

BOARD OF SELECTMEN MEETING

Tuesday, October 24, 2017 (following Health meeting). 6:12 PM

Board members present: James Consolati, Matthew Puntin, Michael Curtin & Molly Curtin-Schaefer.

See attached sign in sheet.

Mail was read, previous minutes and treasury warrants were approved.

PUBLIC COMMENT: NONE

20' STORAGE CONTAINER

The following three bids were received for the purchase of a 20' storage container.

Berkshire Mini Storage. \$4,600.00

B Safe Storage \$4,500.00

Box It - \$ 3,800.00

Michael Curtin made a motion to purchase the container from the low bidder Box It for \$3,800.00 - James Consolati seconded, no opposition.

FINANCE COMMITTEE:

James Consolati made a motion to appoint Jennifer Salinetti to the Finance Committee, Matthew Puntin seconded, no opposition.

LAKESIDE DRIVE – Residents from Lakeside Drive sent a letter dated October 20, 2017 to the Board to register their disagreement of the conclusion that Lakeside Drive is “not open to public use” and requested a reconsideration of the matter based on materials that have previously have been submitted. Devon Grierson, JD from Aaronson & Associates, P.C. from Pittsfield, MA attended the meeting and discussed the reasons in his opinion that the Board should exercise its discretion in favor of removing snow and ice from Lakeside Drive. *(See attached letter)* A discussion ensued regarding the decision of the Selectmen to stop plowing Lakeside Drive. Residents expressed their reasons they felt the road is open to public use; snowmobilers & people fishing park on the road, vehicles turn around on the road, and emergency vehicles need access. Some residents asked the board to use their discretion and authorize the plowing and sanding of the road.

Matthew Puntin stated he felt the Town should plow the road as a public safety concern so emergency vehicles could access those properties.

Michael Curtin stated he has been researching and reviewing case law on plowing private ways for weeks and dead end roads, roads with a cul-de-sac are not generally accepted to be plowed. Mr. Curtin further stated the Board has to protect the Town and once you review the information there is a lot to it.

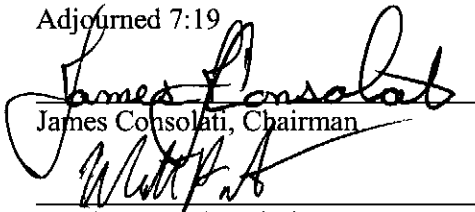
James Consolati stated he acknowledged all the residents' concerns. The Board is obligated to follow the laws of the Commonwealth and the Supreme Court opined that the requirement “open to public use” means that the town's reason for plowing must be primarily for the benefit of the public. In the letter submitted by Attorney Aaronson, dated October 20, 2017 there is no new information received to allow the plowing of Lakeside Drive. He stated there is no grey area, it is clear in the law, and case study that we are not allowed under Massachusetts Law to plow these roads. Furthermore if a law suit was brought against the Town our insurance company could challenge the claim and not pay it. He also stated if the

associations were to bring the road to town standards and move toward becoming a town road, if voted, it could be plowed and maintained.

A discussion ensued about other towns plowing private ways. Mr. Jarvis stated Westfield plows 700 private ways. It was further discussed about fixing the road and working toward the town accepting Lakeside Drive as a public way. Joe Janis will discuss this with the association. A conservation restriction at the end of Lakeside Drive was discussed. Mr. Consolati will look into this to see if the public is allowed on this property.

Mr. Puntin asked about the Town accepting roads. He stated we are working on this for Ridge Street. He discussed what the specifics that might come up in certain sections of Lakeside Drive would be. He stated it can be a lengthy process, coordinating everything. Mr. Puntin asked if anyone contacted towns that plow private roads and asked what their reasoning is for plowing. Mr. Puntin will look into this.

Adjourned 7:19

A handwritten signature in black ink, appearing to read "James Consolati", written over a horizontal line.

James Consolati, Chairman

A handwritten signature in black ink, appearing to read "Matthew Puntin", written over a horizontal line.
Matthew Puntin, ClerkA handwritten signature in black ink, appearing to read "Michael Curth", written over a horizontal line.
Michael Curth, Member

AARONSON & ASSOCIATES, P.C.

COUNSELORS AT LAW

Harris N. Aaronson
JD, LL.M (Tax)
haaronson@aaronsonlaw.com

57 Wendell Avenue
Pittsfield, MA 01201
Tel: 413-499-1200
Fax: 413-499-9838
Email: info@aaronsonlaw.com

Loretta M. Mach, JD
lmach@aaronsonlaw.com

Devon W. Grierson, JD
dgrrierson@aaronsonlaw.com

October 20, 2017

Board of Selectmen
Town of Tyringham
116 Main Road
Tyringham, MA 01264

RE: Removal of Snow and Ice from Lakeside Drive

Gentlemen:

This office represents the Lakeside at Goose Pond Association, which consists of owners of several lots and residences abutting Lakeside Drive in Tyringham. As I am sure you recall, on June 27, 2017 you forwarded a notice to the Lakeside Drive Association notice that the town would no longer be plowing Lakeside Drive as the way is "not open to public use".

The purpose of this letter is to respectfully register our disagreement with that conclusion and to request a reconsideration of the matter based upon the materials previously submitted in the information set forth herein. For the reasons set forth herein it is our opinion that the Board should exercise its discretion in favor of continuing to remove snow and ice from Lakeside Drive.

Tyringham accepted G.L. c. 40, §6C which permits the Town to expend public funds for the removal of snow and ice from private ways open to public use. The statute specifically provides that snow and ice removal from a private way does not constitute a repair of that way and does not result in any increased responsibility of the Town for such roads or cause the removal to become a permanent responsibility of the Town.

G. L. c.40, §6D provides that, following the acceptance by the voters of G. L. c.40, §6C, the Town may fund private snow removal "from such private ways within its limits and open to the public use as may be designated by the...selectmen...." Clearly then, for the Town to choose to fund snow removal on a private way there are two necessary characteristics of any road in question:

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

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

The two quoted phrases, indicate that the road must, at least for the period during which Town plowing occurs, be of such design and location (be "susceptible of use") that the general public is able to use the road, other than as a guest or invitee of an abutter to that road.

The Opinion of the Justices of 1943 and the several cases decided with reference to it, as more fully set forth below and in the attachment hereto stands for the proposition that when a road is "susceptible of use by the public other than for purposes that are merely incidental to the use of the way by the owner thereof" the "public purpose" is satisfied.

Lakeside Drive is open year-round to the general public; its use by the public is not restricted in any manner; it is not marked as "private" or "residents only". Lakeside Drive is used year-round for the following purposes, each of which confer a benefit to the general public:

- a. over 150 times per week in the summer months by persons loading and unloading boats at the boat ramp for backing, turning and accessing the boat ramp via Lakeside Drive;
- b. by ice fishermen in the winter months for use similar to that of boaters in the summer months where Lakeside Drive provides convenience to the public for turning, backing and otherwise maneuvering trailers;
- c. by persons accessing trail number 95 of the Snowmobile Association of Massachusetts and use the state boat ramp in Lakeside Drive for backing and temporary parking;
- d. for access to conservation lands located at the end of in the body Lakeside Drive;
- e. for use by the several home and lot owners for themselves, their guests, and the general public.
- f. As a turn-around point for the gene public throughout the year; and
- g. For access by governmental and emergency vehicles.

Lakeside Drive clearly meets the tests referenced by the Opinion of the Justices in 1943 and the line of cases decided thereafter as set forth in detail in the letter of Attorney Elizabeth Goodman dated July 25, 2017 addressed to the Board and in the email of Attorney Goodman addressed to Jeremia Pollard dated August 3, 2017, portions of which are attached as an exhibit to this letter, with her permission and with which we concur.



We note that in April, 2013 the Town entered into an agreement with Lakeside at Goose Pond Association imposing several conditions upon the Town's agreement to remove snow and ice from Lakeside Drive. In reliance on that agreement, Lakeside incurred considerable expenses improving the road in accordance with that agreement. As Lakeside, in good faith, has met each of the conditions and continues to do so, it is patently unreasonable of the Selectboard to rescind that agreement.

Based upon the foregoing it is our opinion that Lakeside Drive meets all criteria necessary for the town to continue to provide snow and ice removal services. Accordingly, on behalf of our client we respectfully request that Board reconsider its earlier position and provide for snow removal service subject to such requirements as the Board may require.

We welcome the opportunity to meet with you to discuss this matter at your convenience.

Thanking you for your attention to this matter, I am,

Very truly yours,

AARONSON & ASSOCIATES, P.C.



Harris N. Aaronson

cc: Lakeside Drive Association

The second question is the one before the selectmen: whether the road is "open to public use" as may be designated by the selectmen. As stated by the Justices in the Opinion of the Justices, 313 Mass. 779 (1941) there is no universal test. Instead,

'Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. Frequently ... it may in some respects result in conferring a benefit upon the public and in other respects it may result in conferring a benefit upon or in paying money to private individuals... At any rate it is plain that an expenditure is not necessarily barred because individuals as such may profit, nor is it necessarily valid because of incidental benefit to the public.' Quoting *Allydon Realty Corp. v. Holyoke Housing Authority*, 304 Mass. 288, 292 (1939).

The Justices also found that "open to public use" as applied to "a private way naturally means that such way is actually susceptible of use by the public other than for purposes that are merely incidental to the use of the way by the owner thereof, and also that the way is open to the public at large for purposes of travel ... in a manner similar to the ordinary use for purposes of travel in a public way of the same general nature ..." *Id.*

The definition of the term "open to public use" was also discussed in the case of *Bruggeman v. McMullen*, 26 Mass. App. Ct. 963, (1988). There the Appeals Court held that use by the public of a private way is different from the use of the public on a public way. The defendant argued that plaintiffs who accepted the use of public funds to plow their private road were precluded from limiting his access to the road. The Appeals Court said:

By accepting municipal service for the private way, the defendants argue, the plaintiffs may not restrict the public's use of the way. Under G.L. c. 40, § 6C, inserted by St.1943, c. 225, a municipality may appropriate money to plow private ways "open to the public use." Ways to which the public has access for ordinary travel may be private. See *Commonwealth v. Hart*, ante 26 Mass.App.Ct. 235, 236-237, 525 N.E.2d 1345, (1988). Within the text of § 6C, the Legislature took care to state that "the removal of snow and ice from such a way shall not constitute a repair of a way," an apparent recognition of those cases which have said that repair of a way by a municipality is evidence of the way's public nature. See *Commonwealth v. Holliston*, 107 Mass. 232, 234 (1871); *Reed v. Mayo*, 220 Mass. 565, 567, 108 N.E. 366 (1915). The phrase "open to the public use," when applied to a private way, connotes that the private way is open to the public at large for ordinary travel. See *Opinion of the Justices*, 313 Mass. 779, 783, 47 N.E.2d 260 (1943). The use allowed the public in such a case, however, is less than the broad easement of travel which the public has within the limits of a public way. An easement in a public way comprises every reasonable transportation of persons and commodities and the installation of utilities and communication lines. See *Opinion of the Justices*, 297 Mass. 559, 562, 8 N.E.2d 179 (1937).

Thus, the finding that a private way is "open to the public" for the purposes of allowing a town to plow the road is different from the broad use by the public allowed over a public way. The way is still private, but because the public can travel on the private way, the selectmen can conclude that the private way is open to the public, and thus allow town funds to be used to plow the road.

BOARD OF SELECTMEN / BOARD OF HEALTH

Date: October 24, 2017

Time :	Name:
6:00	Mark J. Curtin
5:50	Tim Renn
5:50	ROSEMARY RENN
5:50	JOSEPH JAMIS
5:50	DEVON GRIERSON, Esq.
6:00	Dorothy Neventi
6:00	Henry Neventi
6:00	Penny Wein
6:00	Sue Jarvis
6:00	Brian Jarvis
6:00	Jennifer Salinetti
6:00	Noah Choquette
6:00	Stene Cote
6:45	Torino Palm
6:15	Cory Willey - Berkshire Record