

# MAINE STATE LEGISLATURE

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February 5, 1958

To W. H. Bradford, Right of Way Engineer, State Highway Commission  
Re: Construction of Stone Wall within 33' of Centerline.

You have requested my opinion as to whether or not the construction of a stone wall within thirty-three feet of the centerline comes within the provisions of Section 89 of Chapter 23.

In the first place, I am assuming that Brother Smith's statement that the wall is along the edge of the right of way and does not trespass on the right of way of the State is correct. Obviously, the wall cannot be built within the right of way. Presuming that the only objection to the wall is that it is only thirty feet from the centerline, it is necessary to decide whether or not this is a fixture.

The word "fixture" is almost impossible to define. Each individual case has to be considered on its own merits. In the usual legal sense, it refers to some item of personal property, which can become realty by the manner in which it is affixed to a building and in this connotation the intent of the affixor is often important, and of course buildings can become part of the realty by virtue of their foundations and can even be personalty by agreement or because of the obvious intent of the owner of the building. Whether or not stone walls on the land become part of the realty has not been decided that I know of. Obviously, many of these have foundations and can be moved without damage to the land. The real difficulty in this case is that the word "fixture" is used in connotation with things affixed to a building. It may well be that we have not properly used the word "fixture" in this statute. We have already had some almost impossible problems to answer.

I note, too, that Section 89 has a penalty and thus becomes a criminal statute, which, of course, would have to be strictly construed. The statute says, "gasoline pumps or other fixtures", which does term a gasoline pump a fixture. Thus, many installations that had the type of foundation of a gasoline pump obviously would be fixtures.

Following the reasoning in the cases on fixtures on buildings, we can argue that it is the intent of the owner to make the wall a permanent addition to the realty and to remain there as a part of the land, thus making this a fixture. Our theory then would be that under the police power the owner is denied the use of three feet of his land; under the police power this, of course, is valid. To maintain the argument that the wall is affixed would be to state that if the owner sold the property without any reservations he would have the right to remove the stone wall against the objections of the buyer on the ground that it was personal property.

The use of the word is a very close point and it is my opinion that we could present a very good argument based on the foregoing. However, since the issue is so close, you should resolve it on the importance of the matter to the Department.

L. Smith Dunnack  
Assistant Attorney General

LSD/ek  
cc: Attorney General and  
Chairman of the Commission