

MAINE STATE LEGISLATURE

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May 19, 1930

To the State Highway Commission
Re: Land Taking - Procedures

You inquire with reference to the difference of procedure between cases where land is taken for a State highway and cases where a road is altered or regraded. P. L. 1929, Chapter 219, has to some extent simplified the situation, but there is still some ambiguity.

Sections 2 and 3, amending Sections 11 and 13, distinguish in procedure among three situations where property is taken or damaged and no agreement has been made with the land owner:

- (a) Taking materials or land to provide a change of location or alignment;
- (b) New highways (Sec. 3, amending original Sec. 13);
- (c) Altering or regrading (same reference).

The procedure in (a) and (b) is substantially the same. When the Commission takes land or materials either for a change of location or alignment (Section 2) or for a new highway (Section 3), condemnation proceedings are prosecuted by the Commission, damages fixed by a joint board made up of the Highway Commission and the County Commissioners, subject to appeal, and awards are paid one-half by the State and one-half by the County.

If land is taken, a survey is made and plan filed, notice given and hearing set. It makes little legal difference whether the land is taken for a change of location or alignment under Section 2 or for a new highway under Section 3. The procedure is the same in either case.

As an exact matter, it is a little difficult to say just what is a re-alignment and what is the establishment of a new road. It seems to me that it is largely a question of degree. The cut-off from Deep Cut to Hillside in Brunswick is a new road; the former State highway on the other side of the railway has been abandoned as a State highway. On the other hand, straightening out a curve, as was done at Minot Corner whereby the road ran through the Pulsifer land, is probably a re-alignment. Certainly, straightening a curve, as was done in the Sampson property, is a re-alignment.

If the procedure under Section 2 is followed, I do not believe that any legal objection could be taken to the proceedings due to the fact that the Commission happens to choose one expression or the other and calls it a re-alignment when it is a new layout, or calls it a new layout when it is a re-alignment. See the following cases to this effect:

Raymond v. County Commissioners, 63 Me. 112, - petition for "alteration" held to justify a relocation;

State v. Canterbury, 40 N. H. 307,- although a new highway cannot be laid out upon a petition to widen an existing highway, nevertheless the Commissioners in straightening curves or corners may depart entirely for short distances from the route of the old highway;

Bowley v. Walker, 8 Allen 21,- straightening a highway operates as a discontinuance of the portion of the former way which does not come within the new limits.

The procedure in (c) is quite different. Here the moving party is the land owner and not the Commission. Where no land is taken, it is apparently beyond the power of the Commission to compel the claimant to come in and take damages. If a road is altered or regraded without taking the property of a land owner and the Commission is unable to arrive at an agreement with him as to his damages, he may, within six months, ask for damages and subsequently the procedure is the same as if the Commission had started the wheels. After six months he is out of luck. During the six months all the Commission can do is await his action.

A difficult question is presented where at the same time land is taken and the road regraded. This was the situation in the Sampson case. Here it seems to me that if the land owner comes in before the Commissioners, submits evidence of damage to his property from the regrading and damages are fixed on that basis, his appeal would perhaps cover this element of the case and he would probably appear in Court on the appeal as to all the elements of his case. If he does not appear and the Commissioners award damages in his absence, it may well be that all they legally can pass on is the value of the land or materials taken and perhaps the damage to his remaining property caused by such part of the relocation of the road and regrading thereof as is intimately connected with this taking. The damage to his property caused by the change of grade on the property taken might enter into the award for the taking. The damage to his property from a change of grade further down the line would not. This was the point which I raised in the Sampson case.

In the Lila Parker case there was an actual taking of land and the award of damages unappealed from. There was no change of grade. Her suggestion was that she could proceed within six months because in your proceedings you purported to be laying out a new road under Section 3, instead of re-aligning an old road. My answer to this is that your procedure with respect to a taking of land should be the same, and was actually carried out the same, as it would have been if you had denominated the proceedings a re-alignment instead of new construction.

She could file claim within six months from any regrading or re-alignment which, as such, damaged her property, aside from the damage caused by a taking of land. The only damage to her property was the taking. Your procedure to fix the damages for the taking was

correct. It is immaterial as a matter of law whether you call the taking a taking for a new road, or a taking for a re-alignment.

Under the circumstances, therefore, I suppose that the proper course is to take no further action in the Parker case. In view of the circumstances to which you refer in your letter, an extra-legal determination of the case is hardly advisable. Should she bring legal proceedings, it seems to me that they will be dismissed. Even should I be wrong in this, it might not be disadvantageous to have a Court determination as to the meaning and interpretation of the Public Act which we have been discussing, for guidance in future cases and as a basis for amending the statute if it is incomplete and ineffectual.

Clement F. Robinson
Attorney General