PUBLIC WAY

I. SHORT-FORM INSTRUCTION

This short-form instruction may be used where the evidence involves only a public street or highway, and does not raise any issue of the statutory alternatives.

The Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle on a public way.

Any street or highway that is open to the public and is controlled and maintained by some level of government is a "public way." This would include, for example, interstate and state highways as well as municipal streets and roads.

In determining whether any particular street is a public way, you may consider whether it has some of the usual indications of a public way — for example, whether it is paved, whether it has street lights, street signs, curbing and fire hydrants, whether there are buildings along the street, whether it has any crossroads intersecting it, and whether it is publicly maintained.

II. FULL INSTRUCTION

The Commonwealth must prove beyond a reasonable doubt that the defendant operated a motor vehicle in one of three places: on a public way, *or* in a place to which the public has a right of access, *or* in a place to which members of the public have access as invitees or licensees.

You will note that the statute treats these three types of places as alternatives. If any one of the alternatives is proved, then this element of the offense is satisfied. Let me discuss the three alternatives one at a time.

Our law defines a public "way" as:

> **"any public highway,**
>
> **[or a] private way [that is] laid out under authority of [a]**
>
> **statute,**
>
> **[or a] way dedicated to public use,**
>
> **or [a] way [that is] under [the] control**
>
> **of park commissioners or [a] body having [similar] powers."**

G.L. c. 90, § 1.

Interstate and state highways, as well as municipal streets and roads, would all be included in this definition. In determining whether a road is a

public way, you may consider whether it has some of the usual indications of a public way — for example, whether it is paved, whether it has street lights, street signs, traffic signals, curbing and fire hydrants, whether there are abutting houses or businesses, whether it has any crossroads intersecting it, whether it is publicly maintained, and whether there is an absence of signs prohibiting public access.

Commonwealth v. Charland, 338 Mass. 742, 744, 157 N.E.2d 538, 539 (1959) (signs, signals, curbing, crossroads); *Commonwealth v. Mara*, 257 Mass. 198, 208-210, 153 N.E. 793, 795 (1926) (street lights, paving, curbing, houses, crossroads, traffic); *Danforth v. Durell*, 8 Allen 242, 244 (1864) (paved roads, no sign that anyone excluded); *Commonwealth v. Muise,* 28 Mass. App. Ct. 964, 551 N.E.2d 1224 (1990) (usual indicia of public way include paved roads, absence of signs prohibiting access, street lights, curbing, abutting houses or businesses, crossroads, traffic, signs, signals, lighting and hydrants; unnamed, paved private way into trailer park with abutting residential trailers, and no signs prohibiting access, was public way); *Commonwealth v. Colby*, 23 Mass. App. Ct. 1008, 1010, 505 N.E.2d 218, 219-220 (1987) (paved road, lighting, hydrants); *Commonwealth v. Hazelton*, 11 Mass. App. Ct. 899, 900, 413 N.E.2d 1144, 1145 (1980) (regularly patrolled by police, "no parking" signs, municipally paved and plowed; photo of way admissible).

The second alternative under the statute is a place that is not a "way," but where the general public still has a right of access by motor vehicle. This might include, for example, a parking lot that is adjacent to city hall, or the parking area of a public park.

The third alternative is a place to which members of the public have access as invitees or licensees. The difference between invitees and licensees is not important here. Both are persons who are lawfully in a

place at the invitation of the owner, or at least with the owner's tolerance. Some examples of locations where the public has access as invitees or licensees include shopping centers, roadside fuel stops, parking lots, and restaurant parking lots.

Bruggeman v. McMullen, 26 Mass. App. Ct. 963, 964, 526 N.E.2d 1338, 1339 (1988) (private way may be open to the public at large for ordinary travel even though there is somewhat less than the broad travel easement that the public enjoys on public ways); *Commonwealth v. Hart*, 26 Mass. App. Ct. 235, 525 N.E.2d 1345 (1988) (private way regularly used to access commercial abutters by employees, customers and vendors is a "place to which members of the public have access as invitees or licensees"); *State v. Brusseau*, 33 Or. App. 501, 577 P.2d 529 (1978) (reckless operation statute "modeled in part after a similar Massachusetts statute" and covering "premises open to the public" is applicable to private road in private apartment complex frequently used as thru street by general public). See *Commonwealth v. Venceslau C. Pires*, 44 Mass. App. Ct. 1101, 687 N.E.2d 651 (No. 97-P-79, Nov. 21, 1997) (unpublished opinion under Appeals Court Rule 1:28) (public park's parking lot remains "a way to which the public had access as invitees or licensees" even when parking is no longer permitted after sunset).

So if it is proved beyond a reasonable doubt that the defendant operated a motor vehicle in any of these areas, then this element of the offense has been proved.

SUPPLEMENTAL INSTRUCTIONS

1. *Prima facie certificate.* **The law provides that a certificate from the (Secretary of the State Public Works Commission) (Secretary of the M.D.C.) (city or town clerk) is evidence that a particular**

(state highway) (M.D.C. highway) (city or town way) is a public way.

G.L. c. 233, § 79F. See Instruction 3.260 (Prima Facie Evidence).

Other official documents, while not prima facie evidence, are admissible as evidence tending to show that a particular road is a public way. *Hazelton*, *supra* (conveying deed, certificate of municipal acceptance, certificate that in municipal road directory).

2. *Stipulation.* **In this case, the parties have agreed that _____ is a public way, and therefore it is not necessary that you have any evidence on that issue.**

3. *Distinction between invitees and licensees.* **An "invitee" is a person who is at a place, usually a business establishment, at the request or invitation of the owner and for the mutual benefit of both — for example, a potential customer or restaurant patron. A "licensee" is a person who is at a place with only the passive permission of the owner and usually for the licensee's benefit — for example, a person driving on a private way that is commonly used by the public without the owner's objection.**

Brosnan v. Koufman, 294 Mass. 495, 499, 2 N.E.2d 441, 443 (1936); *Browler v. Pacific Mills*, 200 Mass. 364, 86 N.E. 767 (1909); *Moffatt v. Kenny*, 174 Mass. 311, 54 N.E. 850 (1899). See *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973) (abolishing distinction in negligence law).

NOTES:

1. **"Way".** General Laws c. 90, § 1 contains a four-part definition of "way" because not all roads open to public use were historically considered "public ways" — i.e., those which some governmental entity has a duty to maintain free from defects. See G.L. cc. 81-82; G.L. c. 84, §§ 1-11A, 15-22; *Fenn v. Middleborough*, 7 Mass. App. Ct. 80, 83-84, 386 N.E.2d 740, 742 (1983). Roads subject to a public right of access but not considered "public ways" included: (a) formally-accepted "statutory private ways," whether privately- or publicly-owned, see G.L. c. 82, § 21; G.L. c. 84, §§ 23-25; *Casagrande v. Town Clerk of Harvard*, 377 Mass. 703, 707, 387 N.E.2d 571, 574 (1979); *Schulze v. Huntington*, 24 Mass. App. Ct. 416, 418 n.1, 509 N.E.2d 927, 929 n.1 (1987); (b) private ways that were "open and dedicated to the public use" by a private owner's unequivocal dedication of the land to public use and surrender of private control, see *Uliasz v. Gillette*, 357 Mass. 96, 104, 256 N.E.2d 290, 296 (1970); and (c) park roads that were erected under the general authority of park commissioners, see *Burke v. Metropolitan Dist. Comm'n*, 262 Mass. 70, 73, 159 N.E. 739, 740 (1928) (sections of Memorial Drive adjoining an M.D.C. park); *Gero v. Metropolitan Park Comm'rs*, 232 Mass. 389, 392, 122 N.E. 415, 416 (1919) (Revere Beach Blvd.); *Jones v. Boston*, 201 Mass. 267, 268-269, 87 N.E. 589, 590 (1909) (Back Bay Fens traverse road); *McKay v. Reading*, 184 Mass. 140, 143-144, 68 N.E. 43, 44-45 (1903) (walkway/drive across municipal common); *Fox v. Planning Bd. of Milton*, 24 Mass. App. Ct. 572, 573-574, 511 N.E.2d 30, 31-32 (1987).

2. **"Place to which the public has a right of access"**. The phrase "a place to which the public has a right of access," as it appears in motor vehicle statutes, refers to property subject to a general public easement as of right. See *Commonwealth v. Paccia*, 338 Mass. 4, 6, 163 N.E.2d 664, 666 (1958). The phrase is limited to places to which the public has a right of access *by motor vehicle*. *Commonwealth v. George,* 406 Mass. 635, 550 N.E.2d 138 (1990) (phrase does not extend to a baseball field which is not open to the public for travel in motor vehicles).

The park example in the model instruction was suggested by *Farrell v. Branconmier*, 337 Mass. 366, 367-368, 149 N.E.2d 363, 364 (1958) (unpaved parking lot in public park is not a "way" as defined in G.L. c. 90, § 1). See *Parcia, supra* ("unnecessary for us to decide . . . whether a public property like that considered in the *Branconmier* case would be . . . a 'place to which the public has a right of access'").

3. **"Place to which members of the public have access as invitees or licensees".** This language was apparently intended to cover locations such as public parking lots or chain store parking lots. *Commonwealth v. Callahan,* 405 Mass. 200, 205, 539 N.E.2d 533, 536 (1989) (privately-owned parcel of land commonly used by recreational vehicles, and which had no barriers to access but was posted with an old "no trespassing" sign and which police had agreed to patrol for trespassers, was not such). See *Commonwealth v. Langenfeld,* 1 Mass. App. Ct. 813, 294 N.E.2d 457 (1973) (prior to 1961 statutory amendment, statute inapplicable to shopping center parking lot). The defendant need not personally qualify as either an "invitee" or a "licensee." *Callahan,* 405 Mass. at 205-206, 539 N.E.2d at 537 (statute defines the status of the way, not the status of the driver).

4. **Judicial notice.** Whether a street is a public way is an issue of fact and not a subject of judicial notice. *Commonwealth v. Hayden,* 354 Mass. 727, 728, 242 N.E.2d 431, 432 (1968).