given that direct layout records may be lost to time, as in the instant case, or destroyed, as occurred, for example, when the Barnstable County registry of deeds burned in 1827. See Harvey v. Sandwich, 256 Mass. 379, 383 (1926) ("Due perhaps to the fact that the registry of deeds of Barnstable County was destroyed by fire in 1827, there are no records of deeds prior to 1827 through which the ownership of the locus can be traced until that date

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abrogated these older cases in Loriol v. Keene, 343 Mass. 358 (1961). Our opinion in Loriol did highlight the importance of the post-1846 statutory requirements of giving notice and filing a layout, but nowhere did we state that direct evidence of compliance with the requirements was strictly necessary. Rather, we held that there were numerous infirmities with the plaintiff's position that a way was public: that there was no evidence of any dedication of the way, that a single ambiguous reference to a town vote was insufficient evidence of the way's acceptance by the town, and that the Legislature did not intend to cure these deficiencies via a special act. Id. at 360-363.

. . ."). Accident or misfortune cannot be allowed to serve as a complete bar to proof of layout. We therefore do not require, as a matter of law, direct evidence documenting that a public way was laid out.[8]

Of course, the circumstantial evidence must still be sufficient for a fact finder to conclude that it was more likely than not that a public way was properly laid out. As the abutters correctly note, some types of circumstantial evidence may be individually insufficient. For example, both public and private ways alike can be kept in good physical condition and used by the public; such facts alone do not justify finding a public way. See Fenn, 7 Mass. App. Ct. at 85-86. Likewise, we have held that, standing alone, the acts of surveyors in maintaining a road are not enough to prove that it was established as public. See Reed v. Scituate, 5 Allen 120, 123-124 (1862). See also Teague v. Boston, 278 Mass. 305, 308 (1932) (city maintenance of utilities not sufficient alone to prove way was public); Witteveld v. Haverhill, 12 Mass. App. Ct.

[8] At times, the Land Court judge and the abutters referred to proof of laying out as a public way via circumstantial evidence as a "fourth method," alongside (1) laying out in accordance with the statutory requirements, (2) prescription, and (3) dedication. See G. L. c. 82, §§ 1-32. We think this label is inaccurate; reliance on circumstantial evidence is simply a means by which to prove one of these three accepted methods of creating a public way, here layout in accordance with the statutory requirements.

876, 876 (1981) (discontinuance vote did not compel inference that way had been public).

But here those facts do not stand alone. After observing six days of testimony, considering one hundred thirty-seven exhibits, and taking two views, the Land Court judge made detailed subsidiary findings regarding, among other things, the loss of direct records of layout, the reference to the road as a public way in contemporaneous town records, the town's undertaking of maintenance obligations and improvements, the use and physical character of the road, and the fact that the road was subject to the 1932 discontinuance proceedings.[9] Then, considering these facts in light of the entire body of evidence, he found that it was more likely than not that the disputed portion of Estabrook Road had been laid out as a public way. "In view of all the facts . . . we cannot say that the judge of the Land Court was wrong in [so] finding."[10] Reed, 220 Mass. at 568 (finding supported by "the records, the construction of the road and its long user, the occasional repairs, and other circumstances tending to show that Mayo Road originally was laid

[9] As these subsidiary findings all had support in the record, we reject the abutters' challenges to them. See Nylander, 423 Mass. at 159 n.5.

[10] Because we find no error in the judge's conclusion that the disputed stretch of Estabrook Road was properly laid out as a public way, we need not address his finding that, in the alternative, a public way had been established by prescription.

out as a town way"). See Martin, 38 Mass. App. Ct. at 511 (affirming finding that public way was properly laid out as public based on minutes of town meeting, ancient and modern maps, testimony of surveyor and historian, and view).[11] That the evidence may also have permitted a contrary inference, as the abutters argue, does not render the finding clearly erroneous. See Matulewicz v. Planning Bd. of Norfolk, 438 Mass. 37, 43 (2002) (judge's factual finding regarding status of way "seals the fate" of argument that she should have viewed evidence differently); Martin, supra at 512 ("To be sure, there was evidence from which different and possibly contrary inferences could be drawn. Resolution of conflicting tendencies in the evidence, however, was for the judge . . .").

b. Effect of the 1932 adjudication. We now turn to the adjudication by the county commissioners in 1932 and its effect on the rights of the public. The abutters argue that when the road was adjudicated a "private way" under G. L. c. 82, § 32A,

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[11] Contrast Puffer v. Beverly, 345 Mass. 396, 399-400 (1963) (where existence of public way was raised by reference in Seventeenth Century town records, affirming trial judge's finding that no public way had been laid out given rough terrain, lack of reference to way on maps, and lack of municipal maintenance over course of centuries); Moncy v. Planning Bd. of Scituate, 50 Mass. App. Ct. 715, 717 (2001) (affirming finding that way was laid out as private in 1725 and finding significant that there was no evidence town had expended any funding for construction or maintenance of way, and that town had launched inquiry into whether it even owned way in 1858).

inserted by St. 1924, c. 289, it extinguished both the town's maintenance obligations and any extant rights of the general public to access the road. The town, on the other hand, contends that such an adjudication terminates only the town's obligation to maintain the road and leaves the public's rights undisturbed. The effect of the adjudication under § 32A presents a question of statutory interpretation that we review de novo. See Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd., 483 Mass. 600, 603-604 (2019).

"When interpreting a statute, our primary duty is to 'effectuate the intent of the Legislature in enacting it.'" Wallace W. v. Commonwealth, 482 Mass. 789, 793 (2019), quoting Matter of E.C., 479 Mass. 113, 118 (2018). "To that end, we begin with the statutory language," but "also consider the cause of [the statute's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished" (quotation and citation omitted). Wallace W., supra. In so doing, "we look not only to the specific words at issue but also to other sections [of the statute], and 'construe them together . . . so as to constitute an harmonious whole consistent with the legislative purpose.'" Malloy v. Department of Correction, 487 Mass. 482, 496 (2021), quoting Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n, 394 Mass. 233, 240 (1985).

Based on these rules of statutory construction, we conclude that an adjudication under § 32A does not eliminate public access. It simply removes the requirement that the town maintain the road.

The text of § 32A in place when the petition was brought in 1932 provides:

> "Upon petition in writing of the board or officers of a town having charge of a public way, the county commissioners may, whenever common convenience and necessity no longer require such way to be maintained in a condition reasonably safe and convenient for travel, adjudicate that said way shall thereafter be a private way and that the town shall no longer be bound to keep the same in repair, and thereupon such adjudication shall take effect; provided, that sufficient notice to warn the public against entering thereon is posted where such way enters upon or unites with an existing public way. This section shall not apply to ways in cities." (Emphasis added.)

St. 1924, c. 289, inserting G. L. c. 82, § 32A.

Unfortunately, the statute in effect in 1932 does not define "private way," and the words, which have a long history dating back to colonial times, are "susceptible of different meanings." Opinion of the Justices, 313 Mass. 779, 781 (1943). See United States v. 125.07 Acres of Land, More or Less, 707 F.2d 11, 14 (1st Cir. 1983) (125.07 Acres of Land). Nonetheless, in an Opinion of the Justices, supra at 782, issued in 1943, we provided further guidance and, citing this statute, explained:

> "Although the words 'private ways' may occasionally be used in the statutes with a different meaning, . . . they

> commonly mean ways of a special type laid out by public authority for the use of the public. Such 'private ways' are private only in name, but are in all other respects public." (Quotation and citations omitted.)

See Butchers' Slaughtering & Melting Ass'n v. Boston, 139 Mass. 290, 291 (1885) (distinction between highways and town ways or private ways rests "in the fact that the former are laid out . . . by the authorities having jurisdiction throughout the county, . . . while the latter are laid out . . . by the selectmen, with the approval of the town. In other respects they are alike, and equally parts of the system of public ways" [emphasis added]); 125.07 Acres of Land, supra (describing three kinds of public ways, including highways, town ways, and private ways necessary for access that were laid out by town, and all of which are "public in the sense of providing access"). See also Black's Law Dictionary 1223-1224 (2d ed. 1910) (defining "private way" as "[a] right which a person has of passing over the land of another" or "[chiefly in New England] . . . one laid out by the local public authorities for the accommodation of individuals and wholly or chiefly at their expense, but not restricted to their exclusive use, being subject, like highways, to the public easement of passage"); Black's Law Dictionary 1838 (3d ed. 1933) (same).

Our conclusion that the reference to private way in the version of § 32A in effect in 1932 refers to a type of private

way that retains public access is consistently supported by the case law. In Coombs v. Selectmen of Deerfield, 26 Mass. App. Ct. 379, 381 (1988), the Appeals court stated that "a natural reading of the pre-1983 statute [that was the one in effect at the time of the 1932 discontinuance] . . . eliminat[es] the expense of the town's burden of maintenance, while leaving unimpaired the public's right of access over the road." And in Nylander, 423 Mass. at 161 n.7, this court, relying on Coombs, explained that a discontinuance under the 1983 amendment of § 32A "merely relieves a municipality of liability for care and maintenance of the road" but "does not extinguish the right of the public, and abutting landowners, to travel over the road."

This consistent interpretation is well supported because we, rejecting the argument of the abutters, conclude that the 1983 rewriting of this provision reflects a clarification and not a substantive change with respect to the meaning of "private way." See Weston v. Maguire, 10 Mass. App. Ct. 540, 542 (1980) ("In appropriate circumstances a court may resort to the subsequent act of a Legislature for discovery of the legislative intent in a preexisting statute"). The amended provision provides, in relevant part:

> "The board or officers of a city or town having charge of a public way may, after holding a public hearing . . . upon finding that a city or town way or public way has become abandoned and unused for ordinary travel and that the common convenience and necessity no longer requires said

> town way or public way to be maintained in a condition reasonably safe and convenient for travel, shall declare that the city or town shall no longer be bound to keep such way or public way in repair and upon filing of such declaration with the city or town clerk such declaration shall take effect, provided that sufficient notice to warn the public against entering thereon is posted at both ends of such way or public way, or portions thereof."

G. L. c. 82, § 32A, as appearing in St. 1983, c. 136. This provision, like its predecessor, is focused on the process for discontinuing town maintenance of public ways.

The removal of the reference to the term "private way" thus appears to be in response to the confusion such terminology may cause when referring to a way that retains public access. See 125.07 Acres of Land, 707 F.2d at 14 (warning in 1983 decision of "the danger of making broad public/private distinctions in this area" because "[t]erminology has changed over the years"). By modernizing the language, a historic understanding that a private way may retain public access is not required.[12] We

[12] Letters sent to the Governor's office during the lead up to the bill's enactment suggest as much. See Letter from Massachusetts Municipal Association to the Governor's legislative office (May 17, 1983) (stating that House Bill No. 6019 [Apr. 13, 1983] "simplifies and makes more efficient the procedure by which a city or town can free itself from the responsibility for maintaining unused public ways"); Letter from Massachusetts Association of Conservation Commissions to Governor Michael S. Dukakis (May 18, 1983) (stating that House Bill No. 6019 "would permit towns to be relieved of the responsibility of maintaining certain town roads without having received the approval of [c]ounty [c]ommissioners" and towns had found "that the intervention of [c]ounty [c]ommissioners on this matter has 'infused' politics in land use decisions where politics are unnecessary"). The text of House Bill No. 6019 was

therefore interpret the 1983 amendment, entitled "An Act further regulating the procedures for abandoning certain municipal ways," as merely clarifying and modernizing, rather than changing the substance of, the provision in this regard, and that, accordingly, the 1924 version should be understood to relieve the town of maintenance obligations without altering the public's rights to the resulting "private way." See Lincoln Pharmacy of Milford, Inc. v. Commissioner of the Div. of Unemployment Assistance, 74 Mass. App. Ct. 428, 436 (2009), quoting DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 103 (1983) ("It is not unusual for the Legislature to amend a statute 'simply to clarify its meaning'").

The consistent interpretation of § 32A, including our understanding that the 1983 amendment is a clarification and not a change in the law, further undermines the abutters' argument that public access is denied because notice must be posted "to warn the public against entering thereon . . . where such way enters upon or unites with an existing public way." G. L. c. 82, § 32A, inserted by St. 1924, c. 289. The abutters' argument is undercut by the retention of similar language in the version of § 32A amended in 1983, which, like the preamendment

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substantially similar to the language ultimately adopted except that House Bill No. 6019 referred only to town officials, rather than officials of cities or towns.

statute, has been interpreted to terminate the town's maintenance obligations and attendant liability but not diminish public access. See G. L. c. 82, § 32A, as appearing in St. 1983, c. 136 ("provided that sufficient notice to warn the public against entering thereon is posted at both ends of such way or public way, or portions thereof"); Nylander, 423 Mass. at 161 n.7 (discontinuance under 1983 version of § 32A relieves municipality of liability for care and maintenance but does not extinguish public access rights over road). See also G. L. c. 84, § 24 (providing means of avoiding liability for safety risks on dedicated ways because "otherwise the town shall be liable for damages arising from defects therein as in the case of ways duly laid out and established" [emphases added]). Indeed, the text was again amended, and its meaning further clarified, in 2006 from "warn[ing] the public against entering thereupon" to "warn[ing] the public that the way is no longer maintained." St. 2006, c. 336, §§ 29, 30. For all these reasons, we conclude that this warning against entering is designed to protect the town from liability, not prevent public access.

We also conclude that the town's, and not the abutters', reading of § 32A is compatible with the broader statutory scheme, particularly the difference between G. L. c. 82, § 21 (§ 21) and § 32A. In contrast to an adjudication under § 32A, a

legal discontinuance of a town way or private way by town vote under § 21 extinguishes not only a town's maintenance responsibility, but also the right of the public and abutting landowners to travel over the road. See Nylander, 423 Mass. at 161 n.7 ("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, § 32A [1994 ed.]"); Mahan v. Rockport, 287 Mass. 34, 37 (1934) ("A town way may be discontinued by vote of the town and not otherwise. G. L. [Ter. Ed.] c. 82, § 21"); Stone v. Garcia, 15 Land Ct. Rep. 640, 642 n.6 (2007).[13] Relatedly, the parties dispute the significance of the statutory term "discontinuance" as applied to § 32A. We are unpersuaded, however, that the mere use of the term "discontinue" sheds any light on what rights the public retains after a road is adjudicated a private way under § 32A. As discussed, this court has previously distinguished between a "legal discontinuance, by town vote," under § 21, and a

[13] The abutters also argue that the purpose of § 32A is to preserve the rights of abutting landowners, rather than the general public, to a road that has been adjudicated a "private way" under § 32A. We are unpersuaded. This distinction is not drawn in G. L. c. 82 or the case law interpreting it. The abutters' reliance on Nylander is misplaced, as Nylander expressly notes that a discontinuance under § 32A "does not extinguish the right of the public, and abutting landowners, to travel over the road." Nylander, 423 Mass. at 161 n.7. That is, a discontinuance under § 32A does not preserve the rights of abutting landowners alone.

"discontinuance of maintenance" under § 32A. Nylander, 423 Mass. at 161 n.7. That is, § 21 discontinues public access altogether, and § 32A discontinues only the town's maintenance obligations and any accompanying liability for failing to maintain the road in a condition safe and convenient for travel.

This distinction between a town vote under § 21, which extinguishes public access altogether, and an adjudication by county commissioners under § 32A, which only ends the town's obligation to maintain the road, reflects the significant differences in who is deciding and what is being decided under §§ 21 and 32A. The town as a whole is the decision maker in § 21, while the county commissioners -- or, subsequent to the 1983 amendment, other town or city officials -- are the decision makers under § 32A. All public access is being terminated by a § 21 proceeding while public maintenance alone is being discontinued under § 32A. The public has more at stake in a legal discontinuance under § 21 than in a mere discontinuance of maintenance under § 32A. Requiring notice, a town meeting, and a town vote reflects the public's wider interest in access -- as demonstrated by those desiring to walk along or preserve these historic public paths -- and the democratic process required before that access may be terminated. See G. L. c. 82, § 21.

We also conclude that this reading is supported, and not undermined, by G. L. c. 82, § 30 (§ 30), which allows the county

commissioners to discontinue a town way or private way "[u]pon the application in writing of a person aggrieved by the refusal of a town to discontinue a town way or private way," only after a town meeting. A discontinuance under § 30 comes with additional requirements, including notice and recognizance. See G. L. c. 82, § 31. Importantly, a town meeting has already been held in these circumstances and the voices of those concerned by the proposed change heard. The decision to override that refusal is a weighty one for county officials.

We cannot therefore conclude that the Legislature intended § 32A to achieve the same result as § 21 or § 30 -- the termination of public rights to use a road -- without engaging in the democratic process outlined in § 21 or triggering the procedural safeguards provided by § 30 at county-level, post-town meeting proceedings. See Plymouth Retirement Bd., 483 Mass. at 605 ("'[c]ourts must look to the statutory scheme as a whole' . . . so as 'to produce an internal consistency' within the statute" [citations omitted]).

We next briefly address concerns raised by the abutters and amici about the practical implications of our decision. The abutters argue that the interpretation of § 32A that we adopt here will be profoundly disruptive to property rights in the Commonwealth. We are not persuaded. The case law interpreting §§ 21 and 32A has consistently distinguished between the

discontinuance of public access altogether and the discontinuance of public maintenance. See Nylander, 423 Mass. at 161 n.7; Mahan, 287 Mass. at 37; Coombs, 26 Mass. App. Ct. at 381. Mahan, supra, which stated that only a town vote can discontinue public access, was decided almost a century ago. Furthermore, in the event that town ways or private ways are subject to dispute in the future, §§ 21 and 30 remain available to landowners and towns wishing to extinguish public rights.[14]

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[14] Finally, we briefly dispose of the abutters' argument that the Land Court judge abused his discretion by excluding the abutters' proffered evidence of other § 32A discontinuances. "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made a clear error of judgment in weighing the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives" (citation omitted). Luppold v. Hanlon, 495 Mass. 148, 154-155 (2025).

Pretrial, the abutters offered evidence concerning the status of other roads discontinued pursuant to § 32A in Concord and nearby Acton. The judge allowed the town's motion to exclude this evidence, concluding that the discontinuances were not contemporaneous with the 1932 discontinuance at issue and equating the proffered examples to "cherry-picking, with no assurance that the few examples . . . represent a consistent understanding of the statute throughout the Commonwealth at or about the time of the adoption of the 1924 Act." At trial, the abutters requested that the judge reconsider and submitted an offer of proof arguing that admitting the evidence was justified because (1) the abutters had confirmed that the four roads were the only roads in Concord discontinued under the version of § 32A in effect in 1932, and the abutters no longer sought to introduce evidence of roads in Acton, and (2) the town's theory of the case had become more clear and would be contradicted by the evidence of how other Concord roads had been treated by the same road commissioners involved in the 1932 discontinuance. The judge denied the motion to reconsider for failing to timely

4. Conclusion. We hold that the Land Court judge did not err in finding that the way was publicly laid by 1763. In addition, we hold that the 1932 discontinuance under § 32A, by which the road was adjudicated a "private way," terminated the town's obligation to maintain the road in a condition reasonably safe and convenient for travel but left the public's right to the road undisturbed. Accordingly, we affirm the judgment as modified by the Appeals Court "to declare that the disputed northern and southern sections of Estabrook Road were laid out as a public way prior to 1932 and that the 1932 order of the county commissioners did not terminate the public's access to the disputed sections of the road." Rasmussen, 104 Mass. App. Ct. at 842-843.

So ordered.

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raise the issue when such motions were being considered, months before trial.

We discern no abuse of discretion, here, where the judge determined that a subset of discontinuances from Concord and a nearby town would not necessarily "represent a consistent understanding of the statute throughout the Commonwealth at or about the time of [its] adoption," and would significantly add to the already voluminous amount of evidence being considered.