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**Abandoned and Discontinued Roads Report
Report to the Joint Standing Committee Having
Jurisdiction Over State and Local Matters**

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2013**

L.U.O.



PAUL R. LEPAGE
GOVERNOR

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY

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January 15, 2013

Honorable Senator Colleen M. Lachowicz (D-Kennebec), Chair
Honorable Representative Anne P. Graham (D-North Yarmouth), Chair
Joint Standing Committee having jurisdiction over state and government matters.

Re: Abandoned and Discontinued Roads Stakeholders Group Report

Dear Senator Lachowicz, Representative Graham, and Members of the Joint Standing Committee having jurisdiction over state and local matters, I am writing this letter to provide information on the Abandoned and Discontinued Roads Stakeholders Group recommendations.

Attached please find the Abandoned and Discontinued Roads Stakeholders Group report submitted pursuant to L.D. 1596 passed into law by the 125th Legislature. The L.D. required the Department of Agriculture, Conservation and Forestry to convene a stakeholder group of no more than 10 members to review laws and policies relating to abandoned and discontinued roads and to report the group's findings and recommendations to the joint standing committee having jurisdiction over state and local government matters. This report includes the findings and recommendations for legislative consideration.

Please let me know if you need more information.

Sincerely,

Walter "Skip" Varney, Co-chair
Department of Agriculture, Conservation and Forestry
Division of Parks and Public Lands



STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY

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COMMISSIONER

L.D 1596 - Abandoned and Discontinued Roads Stakeholders Group

Walter "Skip" Varney, Chair
Director of Engineering and Real Property
Department of Agriculture, Conservation and Forestry
Division of Parks and Public Lands

Toni Kemmerle, Chair
Chief Legal Counsel
Maine Department of Transportation

Bob Meyers
Executive Director, Maine Snowmobiling Association

Kate Dufour, Senior Legislative Advocate, Maine Municipal Association
Michael Schultz, Attorney
Attended 2nd and 3rd meeting on behalf of Maine Municipal Association

Tom Doak
Executive Director, Small Woodlot Owners Association of Maine

Greg Foster
Forest Products: Maine Forest Products Council

Roberta Manter
Interested Party/Property Owner along Abandoned or Discontinued Road

Bruce Bell
Interested Party/Property Owner along Abandoned or Discontinued Road

John Cunningham
Interested Party/Attorney
Attended initial meeting, but did not participate in later deliberations or the adoption of the report.

Sandra Guay, Esq.
Interested Party/Attorney, Woodman, Edmands, Danylik
Unable to attend due to scheduling conflict and did not participate in the adoption of the report.

STATE OF MAINE

—
IN THE YEAR OF OUR LORD
TWO THOUSAND AND TWELVE

—
S.P. 522 - L.D. 1596

**Resolve, To Review Laws and Policies Related to Discontinued and
Abandoned Roads**

Sec. 1. Department of Conservation stakeholder group on discontinued and abandoned roads. Resolved: That the Department of Conservation shall convene a stakeholder group of no more than 10 members to review laws and policies related to discontinued and abandoned roads. The stakeholder group shall examine issues relating to continued road access through public easements, damage to a road caused by use by abutting property owners, damage to a road caused by members of the public, maintenance of a private road that has a public easement, methods to address problems of road damage and ways to maintain access for intermittent users who need access to a road. The stakeholder group must include representatives from the Department of Transportation, up to 2 residents who own property on a discontinued or abandoned road with a public easement and members from statewide organizations representing municipalities, small woodlot owners, producers of forest products, snowmobilers and other interested parties. The Department of Conservation shall fund the work of the stakeholder group from within existing resources. The Department of Conservation shall report the stakeholder group's findings and any recommendations to the joint standing committee of the Legislature having jurisdiction over state and local government matters no later than January 15, 2013. The joint standing committee of the Legislature having jurisdiction over state and local government matters is authorized to report out legislation to the First Regular Session of the 126th Legislature.

State of Maine

Abandoned and Discontinued Roads Report

Report to the Joint Standing Committee having
jurisdiction over state and local matters.

1/15/2013

Department of Agriculture, Conservation and Forestry

Abandoned and Discontinued Roads Stakeholders Group Report

The Department of Agriculture, Conservation and Forestry was charged to convene a 10 member stakeholder group to review laws and policies related to discontinued and abandoned roads. The group examined issues relating to continued road access through public easements, damage to a discontinued road caused by use by abutting property owners, damage to a discontinued road caused by members of the public, private repair of a road that has a public easement, methods to address problems of road damage and ways to maintain access for intermittent users who need access over a road.

Discontinued and abandoned roads have been an issue for a number of years in the State of Maine. There have been numerous attempts to develop cures by crafting statutes to assist municipalities in dealing with this issue; these have met with limited success and have been problematic for certain property owners. Currently, municipalities can employ common law abandonment, statutory discontinuance and statutory abandonment to change the status of a public road. In many instances these mechanisms have not only added uncertainty and complexity to this issue but have shifted the cost and burden of maintaining former municipal roads to private citizens while still allowing unlimited access and use through a public easement.

Since Maine became a State, towns have had legislative authority to discontinue town ways. County Commissioners have had similar powers over county ways. Prior to 1965, nothing in the law gave either towns or counties the authority to retain a private way or public easement over a discontinued road; however, towns and counties sometimes attempted to reserve these rights when a road was discontinued in order to avoid the necessity of compensating land owners for loss of access. In 1965, the law regarding discontinuance of town ways was changed to provide: "The discontinuance of a town way shall be presumed to relegate the town way to the status of a private way unless the town meeting article specifically stated otherwise". Unfortunately, the wording of this

law at times resulted in townspeople unwittingly voting to keep a private way because the article neglected to state otherwise.

In 1975, a new statute (Title 23 MRSA Section 3021) was enacted that changed all county ways not discontinued or abandoned prior to July 29, 1976 to town ways. From this point forward, when a road that had been a county way was discontinued, it became subject to the 1965 change which automatically retained a private way. That same year, revision of the law governing discontinuance of town ways also changed the term “private way” to “public easement,” resulting in retained rights for public use with no municipal obligations for ongoing maintenance or repair. Ceasing to provide maintenance or repair of a public road will inevitably result in loss of access due to the harshness of Maine weather, normal use by motor vehicles and recreational activity.

There are no requirements that municipalities maintain a public easement in order to keep it safe and convenient for travelers. Municipalities typically abandon or discontinue a road due to lack of use or financial constraints. Roads that are not part of a municipality’s annual maintenance program are very expensive to restore and are, therefore, sometimes discontinued. The long history of discontinuing public roads and retaining unrestricted public use without an obligation to provide maintenance, management, and repair leads to many inequities because the burden often falls upon abutters to assume liability and keep the road in repair.

This Stakeholders Group has developed the following recommendations when a governing body chooses to retain a public easement when a road is discontinued:

1. Municipalities should be given 2 years to complete the process of developing a list of all municipal roads that they intend to keep in repair with public funds. After 2 years, the roads not included in the list will become automatically discontinued with no public easement. Abutters have 2 years from the date of the publication of the list to file a claim with the governing body.

2. Title 23 MRSA Section 3028 regarding abandonment of public ways should be repealed. Title 23 MRSA Section 3026 regarding discontinuance of town ways/roads, should no longer automatically retain a public easement; rather, an easement can only be retained by an affirmative vote to do so by the governing body.
3. If a governing body (municipality) determines it would like to retain a public easement after discontinuance of a town way, the governing body must assume liability and responsibility for the easement to the extent of its intended uses. A public easement must come with fiscal and maintenance responsibilities, and abutting land owners must be notified of proposed action. Failure to maintain the easement for 2 years will automatically extinguish the public's interest.
4. When a municipality chooses to end its maintenance responsibility for a road via a discontinuance process under Title 23 MRSA Section 3026, the municipality's rights will be extinguished.
5. Courts have declared that access to property is a property right attached to the land; therefore, if a road is discontinued and a municipality no longer retains any interest in the property, an easement must be given to property owners requiring access to their property. Continued use of the previously existing access may not be precluded unless an equivalent access is available.
6. Future municipal decisions to discontinue or abandon a municipal road must be by an affirmative vote by the governing body. There will be no assumption of abandonment or automatic conclusion that a public easement does not exist due to the lack of maintenance or lack of use of the road.

Taxation has long been part of our society in one form or another. Taxes are collected from citizens that own real property within a given municipality. These taxes are then used to pay for the various services provided by the municipality. The governing body of

the community must decide on how to equitably divide the available funds obtained through taxes given the wants and needs of the community. When retaining a public easement over property, governing bodies must not only decide upon the level of interest the municipality would like to retain, but must also decide on how the maintenance and management of these rights will fit within their numerous other financial obligations.

Are current laws and statutes fair and equitable? Is everyone involved paying their fair share for use, maintenance and management of a public easement? Is the burden being shifted to private citizens with no recourse because it is easier and less expensive?

Municipalities should not be allowed to rely on flawed statutes to rid themselves of public responsibilities and costs or to unfairly shift the financial burden to individuals while still retaining public access rights. This Stakeholders Group strongly believes that it is in the overall best interest to maintain, enhance, or provide adequate access to public or private lands and resources, provide for future trail and/or access needs, and to protect or establish corridors to ensure continued access while respecting the needs of the user and abutting land owners.

The Abandoned and Discontinued Roads Stakeholders Group recommends that the joint standing committee of the Legislature having jurisdiction over state and local government matters report out legislation to the First Regular Session of the 126th Legislature based on the recommendations provided in this report.



Paul Richard LePage
GOVERNOR

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY
DIVISION OF PARKS & PUBLIC LANDS
22 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0022

Walter Whitcomb
COMMISSIONER

October 15, 2012

Walter "Skip" Varney
Division of Parks and Public Lands
22 State House Station
Augusta, Maine 04333

Dear Mr. Varney:

On behalf of the Department of Agriculture, Conservation and Forestry, thank you for your willingness to serve as a member of this important study of abandoned and discontinued roads. The Department was charged to convene a stakeholders group to review the laws and policies related to discontinued and abandoned roads. The Resolve requires that you and the other members examine the issues relating to continued road access through public easements, damage to a road caused by use by abutting property owners and members of the public, maintenance of a private road that has a public easement, methods to address problems of road damage, and ways to maintain access for intermittent users who need access to a road. Once completed, staff from the Department of Agriculture, Conservation and Forestry shall report your collective findings to the joint standing committee having jurisdiction over state and local government matters no later than January 15, 2013.

Your time commitment will be relatively short given the length of legislatively mandated time the stakeholder group has to discuss the issues, draft, and review the required report. Meetings will be held on October 31, November 15 and December 5 from 1:00-4:00pm in the second floor conference room of the Williams Pavilion Building in Augusta (directions enclosed). The group will be co-chaired by Skip Varney, Director of Engineering and Real Property, Division of Parks and Public Lands, and Toni Kemmerle, Chief Legal Counsel for the Maine Department of Transportation. Information from the Office of Policy and Legal Analysis on L.D 1596, a copy of the resulting Resolve, and a complete list of stakeholder group membership is enclosed for your review.

We look forward to working with you on this important matter.

Sincerely,

Walt Whitcomb, Commissioner
Department of Agriculture, Conservation and Forestry

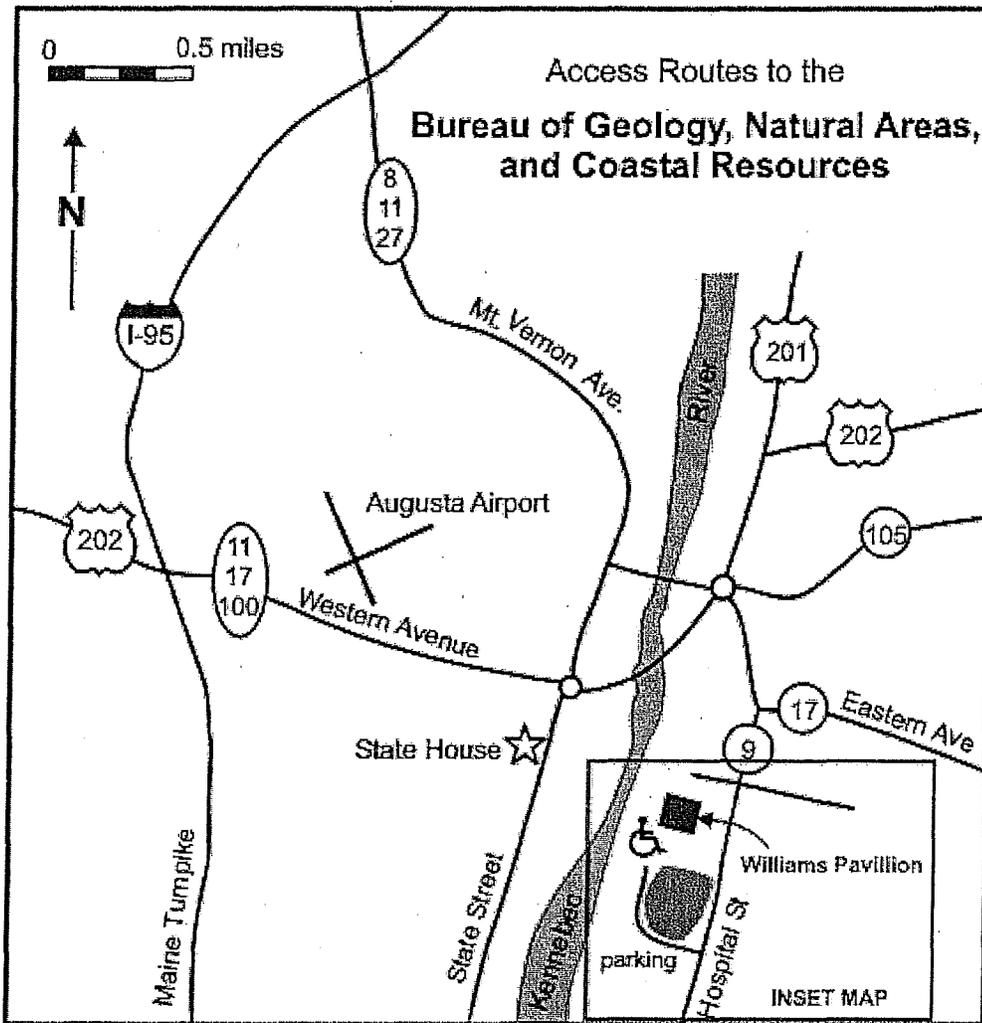
Enclosure

BUREAU OF PARKS & LANDS
WILLARD R. HARRIS, DIRECTOR

PHONE: (207) 287-4960
FAX: (207) 287-8111
TTY: 888-557-6690

Directions

The Williams Pavilion on the grounds of the Eastside Campus of government buildings in Augusta, Maine. From I-95, take Exit 30, US Route 202 East approximately 1.5 miles. Proceed onto the traffic circle (rotary) and take the second exit onto US 202 East. Cross the bridge over the Kennebec River. Approach the second rotary and follow the signs onto Route 9 West. Continue on Route 9 West through the intersection with Route 17 (stay in the right-hand lane). Proceed past the traffic light by the Department of Environmental Protection facility (the Ray Building) and immediately turn right onto Arsenal Street. The Williams Pavilion is located on the right, just beyond the Harlow Building. Parking is available throughout the Campus.





125th MAINE LEGISLATURE

SECOND REGULAR SESSION-2012

Legislative Document

No. 1596

S.P. 522

In Senate, December 13, 2011

An Act To Amend the Laws Governing Discontinued Town Ways

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 203.

Received by the Secretary of the Senate on December 9, 2011. Referred to the Committee on State and Local Government pursuant to Joint Rule 308.2 and ordered printed.

Joseph G. Carleton Jr.

JOSEPH G. CARLETON, JR.
Secretary of the Senate

Presented by Senator SAVIELLO of Franklin.

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: January 23, 2012

To: State and Local Government Committee

From: Anna Broome, Legislative Analyst

LD 1596 An Act to Amend the Laws Governing Discontinued Town Ways

SUMMARY:

Under existing law, a public easement is retained on discontinued town ways. This bill authorizes municipal officers to propose placing restrictions on the public easement, such as limiting motorized vehicle traffic, as part of the discontinuance order approved by the local legislative body.

TESTIMONY

Proponents:

- Municipalities need to have authority to restrict types on use on discontinued and abandoned roads. Municipalities can extinguish public easement or keep ROW but nothing in between.
- Fayette selectmen support amending the bill to apply to both.
- Property owner maintains the road at private expense so they can get to their property but public access results in damage to the road.
- Road isn't discontinued; only the public maintenance. Abandoned roads are worse – no meeting means no opportunity to extinguish public access.
- Private roads are different – can be gated off to the public.
- No guarantee that town meeting will agree to restrictions of use.
- Towns should be given a period of time to declare the status of all roads in the town.

Opponents:

- Language in the bill doesn't go far enough – easement should be relinquished. If the public want access to a road, should be responsible for the condition of the road. If not; private owners should be left alone.
- Manters have spent \$80,000 over 40 years to maintain the Young Road in Fayette.

NFNA:

- MMA's LPC hadn't met on LD 1596 [since then support the bill as drafted only].
- Amendment request would revert to September 1965 law. That law came from court pressure to ensure access to property.
- Concern that local governments could place conditions that are incompatible with timber management and harvesting; growing trees takes a while.
- Most harvesting is done in a responsible way; try to have good contractual relationships with landowners.

ADDITIONAL INFORMATION:

Discontinued roads 23 MRSA §3026: formal procedure to terminate the town's interest in a town way. Municipal officers must give best practicable notice to all abutting property owners and includes the amount of damages to be paid to each abutter (for loss of fair market value as a result of the loss of municipal maintenance of the road). Discontinuance order must be approved by the legislative body. Unless otherwise stated in the discontinuance order, public easement is retained (this is the paragraph that the Manters want repealed). **23 MRSA §3029:** Any person aggrieved by the determination of the damages awarded to owners may, within 60 days after the day of taking, appeal to the Superior court in the county where the property lies.

Public easement of discontinued roads: Before 3rd September 1965, a discontinuance left no public easement and ownership reverted to the abutters on each side to the centerline of the road. A public easement is retained in a pre-1965 discontinuance if the article authorizing the discontinuance specifically provided for the retention of one.

On or after 3rd September 1965, a discontinuance terminates the municipality's maintenance obligation but leaves a public easement automatically unless the article authorizing the discontinuance specifically rejects retention of a public easement. The municipality can extinguish the easement at the time of the discontinuance or later (may affect damages and would be recalculated).

Law amended in 1977 to provide for the public easement to include an easement for public utility facilities necessary to provide service.

Abandoned roads 23 MRSA §3028: A town or county way not kept passable for motor vehicles at the expense of a municipality or county for a period of 30 \geq years has been discontinued by abandonment. Passage of time combined with lack of maintenance. Determined by the municipal officers and does not require a vote of the municipality. Municipalities bear the initial burden of establishing the presumption of abandonment. Once the presumption arises, the burden of proving that a road is a town way is on the person seeking to have the road repaired or maintained. The person affected by the presumption of abandonment may seek declaratory relief in Superior court.

A road that has been abandoned under this section is relegated to the same status as if it is discontinued with respect to public easement (including 1965 differentiation).

Common law doctrine of abandonment: Maine court decisions also recognize roads may be abandoned by long periods of non-use by the public. Differs from statutory abandonment – no clearly established time period (may only be 20 years), focus on public non-use rather than public non-maintenance, no public easement retained, private easements may exist.

FISCAL IMPACT:

OFPR: No fiscal impact.

Title 23 §3026. Discontinuance of town ways

1. **General procedures.** A municipality may terminate in whole or in part any interests held by it for highway purposes. A municipality may discontinue a town way or public easement after the municipal officers have given best practicable notice to all abutting property owners and the municipal planning board or office and have filed an order of discontinuance with the municipal clerk that specifies the location of the way, the names of abutting property owners and the amount of damages, if any, determined by the municipal officers to be paid to each abutter.

Upon approval of the discontinuance order by the legislative body, and unless otherwise stated in the order, a public easement shall, in the case of town ways, be retained and all remaining interests of the municipality shall pass to the abutting property owners to the center of the way. For purposes of this section, the words "public easement" shall include, without limitation, an easement for public utility facilities necessary to provide service.

2. **Definition of best practicable notice.** "Best practicable notice" means, at minimum, the mailing by the United States Postal Service, postage prepaid, first class, of notice to abutting property owners whose addresses appear in the assessment records of the municipality.

Title 23 §3028. Abandonment of public ways; determination of status of any town way or public easement

1. **Presumption of abandonment.** It is prima facie evidence that a town or county way not kept passable for the use of motor vehicles at the expense of the municipality or county for a period of 30 or more consecutive years has been discontinued by abandonment. A presumption of abandonment may be rebutted by evidence that manifests a clear intent by the municipality or county and the public to consider or use the way as if it were a public way. A proceeding to discontinue a town or county way may not prevent or estop a municipality from asserting a presumption of abandonment. A municipality or its officials are not liable for nonperformance of a legal duty with respect to such ways if there has been a good faith reliance on a presumption of abandonment. Any person affected by a presumption of abandonment, including the State or a municipality, may seek declaratory relief to finally resolve the status of such ways. A way that has been abandoned under this section is relegated to the same status as it would have had after a discontinuance pursuant to section 3026, except that this status is at all times subject to an affirmative vote of the legislative body of the municipality within which the way lies making that way an easement for recreational use. A presumption of abandonment is not rebutted by evidence that shows isolated acts of maintenance, unless other evidence exists that shows a clear intent by the municipality or county to consider or use the way as if it were a public way.

2. **Status of town way or public easement.** The determination of the municipal officers regarding the status of a town way or public easement is binding on all persons until a final determination of that status has been made by a court, unless otherwise ordered by a court during the pendency of litigation to determine the status.

3. **Removal of obstructions.** If the municipal officers have determined under subsection 2 that the way is a town way or public easement and a court has not ordered otherwise, the municipality or an abutter on the way, acting with the written permission of the municipal officers, may remove any gates, bars or other obstructions in the way.

4. **Quasi-judicial act.** The determination of the municipal officers regarding the status of a town way or public easement pursuant to subsection 2 is a quasi-judicial act under Title 14, section 8104-B, subsection 2.

§3029. Damages; appeal

Damages shall be determined using the methods in sections 154 through 154E, as far as practicable, except that references to the "commission" or the "board" shall mean the "municipal officers" and references to the "state" shall mean the "municipality."

Any person aggrieved by the determination of the damages awarded to owners of property or interests therein under this chapter may, within 60 days after the day of taking, appeal to the Superior Court in the county where the property lies. The court shall determine damages by a verdict of its jury or, if all parties agree, by the court without a jury or by a referee or referees and shall render judgment for just compensation, with interest where such is due, and for costs in favor of the party entitled thereto.

Any person aggrieved by the action or nonaction of municipal officers or the municipal legislative body in proceedings under this chapter, other than a determination of damages, may appeal to the Superior Court in the county where the property lies, pursuant to Rule 80B of the Rules of Civil Procedure.

1964 version of M.C.S.A.

Pres 1965 discontinuance law

23 § 3003

LOCAL HIGHWAY LAW

Title 23

Note 9

point and ran toward Kennebec River, and stated termini thereof, it was to be presumed that the laying out of way was in accordance with the petition. *Cushing v. Webb* (1906) 102 Me. 157, 66 A. 719.

9. Evidence

The selectmen's return is prima facie evidence of the fact that they gave notice on the petition, and also of such other facts as were required by law to be embraced in the notice. *Cushing v. Webb* (1906) 102 Me. 157, 66 A. 719. See, also, *Inhabitants of Limerick, Petitioners* (1841) 18 Me. 183.

Where it appears by the town records, that the location of a town road by the selectmen was subsequent to the issuing of the warrant to call the meeting of the town for its acceptance, it is not competent to show by parol evidence, that the location by the selectmen in fact preceded the

issuing of the warrant. *Blaisdell v. Briggs* (1843) 23 Me. 123.

The return of the selectmen, as to their doings in regard to the location of a highway, as contained in the town records, must be proved by such records in so far as the fact of the return and its acceptance at a legal town meeting is concerned; but the record is not sufficient evidence that notice of the location of the highway was given to the owners, through whose land it was to run, where the giving of such notice is contradicted. *Harlow v. Pike* (1825) 3 Me. (3 Greenl.) 438.

10. Applicability to school lots

Where lot is laid out for a school district, the town has no interest in it, and the provisions of this section for a return to the town clerk, and action thereon by the town as in case of town ways, are inapplicable. *Cousens v. School District No. 4* (1877) 67 Me. 280.

§ 3004. Discontinuance of way

A town, at a meeting called by warrant containing an article for the purpose, may discontinue a town or private way. The municipal officers shall estimate the damages suffered by any person thereby.

R.S.1954, c. 96, § 33.

Cross References

County action as restriction on action by town, see § 3009 of this Title.
Damages, see § 3005 of this Title.
Municipal officers defined, see § 1901 of Title 30.
Termination of right of way, by adverse obstruction, see § 813 of Title 14.
Town meeting and warrant therefor, see § 2051 et seq. of Title 30.

Notes of Decisions

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I. Construction

This section is utterly inconsistent with any contention that a private way laid out under the provisions of section 3001 of this Title is not a public easement. *Browne v. Connor* (1941) 138 Me. 63, 21 A.2d 709.

This section relates only to such ways as town may lay out, alter or widen under section 3001 of this Title, and not to those created by express grant in deed. *Tibbetts v. Penley* (1890) 83 Me. 118, 21 A. 838.

2. Discrimination—Generally

A discontinuance of a public way by the city government of Augusta was legal, notwithstanding there was no determination as to damages, and no previous action taken upon that subject. *Hicks v. Ward* (1879) 69 Me. 436.

Use by defendant of discontinued town way which had crossed plaintiff's farm gave rise to a cause of action of trespass. *Larry v. Dunt* (1853) 37 Me. 69.

The inhabitants of a town are authorized by this section, to discontinue a town way at a meeting legally called for that purpose; no previous action of the selectmen being requisite to make such discontinuance effectual. *State v. Brewer* (1853) 45 Me. 606. See, also, *Latham v. Wilton* (1843) 23 Me. 125.

3. —Ways affected

Ways created by express grant in deed are not subject to the provisions of this section, but only such ways as are authorized to be laid out, altered or widened by town under provisions of section 3001 of this Title. *Tibbetts v. Penley* (1890) 83 Me. 118, 21 A. 838.

4. —Effect of user

Town way, which had its origin and continuance by virtue of legal location, may be discontinued, although used for more than 20 years. *Larry v. Dunt* (1853) 37 Me. 69. See, also; *Bigelow v. Hillman* (1854) 37 Me. 52.

5. Town meetings

An unrestricted vote to discontinue a town way takes effect from its passage, though the meeting at which it is passed may be adjourned to a subsequent day. *Bigelow v. Hillman* (1854) 37 Me. 52.

Whether it would be competent for a town to reconsider unrestricted vote to discontinue town way, at an adjourned meeting after rights of 3rd parties had intervened, *quaere*. *Id.*

§ 3005. Damages; appeals

The damages for a town way shall be paid by the town; for a private way, by those for whose benefit it is stated in the petition to be, or wholly or partly by the town, if under an article in the warrant to that effect it so votes at the meeting accepting such private way; or by cities, if it is proposed in the return laying out such way. Any person aggrieved by the estimate of such damages may have them determined as provided in section 2058, by written complaint to the Superior Court, in the county where the land lies, within 60 days from the date of the establishment, alteration or discontinuance of such way by the town at its town meeting. Service shall be made upon the town where the land lies as in other actions, and by posting attested copies in 2 public and conspicuous places within said town and in the vicinity of the way; but the final judgment shall be recorded in said court and shall not be certified to the county commissioners. When any person, aggrieved by the estimate of damages for his land taken for a town or private way, honestly intended to appeal therefrom and has by accident or mistake omitted to take his appeal within the time provided by law, he may, at any time within 6 months

Note 1

after the expiration of the time when said appeal might have been taken, apply to any justice of the court, stating in his said application the facts of his case. Said justice, after due notice and hearing, may grant to such petitioner permission to take his said appeal within such time as said justice shall direct and on such terms as said justice shall order, and the subsequent proceedings thereon shall be the same and with the same effect as if said appeal had been seasonably taken.

R.S.1954, c. 96, § 34; 1959, c. 317, § 60.

Cross References

Appeals from—

Award of damages by Superior Court, see § 1851 of Title 14.
Town's action on petition to lay out, alter or widen way, see § 3006 of this Title.

Damages—

Discontinued town way reinstated, see § 3011 of this Title.

Located street is vacated, see § 3012 of this Title.

Estimation and award, see § 2057 of this Title.

Life tenants, remaindermen and reversioners, see § 2057 of this Title.

Recovery of damages from town, see § 2002 of this Title.

Service of process on towns, see §§ 701-703 of Title 14.

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- Towns 3-95(1).
- C.J.S. Municipal Corporations §§ 1290 et seq.
- C.J.S. Towns § 90 et seq.
- See, also, annotations set out under section 2058 of this Title.
- 1. Historical
 - Enactment of savings provisions in last 2 sentences of this section did not revive a right of appeal which was barred by statute of limitations at time of enactment. Dyer v. Belfast (1895) 88 Me. 140, 33 A. 790.
- 2. Prior law
 - Under R.S.1857, c. 18, § 21, a predecessor of this section, which provided that "any person aggrieved" by the estimate of damages could petition county commissioners to have damages assessed "in the manner provided respecting highways", the only party that could appeal, in the matter of damages, was the person whose land was taken; for though it was true that section 5 of above-cited chapter (compare with section

Library references

Municipal Corporations 3-405 et seq., 648 et seq.

R.S. 1954

Ch. 96 § 33

356

CHAP. 270

DISCONTINUANCE OF ROADS

PUBLIC LAWS, 1965

1965 law that changes
the amendment provision

'Unless the instrument creating the trust prohibits, the corporation may treat 2 or more trust funds as a single fund solely for the purpose of investment.'

Effective September 3, 1965

Chapter 268

AN ACT Relating to Amending Provisions of Charters and Bylaws of Corporations Relating to Preemptive Rights.

Be it enacted by the People of the State of Maine, as follows:

R. S., T. 13, § 201, amended. The last paragraph of section 201 of Title 13 of the Revised Statutes is amended to read as follows:

'Provisions of the charter or bylaws relating to preemptive rights may be adopted or amended at any time by the stockholders having a right to vote at any meeting, the call for which shall give notice of the proposed action, by ~~90%~~ a majority of the shares which are present or represented at the meeting issued and outstanding.'

Effective September 3, 1965

Chapter 269

AN ACT Relating to General Powers of Cities.

Be it enacted by the People of the State of Maine, as follows:

R. S., T. 30, § 5359, additional. Title 30 of the Revised Statutes is amended by adding a new section 5359 to read as follows:

'§ 5359. General powers of cities

When no specific provision in a city charter exists in reference to the exercise of a municipal power, the city shall have all of the powers granted to towns or municipalities under the general law.'

Effective September 3, 1965

Chapter 270

AN ACT Relating to Discontinuance of Highways and Town and County Roads.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., T. 23, § 3004, amended. Section 3004 of Title 23 of the Revised Statutes is amended by adding after the first sentence, a new sentence, as follows:

'The discontinuance of a town way shall be presumed to relegate the town way to the status of a private way unless the town meeting article shall specifically state otherwise.'

Sec. 2. R. S., T. 35, § 2347-A, additional. Title 35 of the Revised Statutes is amended by adding a new section 2347-A to read as follows:

§ 2347-A. Discontinuance of public ways

In proceedings for the discontinuance of public ways, such public ways may be discontinued in whole or in part. The discontinuance of a town way shall be presumed to relegate the town way to the status of a private way unless the town meeting article shall specifically state otherwise. Unless an order discontinuing the same shall specifically otherwise provide, a utility may continue to maintain, repair and replace its installations within the limits of such way for a period not exceeding 3 years from the date of discontinuance.'

Effective September 3, 1965

Chapter 271

AN ACT Establishing a Commercial Standard for Maine White-Cedar Shingles.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R. S., T. 30, §§ 3653 and 3654, repealed. Sections 3653 and 3654 of Title 30 of the Revised Statutes are repealed.

Sec. 2. R. S., T. 30, c. 226, additional. Title 30 of the Revised Statutes is amended by adding a new chapter 226, to read as follows:

'CHAPTER 226

COMMERCIAL STANDARD FOR MAINE WHITE-CEDAR SHINGLES

§ 3701. Purpose

The purpose of this chapter is to establish a standard method of testing, rating, labeling and certifying of Maine white-cedar shingles, and to provide a uniform base for fair competition.

§ 3702. Raw material

Shingles labeled under this chapter shall be sawn from wood of the tree, *Thuja occidentalis* L., Northern White-Cedar, also known as Eastern Arborvitae.

§ 3703. Maine commercial standard shingles

1. Maine commercial standard shingles. "Maine commercial standard shingles", MCST, shall mean northern white-cedar shingles that are graded by producers authorized by the State Forestry Department to label northern white-cedar shingles under this chapter.

CURRENT VERSION

Sec. 3028. Abandonment of public ways; determination of status of any town way or public easement

1. Presumption of abandonment. It is prima facie evidence that a town or county way not kept passable for the use of motor vehicles at the expense of the municipality or county for a period of 30 or more consecutive years has been discontinued by abandonment. A presumption of abandonment may be rebutted by evidence that manifests a clear intent by the municipality or county and the public to consider or use the way as if it were a public way. A proceeding to discontinue a town or county way may not prevent or estop a municipality or county from asserting a presumption of abandonment. A municipality or its officials are not liable for nonperformance of a legal duty with respect to such ways if there has been a good faith reliance on a presumption of abandonment. Any person affected by a presumption of abandonment, including the State or a municipality, may seek declaratory relief to finally resolve the status of such ways. A way that has been abandoned under this section is relegated to the same status as it would have had after a discontinuance pursuant to section 3026, except that this status is at all times subject to an affirmative vote of the municipality within which the way lies making that way an easement for recreational use. A presumption of abandonment is not rebutted by evidence that shows isolated acts of maintenance, unless other evidence exists that shows a clear intent by the municipality or county to consider or use the way as if it were a public way.

[1991, c. 195, (NEW) .]

2. Status of a town way or public easement. The determination of the municipal officers regarding the status of a town way or public easement is binding on all persons until a final determination of that status has been made by a court, unless otherwise ordered by a court during pendency of litigation to determine the status.

[1991, c. 195, (NEW) .]

3. Removal of obstructions. If the municipal officers have determined under subsection 2 that the way is a town way or public easement and a court has not ordered otherwise, the municipality or an abutter on the way, acting with the written permission of the municipal officers, may remove any gates, bars or other obstructions in the way.

[1991, c. 195, (NEW) .]

4. Quasi-judicial act. The determination of the municipal officers regarding the status of a town way or public easement pursuant to subsection 2 is a quasi-judicial act under Title 14, section 8104-B, subsection 2.

[2009, c. 59, sec. 1 (NEW) .]

SECTION HISTORY

1975, c. 711, sec. 8 (NEW). 1977, c. 479, sec. 4 (AMD). 1979, c. 127, sec. 154 (AMD).
1979, c. 629, (AMD). 1989, c. 395, (AMD). 1991, c. 195, (RFR). 2009, c. 59, sec. 1 (AMD).

ANALYSIS OF CURRENT STATUTE

Presumption of abandonment. It is prima facie evidence that a town or county way not kept passable for the use of motor vehicles at the expense of the municipality or county for a period of 30 or more consecutive years has been discontinued by abandonment.

The way this is now worded, it does not specify that the town or county way was ever actually approved, entered upon, or built. Thus the statute would apply to paper streets, which are dealt with elsewhere in the law. Nor does the statute specify that the way can not have already been discontinued by action of the town or county, or by common law abandonment. This is a major problem, as is illustrated by the Young Road in Fayette. Once a way has been discontinued without easement and has been treated as private property for years, it can not now be readdressed as if it still belongs to the public and is subject to a new determination as to whether it now becomes a public easement for vehicular traffic, recreational traffic, utilities, and the like. The statute also does not specify that the way had to have actually been in existence for 30 years. Thus a way which was only laid out and built a year ago could be presumed abandoned because it has not yet been kept passable for thirty or more years. Finally, the statute does not specify any particular thirty year period. If the municipality or county has been maintaining a road for the last fifty years, but there was a thirty year period before that when it was privately maintained, this statute as currently worded could be used to relieve the public of the expense of maintaining it.

A presumption of abandonment may be rebutted by evidence that manifests a clear intent by the municipality or county and the public to consider or use the way as if it were a public way.

How does one define use "as if it were a public way?" What if the public has been using the way as if it were a private way? Or using it as if it were a public easement, which is open to their use but does not require them to maintain it? If there has been a full thirty year period during which neither the municipality, nor the county, nor the public has been considering or using the way as if it were a public way, then there is no reason why the public should now expect to be able to enjoy any sort of public rights from this day forward in the form of a public easement. Complete discontinuance loses them nothing, as they have had nothing for the last thirty years. On the other hand, if the municipality or county and the public have been considering and using the way as if it were a public way for part or all of the specified thirty year period, then it is high time they paid up for the damage they have done to the way by using it and not maintaining it.

A proceeding to discontinue a town or county way may not prevent or estop a municipality or county from asserting a presumption of abandonment.

Again, there is no specified time attached to the proceeding to discontinue. Does this mean that when someone presses the municipality or county to maintain the road, they can claim abandonment and simultaneously begin proceedings to discontinue the road without being prevented from also asserting a presumption of abandonment, or does this mean that a road can be abandoned even if it was already discontinued years ago?

~~A municipality or its officials are not liable for nonperformance of a legal duty with respect to such ways if there has been a good faith reliance on a presumption of abandonment.~~

The legislative discourse when this law was first created shows that it was intended to apply to roads that had been forgotten or lost in the records. "Good faith reliance on a presumption" implies knowledge of the situation. If a "lost" or "forgotten" road is rediscovered before the required thirty year period has passed, it would be the legal duty of the municipal officials to either resume maintenance, or begin proceedings to discontinue the road. If the thirty year period has already been completed when the road is rediscovered, the road could then be presumed abandoned. What would constitute a "bad faith" reliance on a presumption of abandonment? Possibly if the municipal officials knew that the road was there and ignored it, hoping to reach the thirty year mark before anyone complained, or if there had been a thirty year period of non-maintenance, but the public had continued to consider or use the way as if it were a public way.

Any person affected by a presumption of abandonment, including the State or a municipality, may seek declaratory relief to finally resolve the status of such ways.

There should be some requirement as to what evidence is to be presented. In the case of the Young Road, the Town was granted a motion in limine which effectively excluded all evidence which might have proved that the road had already been discontinued without easement before the abandonment period began. This evidence included multiple attempts to discontinue the road without easement dating back to the mid-1800's, a request to either repair or discontinue the road in 1904 (the results of which have been lost,) a 1945 County Commissioners' order discontinuing the Young Road and seven others and describing them all as "no longer used and not kept open any part of the year," evidence that the Commissioners lacked the authority to keep an easement over roads discontinued before 1965 (I think I have the correct year?) and a map of the roads discontinued by the County Commissioners in 1945 showing that the Young Road was already gone at the time the others were discontinued. In the absence of this evidence, the Maine Supreme Court determined that abandonment of the Young Road merely confirmed what the 1945 order had done, that is, it made the Young Road a public easement. In making this order, the Court inadvertently opened all eight roads on the 1945 County Commissioners' order to public use after they had been considered private property for decades. Since the Courts are not necessarily familiar with road law history and the complexities of property access, perhaps it would be wise to first require a review of the proposed abandonment by the Division of Rights of Way.

A way that has been abandoned under this section is relegated to the same status as it would have had after a discontinuance pursuant to section 3026, except that this status is at all times subject to an affirmative vote of the municipality within which the way lies making that way an easement for recreational use.

This sentence has to go! Prior to 1976(I think?), when a way was discontinued it automatically ceased to exist. Somewhere along the line, county commissioners and towns started retaining a private way over the old road when a way was discontinued, but they had no authority to do so until the law was changed. After the change in the law, a public easement was automatically retained upon discontinuance of a road unless the municipality specifically voted not to retain one. The unfortunate result of this change is that the people can vote to get rid of a road without having read the law, and so without realizing that they are now no longer getting rid of the road,

but keeping an easement by default because they failed to specify that they did not want to retain an easement. Section 3028, by its reference to section 3026, hides the retention of the easement still further. It is likely that the legislators were not even aware that their reference to section 3026 would automatically turn an abandoned road into a public easement; if they had realized this was what they were doing, why would it have been necessary to include a separate provision for making the way into an easement for recreational use? Or did the legislators intend to mean that the municipality could vote to **limit** the public easement to an easement for recreational use, and so to exclude vehicular traffic? The legislative discourse seems to indicate that the legislators were afraid of losing recreational access if a way was declared abandoned. And what is meant by the phrase, "at all times subject to an affirmative vote ... making that way an easement for recreational use"? Does that mean that even if the municipality votes not to keep a public easement, and the land reverts to private property, that at any time in the future they can come back and take it as a recreational easement without compensation? If the proper conditions are met for abandonment of a road, then the public has not had use of it for thirty years. Why should the public be able to regain any rights to the road, whether in the form of a public vehicular easement, or in the form of a recreational easement, when in order to accomplish abandonment they have had to admit that they have not considered or used the road as if it were public for thirty years? There are those who will argue that this is simply a method of assuring that abutting properties will not be legally land-locked. But once again, if no abutter has complained about the road not being maintained for thirty years, isn't it time they lost their right to complain? It should not be the obligation of the municipality to insure access after proving that they have not done so for thirty years. On the other hand, some consideration should be given to the problem of loss of access. If there will be properties that are truly land-locked, they should be able to obtain an "easement by necessity." This process could be facilitated by a provision in the law that allows for private access to otherwise isolated property to continue over the old roadbed. Where multiple properties are affected, the law could make provision for establishing a road association to cooperatively keep the access open for their private use. The problem with keeping a public easement is that then the public has both ownership of the way, and (according to the Supreme Court in Fayette v. Manter), an unfettered right of access over the road. This can result in one individual being compelled to maintain a road for the use of the public at his own private expense, in order to keep the access passable for his own use. This amounts to involuntary servitude as well as taking of private property for public use, since the abutter is forced to put his time, effort, and materials into the road without compensation, only to have public use of the road wear it out so that he has to do it over again. Forming a road association does not really solve the problem - it merely divides the burden between more slaves. On a private association road, abutters have the choice of restricting public access; those on a public easement do not have this choice. Moreover, private association roads are most often dead-end roads that primarily serve the community of association members. In this regard, they resemble the historic private ways, which were laid out to provide access to improved land not yet connected to the public road system, and so they went to the land in question, and there they ended. Public easements, on the other hand, are very often through roads, which are attractive to the public as shortcuts between places that used to be served by the road before it was abandoned. This places an unjust burden on private individuals who maintain these roads. Section 3021 attempted to remove confusion about the rights of the public to use private ways by creating a new class of roads called public easements. In so doing, section

3021 also makes all ways previously created as private ways into public easements. This is a little like saying that wherever old laws referred to horses and buggies, they will now refer to motor vehicles, and then saying that all horses and buggies are now considered to be motor vehicles. Imagine the confusion that would result when someone drives their horse and buggy onto the interstate because they are now by definition a motor vehicle, or when someone enters a car in a harness race at Scarborough Downs! The term "private way" may be obsolete, but changing its name to the more modern "public easement" does not make a dirt path into a road that can support tractor trailers.

A presumption of abandonment is not rebutted by evidence that shows isolated acts of maintenance, unless other evidence exists that shows a clear intent by the municipality or county to consider or use the way as if it were a public way.

If evidence of a clear intent to consider or use a way as if it were a public way is sufficient to prevent a road from being abandoned, then it follows that in order for a road to be successfully abandoned, it must first be proven that the municipality or county has NOT considered or used the road as if it were a public way. If this is the case, then they should not retain a public easement, because they have no need for the road. Private property can not constitutionally be taken for public use unless the public exigency requires it, yet this law allows the taking of a public easement upon proving that the public has had no need of it for thirty years.

2. Status of a town way or public easement. The determination of the municipal officers regarding the status of a town way or public easement is binding on all persons until a final determination of that status has been made by a court, unless otherwise ordered by a court during pendency of litigation to determine the status.

This sounds an awful lot like the Limited User Highway in the ill-fated 23 MRSA 2068 [if I remember the number correctly] which was repealed because the municipal officers could simply decide that a way was of limited use and value to the traveling public and stop maintaining it, with no due process. Granted, this paragraph does provide for the matter to be addressed by a court, but it does not specify when or by whom the court action must be brought. Could it be kept in limbo indefinitely, especially where abutters do not have the funds to file suit? Besides, the Limited User Highway was proven unconstitutional not only because it took private property without due process, but also because it took private property without just compensation. 3028 addressed one error, but not the other, perhaps because there simply is no way to provide just compensation for lost access when the destruction of the road occurs repeatedly every time the landowner reconstructs it.

3. Removal of obstructions. If the municipal officers have determined under subsection 2 that the way is a town way or public easement and a court has not ordered otherwise, the municipality or an abutter on the way, acting with the written permission of the municipal officers, may remove any gates, bars or other obstructions in the way.

In our case, the 1945 County Commissioners' discontinuance specified that the way was "to be retained as a private way, subject to gates and bars." But because that was by order of the County Commissioners, not by a Court Order, this paragraph allows the municipal officers to override the protection that the commissioners tried to provide, simply because a private way

has now been redefined as a public easement. You cannot change the terminology, then change the definition of the terminology, and expect it to work when you apply the new definition to a road that was defined under the old terminology.

4. Quasi-judicial act. The determination of the municipal officers regarding the status of a town way or public easement pursuant to subsection 2 is a quasi-judicial act under Title 14, section 8104-B, subsection 2.

Upon looking up this reference, we find:

§§§§8104-B. Immunity notwithstanding waiver

Notwithstanding section 8104-A, a governmental entity is not liable for any claim which results from: [1987, c. 740, §§§§4 (NEW).]

2. Undertaking of judicial act. Undertaking or failing to undertake any judicial or quasi-judicial act, including, but not limited to, the granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial;

[1987, c. 740, §§§§4 (NEW) .]

In other words, a governmental entity can not be held accountable if it behaves irresponsibly. The laws that apply to U.S. citizens do not apply to our government; it is above the law. Our laws have become so complicated that it is now unreasonable to expect that a reasonably intelligent person - one capable of holding public office - should be able to know what the law requires.

LD 1596 - An Act to Amend the Laws Governing Discontinued Town Ways
Ladies and Gentlemen of the State and Local Government Committee,

My name is Roberta Manter, and I have been a resident on the Young Road in Fayette, a discontinued road, for nearly thirty years. My husband, David, has been a resident there for over forty years, and our daughter for over twenty-one years, so we have a combined ninety-one years of experience with discontinued roads. During that time we have done extensive research and have tried repeatedly to solve the problems caused by these roads, including serving on the Public Easements Working Group appointed by this Committee in 1999. Unfortunately, the final vote of that Working Group was taken on a day when a number of key members were absent, resulting in a flawed final recommendation.

After that, I'm afraid frustration and exhaustion kept us from pursuing a legislative solution to the problem again, until now. At that time, I had tried contacting other residents on discontinued roads to try to get their support. Many of them gave me the same answer - that I could go ahead and put their names on the list of people who had problems with discontinued roads, but please don't ask them to DO anything, because they were too exhausted and emotionally spent from dealing with their road.

Although I am definitely in favor of correcting the current road discontinuance statutes, I am NOT in favor of the language of the proposal which is before you. The crux of the problem is that both 23 MRSA sections 3026 *and* 3028 result in *public* roads being kept for *public* use, while *private* individuals are forced to keep them in repair at *private* expense. This places an unjust burden of upkeep of a public road upon those who have no other choice except to lose access to their property. It is one thing to have to build and maintain your own private driveway; it is another thing entirely to be forced to build a road which the public can use freely without contributing a cent to the cost of upkeep of that road. The concept of a "*public easement*" which is kept in repair at *private expense* has got to cease. Towns should be given a one-time opportunity to declare all their *known roads*. After that, any road which was so thoroughly forgotten that it did not make the list would be declared abandoned without easement. The original version was tied to a date, and I believe that was its intent, but the job didn't get done and the date restriction was removed.

For years, towns have sought a way to escape the expense and liability of keeping up little-used old roads, while at the same time avoiding the necessity of compensating owners of abutting land for the loss of access. The retention of a public easement was supposed to get them off the hook. The current Abandonment statute, sec. 3028, was intended to replace the "Limited User Highway" law, 23 MRSA section 2068, after that law was deemed unconstitutional by the Maine Supreme Court in the case of Jordan v. Canton. Section 2068 allowed Selectmen to determine that a road was of limited use and value to the traveling public, after which the road remained a *public* road, and was *not* discontinued, but the Town was no longer obligated to keep the road in repair. Abutters were allowed to maintain the road if they wished, on a purely voluntary basis.

In 1970, the Court determined that the Limited User Highway was unconstitutional for two reasons: it did not satisfy due process, and it resulted in an uncompensated taking of land. The Court said that access is a property right attached to the land, and destruction of that access constitutes a taking. Furthermore:

"The fact that a limited user highway continues to have a legal status as a public highway over which there continues to be a public easement of travel is meaningless if there is no longer any public responsibility for maintenance or

repair. Without maintenance or repair, it is only a question of time before a public road will become impassable or unsafe for travel. The rigors of Maine weather, the action of frost and the erosion from rain and melting snow will speed the process of disintegration. The ability to use the road for vehicular travel and thus the abutter's easement of access to and over the road to the public road system will inevitably be destroyed." Jordan v. Canton, 1970 ME 265 A.2d 96 at 99.

In short, calling a strip of land a public road does not make it of any actual use as a road if the public does not in fact build it and keep it in repair. "*Cases involving loss of access depend on the practical and factual consequences of governmental action, rather than the legal status of the highway.*" Jordan at 99.

I challenge anyone to show me how the "practical and factual consequences" of making a discontinued or abandoned road into a public easement differs from the "practical and factual consequences" of the unconstitutional limited user highway. Under the current 23 MRSA section 3026, when a road is discontinued it automatically becomes a public easement unless the legislative body of the town specifies otherwise. This results in two problems. The first is that it is not really the *road* that is discontinued, but only public *maintenance* of the road. The road remains open to unrestricted public travel, while the town escapes both the expense of compensation and the responsibility of keeping the road in repair. Those who own land on such a road, or who live on such a road, suddenly find their access deteriorating due to public use in the absence of public upkeep. If they fix the road themselves, it attracts *more* public use. Build a better public easement, and the world will *beat* the pathway to your door! Like the children's story of "The Little Red Hen," once the industrious hen has planted the grain and done all the work, everyone else wants to eat the bread.

The second problem is that unless a person has read the law carefully, he may assume that when a road is discontinued, it is no longer a road. So a citizen may vote to discontinue a road, thinking the town is getting rid of it, when in fact it remains a public road, open to "unfettered" public use, according to the Maine Supreme Court. The term "discontinued" is deceptive, as section 3026 only truly discontinues the road if *further* action is taken to get rid of the public easement which otherwise is automatically retained. As it stands, section 3026 is really a *reclassification* law, rather than a discontinuance law.

Section 3028 is even more deceptive. According to this statute, "It is prima facie evidence that a town or county way not kept passable for the use of motor vehicles at the expense of the municipality or county for a period of thirty or more consecutive years *has been discontinued by abandonment.*"... "A road that has been abandoned under this section is relegated to the same status as it would have had after a discontinuance pursuant to section 3026..." This would lead the casual reader to believe, again, that an abandoned road is discontinued, and therefore is no longer a road. Here the situation is even worse, because no vote is required to abandon a road, and so there is *no opportunity* to vote *not* to keep a public easement. So a road that has *not been kept passable for the use of motor vehicles* is now declared to be a public easement, which by definition is "a way used for foot or *motor vehicular traffic*"! If you think about it, the way the statute is worded, every road in this state that meets the criteria of section 3028 *has been discontinued* already, not by the town, but by the *action of the legislature*, and therefore it is a public easement, without any notice or hearing or compensation!

Furthermore, the way is declared to be open to unrestricted public use after a showing that the public has had *no use* for it for at least thirty years. Contrast this to the Constitutional requirement that in order for the public to take land for a road, it must first prove that there is a

public exigency, that is, a *public need* for the said road. Under *common law* abandonment, a road which has not been used for *twenty* years reverts to private property. But unless someone has had it declared such by a court, ten years later that same land can be declared a public easement after proof of *lack* of public need.

Statutory abandonment does *not* solve the problem of destruction of the access to abutting properties. Keeping a public easement was supposed to preclude the need to compensate for loss of access, but in fact it has the opposite effect. This is just like section 2068's declaration that the road remains a public road and is not discontinued. When a road becomes a public easement, public use *will* destroy the road every time abutters rebuild it, so that new takings happen repeatedly. There really is no way to justly compensate for ongoing destruction of the access.

Section 3028 *did* address the matter of *due process*, by specifying that when a way is declared abandoned, "Any person affected by a presumption of abandonment, including the State or a municipality, may seek declaratory relief to finally resolve the status of such ways." By contrast, section 2068 allowed Selectmen to determine on their own that a road was a limited user highway, and thereafter the Town had no obligation to maintain it. There was no opportunity for hearing, compensation, or appeal. But then in 1991, the abandonment statute was amended to provide that, "The determination of the municipal officers regarding the status of a town way or public easement is binding on all persons until a final determination of that status has been made by a court..." So in effect, unless an aggrieved abutter has the money to file and pursue a lawsuit against the Town, 3028 now acts in the same manner as the unconstitutional 2068. In spite of this provision in the law, MMA's Municipal Roads Manual states that MMA's Legal Services staff is of the opinion that the municipal officers' determination that a road is abandoned is *not* *appealable*. So due process has been thrown out the window, and we are back to giving Selectmen the power to decide the fate of a road all on their own, just as in the unconstitutional Section 2068.

What makes this legislation an emergency?

1) UNCONSTITUTIONALITY. First and foremost, section 3026 and 3028 are unconstitutional in that they result in the uncompensated repeated destruction of property access, which is a right attached to the property. One could argue that they also result in involuntary servitude, i.e. slavery, in that owners of abutting land are compelled against their will, and with no compensation, to build and keep in repair a road for public use.

2) MAGNITUDE OF THE PROBLEM STATEWIDE. Michael Maines is a law student, as well as a member of SWOAM, the Small Woodlot Owners' Association of Maine. When Maines was looking for a topic for a law research paper, the executive director of SWOAM *immediately* recommended the subject of abandoned and discontinued roads, because it is such a widespread problem for small woodlot owners. Last week, SWOAM sponsored Maines as a speaker at the Agricultural Trade Show in Augusta, on the topic, "Putting Public Roads to Bed in Maine: Abandonment vs. Discontinuance - Can the laws be improved?" The room was packed - standing room only, with probably 200 seats provided. In the Question and Answer session that followed, one woman asked how many people there had a problem with a discontinued road. *Most* of the people there raised their hands.

3) CONFUSION. Michael Maines has personal experience with the subject. When he went to buy a piece of property on an un-maintained public road, he had an attorney research the road's status. The attorney *wasn't sure* what the actual status of the road was. As Maines commented, if the law is so confusing that even attorneys can't figure it out, there's something

wrong.

4) LAWSUITS. I have a huge file of Maine Supreme Court decisions involving discontinued or abandoned roads that have caused problems, plus another file of cases that only went to the Superior Court level. According to a printout from the Maine Department of Transportation, there are nearly 3,000 discontinued roads in Maine, including, no doubt, the ones that have caused problems for the people at the SWOAM presentation. The rest are just waiting to blossom into disputes between landowners and the public.

5) MMA'S CAUTION TO TOWNS. The current Abandonment statute includes a clause for making an abandoned road into a recreational easement. According to MMA's Municipal Roads Manual, the intent of this passage is unclear and may raise *constitutional* issues. It goes on to say, "... in view of these issues, we recommend that the municipality consult an attorney before creating a recreational easement." So MMA's attorneys are recommending that towns consult an attorney and avoid risking an action *which is authorized under current law*, but which in their view may violate the constitution and result in the Town being sued.

6) MMA'S RECOMMENDATION TO DISREGARD LAWS. In the case of the Young Road in Fayette, a discontinued road is now being used as a mail delivery route. According to 23 MRSA sec. 3202, "There shall be furnished and kept in repair in each section of the town through which there is a mail route some effectual apparatus for opening ways obstructed with snow, to be used to break and keep open the way to the width of 10 feet..." When the Town of Fayette was confronted with this law and asked to plow the Young Road, MMA advised them that this statute was "archaic" and should be ignored. But Maine Constitutional Article I, Section 13, states: "**Suspension of Laws.** The laws shall not be suspended but by the Legislature or its authority." 23 MRSA sec. 3202 has not been suspended by the legislature, and I do not believe the legislature has given MMA that authority. So MMA would advise breaking the constitution in order to evade responsibility under the law. Moreover, the previous section, 23 MRSA sec 3201, is the section under which municipalities plow all of their public roads. It states, "When any ways are blocked or encumbered with snow, the road commissioner shall forthwith cause so much of it to be removed *or trodden down* as will render them passable..." Unless we plan to go back to snow rollers and sleighs, the language of this law is *also* archaic, so by MMA's reasoning, we should ignore this one, too. If we can arbitrarily decide which laws to obey and which to ignore, we will have anarchy. Besides, it appears that the word "way" in this statute would include public easements, thus requiring towns to plow discontinued roads. If our laws are so archaic, confusing, or contradictory that MMA is resorting to advising towns to ignore the law, then something needs to be done to correct the situation NOW.

7) MAGNITUDE OF THE PROBLEM IN A TYPICAL TOWN. In Fayette alone, there are at least twenty-one discontinued roads which have been retained as public easements. The Young Road has been the subject of contention since the 1970's, and a viable solution has yet to be found. As of 1983, there was still only one year-round residence on the Young Road. As of this date there are at least nine, with more under construction. Now someone is seeking to build on another of Fayette's public easements, and the Town is not looking forward to dealing with the problem all over again with that road, let alone the other nineteen.

8) OPPORTUNITY LIKELY TO BE LOST. The State of Maine is currently in negotiations to purchase a parcel of land on the Young Road from us, David and Roberta Manter, for a public park to provide access to Hale's Pond. Inland Fisheries and Wildlife is very excited about the project because Hale's Pond has been on their priority list for years. Land For Maine's

Future has already approved grant money to purchase the land, and the Kennebec Land Trust has contributed towards a relocation fund for us so that the project can go forward. The catch is, we told them at the outset that the project would require fixing the statutes regarding discontinued and abandoned roads. For the last forty years, David has been providing maintenance of the south end of Young Road himself, at an estimated average cost of \$2,000 per year. At that rate, he has barely been able to sustain the road in the face of use by abutters plus those members of the public who use it. None of the other abutters on our end of the road has the desire or capability to assume this responsibility or expense. There are currently three year-round residences on the South end of the Young Road which depend for access on the same section of road that will be used for access to the park. Two more year-round residences are under construction. What will happen to the access to these properties if:

- a) the Manter land becomes that of the State, and Manter is no longer there to provide maintenance, and
- b) public use of the road increases dramatically due to its providing the sole access to the park, which also will be the only public waterfront in Fayette?

What good would it do for the State to acquire the park, only to find the public can no longer access it because public use has destroyed the access? Sadly, unless this mess is straightened out in a hurry, the State may lose its opportunity to acquire the parkland they desire, because the offer of funding from Land for Maine's Future expires in just a few weeks.

This is just one example of lost opportunity. Owners of land abutting public easements are often denied the ability to harvest timber, develop land, operate businesses, etc., because of the cost of keeping the access passable. This also has an impact on the value which towns can assess for taxes.

If anyone here does not yet grasp the urgency of this situation, consider this: what if the town you live in decided that it could save taxes by discontinuing the road YOU live on? In fact, why don't we just discontinue ALL of our roads? They would then remain public easements, which we all could use freely. Just how long do you think our public road system would continue to function under those circumstances? Yet that is what residents on our current public easements face every day. Is this right?

In conclusion, it appears that the *very minimum* that can be done to correct this situation would be to *eliminate* the public easement provision in section 3026, which would also eliminate it from section 3028. David and I have done a detailed analysis of the current abandonment statute, line by line, and have written a carefully crafted replacement for it. We urge you to give our amendment careful consideration.

We also recommend that towns be given a period of time within which they are required to declare the status of every road within their borders. Any forgotten road not discovered within that time would be abandoned without easement. No compensation would be needed because the road has been gone from memory already.

If there is anything we can do to help resolve the problem of discontinued and abandoned roads, please let us know. Thank you for listening to our concerns.

Respectfully Submitted,
Roberta J. Manter
Roberta Manter
120 Young Road
Fayette, Maine 04349

23 MRSA sec 3028

In order for a way or public easement to be abandoned, the following prima facie evidence must exist:

- 1) the way or public easement exists by record
- 2) the way or public easement has been actually constructed and opened for the public use for which it was designated
- 3) the way or public easement has not already been legally discontinued without easement
- 4) there is a period of thirty or more consecutive years after the way was opened during which the way or public easement has not been kept in repair at public expense for the purpose for which it was designated

When the prerequisites for abandonment have been met, and either a governmental agency or an owner of property abutting the strip of land in question is addressed by a party wanting to use this strip of land, the agency or property owner may declare the way abandoned. The determination of the municipal officers or property owner regarding the status of the strip of land in question is binding on all persons until a final determination of that status has been made by a court, unless otherwise ordered by a court during pendency of litigation to determine the status. Any person or governmental agency who prevents anyone from using such strip of land may not be held liable if it can be shown that there has been a good faith reliance on a presumption of abandonment. Any person or entity affected by a presumption of abandonment, including a governmental agency, may seek declaratory relief to finally resolve the status of such strip of land.

A presumption of abandonment may be rebutted by evidence that the way has been regularly kept in repair at public expense, or by evidence that manifests a clear intent by the municipality or county or the public to consider or use the way as if it were a public way.

Discontinuance by abandonment of a town way or public easement may not necessarily preclude private access over that same strip of land.

If a municipality or county has begun the formal process of discontinuing a road, an assertion of abandonment cannot be made. If a way or public easement has been presumed abandoned, the process of discontinuance cannot be initiated unless the presumption of abandonment is successfully rebutted.

If the strip of land has met the criteria for abandonment, and if abutting owners have not demanded public upkeep for the thirty year period, then they have relinquished their constitutional right to compensation.

A way that has been declared abandoned becomes private property and is no longer subject to use by the general public.

23 MRSA sec 3026

(Remove the second paragraph entirely, thus removing any reference to retention of a public easement when a way is discontinued.)

23 MRSA sec 3021

Definitions

Public easement - (We have not yet come up with a way in which this definition can be corrected. You cannot change the term "private way" to "public easement" and then change the definition as well. By doing so, you make a private way into something it was never intended to be. A private way could only be a dead end, and could be subject to gates and bars. Its purpose was to benefit a property which was not yet connected to the public road system, and needed access. It was not unreasonable to expect the party so benefitted would be responsible for providing his own maintenance. By making changing its definition to that of a public easement, you open it to unrestricted through traffic by the public, unsupported by public maintenance, and have given municipal authorities the right to remove any gates and bars which a private way was legally authorized to keep in place. If you want to say that from now on, only public easements can be created, that's fine - but private ways that were already in existence should remain private ways as they were originally defined.)

EXPLANATIONS

A strip of land that has never been formally designated as a way or public easement does not exist as such and therefore cannot be abandoned.

A municipality or county cannot simultaneously claim statutory discontinuance and abandonment, since discontinuance requires a determination of damages, while abandonment presumes that no damages will result from formally declaring the fact that the way has been forgotten for thirty years.

"To avoid a constitutional violation, establishment of any road or way, whether state, county, town, or private way, must be for public use, and its requirement must be in response to public exigencies." Brown v. Warchalowski (1984) Me., 471 A.2d 1026

"To pass constitutional muster, private way established under sec. 2006 of this title (repealed; see, now, sec. 3029 of this title) had to be laid out for a use which at the time was a public use, not only in a theoretical aspect, but in actuality, practicality, and effectiveness, under circumstances required by public exigency." Brown v. Warchalowski (1984) Me., 471A.2d 1026
In light of the above, it makes no sense to say that after proving that the public has had no use for a road for thirty years and therefore it is declared abandoned, the public should regain the right to use it in the form of a public easement. Where is the public exigency?

To pass constitutional muster, whenever a government takes any private property for public purposes or restricts the use of private property, just compensation is required.

Jordan v. Canton declared that in the absence of public maintenance, public use combined with the rigors of Maine weather would inevitably destroy a public road. The destruction of access to a property was considered a taking of access, which was a property right attached to the property, and therefore required both due process AND compensation. Therefore it should follow that a public easement is unconstitutional because it provides no maintenance, and therefore ultimately destroys the access.

ALTERNATIVE WORDINGS

When a way that has been constructed and opened for public use has not been kept in repair by a governmental agency for the purpose for which it was originally taken, for a period of thirty or more consecutive years, it may be presumed to be abandoned. When the prerequisites for abandonment appear to have been met, and either a governmental agency or a property owner is addressed by a party wanting to use this strip of land, the agency or property owner may declare the way abandoned. No one can then use the strip of land for the purpose originally intended until decided in a court of law. Any person or governmental agency who prevents anyone from using such way may be held liable if it can be shown that their reliance on a presumption of abandonment was in bad faith. A presumption of abandonment may be rebutted by evidence that the way has been kept in repair by a governmental agency, or by evidence that manifests a clear intent by the governmental agency or the public to consider or use the way as if it were a public way. Discontinuance by abandonment of a strip of land may not necessarily discontinue private access over that same strip of land. Abandonment does not necessarily preclude a private access. [Abandonment shall not preclude private access to properties which have no other access. If a property owner who would otherwise be land locked desires to continue to use the way for access, he may be liable for his share of the cost of upkeep.] If the strip of land has met the criteria for abandonment, and if abutting owners have not demanded public upkeep then the need for further constitutional compensation need not be met. The reason for this is the public will lose all its rights and the property owner has given up its rights. [If the strip of land has met the criteria for abandonment, no compensation for loss of access shall be required if no affected property owner has sought to compel the appropriate governmental agency to repair the way.] Any person affected by a presumption of abandonment, including a governmental agency, may seek declaratory relief to finally resolve the status of such strip of land. A way that has been declared abandoned becomes private property and is no longer open to use by the general public. Evidence that a governmental agency desires to retain public access over the strip of land is evidence of a clear intent by the governmental agency to consider or use the way as if it were a public way, and therefore rebuts a claim of abandonment.

[However, if it can be proven that the public has continued to use the way for non-vehicular recreational use, the governmental agency may designate the way for such limited use under the condition that: 1) the said agency provides upkeep to support the said use in a manner that it will not obstruct use by the property owners, 2) said use does not interfere with any remaining access rights to private properties, and 3) the way is kept clearly posted to inform the public of the limited nature of public rights thereon.]

Existing utility easements may be evidence of public need of the way.

If government is not liable for nonperformance due to good faith reliance on a presumption of abandonment, then neither can a private property owner be held liable for obstructing the way if he has relied on a good faith reliance on a presumption of abandonment.

LD 1596 - An Act to Amend the Laws Governing Discontinued Town Ways
Ladies and Gentlemen of the State and Local Government Committee,

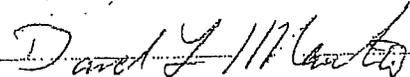
My name is David Manter, and I purchased my home on the Young Road in Fayette in 1971. Over the past forty years, I have poured approximately \$80,000 into maintaining this road for the public. To put this in perspective, this is about *five and a half years'* worth of income for me. How would you feel about putting that percentage of *your* income into maintaining the public road on which you live? I asked for legislation which would solve the problem of discontinued and abandoned roads which become public easements, and therefore are used by the public but kept in repair at private expense. I am looking not so much to solve this problem for just myself, and not to regain what I have lost, but to make sure this never happens to anyone else.

The bill that has been proposed at MMA's recommendation does *not* solve the problem. Paragraph 2A says that municipal officers *MAY* propose restrictions on the use of the public easement. You are giving them a choice. That doesn't mean that they will actually do what is needed to protect landowners. Even if they *do* take action under this paragraph, where is the guarantee that the action they take will help those who own property on the road? What input do the owners of abutting land have in the process? It is possible that the municipal officers either will *not* propose any restrictions, or that they will propose restrictions which *do not solve* the landowners' problem of cost of upkeep of the road, or even that they will propose restrictions which *actually damage* the landowners. For example, they could propose to make the public easement a seasonal road, and thus make it impossible for a landowner to live there year-round, or they could propose a weight limit which would prevent a landowner from harvesting wood from his wood lot. Whatever restrictions the municipal officers may propose, they are then subject to approval by the legislative body. What motivation do the townspeople have, to afford protection to someone who owns land on a road which they themselves would like to use for free in a way which might damage the landowner?

If you want to do something right with the term discontinued, make it mean what the word means everywhere else - *remove* the paragraph about retaining an easement. Let the word *abandoned* mean what it means everywhere else, that is, to relinquish ownership with no intent of ever reclaiming it. If you want to keep easements, then label the law, "change of status," and then provide the municipalities with a choice of classes of roads, along with the standards to which the *town* must keep each class. As the law stands now, town roads are expected to meet the same requirements as state roads, i.e. they are to be capable of supporting trucks up to 100,000 lbs. If a town could have various classes of roads that do not require so ambitious a standard, they might be more willing to continue to provide upkeep for little-used or unpaved roads. For example, if a Town wants to keep a road for seasonal use only, it should be willing to keep it in repair for that use, and it should be clearly marked to warn the public that it is only open at specified seasons.

If towns are unwilling to bear the responsibility for the roads they want to use, you might as well make every road a toll road, and each user could be charged a price according to his usage of the road, so as to pay for the wear and tear. In conclusion, I ask that you remove from Section 3026 the retention of a public easement, which would, by reference, also remove it from Section 3028. Remember we agreed to restrict ourselves to the confines of the Maine and the U.S. constitutions and guidance from the Creator. I don't think any of us really meet those promises. Thank you for your consideration.

Respectfully Submitted,



David L. Manter, 120 Young Road, Fayette, Maine 04349

LD 1596

To the members of the committee,

My name is Eric Englehardt I own a home at 139 Young road in Fayette Maine, a discontinued road. I built my home 20 years ago with the hope that the problems with this road would eventually be resolved by community growth. I am now a bit wiser and experience has shown me that there are at least 3 problems with current road abandonment law.

(1) When a road is discontinued the residents who repair the road become liable for any losses suffered by the public who use it. By comparison residents on a town serviced road have no liability. This is not equal protection under the law.

(2) The general public retains the right to use a discontinued road without compensating the residents for their repairs done out of sheer necessity. Why should the residents supply a road to the public when they no longer contribute to its upkeep?

(3) A municipality can use a road closure to withhold a fair distribution of tax dollars and emergency services to undesirable neighborhoods. This is a discriminatory practice known as redlining.

Nationally there has been a trend to close and demolish bankrupt suburban neighborhoods by pinching off municipal services. The temptation for municipalities to slash budgets by road closure is a grim reality for those affected.



Eric Englehardt

January 17, 2012

Betsy Connor Bowen
31 Roseanne Drive
Winthrop ME 04364

Dear Senator Thomas and Members of the Joint Standing Committee on State and Local Government

My name is Betsy Connor Bowen. I am a writer and videographer living in Wayne and Winthrop ME. Over a decade ago I became familiar with the problems David and Roberta Manter were having maintaining the gravel road that led to their property, a public easement that general traffickers were free to use and did. Trucks driving over the road in mud season, for example, severely exacerbated the burden of maintaining the road. The situation had environmental consequences, since phosphorous-bearing sediment from the road could drain into nearby Hale's Pond and promote algae growth. I produced a video documentary "Oak Hill Road Wars" attempting to set forth the issue. Afterwards I founded and became webmaster of the Maine Alliance for Road Associations (www.maineroads.org) or MARA, an informational and advocacy membership group whose goal is to share information relating to the maintenance of private roads and the formation of road associations under Maine statute.

Through MARA, I have been active in a few road law matters coming before the Transportation committee. The 2007 revisions MARA advocated and saw adopted, among other changes, made it explicitly clear that abutters on public easements could form a road association under Maine statute and be able to collect from non-payers.

However, even with a road association, the problem the Manters originally faced on their public easement remains, that of being responsible for maintaining a road the public is free to use. I have read the Resolution proposed by of the Town of Fayette. Assuming that town meeting voters might already be aware (or could be made aware in open discussion) that by creating a public easement they would be foisting maintenance onto the easement's abutters and that they therefore would be less likely to approve doing so, I support it. I am also in sympathy with the sentiment a town might feel for retaining a recreational easement on certain roads. However, I would hope the public would remain cognizant of the maintenance burden easements of both kinds place on private road associations formed on public easements.

Testimony in Support of L.D. 1596,

“An Act to Amend the Laws Governing Discontinued Town Ways”

January 18, 2012

Good morning, Sen. Thomas, Rep. Cotta and members of the State and Local Affairs Committee. I am Linda McKee of Wayne, where my family has lived for almost 40 years, and I am here to urge you to unanimously pass the bill before you, “An Act to Amend the Laws Governing Discontinued Town Ways.” My interest in this issue goes back at least three decades when I first became aware of the term “public easement” and observed firsthand the difficulties that the creation of this designation has caused. That concern extended into my four terms as a State Representative for what was then District 79, which included the towns of Winthrop, Wayne, and Fayette. It was through my familiarity with road concerns in the Town of Fayette that I became involved with trying to help the family of David Manter, who lives on the Young Road which had been affected adversely by a public easement.

The bill before you is a positive step forward. To the credit of the Fayette Selectmen, the proposed bill reflects a desire not to create any more problems than they and towns across the state already have. It demonstrates both the good will of the board and the sincerity with which the Town Manager approaches his job. I applaud them both. To my former constituent who has suffered for more than 35 years under a short-sighted law, it comes as no consolation for the hardships he and his family have endured. “Far too little too late” is, I am sure, his feeling today.

This bill, however, is important, especially since urban sprawl continues throughout the state, and a new wave of interest in farming and rural living has hit America. Cheaper land prices for overgrown farmland where old discontinued or abandoned roads entice building will lead to ongoing disputes about the proper use and regard of those roads. Town leaders who are interested in fairness, openness, and community harmony need to be aware of the possible problems that may arise from ignoring the proper use of these traffic networks. If a discontinued road deemed by the 1975 law to have a “public easement,” towns should be able to determine exactly what kind of use is appropriate—foot, automobile, skidder, or “unfettered access”—all determined in an open and public setting.

I urge you to examine this bill carefully and understand its intent. Road law in any state is often complex, convoluted, and arcane. This bill does not propose any addition to that quagmire. This one is straightforward, easy to understand, and—most of all—an opportunity to do the right things for the people of the State of Maine. Thank you. If you have any questions, I am happy to try to answer them.



Linda Rogers McKee, 201 Walton Rd., Wayne, ME 04284 plumgoodfarm@aol.com

TESTIMONY IN SUPPORT OF LD 1596
An Act to Amend the Laws Governing Discontinued Town Ways
Submitted: January 18, 2012.

Senator Thomas, Representative Cotta, Members of the State and Local Affairs Committee:

My name is Mary Wright and I am a resident of the town of Fayette, Maine. I also serve as a Selectman and have been enjoying this position for two terms, this being my 6th year. My fellow selectmen and I have approved a resolution in an attempt to clear some pretty muddy water. This resolution is attached to papers submitted by Mark Robinson on this date.

It's time to clear up the chaos surrounding discontinued roads and clarify things for hundreds of citizens who continue to suffer from the uncertainty that has been going on for way too long!

Since 1820, a private way was built and repaired by the property owner, providing access to private land. This seemed on the face to be a simple answer but:

Court case after court case – neighborly argument after not-so-neighborly argument ensued.

1933 – Discontinued roads were discharged of public easement.

1945 – Roads can be closed but retained as a private way. → *include Master's road*

1965 – Discontinued roads now automatically town retains public easement.

1967 – Limited User Highway

1975 – Private ways are now Public Easement where all rights enjoyed by public but paid for by the property owners.

???? – Common Law Abandonment – Road reverts to private property after 20 years.

1976 – Statutory Abandonment retains public easement after 30 years of neglect.

1986 – After Statutory Abandonment, road is now a Public Easement.

Then, a private way was changed to include public access - still being paid for by the private landowner.

My dates may be off a tad, and I've omitted many other court decisions. The fact remains that confusion reigns supreme in the determination of town ways, public ways, private ways, county roads, county ways, discontinued roads, abandoned roads, public easements, etc.

Sadly, the property owners are the ones that suffer. Not only do they suffer from the utter confusion of "what the heck am I living on anyway?" But possibly more importantly, the changing of the municipal guard add to the chaos. Selectmen and town managers come and go – as do their own perception of problems and personalities. Landowners choose where they live – therefore, they are stuck with the "personalities" of those that lead them (and vice versa). They should not also be forced to be stuck with legislature that is crazy making at best.

In our town, the Mantors have dealt with all of this. In my opinion, they have been wronged by the State, the selectmen and the town managers of the past. What happens when Mark and I choose to leave? What if the new town manager doesn't like people named "Dave"? Or the legislature decides to make driveways public easements?

I humbly request that dialogue be opened to address the chaotic changes regarding our roads in this state. I would like to see MRSA 3028, 3021 and all other MRSAs pertaining to roads re-evaluated and revised to make sense – FROM THIS DAY FORWARD.

TESTIMONY OF THE TOWN OF FAYETTE

IN SUPPORT OF

LD 1596, AN ACT TO AMEND THE LAWS GOVERNING DISCONTINUED TOWN WAYS;

SUBMITTED ON JANUARY 17, 2012

SENATOR THOMAS, REPRESENTATIVE COTTA, AND MEMBERS OF THE STATE AND LOCAL AFFAIRS COMMITTEE, MY NAME IS MARK ROBINSON I AM A RESIDENT OF THE TOWN OF FAYETTE MAINE AND FOR LAST 7 YEARS I HAVE HAD THE DISTINCT HONOR TO SERVE AS FAYETTE'S TOWN MANAGER.

I AM TESTIFYING IN SUPPORT OF LD 1596. THIS LD OFFERS A MUNICIPALITY THE OPPORTUNITY TO PROPOSE RESTRICTIONS ON THE USE OF A PUBLIC EASEMENT. SUPPORT OF THIS LD IS CONDITIONED UPON THE TENETS OF THE ATTACHED RESOLUTION SIGNED BY THE FAYETTE BOARD OF SELECTMEN AT ITS JANUARY 9, 2012 MEETING. (PLEASE SEE THE HIGHLIGHTED SECTION)

TODAY BOTH THE ROAD DISCONTINUANCE LAW AND ROAD ABANDONMENT LAW PROCESSES LEAD TO THE CREATION AND RETENTION OF PUBLIC EASEMENTS. LEAVING A SITUATION WHEREBY THE PUBLIC CAN USE A ROAD BUT IS NOT OBLIGATED TO CONTRIBUTE TO ITS MAINTENANCE. THIS RESULT IS AT THE HEART OF CONTROVERSIES THAT CONFOUND AND PLAGUE MANY MUNICIPAL OFFICIALS AND PROPERTY OWNERS ACROSS THE STATE.

THE MESSAGE I WANT TO CONVEY TODAY IS THAT THIS TOWN SUPPORTS LEGISLATION THAT WILL PROVIDE CLARITY IN THE LAW. SO THAT WHEN A PUBLIC EASEMENT IS CREATED, THE MUNICIPALITY'S LOCAL LEGISLATIVE PROCESS (TOWN MEETING) AFFIRMS AND ACCEPTS THE NEWLY CREATED PUBLIC EASEMENT OR REJECTS AND EXTINGUISHES IT AND IF ACCEPTED EXERCISES THE RIGHT TO PLACE RESTRICTIONS ON IT.

WE ALL CAN AGREE THAT THESE ROAD LAWS CAN BE CONFUSING. THIS CONFUSION LEADS TO EXCESS TIME AND EXPENSE FOR MUNICIPAL OFFICIALS AND ULTIMATELY THE TAXPAYER.

RESPECTFULLY SUBMITTED,



MARK ROBINSON, TOWN MANAGER, TOWN OF FAYETTE

A RESOLUTION
of the
BOARD OF SELECTMEN
Town of Fayette, Maine

WHEREAS, The Town of Fayette in the County of Kennebec and State of Maine has recognized the current statutes that govern the discontinuance of a public way and the abandonment of a public way leave behind a continuous complicated challenge for both private property owners and municipal government officials.

AND WHEREAS prior to 1976, a road could only be abandoned by "common law." That is, if a road had not been used or maintained by the public for a period of twenty or more years, it ceased to exist as a road.

AND WHEREAS In 1976, the Maine State Legislature passed a law specifying the procedure for *statutory* abandonment: This law required a thirty year period of non-use and non-maintenance, after which the road would take on the same status as it would have had as a "discontinued" road. This should have meant, logically enough, that if the public had forgotten a road or had no use for it for thirty or more years, it should have ceased to exist.

HOWEVER, in 1965 the discontinuance law was changed to state that when a road is discontinued, it *automatically* becomes a "public easement" unless the Town specifically votes otherwise. ~~Such that it is~~

~~no requirement for a town vote when a public way is abandoned. There is a time period in which the town can decide to or not keep a public easement.~~

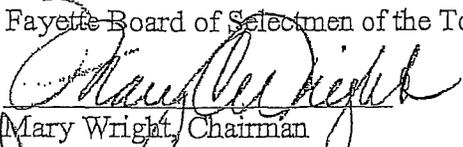
THEREFORE a road which has been forgotten that should cease to exist after twenty years by common law abandonment, thus becoming private property; could become a public road again if someone addresses it through statutory abandonment ten or more years later,

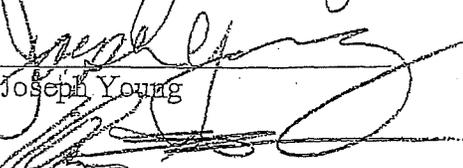
BE IT THEREFORE RESOLVED That the Fayette Board of Selectmen requests the Maine State Legislature ~~to vote on and adopt the current statute that governs the discontinuance of a public way and that~~

~~abandonment of a public way so that if a road ceases to win votes and to win the process, it will lead to the appropriate ending and not remain a public easement.~~

IN WITNESS WHEREOF, We have hereunto set our hands and caused the Seal of the Town of Fayette, Maine to be affixed at Fayette, Maine this 9th day of January, 2012.

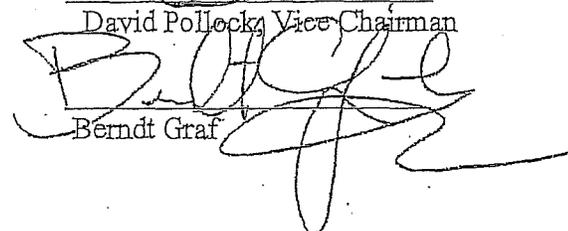
Fayette Board of Selectmen of the Town of Fayette, Maine:


Mary Wright, Chairman


Joseph Young


Ken Morrison


David Pollock, Vice Chairman


Berndt Graf

January 23, 2012.

State and Local Affairs Committee
State House
Augusta, ME 04333

Senator Thomas, Representative Cotta, Members of the Committee:

Re: LD 1596

Herewith is the written testimony I was unable to provide when I testified before your Committee on January 18, 2012. Senator Saviello's bill is a good place to start, but it may not be sufficiently inclusive.

Before 1965 state law on discontinuance was generally understood by our 450+ municipalities: roads were discontinued by town meetings with damages paid to abutters for their losses. The former road easement then returned to the abutters, usually to the center line, reverting to private property. The public had no further right to use the road and the abutters had no expectation that the town would maintain the road. Since 1965 road law has been rewritten several times, county roads (between towns) have been returned to the jurisdiction of the individual towns, abandonment has been introduced, with or without public easements retained either for utilities or recreational use, and the number of costly lawsuits has grown. My suggestions follow:

Well Defined Language: However your Committee chooses to rewrite the road laws, the terminology used must be unambiguously defined. What is the meaning of discontinued, abandoned, public utility easement, recreational easement, even prescriptive easement, and especially *isolated acts of maintenance*? Also, the process of discontinuance or abandonment must be clearly set out. The changes since 1965 have complicated the relatively simple process of discontinuance. The undefined concept of abandonment has led to arbitrary decisions by boards of selectmen and town meetings who substitute their wishes for due process. More often than not, they wish to preserve passage over the road for multiple recreational uses without having to pay for road upkeep. This creates significant problems for abutters. Also, under current law, the selectmen both bring the case for abandonment and then sit as the jury. The citizen who wishes to challenge the action on legal grounds must play a game against a loaded deck: unload this deck, please. If an abutter to this newly created recreational easement wishes to repair the road for his own use, he has no way to keep the public from destroying the road: ATVs, mud runs, even logging in the wrong season. And, if he attempts to gate it to keep it from being damaged, he could be liable if someone who expects open passage

gets hurt.

Responsibility of Municipal Officials: Under present law, abetted by a court decision, municipal officials, acting under 3028 and other laws, can simply declare that a road has received no maintenance for whatever period of time might be applicable for abandonment or discontinuance. Further, the officials site the *absence* of road maintenance records as proof of their claim. The court upheld such a claim, writing, that a failure to act did not constitute an act, on the part of the officials. However, the local officials are responsible, as the chief executive body of the municipality, to maintain public ways. If they fail to do so, that is a dereliction of duty, and that is, surely, an act.

Access to Information: MMA offers some explanation of the laws in its road manual, but in actual practice MMA appears to tell the selectmen how to get out of paying for roads but keep the recreational rights. Abutters do not have access to MMA advice, so instead must hire lawyers at great expense. The issue of MMA representation of town government, but not townspeople is problematical, especially in availability of information. This information should be subject to some form of discovery in litigation or arbitration. Here again, the deck is loaded: please unload it.

Property Taking and Compensation: If a road is to be closed to the public, then a process must be established so that no abutter is landlocked without full compensation for the loss in property value due to lack of road access. No one should be deprived of any part of the value of property without just compensation.

Flexible Classification of Town Ways: Individuals have different reasons for asking for a new, comprehensive road law regarding discontinued and abandoned roads. What is important is that such roads that retain a public easement must be maintained to some degree (probably as gravel roads) at public expense. Abutters must have some rights to make repairs, and persons who damage such a road must be required to pay toward its repair. Also, the principal reason for a municipality to abandon or discontinue a road is to escape maintenance costs. There should be a way for a municipality to declare that a road continues its status as a town way, but will be maintained at some level less than that of other, more traveled, town ways, until the way may again be needed.

Thank you for allowing me to address you on this matter. My own experience in a 3028 road case led me to offer the above.

Respectfully submitted,
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