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June 25, 1980

Honorable John L. Martin
Speaker of the House
House of Representatives
State House
Augusta, Maine 04333

Attention: Joanne D'Arcangelo.

Dear Speaker Martin:

In a letter dated June 6, 1980, you sought information with respect to what powers and rights citizens have in using private roads in order to reach a public lot located within their organized township.

There is no general public right to cross the property of a private party to gain access to the public lots. There is no indication, either express or implied, that the State reserved such a right when it disposed of the public lands. However, it is possible that the public may have the right to use particular roads or paths across private property to public lots where the deeds to such private property include express reservations providing for such or a public way has been created by prescription.

The State of Maine and its predecessor the Commonwealth of Massachusetts failed to express any reservation of public ways across private property to public lots. In the eighteenth century, Massachusetts began the practice of reserving acreage within each township for public purposes such as the creation of schools, ministries and a general court. Ch. 40, [1786] Laws and Resolves of Massachusetts; Ch. 90, [1787] Laws and Resolves of Massachusetts. The reservation of land for public uses was incorporated into Maine's Constitution through the Articles of Separation. Me. Const. art. X, § 5, Item Seventh of the Articles of Separation. The Articles of Separation provided that all grants of public lands made by the State would be subject to the same reservations as those of

Massachusetts for the benefit of the public. In 1824, the Maine Legislature enacted a bill which assured that 1,000 acres would be reserved for the public in each township. P.L. 1824, c. 280, § 8. The management of these public lots is now provided for at 30 M.R.S.A. §§ 4151, et seq. In none of these enactments is included any reservation of an easement over private property to gain access to public lots. If such an easement were reserved by statute, such reservation would be effective despite lack of repeating the reservation in any conveyance by the State. Mace v. Ship Pond Land & Lumber Co., 112 Me. 420, 424 (1914). The failure to expressly reserve such access, by statutory or constitutional provision, mandates a conclusion that there is no express public right to cross private property to reach the public lots.

It is possible that a particular conveyance by the State of land abutting a public lot included an express reservation for public access. Such a reservation, obviously, would be enforceable. The deeds of the particular land would have to be examined to determine such.

It can be argued that an easement by implied reservation, a quasi-easement, was reserved by the State in locating the public lots. In spite of the rule of construction that grants made by the State are to be construed in the State's favor, easements created by such implied reservations are looked upon with disfavor. See Leo Sheep Company v. United States, 440 U.S. 686, 99 S. Ct. 1403 (1979); Jones on Easements, § 136. In determining whether an implied easement was created, the court looks to the probable intent of the parties. LeMay v. Anderson, 397 A.2d 984, 987 (1979). Although an argument can be made that such an implied easement to gain access to public lots was intended as a matter of practicality, the history surrounding the creation of public lots evinces no such intent. First, as discussed above, the State failed to reserve such easements even though it had the opportunity to do so by legislation, while at the same time reserving the public lots themselves. Second, in comparison, there is a long history of legislatively-mandated access across private property, by foot, to the great ponds. Colonial Ordinances of 1641-47, now 17 M.R.S.A. § 3860; Opinion of the Justices, 118 Me. 503 (1919). The Legislatures of Massachusetts and Maine, therefore, contemplated the access issue with respect to other publicly-held property, the great ponds, but failed to reserve such access to public lots.

Going beyond the lack of intent necessary to create a quasi-easement, if the three elements necessary for the creation of such an easement are applied to this situation, it is clear that such a quasi-easement has not been created with respect to public lots.

The elements of a quasi-easement are: (1) apparent and open use of the easement; (2) severance of unity of title in the dominant and servient portions; and (3) the strict necessity of the servitude to the enjoyment of the dominant estate. LeMay v. Anderson, supra at 988. An easement for access to public lots fails on elements 2 and 3. The majority view is that the original ownership of all of the State's land by the sovereign does not fulfill the unity of title requirement. See State v. Black Brothers, 297 S.W. 213, 218-19 (Texas 1927); Annot.: What Constitutes Unity of Title or Ownership for Creation of Easement by Implication or Way of Necessity, 94 A.L.R. 3rd 502, § 9(c). The reasoning behind this view is that if the sovereign's unity of title could be utilized in order to fulfill this element, all landowners of the State could be entitled to such quasi-easements across their neighbors' land since they all trace their title back to the sovereign. Id. This result is obviously illogical. The third element, the requirement of strict necessity, does not apply to the sovereign. Id.; Leo Sheep Company v. United States, supra. The sovereign clearly has the ability by legislation prior to any conveyance and in the conveyance itself of reserving such easements. Failing to do so, the sovereign cannot come back later arguing that its uncommunicated intent should be legitimized. Moreover, strict necessity is not present for the sovereign since it has the power of eminent domain to create a public way. Id.; Schepps, Emergence of a Public Trust, 26 Me. L. Rev. 217, 242 (1974).

The Legislature has declared that it shall be the policy of the State

> "that full and free public access to the public reserved lands, to the extent permitted by law, together with the right to reasonable use thereof, shall be the privilege of every citizen of Maine." 12 M.R.S.A. § 556(1).

By this declaration, the Legislature did not, and could not, intend to permit free public access across any private property. The declaration is intended only to limit the authority of the Director of the Bureau of Public Lands to restrict public access into the public lots. 12 M.R.S.A. § 556(2). There is neither a recognition of the existence of such a privilege to freely cross private property nor an expression granting such, if the Legislature even could do so now without justly compensating the private landowner. See Schepps, Emergence of a Public Trust, supra. Moreover, the phrase "to the extent permitted by law" recognizes any legal limitations on how the public may exercise its privilege, e.g. without trespassing on private property.

In 1980, the Legislature enacted a bill which provides for the leasing of timber harvesting rights on the public lots to incorporated towns. P.L. 1980, c. 683. Among the provisions enacted into law is the following:

> "Public access to lands leased under this paragraph may not be unreasonably denied . . . ." 30 M.R.S.A. § 4162(4)(L)(5).

Construing this provision in light of existing law, the access assured is that within the leased public lot. For instance, only a portion of a public lot may be leased to the incorporated town (30 M.R.S.A. § 4162(4)(L)), and in such a case the town could not unreasonably deny access to the leased portion from the unleased portion. At most, this provision may require a town to permit access to the leased land across municipal property. There is no indication a right to cross private property is recognized here.

An easement by custom is of doubtful validity in the State of Maine, and therefore cannot be used as a theory upon which to create public access to public lots. Piper v. Voorhees, 130 Me. 305, 311 (1931).

A public way could be created by prescription, without the necessity of a formal laying out or taking. Comber v. Inhabitants of Plantation of Dennistown, 398 A.2d 376 (Me. 1979); Inhabitants of the Town of Kennebunkport v. Forrester, 391 A.2d 831 (Me. 1978); State v. Beck, 389 A.2d 844, 847 (Me. 1978); MacKenna v. Inhabitants of the Town of Searsmont, 349 A.2d 760 (Me. 1976); State v. Bunker, 59 Me. 366, 270-71 (1857). The creation of a public way by a prescription is recognized by statute. 14 M.R.S.A. § 812; 23 M.R.S.A. § 3030. The requirements for creation of a public way by prescription parallel those for the creation of a prescriptive easement, which are as follows:

> "A prescriptive easement is created only by a continuous use for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed." Comber v. Inhabitants of Plantation of Dennistown, supra at 378.

In order to determine whether a particular road or path to a public lot has become a public way by prescription, the specific facts and circumstances surrounding that road or path must be analyzed. Without such facts, it is impossible to determine whether such a public way has been created by prescription. Once such a public way is established, however, "any use may be permitted thereon which is

not inconsistent with a public way." MacKenna v. Inhabitants of the Town of Searsmont, supra, at 763. Therefore, it would be possible for such a way to be used to provide access for recreational purposes although the original use creating the way was for some other public purpose.

As is obvious from the discussion above, it is possible that citizens have a right to use a particular "private" road in order to gain access to a public lot. However, this right must have been created by an express reservation in a particular deed or by means of prescription creating a public way. Whether this right exists in a specific case requires knowledge of all the relevant facts.

Finally, I should note that because of the broad nature of your question, as well as certain time constraints, my response has not been reviewed through our customary opinion process. Accordingly, I would ask that you treat this letter not as a formal opinion, but rather as an informational letter which reflects my research and the conclusions I have drawn from the research. Needless to say, this Office would be happy to provide you with a formal opinion should one prove necessary.

Sincerely,

PAUL STERN
Assistant Attorney General

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