

Memo

To: Board of Selectmen
Town Administrator

From: Planning Board

Date: May 14, 2012

Re: Plowing of Private Ways

I. Executive Summary

In response to a request from the Selectmen and the Town Administrator, the Planning Board (PB) has researched the different types of ways in Carlisle and has reviewed the draft policy for plowing private ways discussed by the BOS at their April 10, 2012 meeting. The following memorandum provides a report and explanation of the research the Board has undertaken in the archival records of the Town to identify, classify, and confirm the origins of all current roadways in Carlisle.

Based on the information obtained through this research, the PB believes there are now more private ways in active use in Carlisle (105) than public ways (97). Although the private ways are of several types—based on when they came into existence, the approval process for the developments or groups of homes which they serve, and the underlying form of private ownership of the way and/or the land underlying the way—the PB believes that as far as the Town's interests and responsibilities are concerned, all private ways are essentially the same.

From its research, the Board has found that when Town plowing of private ways commenced—apparently in the late 1960s—the private ways then being plowed were virtually the only such ways that would not eventually be accepted as public ways. In short, as the Town was plowing all the ways in Town, public or private, the practice may have been both practical and equitable to all citizens. Today, when there are as many private ways being maintained by the residents whose homes are served by the ways as there are public ways owned—and thus being properly maintained—by the Town, the cost of plowing all the ways in Carlisle is no longer practical and, moreover, there is no longer any reasonable justification for the Town to be selectively plowing just a few of the private ways.

In its review of the new draft policy for Town plowing of private ways, the PB finds no clear rationale within the criteria laid out in the policy for discriminating among Carlisle's private ways to make a reasonable or defensible determination as to which deserve to be plowed at public expense and which do not. The PB is therefore in support of the BOS decision on November 22, 2011, to cease all public plowing of private ways.

II. Introduction

This memorandum and the attached documents are provided in response to the Selectmen's request for information regarding which roadways in Town are public, which are private and which are common driveways and the legal distinctions among the various roadways.

From the Planning Board's perspective, the simple answer to that question is that—from the Town's standpoint—there are two meaningful categories: Public Ways and Private Ways. Roads are either public or they are private. Public Ways are essentially owned by the Town, which is responsible for their repair and maintenance, including plowing. Private Ways are in different forms of private ownership as a result of changing and differing statutes, Bylaws and Rules & Regulations under which they were permitted (or in some cases, not permitted) over the years, but they are all alike in that the Town does not own them and thus has no legal responsibility for their repair or maintenance, including plowing. See Appendix A for an outline of the various types of Public and Private Ways in Carlisle and some characteristics of each.

The exercise of determining the current status of the ways in Carlisle has been useful as we have discovered some gaps and errors in the Town's records. To the best of our ability, we have undertaken research to correct the errors and fill the gaps, and we have found that there are currently more Private Ways open to public travel than there are Public Ways in Carlisle. There are currently approximately 105 Private Ways "open to public travel"¹ in Carlisle (excluding from the attached list of 110 the two "paper streets" that exist only on recorded plans and three "Ancient" ways that are not suitable for vehicular travel). In comparison, there are currently 97 Public Ways approved and accepted as such by Carlisle Town Meeting.² See attached Appendix B for a list of all Public Ways and Appendix C for a list of all Private Ways in Carlisle.

Another question that has been asked is: "Why is the Town plowing four of Carlisle's 105 Private Ways." To answer this question—and to enumerate Carlisle's ways, public and private—the Board has researched a variety of sources: Planning Board development files, Planning Board and Board of Selectmen's minutes across 50+ years, and Annual Town Reports (including minutes of Annual and Special Town Meetings, and reports of the Selectmen, Planning Board, and Highway Department/DPW). These sources are referenced in the footnotes below.

III. A Short History of Roads in Carlisle

1950s through 1960s – Rapid Development, Varying Standards

In 1953—the same year the Subdivision Control Law was enacted—the Town amended the General Bylaws to require that to be eligible for acceptance by the Town, each street or way must have a gravel surface 16 feet wide within a 40-foot right of way.³ In 1959, this was further amended to require a 24' wide asphalt surface.⁴ But most of the Town's roads predated these bylaws and

¹ Although the ways enumerated generally are signed "Private Way," none are known to be gated or to have posted "No Trespassing" signs. Thus, they are technically "open to public travel."

² Note that for two of the 97 Public Ways, we have yet to find confirmation as to when they received their current names: Milne Cove Road, which in 1970 was one of two ways designated Old East Street, and Foss Way, which in 1970 was one of two ways designated Cross Street.

³ "Before acceptance by the Town, the entire area of each street or way shall be first cleared of all stumps, brush, roots and like material and all trees not intended for preservation. All loam and other yielding material shall be removed from the roadbed and replaced with suitable material. Rock and boulders shall be taken away or broken off to a depth of not less than 12 inches below the bottom of the sub-grade with at least 8 inches of building gravel over a width of 16 feet. Total right of way must be at least forty feet."

⁴ "All streets shall be subgraded and brought to a finished grade with at least 8 inches of binding gravel, to which shall be applied not less than three-quarters of a gallon of asphalt per square yard by surface over a width of twenty-four feet."

some remained unpaved into the 1980s.⁵ Through the 1950s and 1960s, the Carlisle Highway Department used surplus funds each year when available to widen, gravel, and pave some of the old, narrow, and in many cases still dirt Town ways.⁶ Even the roads thus "improved" were nowhere near the quality of a paved road built from scratch and required considerable ongoing maintenance.⁷

In the 50s and 60s, the presumption was that the Town plowed all its roads, as a matter of public safety. Due to dramatic growth in the 60s, more concerns arose about the number, location, and quality of town roads, the impact of increased local and through traffic, and the expense of upgrading, repairing and maintaining (including plowing and sanding) the roads.⁸

1960s and 70s – Efforts to Establish Consistency and Maintain Rurality Despite Growth

Confusion about distinctions between public and private ways was caused in part by the lack of agreement between the requirements for acceptance of a way by the Town and the requirements for both subdivision and small subdivision roadways. Subdivision and small subdivision roadways could be built to PB standards—an 18' paved way within a 40' right of way (ROW) for subdivision and 12' unpaved way within half the width of ROW (20') in small subdivisions—and still fall well short of the requirements for acceptance as a public way by Town Meeting (in 1969, 24' paved surface within a 40' ROW).⁹ Nevertheless, if their road was "built to Planning Board standards," some citizens expected it could and would be accepted as a public way.¹⁰

Responding to the concerns about growth and increased Town expense in maintaining ways, the Planning Board took several steps: They held several Public Hearings on Roads "in order to see

⁵ In the minutes of a BOS meeting in 1977 it was noted that the DPW was requesting \$20,000 for oiling of [unpaved] Town roads. In the 1981 Town Report, the DPW reports that it had done "... oiling and maintenance work... on several secondary roads."

⁶ Highway Dept. report in 1954 Annual Report: "The Highway Department operates under a progressive plan of widening, graveling and applying an asphalt surface to a section of road each year in so far as funds will allow. In this way we will eventually improve all dirt roads in town."

⁷ A description from a 2/12/68 Planning Board meeting: "...most roads in town are 'improved roads' which means that they are basically dirt roads, later graveled and still later black-topped, with poor foundations and short lifetimes."

⁸ Highway Dept. report in both the 1965 and 1967 Annual Report: "Snow removal and sanding presents more of a problem than in the past, due to the growth of the town and its new streets. As Carlisle is strictly a residential town, it is very important that all streets be plowed and sanded so that its residents may drive safely to and from work. It is also most important that roads are in good condition to insure safe transportation for school children." In its 1968 Annual Report, the Highway Department's superintendent, Roger Davis, made an effort to help Carlisle's citizens understand what meeting their expectations entailed: "Most people do not realize that there are over 51 miles of road maintained by myself and 2 full-time assistants." (This was a 20% increase over 6 years earlier.) In the 1981 Annual Report, although he had a larger staff, the number of roads and the demands on the department led Mr. Davis to make a similar point: "The Department of Public Works is continuing its efforts to give the best possible public service with its 6 full-time employees and the Superintendent. However, at the rate at which the town is growing, the current necessity for level-funded budgeting and its restrictions on departmental budgets will make it extremely difficult for the Department to continue to offer the same level of service to the town as in the past."

⁹ Minutes of joint BOS/PB meeting 10/23/67: "The Planning Board sought the Selectmen's comments on revising the town road width requirements in some way so that the By-laws and the Planning Board's regulations would jibe. Mr. Hosmer noted that an average set of dimensions might be proper. Mr. Davis suggested that the road bed be required to be 24' wide, with an 18' or 20' wide surface. This would permit reasonably easy widening at some future date, if the traffic load were to require such a move. Mr. Hosmer asked if the Selectmen felt that a general hearing on the subject, for the education of the town, and so the Planning Board could get a feeling of the town's desires, should be held. The Selectmen felt that such a hearing would be useful in both ways. Mr. Bickford also noted that 24' wide roads were probably too wide for existing traffic and cost more to maintain."

¹⁰ PB Report in 1966 Annual Report: "The minimum width of paving for new roads has been the subject of some difference of opinion in the past. At present, the requirements of the Board for an approved subdivision are out of phase with the provisions of the Town By-Laws respecting acceptance of new roads by the Town. It is not essential that requirements for different purposes should be identical, but the difference in the provisions has led to confusion and probably should be eliminated."

what kind of roads the citizens of the town want to have and how they want to pay for them" (6/23/64) and to "learn about public opinion on the general character of the new roads in town" (7/30/68). (Opinions varied, with some wanting wider, straighter roads, and some preferring narrower winding roads.) In 1965, the PB proposed a bylaw that was passed establishing reduced frontage pork chop lots with the thought that houses on them would be set back from the road and accessed by individual private driveways—from the PB perspective, presumably not to be maintained by the Town.¹¹

But, since the Town was *plowing* the few private, generally unpaved, gravel roads that existed in town, Town officials wanted more control over those ways. Therefore, in the late 60s, both the PB and the BOS sought to have ways accepted by the Town as soon as possible so the Highway Department could maintain them. Ways were sometimes accepted by TM early in the development process, before they had even been named, then at a later TM the ways would be named.¹² Another interesting practice was that roads were sometimes accepted by TM even though they didn't comply with the bylaw, because they were too narrow and in subpar condition (and usually had been rejected by previous TMs due to these faults), with the condition that specified amounts paid by residents on the ways such that the Highway Department would widen and improve the roads *subsequent* to their acceptance at TM.¹³

Additional concerns about potential development on "Ancient" ways led to a thorough review directed by the Planning Board over several years (arising out of a joint meeting of the PB and BOS on 9/9/68¹⁴) of all the roads in town, culminating in a 1970 Town Meeting vote to eliminate all such "paper streets" by approving a list of the 61 roads in existence at the time that would remain public ways. Many of these official public ways were still unpaved and all but perhaps one (Bedford Rd.) were narrower than then existing bylaw requirements for acceptance of public ways (many considerably so, 15' wide or much narrower). Long-standing public ways that were so narrow added to the confusion, noted above, about distinctions between public and private ways.

Concerned that 24' paved subdivision roads, as required by the bylaws for acceptance, were not consistent with the town's historical rural character, in 1972 the PB proposed a bylaw amendment that would allow Town acceptance of 18' paved cul de sacs of a limited length serving a limited number of lots. Such a provision was eventually adopted five years later¹⁵ and remains in effect, in

¹¹ PB report in 1964 Annual Report - The rationale for pork chop lots concludes: "The present requirements [without pork chop lots] tends to produce a multiplicity of short roads to be maintained and plowed by the Town each of them lined with houses all in a row."

¹² For example, at Annual TM in March 1966, several roads were accepted as public ways; they weren't named until a Special TM in July (Heald, Judy Farm, and Berry Corner Rds.—the latter not to be confused with Berry Corner La.)

¹³ Carlisle Pines Dr. was rejected by TM in 1965. In 1973, after lobbying by the residents and negotiation with the PB and BOS, contingent on a payment to the Town by those residing on the way of \$1,850 to be expended for road repairs by the DPW, Carlisle Pines Dr. was accepted by TM. It was understood that it did not comply with the bylaw for road acceptance but was accepted anyway because it was claimed that once it was repaired it would comply with PB standards in place when it had originally been constructed and would be no more difficult to maintain than other roads in town. At a December 6, 1972 BOS meeting Roger Davis of the Highway Department had noted that it would cost over \$15,000 to improve Carlisle Pines to bring it up to the then current standards for acceptance, but the desire to get ways under public control was such that, as noted, it was accepted despite its non-compliance. After several failed attempts for acceptance at TM, Orchard Acres Drive was also accepted in 1973 with a similar arrangement and a payment of \$770 for repairs.

¹⁴ From the BOS minutes of the 9/9/68 joint BOS/PB meeting: "Mr. Hosmer took up the matter of the long range planning for improvement and modification of existing town roads by inquiring whether it might be a useful Planning Board function to originate priorities for specific improvements. Mr. Bickford noted that the Highway Surveyor needed backup and ground rules to work from. Mr. Davis added that the many open questions about right of ways and easements should be answered in a more formal manner than heretofore."

¹⁵ The 1981 amendment also included a provision for 20', rather than 24' paved roads if they include an adjacent minimum 5'-wide bicycle/footpath. That provision is not in the current bylaw.

slightly different form, today. The 24' width requirement for subdivision roads not ending in a cul de sac remained in effect until 1986, when it was reduced to the current 20'.

Although four small subdivisions with their allowance for reduced road standards on roads shared by 5 lots or fewer were approved in the 1960s, after several subsequent years with none having been permitted, in 1974 the Planning Board eliminated small subdivisions from their regulations. This action was taken because of concerns that although the roadways in these subdivisions were clearly meant to remain private (as they would meet none of the requirements for acceptance as public ways), given the general view that all roads should be plowed by the Town, residents on these substandard roads were requesting and generally receiving plowing services¹⁶ (see more below, under "History of Plowing Private Ways").

A New Form of Private Way

Subsequent to eliminating small subdivisions, in 1978, the Planning Board proposed and the Town approved an amendment to the Zoning Bylaws to allow common driveways under special permits. Although the form of ownership of the way thus created for those residing on a common driveway was different from that of those residing on a small subdivision roadway—and although a common driveway could not be used to create frontage for building lots—the common driveway bylaw essentially replaced the small subdivision provision of the Board's Subdivision Rules & Regulations.¹⁷ Where in a small subdivision the number of lots sharing the way was limited to 5, the number of lots sharing a common driveway was limited to 6. The bylaw established that common driveways were—like small subdivision roadways—meant to remain private, and that they be marked with a sign reading "Private Way."¹⁸ The PB later adopted construction standards within its rules and regulations requiring that common driveways—like small subdivision roadways—be a minimum of 12' wide with no requirement for them to be paved. The common driveway regulations require a maintenance agreement among the homeowners on the way covering repair and maintenance, including snow plowing of the way.

Since 1978, a total of 87 common driveways, ranging from 12' wide and unpaved to 18' wide and paved, and serving 1 to 7 homes,¹⁹ have been built in Carlisle under special permits granted by the Planning Board. In Conservation Clusters (e.g. Buttrick Woods, Greystone Crossing, Chestnut Estates), which by definition are to be served by common driveways, the ways are far superior to the roads in a 60s era small subdivision. Generally speaking, individual private driveways extend off the common driveway to the homes sharing the way, just as they do off of subdivision roads and roads approved as small subdivisions in the 60s.

¹⁶ PB Report in 1971 Annual Report: " , some residents living on Small Subdivision roads have expressed dissatisfaction with the fact that even though their road cannot be accepted by the Town they are still required to pay the same taxes as people living on Town Ways."

¹⁷ The similarity between small subdivisions and common driveways was noted at the public hearing on the proposed Common Driveway Bylaw held by the Planning Board on March 27, 1978: "Charles Evans spoke to say that he had great difficulty distinguishing a private driveway (common driveway) from a private way as defined in some parts of the statute. He compared this proposed Bylaw to the Small Subdivision Bylaw which has since been rescinded."

¹⁸ At a meeting on August 12, 1968, the Planning Board had similarly agreed to require the "Private Way" designation on small subdivision roads.

¹⁹ Although the zoning bylaw defining common driveways (Section 5.4.4) limits them to 6 lots, the Conservation Cluster bylaw (Section 5.5, adopted 1982) allows a seventh lot on a common driveway as an incentive for a developer to set aside 30% of the parcel as permanently protected open space.

IV. History of Plowing Private Ways

How it Started

The Town was legally able to plow private ways once it had accepted the provisions of MGL Chapter 40, Section 6C.²⁰ The statute had been in place since 1943, but was not accepted by the Town until 1962, when it barely passed by written ballot at the 3/5/62 TM (225 for, 221 opposed, with 50 blanks).

In 1970 when the 61 public ways were definitively established—there were remaining a handful of named private ways in town. Of these, just three²¹ were not accepted as public ways within the next few years: Berry Comer Lane, Red Pine Drive, and East Meadow Lane. These three ways were in “Small Subdivisions” developed per a set of regulations established by the PB in 1960 to allow for smaller, more rural access roads than what was required in standard subdivisions. Another purpose of the small subdivision provision was to allow for growth without adding to the Town’s responsibility for repair and maintenance of these narrow, unpaved private roads.²² Subsequent to 1970, the PB discontinued small subdivisions because even though such unpaved narrow roads were designated as permanently private, they found that those living on these ways expected Town services such as plowing.²³

Despite the intent of the Planning Board that these private ways not be Town-maintained (to minimize the burden on the Town), the Town apparently began providing plowing services to these three small subdivision roads²⁴ because, as noted, it was assumed all roads in town would be plowed, and they were essentially the only private ways in town that weren’t eligible for eventual acceptance. Plowing a few roads in addition to the 61 or so public ways at the time was insignificant, and all citizens on completed ways thus had their roads plowed.

There doesn’t seem to be a record of a formal policy, but even though it caused some problems for the Town, private ways were plowed upon request.²⁵ The only specific documentation that could be found of such a request in the 60s is in the BOS minutes of 12/15/69: “The Selectmen authorized the snow-plowing of Berry Comer Lane, Indian Hill extension, Pine Brook and Virginia Farms [sic] Rd., where there are houses to allow access to inhabited dwellings.”²⁶ (All but the first of these were accepted as public ways within the next several years.)

²⁰ MGL Ch 40, S 6C, if accepted by a town, allows a town to “appropriate money for the removal of snow and ice from such private ways within its limits and open to the public use as may be designated by the city council or selectmen; provided that ... the removal of snow or ice from such a way does not constitute a repair of the way.”

²¹ Not including the paper streets never built and “Ancient” ways.

²² PB report in 1960 Annual Report: “The Planning Board recently adopted new Subdivision Rules & Regulations... designed to further implement the protection of the Town by guiding development along lines which will permit further development with a minimum burden to the Town.

²³ Memo from PB Chair to the PB (9/13/71) “The question of Small Subdivisions keeps coming back to haunt the Selectmen and Planning Board. In spite of our requirement for the warning ‘Private Way’ on the original linen [approved plans], people buy lots on small subdivisions, ask the selectmen to have them plowed, see the street start to fall apart and then descend on the Board wanting to know why the road wasn’t built properly, why it can’t be accepted, and so forth.” For example, Red Pine Drive, though it clearly didn’t meet the requirements for acceptance, was included on the warrant in 1964, but the motion to accept it as a public way was tabled.

²⁴ The assumption is based on the fact that these three small subdivision roads (Berry Comer Lane (BCL), Red Pine Drive (RPD), East Meadow Lane (EML)) were all built around this time and that they are the three such standard roads still being plowed as of the winter of 2011.

²⁵ BOS report in 1960 Annual Report: “However, drainage of roads remains a problem as does private ways, which we plow upon request.”

²⁶ It is unclear why Red Pine Drive and East Meadow Lane are not on this list; perhaps it was already assumed they would receive town plowing services.

The Town's interest in having these private ways in adequate shape for plowing²⁷ led the Town to go so far as to put before 1971 TM an article that was approved, accepting the provisions of MGL Chapter 40 Section 6E, which allowed the Town to make repairs on private ways at the request and expense of those living on such ways.²⁸ Further, from the minutes of the 3/21/73 BOS meeting: "It was voted to authorize the superintendent of Public Works to remove sand from private ways at his discretion." Plowing and sanding private ways led to the need for sand to be removed at the Town's expense come spring.

The Planning Board Weighs In

From early on, the Planning Board understood and was frustrated by the slippery slope caused by plowing ways the Town had no responsibility to maintain (as reflected in its minutes from 6/1/71): "Pine Brook Road acceptance cannot be condoned by Board until the curbing is repaired, even though it was broken by the town plow (apparently) in course of gratuitous work on behalf of residents request for plowing. This is a Selectmen's problem at this stage, not for the P.B."

In September of that year, PB Chair Terry Herndon appeared at a BOS meeting reporting on a PB meeting relative to new development roads. From the BOS minutes: "He said that Concord requires a road to be on a warrant article for Town Meeting vote before any plowing or repair is done. In other words, the road must be of acceptable standards before the Town will provide services." The Chair of the Selectmen presented the rationale for plowing all the roads in Town, including private ways: "Mr. DeMott felt that this may not be a suitable standard for Carlisle however, since safety of residents must be considered paramount." The Planning Board persisted and sent a letter to the BOS dated November 23, 1971, noting the "Town's eventual benefit and lower highway maintenance expense" of adopting the following rule: "No subdivision under development shall have its streets plowed or maintained in any manner by the Town of Carlisle until and unless the street in question has been placed on a Town Warrant at the recommendation of the Planning Board for approval by the Town as an accepted Town way."²⁹

This recommended approach was not followed and a handful of private ways continued to be plowed by the Town. In addition to the three small subdivision roads noted above, Cutters Ridge Rd. apparently began receiving Town plowing services around 1988.³⁰ Cutters Ridge was one of several subdivision roads built to Town standards for acceptance as public ways that around 1990 faced some technical difficulties regarding completion and sign off (mostly from the Conservation Commission) that prevented their approval by TM. The issues on all but Cutters Ridge were resolved within a year or two and they were accepted as public ways, but a final release was never sought for Cutters Ridge by its developer and it remains a private way today. Although there does

²⁷ BOS meeting minutes, 11/1/72: "Roger Davis said he is still plagued by the unaccepted roads in Town, and specifically that Carlisle Pines will need repairs before the Town can snow-plow the road. He will discuss the matter with the residents."

²⁸ The state statute was repealed in 1977 (Section 6N now covers temporary repairs to private ways), but per the 1971 TM warrant, its acceptance authorized the town "to make temporary minor repairs on certain private ways at the cost of the abutters, and upon their petition, such acceptance being limited to private ways in small subdivisions as described in the Rules and Regulations Governing the Subdivision of Land adopted by the Planning Board."

²⁹ The letter, signed by Robert B. Thomson, Clerk of the PB, went on to assure the BOS "that this is a draft rule only, and the intent is to determine the feelings of the Selectmen regarding the proposed rule."

³⁰ The plowing service began before the development was complete, and the way was still called "Lanes End," as indicated by the BOS minutes for 12/19/88: "On motion of Mr. Sauer and approved by all, the Selectmen approved the request of the developer of Lanes End that the Highway Department plow this road in the upcoming winter season with the condition that the Town will not be responsible for any possible damage caused by the plows." BOS minutes of 10/24/88 indicate that they approved, at the recommendation of DPW head Gary Davis, a similar request for Town plowing services from the developers of Elizabeth Ridge and Patch Meadow. There is no record as to whether these roads were plowed in 1989, although a request by the developer of Rodgers Rd. was approved in October, 1989. Rodgers and Patch Meadow were accepted at TM 1990, Elizabeth Ridge not until 1991.

not seem to be a record of any decision by the BOS, the DPW apparently began plowing it because it met the Town's standards for acceptance in terms of width, shoulders and other physical characteristics.

The 1994 Plowing Policy

The 1994 "Board of Selectmen Policy: Plowing of Private Ways" (Appendix D) arose out of issues surrounding Hartwell Road. Although built to subdivision standards and standards for possible acceptance at TM, Hartwell Road posed unique challenges as it could only be accessed through Concord. Concerns about legality, liability and possible conflicts with Concord (since the Town plows couldn't get to the Carlisle portion of the road without passing through Concord) had stifled Hartwell Rd. residents' hopes for TM acceptance for several years. The 1994 policy regarding plowing was written to address the Hartwell Rd. issue, as evidenced by its clauses limiting plowing services to the portion of the way in Carlisle, limiting the distance through a neighboring community to access the way being plowed, and limiting it to ways with no salt restrictions (out of concern that Concord might have such restrictions on its portion of the way that might add an unacceptable degree of difficulty to Carlisle's efforts to access and plow the Carlisle portion). The policy also required an indemnification agreement from residents, and, although it is not part of the policy, BOS minutes and Mosquito reporting note that Hartwell Road residents would be expected to pay for the plowing service.³¹

Most importantly, the policy limited the plowing of Hartwell Rd. (and any subsequent subdivision road built to Town standards) to one year while it awaited possible TM acceptance. If after that year the road were to be rejected by TM, the Town would cease plowing services.³² This time period limitation was apparently the key provision of this policy, as evidenced by the fact that the only BOS mention of this policy in the 1994 Annual Report reads as follows: "The Selectmen adopted a policy limiting the period of time the Town will plow a private way to the period of one year, while application for acceptance as a public way is being processed."

Because the 1994 policy was for subdivision roads pending their acceptance by TM (manifested by the provision that the way be built to Carlisle PB standards, by this time consistent with the standards in the bylaws on acceptance as a public way), the policy would have forced the cessation of plowing services to at least 3 of the 4 other private ways being plowed at that time.³³ Rather than cease such services, a final clause was included in the policy grandfathering the plowing of these private ways.³⁴ Interestingly, although the policy is quite specific that it only covers private ways having been plowed for at least a year, neither the BOS minutes of the three meetings where the

³¹ Carlisle Mosquito 1/21/94: "The selectmen also agreed that residents of private ways should be billed for any snow removal services. At Cohen's recommendation, the selectmen agreed to charge the fifteen Hartwell residences \$225 per winter for plowing, or \$15 per house."

³² As it turned out, Hartwell Rd. was not accepted by the Town at TM in 2004, or in 2005. After the one year of plowing (winter 2003/2004) allowed under the new policy, Hartwell residents approached the BOS in November 2004 requesting another year, as the Mosquito (11/2/04) reports: "This is an issue of fairness versus consistency," said Hartwell Road resident Mark Green... The town grandfathered plowing privileges to other private ways that received services before the regulations were tightened. The selectmen should extend those same privileges to all homes that were built before the new interpretation of the regulations, according to Green. He argued that by that time, Hartwell Road residents had already invested in their property and some families had moved into their homes." After noting that: "Because of Hartwell Road's unusual situation, the selectmen have been forced to examine past policies which allowed private ways to be plowed by the town," the Mosquito reports that the BOS denied the request. TM acceptance of Hartwell Rd. as a public way—when it finally came at TM on May 13 and 14, 1996—was contingent on various agreements regarding liability, indemnification, insurance, and resolution of maintenance of the access through Concord.

³³ The three small subdivision ways (BCL, RPD, EML) would not have qualified; Cutters Ridge Rd. may or may not have qualified.

³⁴ "Private ways on which the town had been providing plowing services for at least one year at the time of the adoption of this policy shall be exempt from the provisions of this policy and shall continue to be plowed by the Town of Carlisle."

policy was discussed nor the Mosquito reporting of these meetings—nor apparently any other written documentation—identify the roads that meet this criterion.³⁵

When the 1994 policy was adopted, the private ways being plowed—apparently per an informal policy that arose before 1970—were no longer the only substandard³⁶ private ways in town, but were rather a very select few³⁷ receiving this service among the approximately 74 private ways in existence in 1994.

More Recent Recommendations

Some 18 years after its 1971 proposal that the BOS cease the plowing of private ways, in July 1999, the PB again sent another letter to the BOS (Appendix E) in which they “recommend that you [the BOS] consider directing the DPW to stop providing this service for all private ways.” The letter outlines the Board’s reasons for this recommendation, noting that “a developer proposing a common driveway (or other private way) will argue that the ‘street’ is to remain private and, therefore, the board should not require the same standards as might be required for a public way.” The PB noted that if the Town plows just a few private ways, it “results in an inequitable development process and arguably an inequitable use of Town funds.”

The PB made this recommendation in 1999 in part because one of the four private ways receiving free Town plowing services (Berry Corner Lane) had become the subject of a lawsuit involving the PB and the Town, to a large degree revolving around the construction standards and poor quality of its gravel road and concerns about its maintenance and accessibility for emergency vehicles. In November 2011, after this lawsuit was finally settled, members of the PB met with the Chair of the BOS and the Town Administrator to share the 1999 letter and again recommended that, having extricated itself from a long and expensive lawsuit, the Town cease plowing Berry Corner Lane (and any other private ways it was still plowing).

Although the BOS did not act on the recommendation of the PB in 1999, the Town Administrator echoed the same conclusions at the 11/22/11 BOS meeting:

Mr. Goddard spoke briefly about snow removal on public and private ways in Town. He said he learned from Gary Davis that in addition to 96 public ways, the DPW plows 2 private ways [later learned to be 4] out of 46 private ways [now known to be over 100]. He felt this was very inconsistent. Mr. Goddard said Gary was not sure why this has been this way. Mr. Goddard said that the Town does not have any legal requirement to plow private ways. His recommendation to the Board was that the residents of these two private ways be notified that as of a certain date their street would no longer be plowed by the Town.³⁸

The Selectmen agreed with this recommendation and voted unanimously to cease plowing the 2 private ways of which it was aware (Berry Corner La. and Red Pine Dr.), effective December 31, 2011. At the next meeting of the BOS, two residents on the latter way—asking that they continue to receive this Town service—informed the BOS that there were two other private ways being plowed and, although they weren’t sure why their roads had begun being plowed some 45 years earlier, they suggested that it was due to a distinction between private ways (of which he thought the four being plowed were the only ones) and private roads (meaning common driveways). The question was asked as to why the BOS hadn’t sent letters to residents on the other two private ways being

³⁵ The lack of such records from 1994 when the policy was adopted may explain why the DPW, the BOS, and the PB were unclear as to which and how many private ways were being plowed leading up to the BOS vote this past November to cease plowing all private ways.

³⁶ Not accepted or meeting the town’s standards for acceptance as public ways

³⁷ Presumably the same 4 being plowed today.

³⁸ BOS Minutes 11/22/11.

plowed (Cutters Ridge and East Meadow) informing them that the service would stop for them as well. The BOS decided to take this new information under advisement and at their 1/10/12 meeting agreed to continue Town plowing through the 2012 winter and do the research to clarify the confusion. This report is in response to a request by the BOS and the TA on April 11, 2012 for that research.

V. Review of Selectmen's Draft Policy: Plowing/Sanding of Private Ways

In addition to the historical background provided above, the following are the Planning Board's comments and questions regarding the draft policy (comments are numbered to correspond to the criteria in the draft policy). As the review below of the provisions of the draft policy indicates, the PB is unclear as to the objectives of the draft policy. (The draft policy is attached as Appendix F.)

Preamble. The statement is made that the policy is "for reasons of public safety," but presumably residents on the few ways that would meet the new criteria have the same access to private plowing services as the many citizens who live on private ways not covered by the policy, who have been paying for private plowing services on their private ways since these ways were created. Additionally, the PB has since 1991 required a maintenance agreement for all permitted ways in town (whether or not they may eventually be eligible for acceptance as public ways); thus all residents on any ways approved in the past 20 years and going forward are required to have an agreement with their neighbors for repair and maintenance, including plowing, of their ways.

1. Annual petitioning for plowing each way raises the question as to what criteria the BOS would use to make its determination. In lean times, might the BOS decide not to plow any ways? If a homeowner is in significant arrears in property taxes, could that effect whether they (and their neighbors) get plowing services for their private way? A consistent and objective approach should be promulgated to avoid any confusion, false expectations or the possibility of inequitable treatment.

2&3. Requiring unanimous consent and liability protection is understandable, but along with the requirement in #1, this could create issues every year, especially when new residents move in to a neighborhood. If just one person on a way has an issue with the way the liability clause is written,³⁹ they could affect the rights of their neighbors. One advantage of the existing policy is that it was virtually invisible and required no effort from anyone (aside from the DPW doing the plowing). The draft policy could make the comparisons between those who receive the service and those who do not—but whose taxes pay for a service the select few receive—an annual issue. The Town could also be placed in an awkward situation in having to sue a resident who did not contribute toward a repair of a private way, whether caused by the Town or not.

4. Would this include the requirement that homeowners' take care of sand removal annually or would the DPW do the annual late winter sweeping of sand as they do on public ways? Would the homeowners be responsible for clearing the road sand from their catch basins? In any case, since homeowners would be responsible for repairs and other maintenance of their ways, they would still need to create some form of homeowners' association or other agreement for the sharing of such expenditures.

5. The requirement that the ways be paved eliminates just one of the currently grandfathered roads, the unpaved Berry Corner Lane. Although the BOS clearly has the right to change its policy at any time, eliminating one of the grandfathered ways essentially ends the grandfathering of the 1994 policy and raises the question: why retain any aspect of that policy? Also, in some cases, there are good reasons for unpaved roads (for example minimizing impact

³⁹ For example, some might ask: "Residents on public ways don't have to sign liability waivers; why should I?"

on wetlands); a policy that might encourage paving in such circumstances may run counter to other Town interests. Also, similar to the comments in #1 above, creating clear guidelines such that there would be a consistent determination of whether the way is "free of defects" is critical, but the draft policy lacks clear guidelines, unlike a PB regulation.

6. The minimum 12' width is the required minimum for common driveways, so virtually all common driveways would qualify for plowing, were it not for the distinction created in #11 (see below).

8. Similar to previous comments regarding the need for an objective and consistent approach, whether an "adequate turnaround" exists is not an objective standard. The policy would have to designate whose standards are to be met (BOS, PB, Fire Dept, DPW?). This could lead to inconsistencies. For example, Stoney Gate and Pilgrim Path both have 20' paved widths such that even without a turnaround it might be as easy to turn a large vehicle around on these roads as on a 12' way with a smaller radius circle at the end. The PB Common Driveway Rules and Regulations do set an objective standard, applied in CD special permits, but the draft policy excludes "common driveways."

9. The roadside shoulder requires definition, as there is no right of way requirement in the policy and shoulder widths on existing private ways range from 0 to 4 feet. Most ways (public and private) in town have mailboxes, stone walls or other impediments within the right of way. Again this determination could become subjective or create issues among neighbors (as structures within the right of way did at the time the Tall Pines roads were up for acceptance). Does the Town want to get involved in such issues on an annual basis?

10. This criterion suggests that the DPW would determine which ways would be plowed and the BOS would just rubber stamp the DPW decision. While the need to insure that roads are plowable is understandable, adding this additional layer of annual DPW responsibility runs counter to all efforts in town to eliminate unnecessary expenses (not to mention the additional time spent actually plowing and sanding the private ways, wear and tear on vehicles, etc.).

11. The exclusion of "shared or common driveways" is confusing and not actionable since the policy also requires that ways to be plowed must serve as least 3 residences (in #5 above). All ways that serve more than one home are "shared." Certain shared ways happen to have common driveway special permits. It is therefore difficult to discern what the BOS wishes to achieve in this critical section and impossible to determine what ways would be plowed pursuant to the proposed policy.

The different forms of ownership of the various ways in town are of interest and consequence to the owners of property abutting those ways, but arguably not to the Town as it relates to the provision of Town services. As has been documented above, from the Town's perspective, a private way is a private way. Residents on "common driveways" are taxed at the same rate as residents on other non-public ways that weren't created through common driveway special permits. For all intents and purposes, Red Pine Drive (RPD) and East Meadow Lane (EML) are as much shared driveways as any of the common driveways in town.⁴⁰ If the intent of this policy is to include RPD and EML, to be fair, it should be acknowledged that these two roads are narrower and were built to lower standards than almost all of the paved common driveways built in the past decade (for example, those in Greystone Crossing, Chestnut Estates, and Sorli and Gornley Ways in Hanover Hill), which this criterion excludes. The additional qualifying language: "are not considered private roadways for the purposes of this policy" is illustrative of the stretch that would be required to justify the distinction, and the PB does not think that such distinction is reasonable.

⁴⁰ See Appendix C which lists the Private Ways in Carlisle.

If indeed this criterion is not meant to distinguish between RPD and EML and the 100+ other private ways in town, then the policy would eliminate all private ways from consideration *except for subdivision roadways that meet the Town's standards for acceptance but that haven't yet been accepted*. This would mean that just Cutters Ridge (of the four ways currently being plowed) would comply. And it would add to the plowing list Hanover and Johnson Roads and Hart Farm Rd.⁴¹ Interestingly all three of these ways already have a maintenance agreement among the owners on each way, so plowing services are already being provided for them, raising the question: Why should the Town take over this responsibility?"

Comparison with the Existing 1994 Policy

It may be instructive to look at what criteria have been left out of the existing policy in the new draft policy (aside from the grandfathering clause that seems not to be a concern in the new policy). The chart attached as Appendix G documents the differences between the 1994 policy and the draft policy. Most notably, these are that to be eligible for public plowing—under the 1994 policy—(1) a private way has to be built to PB standards, (2) all homes on the way have to be complete, and (3) the plowing services are limited to one year. The elimination of these three criteria in the creation of the draft policy, taken along with the other new criteria, has the singular effect of allowing the plowing of Johnson and Hanover Roads in the Hanover Hill Subdivision.⁴² The draft policy essentially creates a disconnect between what roads the Town will plow pursuant to the policy and the requirements both of the Rules & Regulations of the Planning Board with regard to development roads and of the Town's General Bylaws with regard to what roads can be accepted as public ways.

VI. Recommendations

As it did via letter in 1971 and 1999, and verbally last fall to the Chair of the BOS, the Planning Board recommends that the Town not provide plowing services to any private ways under any circumstances (except perhaps emergency situations), regardless of the fine distinctions between these ways as described above. The 1994 Policy should be rescinded and the proposed policy rejected. The distinctions between the categories of private ways described above do not and should not, in the Planning Board's view, provide a rational basis for a Town policy based on such distinctions.

The Board is in full agreement with the statements and recommendations of the Town Administrator last November. The Board sees no compelling reason for the Town to take on this responsibility, and certainly not selectively. Several Planning Board members have stated in public meetings that the Town should not plow any private ways unless it is going to plow them all. However it is hard to imagine that, in the current economic climate, the Town would want to take on responsibility for plowing all the private ways in town (which may have made sense briefly in the early 70s when, as has been noted, there were just a handful of such ways). Such a voluntary commitment of additional manpower (and overtime), added wear and tear on vehicles, potential for conflicts over sweeping of sand, salt damage, and damage to private ways and infrastructure (even with liability waivers) makes no fiscal sense.

⁴¹ Hart Farm Rd. has a permanent restriction that it shall remain private; it is not clear whether anything in the documents establishing this restriction would impact plowing by the Town.

⁴² The Planning Board has just provided the BOS with its report and recommendation against acceptance of these ways, noting that the PB has yet to sign off on the development so the roads cannot be said to be built to PB standards and that construction of the homes on the roadways is not yet complete (or even close). If either of these provisions of the 1994 policy remained in effect, then Hanover and Johnson Roads would not be eligible for Town plowing. Additionally, if these ways did happen to comply with those two criteria and for some reason TM failed to accept them as public ways, rather than providing plowing for these three-quarters of a mile of private ways on which live a handful of residents for just one year (as was done for Hartwell Rd., at the homeowners' expense), the draft policy would provide for such plowing indefinitely (all at taxpayer expense).

As noted above, there is no need for the town to plow subdivision roads prior to their acceptance. Mechanisms for their repair and maintenance are already in place. When the developments are complete and the subdivision security has been released, such roads are eligible for acceptance by the Town pursuant to the Town's General Bylaws.⁴³ Only upon acceptance by Town Meeting should the Town take on the legal responsibility for the public way's repair and maintenance.⁴⁴ If the Town plows a way before TM has acted (whether for just one year per the 1994 policy, or potentially forever per the draft policy currently under consideration), such interim plowing could create problems when TM arrives, such as:

- Repair and cleaning of private ways is the developer's (and/or homeowners') responsibility prior to acceptance as a public way. Should the road be damaged by Town plows during an intervening winter (as noted above this has occurred and caused problems for acceptance of Pine Brook Rd.), even with liability waivers in place, one can imagine the difficulties involved in sorting out responsibility and getting repairs done prior to final review and a TM vote.
- Similarly, a roadway is to be swept and catch basins cleaned for a final inspection prior to acceptance; as noted above, sorting out of responsibility for such cleaning between the Town that had put down (some of) the sand and the legal responsibility of the developer or homeowners for such maintenance could cause problems.

The Planning Board believes that there is nothing to be gained from the Town's perspective in taking on responsibility for maintenance (including plowing) prematurely; we believe it is clearly better to wait until after a TM vote to accept the way, when the way becomes public, and all responsibility definitively falls upon the Town.

The Board recognizes that adopting a policy based upon a clear distinction between whether a way is private or has been accepted by TM as a public way will affect the homeowners who live on the three private ways that have been previously plowed by the Town free of charge to them for over 40 years (BCL, RPD, and EML). However, we do believe that all the residents who live on private ways should be treated equally going forward, regardless of the benefit that these residents received in the past based upon a historically inconsistent approach to the issue.

The residents of Cutters Ridge Rd. may have an additional option, since it appears to have been built to PB (and Town) standards in accordance with the General Bylaws. The PB suggests that they consider seeking final release of their road from ConsCom and then petition the BOS for acceptance.⁴⁵ Then it would be up to Town Meeting. If accepted at TM, the Town would then repair and maintain (and plow) Cutters Ridge Rd.

⁴³ To be eligible for acceptance by the Town, through affirmative TM vote, a way must have a right of way of at least fifty feet in width, has to have been constructed in accordance with the rules and regulations of the PB, and must have a paved roadway width of at least twenty feet with two foot shoulders on each side or in the case of a cul-de-sac which serves not more than fifteen lots, the pavement must be eighteen feet wide, also with two foot shoulders on each side.

⁴⁴ TM acceptance of a way is entirely discretionary, and therefore should not be assumed. There are many examples of roads being put forth by the BOS and recommended for acceptance by the PB that have been rejected by TM.

⁴⁵ Presumably, since the Town has been plowing Cutters Ridge all these years, there was no incentive for the original residents to clear up the filings on their development. When Cutters Ridge was last seeking to get before TM, the BOS addressed this issue, as reported in the Mosquito of 4/20/90: "In the case of Cutters Ridge Road, the financial viability of the developer was questioned and Selectman Hal Sauer suggested that the residents may have to apply for a certificate of compliance themselves. Chairman of the board Tom Raftery suggested that they contact the conservation administrator what further actions can be taken." Once that is resolved, the Planning Board would be happy to assist the residents of Cutters Ridge Rd. in finding and preparing the necessary plans and other documentation for an application for

Quite simply, the Planning Board is in accord with the simple premise stated by Attorney and Planning Board Chair Daniel Bickford at the 3/2/70 PB meeting leading up to the 1970 Annual TM vote establishing the ways that would be henceforth be considered public ways: "Attorney Bickford stated that a public way is a Town road. If the road is accepted by the Town, the Town must maintain it."⁴⁶

The Planning Board believes that the adoption of a clear policy that can be objectively and consistently applied which provides that the Town shall only plow public ways will eliminate confusion and the potential for inequitable treatment between and among similarly situated town residents.

acceptance. There might be some filing and some legal expenses, plus the cost of preparing an as-built plan, and some engineering inspections (perhaps the DPW could assist with the latter).

⁴⁶ PB minutes 3/2/70