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DEPARTMENT OF THE ATTORNEY GENERAL
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July 15, 1980

Honorable Philip F. Peterson
P.O. Drawer M
Caribou, Maine 04736

Dear Representative Peterson:

You have asked whether a town may provide maintenance services on a private road. More specifically, we understand that the road in question is located within the town, but its first portion is owned by a paper company and its second portion passes through a public lot allocated within the town. The road is used by certain private landowners, who lease either from the paper company or from the State, for access to their camps. These landowners pay property taxes to the town on their camps. Additionally, we understand that the State pays to the town 25% of the proceeds from the lease of land within the public lot. We further understand that the road is not open to use by the general public. Given these facts, we are unable to locate any authority which would permit the town to expend its funds to maintain this road unless the road were open to public use and accepted by the town as a municipal way.

It is a well-established principle arising from our Constitution that public monies may only be expended for a public purpose. Me. Const. art. IV, pt. 5, § 1; e.g., Carlisle v. Bangor Recreation Center, 150 Me. 33 (1954); Crommett v. City of Portland, 150 Me. 217 (1954); Brewer Brick Co. v. Inhabitants of Brewer, 62 Me. 62 (1873). The expenditure of town funds to maintain a road which is not open to public use would violate this principle. See Opinion of the Justices, 118 Me. 503 (1919); see also Paine v. Savage, 126 Me. 121 (1927). Hence, it would be improper for the town to expend its funds in such a way. This general rule apparently admits of no exceptions.

A different result might follow, however, if there were some public right of access to the road. We do not think that the public has the right to use the road merely by virtue of its being located on a public lot. The Director of the Bureau of Public Lands is empowered to limit public access to public reserved lands under certain circumstances, see, e.g., 30 M.R.S.A. § 4162(4)(C), provided he complies with specific procedures. 12 M.R.S.A. § 556(2). Since it appears that the road in question is not open to the public, we must assume that the Director has acted consistently with the statute in so limiting the use of the road.

In any event, there appears to be no right in the public to get to the part of the road located on the public lot from the privately owned portion of the road since there is no general public right to cross private land to reach a public lot. There is no indication, either express or implied, that the State reserved such a right when it disposed of the public lands. It is possible, however, 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 so providing or a public way has been created by prescription, as discussed more fully below. In the absence of either of these possibilities with regard to the privately owned part of the road, the general question of whether there is public access to the public lots is irrelevant since there would be no way for the public to get to the part of the road located on the public lot.

A right of public access to the road in question might be held to exist if the road had been used consistently enough by the public to create a public way by prescription. 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, 370-71 (1857). The creation of a public way by 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.
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> Comber v. Inhabitants of Plantation of Dennistown, supra, at 378.

In order to determine whether this road has become a public way by prescription, an extensive review of the relevant facts and circumstances would have to be undertaken. Without such a review, it is impossible to determine whether a public way has been created by prescription. Such a complex factual determination is clearly beyond the scope of this opinion or of the opinion process in general.

The basic principle underlying this opinion is clear: unless the public has the right to use the road, it cannot be maintained by the municipality. If the landowners who now have use of the road are willing to make it accessible to the public, we find nothing in the Maine statute which would prevent the landowners, the Bureau of Public Lands and the town from agreeing that the town make it a municipal way. See 23 M.R.S.A. § 3021 et seq; 30 M.R.S.A. § 4102(4)(G) (giving Director of Bureau of Public Lands power to "grant the right to construct and maintain public roads" within public reserved lands). This clearly constitutes the most direct and legally unambiguous mechanism whereby the town could become empowered to expend public funds to maintain the road.

If you have any further questions, please feel free to contact this office.

Sincerely,

Richard S. Cohen

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Attorney General

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