

## Excerpt of Memo from the Colchester Governance Committee to the Colchester Selectboard dated August 25, 2015

### Snowplowing of Private Roads

This difficult issue remains unresolved. The Governance Committee again recommends that the selectboard remove from the Charter the language dealing with plowing of private roads. This change should follow the development of a snowplowing policy based on fairness and practicality.

To facilitate this change, the Selectboard should address the following issues, perhaps through the creation of a study group or special panel, with a specific reporting date. (See Attachment 5 *Snowplowing Issues Paper* for additional details.)

1. The Charter directs the Town “to establish a policy whereby the Selectboard may determine it to be in the public interest to plow those private roads serving two (2) or more year round residences, which previous to January 1, 1997 had the town providing winter road maintenance.” Additional searching for the snowplowing policy in July, 2015 revealed that no such policy was developed following the charter change in 1997.
2. For some residents living on private roads that are not plowed, the practice of plowing some private roads and not others raises equity issues. The issue of equity is further complicated by the apparent lack of criteria to allow the plowing of some private roads and not others.

Submitted by David Usher, Bud Meyers, Curt Taylor and Mickey Palmer.

(Revised 8/20/15)

**Issues Paper: Snow Plowing Issues Colchester for 2015**

**Bud Meyers**

Following discussion of the issues related to snow plowing of private roads in Colchester during 2013 and 2014, the Governance Committee released three documents concerning the related issues. The first was a discussion paper in July, 2013. The second was a paper taken from Bryan Osborn's (Director of Public Works) written comments for the July 11, 2013 meeting. The third was a White Paper on the Plowing of Private Roads (subsequently focused on the paragraph in the Town Charter, Section 104 (7) and revised on May 14, 2014. (all documents attached below)

In the context of these above three papers, the Governance Committee recommended to the Selectboard that the paragraph in the Charter be removed by amending the Charter in November, 2014. The Selectboard did not include this recommendation in its proposed charter changes for the November, 2014, ballot.

There are few public documents which respond directly to the concerns of the Governance Committee as detailed in the 'White Paper'. A report on snow and ice removal published by the Department of Public Works and adopted by the Selectboard on July 9, 2013, identifies private roads as part of the Town's transportation System.

**"1.2 Goals and Objectives**

The primary goal and objective of the Town's Snow and Ice Removal Plan is to maintain safety and mobility on the Town's transportation system for motor vehicles and their operators that are properly equipped for travel in inclement weather conditions. The Town's transportation system consists of 88.61 miles of public roadways, 20.13 miles of private roadways and 37.92 miles of sidewalks and bikepaths. Additional goals and objectives include the following:

1. *Maintain mobility on the Town's transportation system within the fiscal constraints of the approved operating budget.* It is recognized that there are limitations to the Town's resources, and that these resource limitations may at times limit the Town's ability to meet this objective.
2. *Maintain mobility on the Town's transportation system while preserving and protecting the Town's natural resources.* It is recognized that some commonly accepted materials and practices associated with snow and ice removal operations are potentially harmful to natural resources, and that the use of these materials and practices may at times limit the Town's ability to meet this objective....."

(d) A municipality may require a letter of credit to guarantee future payment of an impact fee or offsite mitigation. (Added 1987, No. 200 (Adj. Sess.), § 37, eff. July 1, 1989.)

§ 5205. Exemptions

A municipality may exempt certain types of development from any part or all of the impact fee assessed, provided that the exemption achieves other policies or objectives clearly stated in the municipal plan. The policies or objectives may include, but are not limited to, the provision of affordable housing and the retention of existing employment or the generation of new employment. (Added 1987, No. 200 (Adj. Sess.), § 37, eff. July 1, 1989.)

§ 5206. Construction of chapter

Nothing in this chapter shall be construed as prohibiting a municipality from adopting ordinances otherwise authorized by law. (Added 1987, No. 200 (Adj. Sess.), § 37, eff. July 1, 1989.)

Continued interest in this issue has persisted in the Governance Committee and has prompted the following issues to be identified for the Selectboard:

1. The Charter directed the Town “to establish a policy whereby the Board of Selectmen may determine it to be in the public interest to plow those private roads serving (2) or more year round residences, which previous to January 1, 1997 had the town providing winter road maintenance. In his testimony to the Governance Committee on July 11, 2013, Director Osborne indicated that:

“Currently there are a significant number of private roads that do not fall under these policies and therefore are not plowed by the Town. The Department of Public Works receives multiple calls each year from residents along private roads asking why the Town plows some private roads but not theirs. The Department has no good answer to this question. In some cases, the private roads the Town currently plows are within private trailer parks which are for profit businesses. Again, there is no available explanation for this.”

Additional searching for a policy failed to identify a policy related to the plowing of private roads.

2. In July, 2014, Town Manager Francis, Colchester Center Volunteer Fire Department Chief, Mike Chmielewski and Mallets Bay Fire Department Chief, Dave Scibek, sent a letter to residents detailing the need for clearing and maintenance of private roads and citing Chapter 7 of Town Ordinances requiring that “passable” access be maintained “year round.” (suggesting that all private roads are part of the town transportation system.) The letter further detailed specifications and standards for “private driveways or roads” of various types. The Town’s Department of Public Works’ *Specifications and Standards*, May 2013, details road specifications for all town roads. The absence of a policy for the plowing of private roads (above) further complicates the issue of clearing and maintenance identified in the Fire Chief’s letter. The issue is even further complicated by the ownership of seasonal dwellings on many of the private roads.
3. The allocation of tax dollars to the maintenance of town roads suggests that these are services that are not on a ‘fee for service’ basis. At the same time the requirement of the town that private roads be maintained by residents raises questions of equity in the allocation of tax dollars for services provided to all other residents of the town. Furthermore, the

practice of assigning a "view factor" tax basis to lakefront properties, many of which are located on private roads, constitutes additional taxation under the circumstance which withholds town services for road maintenance. On what basis does the Town withhold services for residents of roads serving 2 or more year round residents? For some residents, living on private roads that not plowed, the practice of plowing some private roads and not others raises issues of equity.

4. What criteria are used to allow plowing of the private roads that are currently being serviced?

The Governance Committee requests that the Selectboard respond to the above 5 questions as part of the dialogue requested by the board in resuming the activity of the Governance Committee.

# Attachments:

## Summary of Snow Plowing Issues in 2013

### Snow Plowing of Private Roads by the Town of Colchester

July 28, 2013 CT

During the July 11th, 2013 meeting the following portion of the Colchester Town Charter under Section 104 (Additional Powers) was discussed:

“(7) To establish a policy whereby the board of selectmen may determine it to be in the public interest to plow those private roads serving two (2) or more year round residences, which had previous to January 1, 1997 had the town providing winter road maintenance.”

This allows the Selectboard to establish a policy regarding the snow plowing of private roads. We were not sure as to whether such a policy was actually established subsequent to the date this charter change was adopted.

Our understanding seemed to be that this addition to the charter was made to assure that the plowing of private land by the municipality was legitimate and legal and therefore protected from suit and liability by “sovereign liability”.

The publication *Municipal Law Basics* (March 2009) by the Office of the Secretary of State ([http://www.sec.state.vt.us/municipal/pubs/municipal\\_law\\_basics.pdf](http://www.sec.state.vt.us/municipal/pubs/municipal_law_basics.pdf)) contains the following discussion of Sovereign Liability (skip to highlites if you don't want details):

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**Sovereign immunity.** The doctrine of sovereign immunity protects the state and its subdivisions - including municipalities - from lawsuits except when the immunity has been expressly waived by statute. *Levinsky v. Diamond*, 151 Vt. 178,184 1989; 12 V.S.A. § 5603. State statutes waive sovereign immunity to the extent that a municipality or the state has purchased liability insurance. 24 V.S.A. §§ 901, 901a; 29 V.S.A. § 1403; and 12 V.S.A. § 5603. (Many Vermont local governments obtain coverage from the Vermont League of Cities and Towns' Property and Casualty Inter-municipal Fund which is an inter-municipal risk pool that, by statute, does not create a waiver of sovereign immunity. 24 V.S.A. § 4941 et seq.) In addition, there are some specific statutory exemptions from immunity; for example:

- Towns may be liable for damages caused by the improper maintenance or repair of a bridge or culvert. 19 V.S.A. § 514.
- A town or town clerk can be sued for damages for neglect of duty in relation to a deed, execution or other instrument delivered to him or left at his office for record. 12 V.S.A. §515.
- A town official who fails or neglects to perform a duty imposed on him or her by law can be fined up to \$100.00. 24 V.S.A. § 902.
- "Any town officer who willfully refuses or neglects to submit his or her books, accounts,

vouchers or tax bills to the auditors or the public accountant upon request, or to furnish all necessary information in relation thereto, shall be ineligible to re-election for the year ensuing and be subject to the penalties otherwise prescribed by law." 24 V.S.A. § 686.

- If the tax collector fails after ten days of a request to submit his tax book and list to the treasurer for inspection and computation the collector shall be fined up to \$100. 24 V.S.A. § 1531.

The doctrine of sovereign immunity is generally seen as outdated – based on the feudal system where the king was the law and therefore could do no wrong. For that reason courts have worked to limit the application of sovereign immunity. In Vermont the court will apply sovereign immunity only to what it considers to be governmental functions performed by a municipality. The court has held that some of the things local governments do are "proprietary" (like a private business), for example, trash collection and recycling or providing water and sewer services. A municipality is given no immunity for its proprietary activities. See *Hillerby v. Town of Colchester*, 167 Vt. 270 (1997).<sup>1</sup>

As a practical matter it is not easy to determine what functions of municipal government are governmental and what function are proprietary; for this reason Vermont is one of the few states in which the court still recognizes a distinction. As recently as 2001 the Vermont Supreme Court applied the doctrine of sovereign immunity to protect the City of Rutland from liability for the death of a child who was hit by a car while crossing the street. In *O'Connor v. City of Rutland*, 172 Vt. 570 (2001) the court dismissed the suit because it held that designing and maintaining streets, lighting, and crosswalks are governmental functions.

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#### Bottom Line:

The question then is whether or not the plowing of private roads is "proprietary". If it is, then the town may be subject to suit. If it is not then Sovereign Immunity protects the town. This question needs to be answered by our experts.

#### Added 9-3-2013 by cdt

From VLCT's Handbook for Selectboards - page 89

[http://www.pantonvt.us/handbooks/Handbook%20for%20Vermont%20Selectboards\\_10-20.pdf](http://www.pantonvt.us/handbooks/Handbook%20for%20Vermont%20Selectboards_10-20.pdf)

"Questions frequently arise concerning the status of roads and streets created in private developments. Even though town planning and zoning authorities have approved developments and plats, Vermont law states that new streets and highways "shall be deemed to be ... private ...until formally accepted by the municipality as a public street or highway by ordinance or resolution of the legislative body." 24 V.S.A. § 4463(c). That said, there are some actions that, if taken by a town on a regular basis, can blur the distinction between a private and a public road. It is worth a note and warning that if the town appears to take over some of the private road's maintenance by activities

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<sup>1</sup> See: <http://libraries.vermont.gov/sites/libraries/files/supct/167/96-243op.txt>

**Attachment 5, Plowing of Private Roads**  
2015 Report to Selectboard from Colchester Governance Committee

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such as plowing snow and fixing potholes, it may be deemed to have acquired the road by "dedication and acceptance." In this case, the town might have inadvertently taken on a new street or highway with all of its costs and liabilities."



### **Bryan Osborne's Written Comments on Snow Plowing Private Land**

The following is taken from Bryan Osborne's written response to questions presented to him prior to the July 11th meeting.

Generally the Department of Public Works has no issues with the Town's current Charter with the exception of Section 104 (7) which states; *"To establish a policy whereby the Board of Selectmen may determine it to be in the public interest to plow those private roads serving two (2) or more year round residences, which previous to January 1, 1997 had the town providing winter road maintenance."*

In 1995, the Department of Public Works conducted a study associated with the plowing of private roads. Generally, the Town of Colchester is one of the few communities within Chittenden County that plows private roads. While there were at the time of the study three other communities that plowed some private roads, their efforts were minimal compared to the 22 miles of private roads plowed by the Town of Colchester.

This current practice has resulted from a series of public votes ranging from 1970 to 1990 as outlined in the report. As a part of the study, both the Town's Attorney and Insurance Carrier characterized the Town's practice as inadvisable and formally recommended that the Town discontinue the practice. From a performance standpoint, given that the plowing of private roads makes up approximately 20%-25% of the Town's overall snow removal operation, the Town's efficiency on publicly owned roads could be increased significantly absent the current practice of plowing private roads. At the time of the study, it was estimated that the discontinuance of plowing private roads could save the Town approximately \$42,000 per year.<sup>2</sup> In 1997, the Select Board felt it necessary to address at least the liability issues associated with the plowing of private roads. To accomplish this, the Town's Charter was revised as shown above.

Currently there are a significant number of private roads that do not fall under these policies and therefore are not plowed by the Town. The Department of Public Works receives multiple calls each year from residents along private roads asking why the Town plows some private roads but not theirs. The Department has no good answer to this question. In some cases, the private roads the Town currently plows are within private trailer parks which are for profit businesses. Again, there is no available explanation for this.

The Department of Public Works would recommend that this language be removed from the Town's Charter. If the Town would like to address the private road issue, we believe there are two options to consider. First, discontinue the practice of plowing all private roads which would be phased over a period of years to smooth the transition. Alternatively, the Town should plow all private roads in Colchester only after the owners of the roadways have reconstructed the roadways to meet the Town's minimum public roadway standards.

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<sup>2</sup> Approximately \$61,000 in 2013 dollars using <http://www.usinflationcalculator.com/> (cdt 7/31/13)

# The Plowing of Private Roads Paragraph

Updated: May 22, 2014 CT

In 1997 the portion of the Colchester Charter dealing with the powers of the Selectboard was amended with the addition of the following paragraph.

To establish a policy whereby the board of selectmen may determine it to be in the public interest to plow those private roads serving two (2) or more year round residences, which had previous to January 1, 1997 had the town providing winter road maintenance.

The paragraph gives this power to the Selectboard. The paragraph does **not** establish a policy for or against plowing private roads. Rather, it grants the Selectboard the power to create the policy.

The Colchester Governance Committee voted unanimously to recommend to the Selectboard that the paragraph be removed from the charter and that the Selectboard establish an equitable policy regarding the publicly financed plowing of some private roads in Colchester. The Committee does **not** recommend what that policy should be: to either continue plowing some private roads and not others, to plow all private roads or to plow no private roads.

## Why remove the paragraph?

- 1) **It is not necessary** – Jim Barlow, representing the Vermont League of Cities and Towns, informed the committee that the Selectboard can establish the policy without the paragraph.
- 2) **It does not protect the town from liability suits** – The paragraph was inserted shortly after the town was involved in a liability suit and may have been inserted in the hope that it would help the town claim a *sovereign immunity* defense to any suit resulting from the plowing of private roads. Barlow thought the paragraph might provide a point for augmentation, but that it did not guarantee sovereign immunity.
- 3) **It does not belong in a Town Charter** – A Town Charter is similar to a State or Federal Constitution in that it defines the form of government, the powers and limitations of that government and mechanisms for change within that structure. The Selectboard and town votes are the means of adding or changing policy and ordinances when needed. This paragraph goes beyond that in an attempt to establish a policy which should be the decision of the Selectboard and the voters.
- 4) **The policy is controversial** - The policy of plowing private roads is controversial and not easily understood. How exactly such a policy began and who should or could change it if necessary is not clear. Every time the Charter is reviewed, this paragraph will result in an undue amount of time discussing the various pro and cons of the issue. Such discussions should be held outside the Charter review process.

## Conclusion

It is important to understand that the Colchester Governance Committee is not recommending a policy regarding the plowing of private roads. For the reasons provided above the Committee is recommending removal of the paragraph from the Town Charter.

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<sup>3</sup> See: <http://libraries.vermont.gov/sites/libraries/files/supct/167/96-243op.txt>

## Facts and Findings

In the course of our investigation and discussion of this issue the following facts and findings were obtained. To a large extent these are based on a study conducted in 1995 by the Colchester Department of Public Works and reported to this committee by Bryan Osborne, Colchester Director of Public Works.

When did it begin?

There have been a series of public votes on this issue ranging from 1970 to 1990.

Do other towns plow private roads?

Both Jim Barlow of the Vermont League of Cities and Towns and Bryan Osborn stated that other Vermont towns plow private roads. Bryan Osborne remarked that while there were three other communities in Chittenden County that plowed private roads at the time of the study but that their efforts were minimal compared to those of Colchester.

How much does it cost?

The 1995 study found that the Town of Colchester was plowing 22 miles of private roads. This was 20% to 25% of the Town's overall snow removal operations. It was estimated that the discontinuance of plowing private roads could save the Town approximately \$42,000 per year<sup>4</sup>.

Can the Town be held liable for damages occurring while plowing private roads?

As a part of the 1995 study, both the Town's attorney and insurance carrier characterized the Town's practice as inadvisable and formally recommended that the Town discontinue the practice.

Commercial Enterprises

The maps below show that the Town of Colchester plows roads belonging not only to private citizens but also to commercial enterprises: mobile home parks.

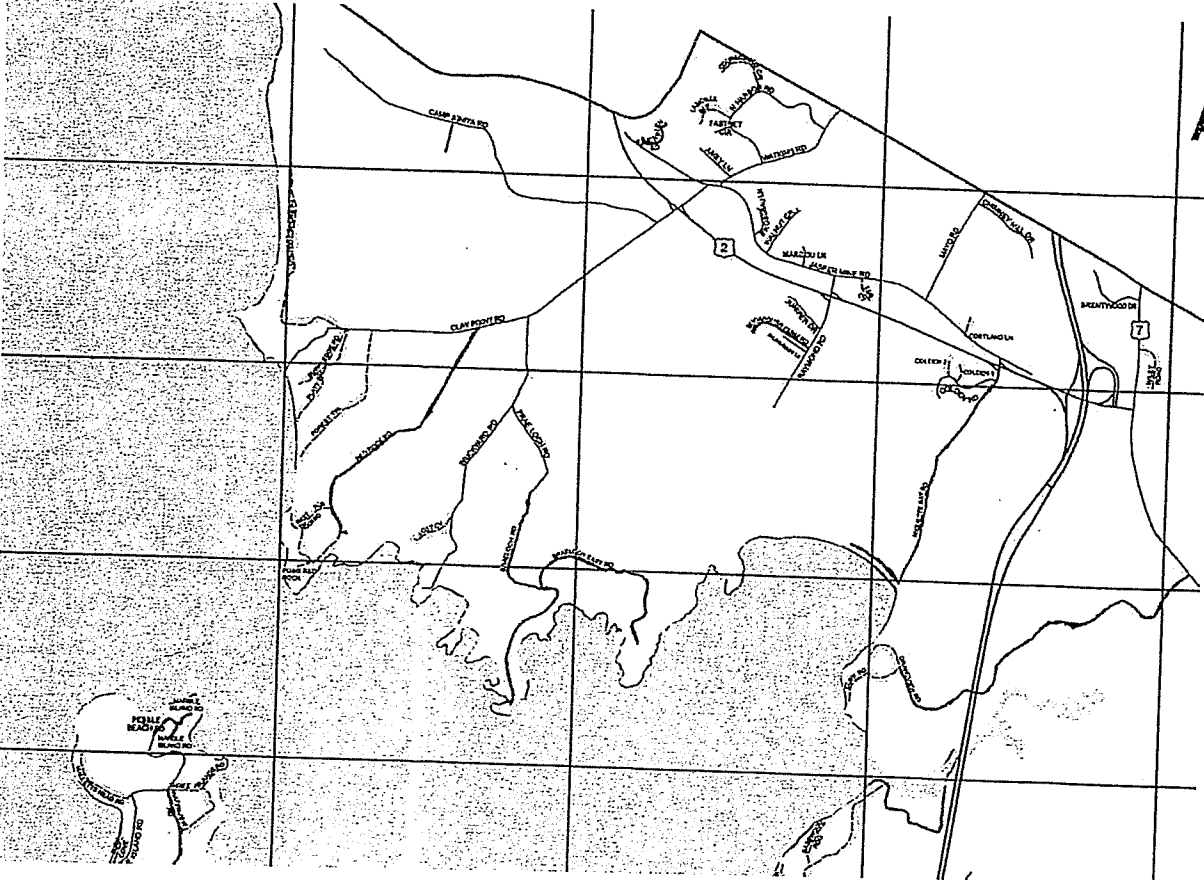
Which roads are plowed?

The following maps show which private roads are plowed (red highlight) and which private roads are **not** plowed (yellow highlight). Public roads are not highlighted. This map was provided by the Colchester Department of Public Works during the winter of 2013-2014.

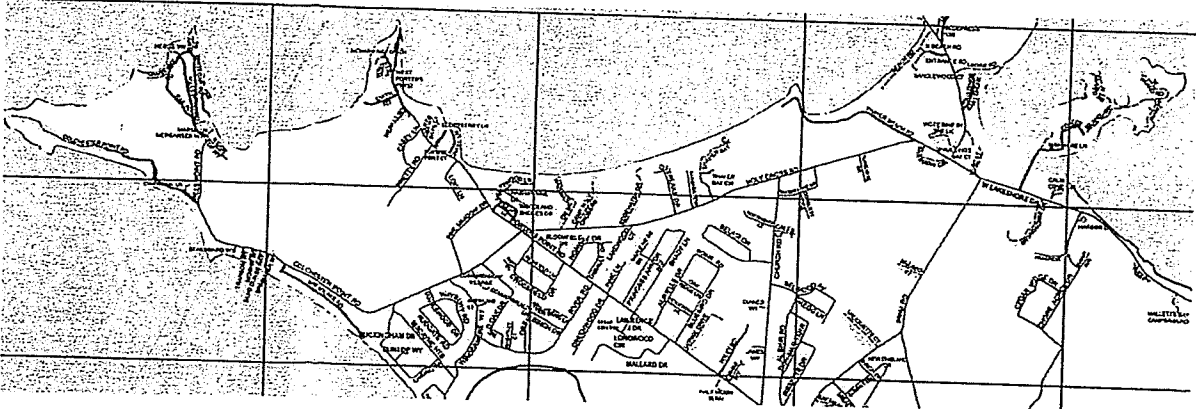
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<sup>4</sup> \$61,000 in 2014 dollars depending on the inflation calculator used.

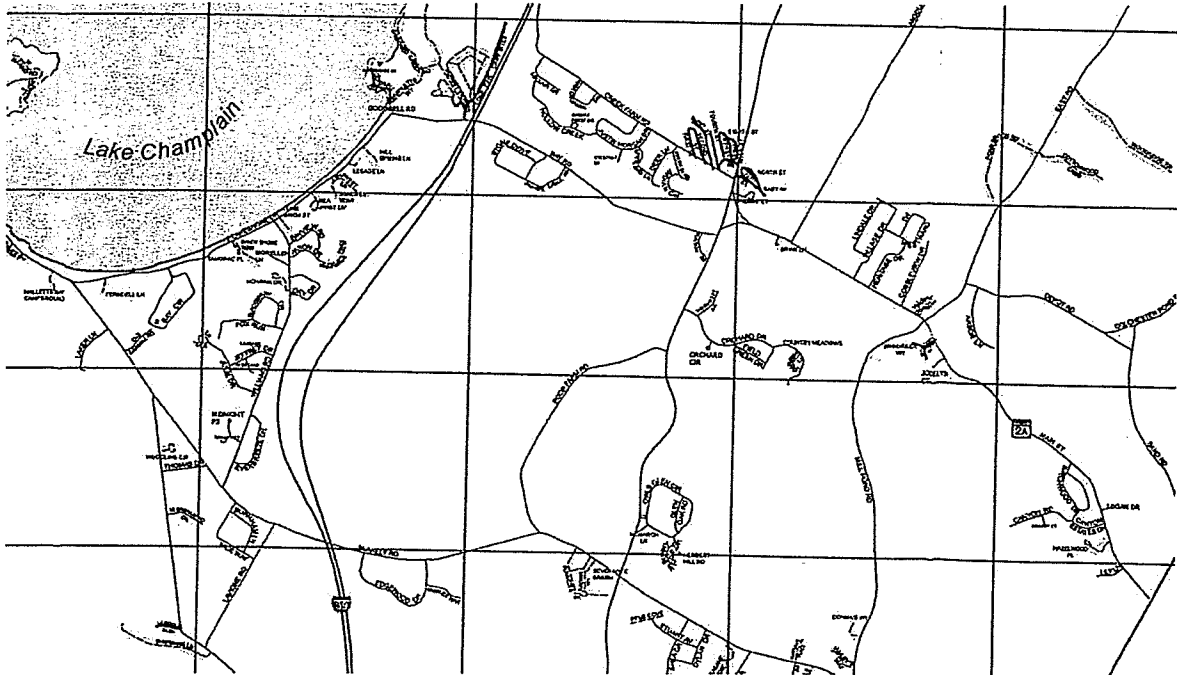
North of Malletts Bay



West of Malletts Bay

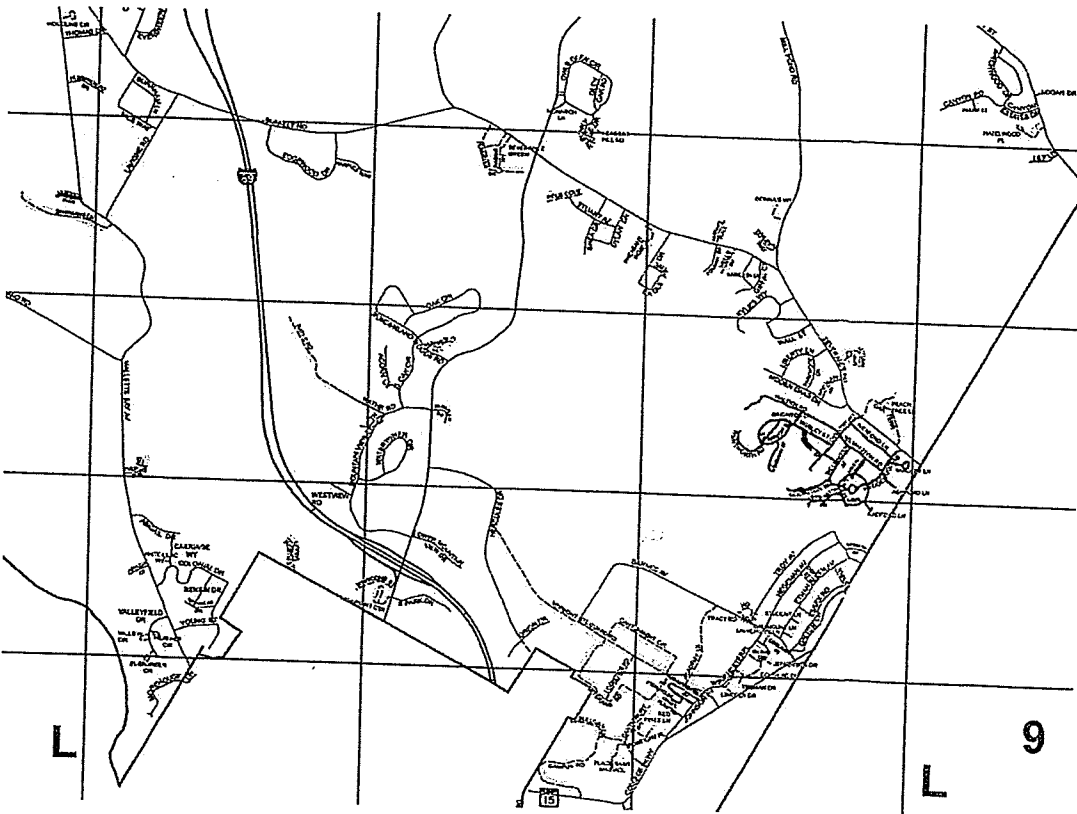


**East of Malletts Bay**



**The Village and the Fort**

Attachment 5, Plowing of Private Roads  
2015 Report to Selectboard from Colchester Governance Committee





**Attachment 5, Plowing of Private Roads  
2015 Report to Selectboard from Colchester Governance Committee**



Colchester Center  
Volunteer Fire Dept.



Town of Colchester  
781 Blakely Rd.



Malletts Bay  
Fire Department

Dear Resident:

The Town of Colchester, Colchester Volunteer Fire Department and Malletts Bay Fire Department request your cooperation as a property owner on a private road in keeping our roads safe and passable for our emergency service operations. We have noticed that many of the private roads are in need of clearing and cutting of vegetation to ensure adequate access for emergency vehicles.

The Town of Colchester's Code of Ordinances, Chapter 7 (Fire Prevention, Fire Protection and Life Safety) requires that "means of access for fire department apparatus shall be provided to all structures and kept passable year round." If damages are incurred from poorly maintained roads, the Fire Departments may have to bill the private road residents for repairs.

Section 7-10 of the ordinance pertains to parcels that use or intend to use a private driveway or road to provide access. This section requires:

- (a) A private driveway shall be extended to, at minimum, within 50 feet of the structure served.
- (b) All private driveways, excepting Private Driveways Type I, shall have at least six foot wide zone on each side of the driveway clear of encumbrances such as trees, structure, and rocks for plowed snow storage area on each side. In driveways under 50 feet and driveways serving commercial structures, designated snow storage areas shall be permissible in lieu of the six foot wide zone.
- (c) Every private driveway in excess of 150 feet in length shall be provided with approved provisions for the turning around (see Figure 3.5 & 3.6 of the Colchester Public Works Specifications and Standards for dimensional requirements for a turnaround).
- (d) A private driveway shall have a minimum of thirteen and one half foot height clearance.
- (e) All private driveways, excepting Private Driveways Type I, shall be constructed so as to support a 40,000 pound vehicle.
- (f) All private driveways shall meet the following dimensional requirements unless waived:

TYPE	MINIMUM WIDTH	NUMBER OF UNITS SERVED
Private Driveway Type I	10 feet	One
Private Driveway Type II >50 feet but <300 feet in length	15 feet	Four or fewer
Private Roads Type II >300 feet in length	20 feet	
Private Driveway Type III	20 feet	<300 feet in length
Private Roads ex Type I, II, III		

We would also appreciate your assistance in keeping fire hydrants cleared of vegetation or snow to a minimum of 3' around all sides.

Thank you in advance for your help in keeping our roads safe and passable.

Dawn H. Francis  
Town Manager

Chief Mike Chmielewski  
Colchester Center Volunteer Fire Dept.

Chief Dave Scibek  
Malletts Bay Fire Dept.