

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

STATE OF MAINE
113TH LEGISLATURE
SECOND REGULAR SESSION

REPORT OF THE COMMITTEE
TO STUDY UTILITY EASEMENTS
OVER EXISTING
RIGHTS-OF-WAY

November 1, 1988

MEMBERS:

Rep. Francis Marsano, Chair
Rep. Patrick Paradis
Rep. Harry Vose
Rep. Norman Weymouth

Staff: Julie S. Jones, Legislative Analyst

Office of Policy and Legal Analysis
Room 101, State House--Sta. 13
Augusta, Maine 04333
(207) 289-1670

CONTENTS

- I. Background of this Study
- II. Introduction to Easements
 - A. Definition
 - B. Creation of easements
- III. Interpretation of Easements
 - A. Extent of an easement
 - B. Interpretation of the limits of easements when utility rights are not explicitly stated
 - C. Interpretation of utility rights in easements in Maine
 - D. Interpretation of utility rights in easements in Massachusetts
 - E. Interpretation of utility rights in easements in other states
- IV. Study Procedure
- V. Findings
- VI. Recommendations

Appendices

- Appendix A: LD 2228, AN ACT Establishing Rights-of-Way for Utilities in Existing Rights-of-Way for Egress and Ingress
- Appendix B: Recommended legislation

UTILITY EASEMENTS OVER
EXISTING RIGHTS-OF-WAY

I. BACKGROUND OF THIS STUDY

This study results from L.D. 2228, AN ACT Establishing Rights-of-Way for Utilities in Existing Rights-of-Way for Egress and Ingress. L.D. 2228 (Appendix A) was sponsored by Rep. Moholland and cosponsored by Rep. Vose. The bill provided that an easement "of access for the purpose of ingress and egress" would be deemed to include an easement "for the purpose of providing utilities or utility services" to the property.

L.D. 2228, originally referred to the Joint Standing Committee on Utilities, was rereferred to the Joint Standing Committee on Judiciary and was heard and considered by that Committee during the Second Regular Session of the 113th Legislature. Following several work sessions, it was apparent that the bill raised important concerns that required more consideration than was possible during the remainder of the Session. The sponsor was granted a Leave to Withdraw and approval of the Legislative Council was sought and granted to conduct this study.

LD 2228 proposed that an easement for the purposes of ingress and egress be interpreted to also include an easement for utility services. During the course of consideration of the bill in the Judiciary Committee, questions were raised about both the constitutionality and the practical effects of the proposed expansion of existing easements. The Public Utilities Commission supported the intent of the bill while preferring not to offer an opinion on its relationship to property law. The PUC provided testimony favoring the idea of increasing accessibility to utility services as beneficial to not only the persons actually served by the increased access but also as a means of spreading the costs of the utility system among a larger number of ratepayers.

A similar bill had previously been presented during the First Regular Session of the 112th Legislature. That bill, L.D. 613, AN ACT to Provide Utility Easement by Implication, based upon a Massachusetts law addressing the issue of utility easements over existing rights-of-way, received a unanimous Ought Not to Pass recommendation from the Joint Standing Committee on Judiciary which was subsequently accepted by the full Legislature.

II. INTRODUCTION TO EASEMENTS

A. Definition

An easement is a legally enforceable right to use the property of another for a limited purpose. (Black's Law Dictionary.) It is a non-possessory interest. The right of use usually must be for the benefit of other property. A right-of-way may be general (i.e. without limitation) or designated as being "for all purposes." It is usually limited to a particular kind of use. A right-of-way is an easement which is limited to the right of passage over the property of another. A right-of-way may also be limited in purpose, such as for logging or residential access. When an easement exists over one piece of land as a means of access to an adjacent piece of land, the land over which the easement lies is called the servient estate. The land which is accessed by means of the easement is called the dominant estate.

B. Creation of easements

Easements may be created in several ways. The most common are:

1. By grant. "A" deeds a back lot to "B" and includes a provision in the deed granting "B" a right-of-way across "A's" land to the back lot.
2. By reservation. "A" deeds a front lot to "B", retaining the back lot for himself, and reserves in the deed the right to travel over the front lot to reach the back lot.
3. By prescription. "A" may acquire a prescriptive easement if "A" travels over the land of "B", without "B's" objection, for a continuous period of 20 years. The use must be open, notorious, visible and uninterrupted such that the knowledge and acquiescence of the owner will be presumed. (Manchester v. Augusta Country Club, 477 A.2d 1124 (Me. 1984). See 14 MRSA §812.)
4. By necessity. "A" owns a back lot which is inaccessible without crossing the land of others. "A" will have an easement of necessity to travel over neighboring land to reach his lot; however, the easement will be limited to the minimum intrusion which will meet "A's" need for access without unnecessarily burdening the land over which the easement passes.
5. By eminent domain. Governments and utilities may take an easement over private land if they compensate the owner for the taking.

III. INTERPRETATION OF EASEMENTS

A. Extent of an easement

An easement is limited in area, location and usage. A right-of way may be limited to a width of 20 feet or it may be limited to a particular traveled way. An easement is usually limited to the use for which it was created. That determination is made by looking at the express words (if any) granting the easement, the intention of the parties to the creation of the easement or what they would have reasonably intended if they had been aware of all current conditions. An easement of necessity will be limited to uses which are necessary to the reasonable enjoyment of the dominant estate without unreasonably burdening the servient estate. An easement acquired by eminent domain will be limited to its purposes at the time of the taking.

B. Interpretation of the limits on easements when utility rights are not explicitly stated

Frequently rights-of-way have been granted without indicating whether utility rights are included. This is obviously true of rights-of-way which were originally granted before utility services became widely available. Deed provisions in Maine commonly grant "rights-of-way for all purposes of a way" or rights-of-way without any expressed indication as to the purposes for which the easement was granted.

Given the lack of specificity in many deeded general rights-of-way, it is understandable that courts are occasionally called upon to interpret the permissible uses of those rights-of-way. When interpreting the extent of the right granted, the court will look at words limiting the use of a right-of-way such as those which are limited to ingress and egress. If the limits of the easement are not clear from its express language, the court will generally look at the intention of the parties to the original easement. Where the intention of the parties is not clear, the court may interpret the limitation in light of what reasonable people might have intended at the time. For example, in Stevens v. Anderson, 393 A.2d 158 (Me. 1975) the Maine Law Court interpreted a right-of-way granted in 1915 for "cattle, teams and foot passage" to include passage by motor vehicles.

C. Interpretation of utility rights in easements in Maine

In Maine, the Supreme Judicial Court has interpreted a grant of a "right to use, for all purposes, a way or road" as indicating an intent to include the right to install electrical lines. Ware v. Public Service Co. of New Hampshire, 412 A.2d 84, (1980). However, the same court has refused to conclude that "a right-of-way for all purposes of a way" provides sufficient indication of that intent. Saltonstall v. Cumming,

538 A.2d 291, (1988). The Law Court concluded that the question of whether "a right-of-way for all purposes of a way" includes the right to install utility lines is a question of "[t]he parties presumed intent ... in light of the circumstances surrounding and leading to the execution of the deed." Saltonstall, p. 292. The Saltonstall case was remanded to the Superior Court which was directed to determine the intention of the parties. That determination has not yet been made.

In Saltonstall the Law Court did not discuss why the Ware "right to use, for all purposes, a way or road" indicated sufficient intent of the parties to include the installation of utility service while the Saltonstall "right-of-way for all purposes of a way" did not. The failure of the Law Court to interpret the Saltonstall language as including the right to install utility services has confounded legal practitioners and created new uncertainty about the meaning of existing rights-of-way which had previously been assumed to include the right to install utility services.

D. Interpretation of utility rights in easements in Massachusetts

In 1975, Massachusetts passed a law providing that owners of real estate with deeded rights of ingress and egress also have, by statutory implication, a right to install utility services. In Nantucket Conservation Foundation, Inc. v Russel Management, Inc., 402 N.E.2d 501 (1980), the Supreme Judicial Court of Massachusetts upheld the statute and ruled that it was not an unconstitutional taking of property. It is not known how a Maine Court would rule on the question.

E. Interpretation of utility rights in easements in other states

The predominant interpretation in other states is that a general easement includes the right to install utility services unless there is an express exclusion. This interpretation is based upon the principal that the law should not stand in the way of beneficial uses of land. J. Bruce and J. Ely, The Law of Easements ¶7.04[1][b].

IV. STUDY PROCEDURE

This study is conducted pursuant to authority of the Legislative Council. Pursuant to the direction of the Council, the Committee to Study Utility Easements Over Existing

Rights-of-Way was composed of three members of the Joint Standing Committee on Utilities and two members of the Joint Standing Committee on Judiciary. Rep. Harry Vose, Rep. Norman Weymouth, and Sen. Edgar Erwin represented the Utilities Committee. Rep. Patrick Paradis and Rep. Francis Marsano represented the Judiciary Committee, although, it should be noted that Rep. Vose is a member of both Committees. Sen. Erwin withdrew from participation because of other obligations. A replacement was not appointed. Rep. Marsano was chosen by the members of the Committee as chair.

The Committee held an initial meeting to discuss L.D. 2228 and the policy implications of the Saltonstall decision and the difficulties confronted by landowners with long-standing rights-of-way which do not clearly indicate whether they include the right to install utility services. The Committee heard the concerns raised by utilities which are reluctant to install services unless the person requesting them has a clear right to do so. The Committee also heard the position of owners of land burdened by unclear easements who believe those easements to be limited to purposes which do not include the installation of utility services. The committee held one meeting in Pembroke, Maine and heard the position of persons unable to obtain access to utility services because of unclear easement language. The Committee directed staff to develop an initial draft of proposed legislation which was made available to interested parties for comment. The initial draft was presented at a meeting of the Title and Real Estate Section of the Maine State Bar Association for comment. After reviewing comments about the original draft the Committee recommended legislation which is attached as Appendix B.

V. FINDINGS

The Committee makes the following findings:

FINDING 1. A significant number of landowners in Maine have access to their property by a right-of-way over the property of others.

Development of land in Maine has, in the past, generally occurred through the rather random division of large parcels of land which was transferred to subsequent generations or to new residents. As a result of the mostly undeveloped character of the State, much of the land which was subdivided was without access to a public road. Access easements or rights-of-way were commonly granted over other land in order to provide access to and beneficial use of the land. Although there is no practical way to calculate the number of deeds containing rights-of-way, experienced observers find them quite common, especially in rural areas.

FINDING 2. A significant proportion of deeded rights-of-way are ambiguous as to whether they include the right to install utility services.

Many deeds establishing the original rights-of-way to property predate the common availability of utility services such as electricity, telephone, and public water and sewer services and, therefore, contain no reference to such services. In most instances, it is very difficult to determine the intent of the parties to the original transfer in order to decide whether the right-of-way permits the installation of utility services. Even after utility services became more widely available, many rights-of-way were granted without an expressed indication of whether utility rights were included. It is not uncommon, in rural areas, for deeds relating to conveyances which do not require financing to be passed without the advice of an attorney. In the absence of court opinions to the contrary, many attorneys have assumed that, in the absence of language limiting the use of the right-of-way, utility services would be included.

FINDING 3. Utility services are a common feature of modern society. They are necessary for most beneficial uses of land.

Although there are some who prefer a nontechnological life style, unburdened by the features of modern life which most people consider "conveniences," those people are definitely only a small minority of society. Most people who own land and wish to use it for purposes other than farming, forestry or open space, feel that the availability of utility services is an essential element of ownership. Indeed, the availability of utility services can have a dramatic impact upon the value of a parcel land.

FINDING 4. Utility companies are hesitant to undertake the work necessary to install utilities over an easement when the status of the right to install utility services is unclear.

Utilities are increasingly sensitive to the potential liability that could result if they undertook to install utility services on land without proper authority. Increasingly, they have begun to require that before they will install utility services, they be granted a valid utility easement. They are generally unwilling to enter into an agreement to provide services when the person requesting services is unable to provide clear authority to grant such an easement.

FINDING 5. Some owners of property burdened by rights-of-way believe that they were not intended to include the right to install utility services and object to the installation of such services either on the grounds of aesthetics or a preference that neighboring land remain undeveloped.

The Committee recognizes that some general rights-of-way exist which were never intended by the original parties to include the right to install utility services. The Committee received compelling information from one landowner reinforcing the Committee's understanding that the parties to a land transfer involving a right-of-way may not always express their intentions in the documents describing the right. While the Committee's recommendations lean toward a preference for the inclusion of utility services, they are intended to include protections for persons who can demonstrate that utility services should not be included in a particular case.

VI. RECOMMENDATIONS

RECOMMENDATION 1. The Committee recommends that a statute be enacted providing, prospectively, that future grants of general rights-of-way include the right to install utility services unless it is specifically excluded in the instrument granting the right-of-way.

The Committee believes that most people believe that when they acquire land with access over a right-of-way that they are also acquiring the right to install utility services related to the purpose of the access. The Committee also believes that most persons granting a right-of-way intend that the grant include the right to install utility services related to the purpose of the access. However, recent decisions of the Law Court interpreting the relationship between general rights-of-way and the right to install utility services have raised doubt about the effect of general grants. While the wise parties to a conveyance of a right-of-way would be well advised to include express provisions excluding or including utility services, it seems unlikely that such a practice will become prevalent in the immediate future. Most people will not become aware of the need for specificity until a conflict arises, and that is usually well after such a conveyance has occurred.

A prospective implication of the right to install utility services in a general right-of-way will give notice to persons conveying or retaining rights-of-way that, if they intend to exclude the installation of utility services, they need to expressly exclude that right in the deed. This implication recognizes that most persons would assume general grants include the right to install utility services.

The Committee believes that it is necessary to enact a statutory implication because of the uncertain state of the law

in this area currently. Utility companies have recently begun insist that persons requesting utility service provide clear evidence that a right-of-way includes the right to install utility services. At the same time that the Law Court is becoming less clear about the meaning of general rights-of-way. It does not seem appropriate to the Committee to require all holders of general rights-of-way to bring an action in court to clarify the intention of the original grantors as to the right to install utility services.

The statute is also intended to provide some protection to the owners of servient estates. The statute permits not only exclusions of the right to install utility services but also permits restrictions to be imposed in future deeds. For example, a landowner may wish to permit installation of utility services but require that they be kept below ground in order to preserve a scenic view. The provision providing that the statute is not intended to enlarge the area of an easement protects the owner of the servient estate; however, it limits the situations where the statute is applicable and may not resolve any current uncertainty where the size and location of the easement is not now clear.

RECOMMENDATION 2. The Committee recommends that the right to install utility services be implied in existing rights-of-way if the owner of the servient estate conveys it without excluding the right to install utility services and if those services have not been previously installed on the property.

This recommendation provides that, for rights-of-way originally granted before October 1, 1989, the implication of the right to install utility services in placed "on hold" until the servient estate is conveyed. It permits the owner of the servient estate to forestall the operation of the implication if in the next subsequent transfer, he expressly provides that the right-of-way does not include the right to install utility services. The Committee does not intend that this express exclusion operate to deprive the owner of a dominant estate of an original right which may exist. It is intended to provide notice to the owner of the dominant estate and subsequent purchasers that the owner of the servient estate has expressed an understanding that the right-of-way does not include utility services. Under the legislation recommended by the Committee, the owner of the dominant estate would not be able to forestall the implication if utility services had previously been installed over the right-of-way.

RECOMMENDATION 3. That state policy of encouraging the beneficial use of land should be supported by a statutory rebuttable presumption that, in the absence of evidence to the contrary, an intention to permit the installation of utility services is included in grants of rights-of-way which do not exclude that right.

The Committee is concerned that the current legal uncertainty about the right to install utility services in a general right-of-way creates substantial hardships for owners of dominant estates who must take action in court in order to establish the right to install utility services. Under current circumstances, in the event of a dispute between the owners of the dominant and the servient estates, the owner of a dominant estate must show by a preponderance of the evidence that the original parties intended to include the right to install utility services. Frequently, there is no evidence on this issue, and the court is left in a difficult position of determining what the parties would have intended. This is an awkward situation which risks putting the Court in the position of "manufacturing" intent or creating a rule of law which may be more appropriate for the Legislature. The Committee recommends a statutory presumption in favor of the intent to include utility services. This presumption would still permit the owner of the servient estate to overcome the presumption by presenting evidence to the contrary, but it would serve to give assistance to the owner of the dominant estate by establishing a statutory preference, in the absence of contrary intent, for including the right to install utility services.

6697

(AFTER DEADLINE)
SECOND REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

NO. 2228

H.P. 1633 House of Representatives, February 10, 1988
Approved for introduction by a majority of the
Legislative Council pursuant to Joint Rule 27.
Reference to the Committee on Utilities suggested and
ordered printed.

EDWIN H. PERT, Clerk
Presented by Representative MOHOLLAND of Princeton.
Cosponsored by Representative VOSE of Eastport.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-EIGHT

1 AN ACT Establishing Rights-of-Way for
2 Utilities in Existing Rights-of-Way for
3 Egress and Ingress.
4

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

7 33 MRSA §458 is enacted to read:

8 §458. Easements; egress and ingress; utilities

1 Any easement of access to private property which
2 exists for the purpose of ingress and egress to a
3 public or private road or way shall be deemed to
4 include an easement for the purpose of providing
5 utilities or utility services for the health and
6 well-being of the owner of that property.

7 STATEMENT OF FACT

8 This bill provides that any easement to private
9 property which is necessary to provide egress and
10 ingress to that property shall also include an
11 easement for the provision of utility services.

12 4454020188

LEGISLATION RECOMMENDED BY THE COMMITTEE TO STUDY UTILITY
EASEMENT OVER EXISTING RIGHTS-OF-WAY:

AN ACT TO ESTABLISH UTILITY RIGHTS
IN CERTAIN EASEMENTS

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

33 MRSA §458 is enacted to read:

§458. Easements; installation of utility services

1. Easements established on or after October 1, 1989. The owner of real estate who has a private easement which includes the right of access over a way has the right by implication to install utility services on or under the way if the easement is originally established by an instrument which was executed on or after October 1, 1989 and if the instrument granting the easement does not expressly exclude the right to install utility services.

2. Easements originally established before October 1, 1989.

A. The owner of real estate who has a private easement which includes the right of access over a way, originally established before October 1, 1989, has the right by implication to install utility services if the instrument originally establishing the easement does not expressly exclude the right to install utility services and:

(1). The owner of the servient estate on October 1, 1989 has conveyed that estate after October 1, 1989 without expressly indicating in the instrument of conveyance that the right to travel does not include the right to install utility services; or

(2). Utility services serving the real estate have previously been installed along the way without objection or license from the person owning the servient estate at the time of installation.

B. There is a rebuttable presumption that a private easement providing in general language for a right-of-way created before October 1, 1989, includes the right to install utility services.

C. A provision in an instrument of conveyance by the owner of a servient estate pursuant to paragraph A, subparagraph (1) which indicates that a right-of-way does not include the right to install utility services prevents the implication provided by this subsection from occurring; however, it does not extinguish any right to install utility services which can be demonstrated by the owner of the dominant estate.

3. Utility services. For purposes of this section, the term "utility services" includes facilities necessary for the transmission of electricity, gas, telephone, cable television, sewer, water or similar services which are presently or may in the future become available.

4. Inconsistent rights. The right to install utility services provided by this section applies only to the extent that the installation of those services does not interfere with or is not inconsistent with the existing use of the way by others.

5. Permission to utilities. Any owner who possesses the right to install utility services under this section may grant permission to a utility to enter upon the way to install, maintain or repair utility services. Any person who installs utility services under this section shall comply with all applicable laws, ordinances and regulations relating to the installation of utility services and with the requirements of the utility providing the service.

6. No trespass. Neither the utility services nor the person installing, maintaining or repairing them constitutes a trespass upon a way which is subject to this section.

7. Express limitations. A right to install utility services recognized by this section is subject to any limitations expressly included in the instrument granting the right of travel.

8. No enlargement. Nothing in this section is intended to enlarge the dimensions of a right-of-way beyond those provided in the instrument granting the right nor to authorize the installation of utility services on any property other than that comprising the way.

STATEMENT OF FACT

This bill contains the recommendations of the Committee to Study Utility Easements Over Existing Rights-of-Way which was authorized by the Legislative Council.

The bill provides for the implication of the right to install utility services in easements created after October 1, 1989. It provides that a right to install utility services may be implied if the owner of the servient estate related to an easement existing before October 1, 1989 conveys the estate without expressly indicating that a the right to install utility services is included or if utility services have previously been installed. It also provides a rebuttable presumption that an easement providing for a general right-of-way includes the right to install utility services.

6214*