

Issues Concerning Special Ways

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The qualifying requirements for an old road to receive designation as a Special Way and the practical implications of the application of Special Way regulations are frequently misunderstood. The following catalogs the principal issues that have been raised in the past and provide, if not a definitive answer, at least some background information to promote better understanding of past practices, status of Special Ways today, and an appreciation for the nuances having to do with legal rights in roads more than a century old. *(The reader is encouraged to also read a companion piece Background Primer on Ancient Ways and Special Ways.)*

Concerning MVC Fundamental Premise of Special Way (SW)

- 1. Must a road or way be accessible to the public to be eligible for SW designation by the MVC?** The utilization of SW designation by the MVC and towns suggests there need only be the presumption of public rights to a way for it to be designated a SW. The MVC narrative establishing the first SW DCPC states that SWs "...provide public rights of way, but are not committed to major vehicular traffic." But the narrative continues by using the future tense, "They tend to link origins and destinations that people will frequent; therefore they offer a resource which can be developed as a means to experience the Island landscape by slower means of transportation..." [emphasis added]

In addition, the nature of the old roads that the MVC alludes to – and the specific roads it designated as SWs – are of such antiquity that recorded documentation of public rights are, more often than not, non-existent. An excerpt from Martha's Vineyard Byways Study, a Vineyard Open Land Foundation publication from about 1976, contemporaneous with the MVC's creation of the SW DCPC, is enlightening:

"The burden of proof that a public right of way exists is on the public. Because this matter must be determined in the courts, it is expensive and time-consuming to track down the history of trail use and prove access rights. Yet it is important to establish the public rights in widely accepted trails like Dr. Fisher Road. Regulation of development along these trails is based on the assumption that these old roads are indeed public. Regulatory powers . . . are now being applied by planning boards and the Martha's Vineyard Commission to some of these old roads without documented proof of public prescriptive rights. While such acts tend to confirm the public access right, they do not legally establish that right." (emphasis added)

Martha's Vineyard Byways Study, p. 13

It appears that definitive public rights were known to exist prior to their designation for only one or two of the fifteen SWs designated by the MVC and adopted by the towns over the past 30 years. Public rights to other SWs have been discovered through subsequent research. The public rights to one designated SW are presently in litigation. No SW has been rescinded.

Thus, SW designation has been used as a zoning tool to preserve a cultural resource where there is some basis for presuming the existence of historical public rights.

2. **Must the entire designated SW route be the exact historical route?** Because these old roads were not usually laid out by survey, they would sometimes become rerouted for stretches due to convenience or necessity; it is not unusual to find segments of parallel tracts of old roads. While there may be desirability in identifying the historical pedigree of an old road's route, this is often impractical if not impossible to determine. Similarly, it is common for an old road to have been known by more than one name over time. It is somewhat subjective in deciding which name has more historical relevance.

Neither has it been the practice in the administering of SW to adhere exactly to the historical route of the old road. West Tisbury's Old Holmes Hole Road veers around the elementary school ball fields that were built across the historical alignment, and then returns to the old alignment. Special Ways regulations approved by the MVC since 1990 for the towns of West Tisbury, Oak Bluffs and Edgartown contain a provision that allows for the realignment of portions of a SW. This is in recognition that part of the basis for the SW designation is that they "...tend to link origins and destinations that people will frequent..." Thus, one of the considerations in altering the course of a SW is whether the relocation would result in preserving the continuity of the SW. (Note, however, that the regulations make clear that such realignments of the SW designation neither creates in the new route nor extinguishes in the former route public rights of use.) West Tisbury has authorized realignment of at least two short segments of Scrubby Neck/Watcha Path.

Concerning MVC SW Guidelines

3. **Can all or part of a SW be accessible to motor vehicles?** The original MVC decision cites SWs as "...not committed to major vehicular travel," so some vehicular use was envisioned as a practicality in some cases. All or portions of the six original SWs (seven, including Dr. Fisher Road) from the original MVC decision had vehicular access at the time of designation and continue to have today.
4. **Can additional motor vehicle access be created on a SW?** SW development guidelines acknowledge the necessity to allow a property access via the SW when no alternatives exist. Any use involving additional vehicular use of the SW must go through a special permit process. As with the Major Roads of the Island Road DCPC, additional entrances onto the way shall be 1000 feet separated from other entrances on the same side of the way, unless that would deny a landowner of all access. Additional vehicular access has occurred on designated SWs.
5. **Can a road used by motor vehicles that is designated a SW be graded and filled to maintain its function? Can it be widened?** The MVC SW guidelines contain only two restrictions on existing roads or those to be created – they cannot be widened beyond 12 feet nor can they be paved. The MVC approved West Tisbury SW regulations that allow by special permit widening a SW beyond 12 feet. The regulations of Oak Bluffs and Edgartown include prohibitions on altering the existing surface and width of a

SW; there has yet to be much experience concerning the applicability of these measures other than the SWs have been kept clear of overgrown vegetation. Presumably, portions of a SW traveled by vehicles can be maintained in their present condition. Oak Bluffs and Edgartown also regulate the conditions by which a road can cross a SW. Per MVC guidelines, all town SW regulations have a special permit process to address circumstances where application of any of the SW regulations is shown to be unreasonable.

6. **Can land be subdivided along a SW?** SW restrictions do not prevent land from being subdivided. Where possible, access to additional parcels will avoid using the SW in favor of alternative access. If additional vehicular use of the SW is unavoidable and approved by town special permit, the town will limit the original parcel to one vehicular access. Any subdivision, however, would still be subject to the town's subdivision regulations and the Selectmen's authority over the widening and use of public ways.
7. **Can DCPC regulations prohibit within 20' of a SW centerline all fencing other than that designed to allow passage on the SW?** The 20-foot from SW centerline requirement is the minimum established by the MVC guidelines to the towns. Aquinnah's bylaw stipulates a 200-foot zone along either side of its SWs, Chilmark 10 feet, and Oak Bluffs 50 feet. However, there appear to be numerous special permits issued, or lax enforcement, as buildings have been erected within these zones. As part of an enforcement matter to remove a blockage of the traveled path on Old Holmes Hole Road in 2000, West Tisbury approved the relocation of an offending stockade fence to within four or five feet of the SW centerline – beyond the traveled width of the SW. As some SWs (and potential SWs) are adjacent small, residential lots, some town boards have considered the necessity for relaxing this requirement. This would require the MVC amending its SW guidelines in the Island Road DCPC.
8. **Can the SW prevent a parallel road from being widened or relocated to occupy some or all of the SW Zone, even if the road remains within the layout approved by the town planning board?** In addition to defining the boundaries of adjacent properties, the centerline for sections of some old roads and existing SWs lie at one edge of road layouts approved by the town's subdivision process. Both Middle Line Road and Tar Kiln Road (as well as the existing Dr. Fisher Road Special Way) lie at the edge of 40-foot-wide road layouts within which the narrower vehicular roadway is set some distance away, but partially within the proposed 20-foot SW Zone. The special DCPC regulatory powers the towns have through the MVC can override previous town subdivision approvals when such does not unduly prevent use of the land. In this Edgartown instances, the existing roadways would continue to be function as they have for decades.

Concerning Public Land Rights (answers provided by MVC Counsel Eric Wodlinger)

9. Can the public have rights to pass over private land?

Public ways could be established in four ways;

- a. Prior to 1846, a way could be given to a town by dedication by the landowner and acceptance of the gift by the town. Since 1846, this can no longer be done.
- b. Towns and counties can lay out public ways pursuant to statute, G.L. c. 82. As such, the Town can take only an easement, leaving the fee interest to the private landowner(s), or lay out a statutory private way, which creates public access, but leaves the burden of maintenance on the abutting landowners. (The town could also take and own the fee in the road, but then it is no longer private land.)
- c. By prescription. Typically this takes more than public use and requires some expenditure of town funds for maintenance. (Note: no prescriptive easement may be acquired in registered land. G.L. c. 185, § 53.)
- d. By ancient layout by the Proprietors, "open to the public for decades, possibly even for centuries", under the holding, "that preserved Proprietors Ways belong for practical purposes to public authority". Soeder v. County Commissioners of Nantucket County, 60 Mass. App. Ct. 780 at n. 2 and 783-85. (2004 case)

10. Can the public have limited rights of passage over a privately owned way, such as walking access but no motor vehicle access?

Yes, but those rights are determined by the nature and origin of the public rights, which must have been acquired by one of the means mentioned above.

11. If town accepts a road, what are its obligations to widen and improve the surface for vehicles and emergency access?

In general, a town cannot be compelled to appropriate money to build out a road it has laid out as a public way. A private landowner who owns the fee in the road, subject to an easement for a public way, may take it upon himself to do so if the town should refuse to do so, but that would be an extraordinary remedy – a court would not let the landowner do so unless he had petitioned the town and definitively ascertained that the town refused to pave the road. Conceivably a town could be liable to persons injured while passing on an ill-maintained road, but a court will typically refrain from ordering the legislative act of appropriating money.

12. To what extent can a public way be limited in use, such as excluding motor vehicle use?

G.L. c. 82, §§ 33 and 35 authorize towns to lay out footpaths and bicycle paths, respectively. If a layout were to be made for such limited purposes, motor vehicles would not be permitted on the way. Where a road has been determined to be a Proprietors Way, and therefore subject to public authority, I believe the Selectmen of the relevant town could regulate the use of the road to exclude particular uses, e.g, vehicular use. Alternatively, the

Selectmen could formally lay out a road, under current statutes, wholly or partly within the layout of an ancient Proprietors Way, for footpath or bicycle path use, or for general use.

13. **If a landowner has common interest in a private, 40-foot-wide road layout, within which the actual roadway is, say, only 20 feet wide, can that landowner use the land in the ROW beyond the roadway? What if there is public rights to**

If a landowner holds easement rights in a 40 ' layout, he has the property law right to improve it for its whole length and width. Public authority may however regulate such work, including the width and composition of the road surface. (Provided such regulation does not go so far as to be a regulatory taking, in which case, the public may have to pay damages if land has been deprived of all economically viable use. Similarly, public authority may not authorize the public use of (or entry onto) private property without compensating the landowner if he has thereby suffered any loss in value.)

14. **Must a court declare prescriptive easement has taken place in order for prescriptive rights to be "vested" by the public (or private party)? Could the prescriptive easement from an earlier period be legitimately asserted?**

Once established by prescription, a public easement for use of a road will not lapse from non-use. So, today, one could try to prove that a public easement by prescription had been established from public use between 1940 and 1960. Even is such public prescriptive rights were established, if a landowner has subsequently blocked passage for 20 years, the public's prescriptive rights would be voided.

15. **Does the requirement that the public take affirmative action in order to abandon public use of property apply to public prescriptive rights? (i.e. can public prescriptive rights be voided from lack of use)? Are there other ways by which prescriptive rights of public access might be voided?**

If the public has gained prescriptive rights, mere non-use does not constitute abandonment. Easements generally can be extinguished by positive action blocking use continuously for 20 years, e.g. if a private party put boulders in a road that prevented its use and kept them there for 20 years. (It is uncertain whether such extinguishment could terminate public rights in a road formally laid out under statute.)