ABANDONED RIGHTS OF WAY

Report of a Study by the

JOINT STANDING COMMITTEE ON JUDICIARY

to the

111th Maine Legislature

January, 1984

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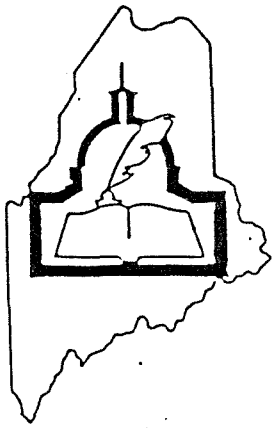

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I. INTRODUCTION

This study of abandoned rights of way was authorized by the Legislative Council after the first regular session of the 111th Legislature and conducted by a subcommittee of the Joint Standing Committee on Judiciary, composed of the following members:

Sen. Samuel W. Collins, Jr.
Rep. David B. Soule, Jr., Chair
Rep. Lloyd G. Drinkwater
Rep. E. Christopher Livesay
Rep. James W. Reeves

The subcommittee held three meetings on August 26, November 1, and December 13, as well as authorizing meetings between individual subcommittee members, staff persons, attorneys experienced in this area and other interested persons. The results of their study were accepted by the full Committee on December 13.

II. BACKGROUND

Society and the law have always supported the policy that an owner should have access to his real property as one of the rights inherent in ownership of land, for the right to use his property as he chooses is valueless if the owner has no access to his land. This policy choice also furthers other social goals such as expanding economic development and creating jobs. To this end, the law has developed various mechanisms to help landowners gain access to otherwise inaccessible land, including common law easements and statutory methods of acquiring access.

However, there must be limits on the circumstances when the law will aid a landowner who wants access to his property for there are many competing interests and factors that must be weighed. These interests fall into three main groups:

A. Landowners Who Want Access to Landlocked or Hard-to-Reach Land.

This is the easiest case to understand for ownership without access carries all the burdens and none of the benefits of property ownership. A common situation in Maine is an owner who wants to cut the wood from a woodlot far from a highway and truck it out. Often, the lot was last cut over years ago when the wood was brought out on an old road whose ownership status was unclear or on private roads with the informal agreement of other landowners. Both public officials and private owners are now much less willing to grant informal access over old roads, which may leave an owner with mature timber and no method to haul it out of the woods. Other examples include individuals who want to build homes or camps and developers who want to construct housing developments away from main roads.

People's options are limited under current laws. An owner can try to purchase a right of way from a government entity or a private owner, but often the other owner refuses to sell such permission because he does not want the nuisance and loss of privacy from vehicles traveling over his land.

The cost of a right-of-way may be prohibitive even if the other owner consents to sell one.

Alternatively, the owner can seek an easement through pursuit of court action. However, there are substantial limits in Maine law on when easements will be established absent an express grant or reservation in a deed. For example, to establish an easement by implication or necessity, there once must have been unitary title to both the owner's lot and the land over which he wants the easement and "strict necessity, " which carries a heavy burden of proof. If there is another way out available, even if it is 50 miles further and the easement is only a mile long, the easement is not "strictly" necessary. Also, lawsuits are expensive and time-consuming.

It is not surprising that such owners seek statutory changes by the Legislature or recourse to town or county legislative bodies. A discussion of these methods follows in Part III.

B. Landowners Whose Property Rights May be Diminished if Others Gain Access Over Their Lands.

Despite sympathy for the landowner who truly wants access to a landlocked parcel, it is also understandable that other landowners nearer the main road may be reluctant to deal with the lost privacy, noise, exhaust fumes, mud and other nuisance features that result from a right of way crossing their property. They may fear that once a road is re-opened or constructed, others besides the intended beneficiary will use it too - perhaps poachers, joyriding teenagers, or many more truckers who will tear up their property. Consequently, they may in all sincerity refuse to sell a private easement at any price or believe that only a large payment can compensate for the nuisance. It is for such reasons that the law jeolously protects an individual's property rights against interference from other private individuals and constitutionally limits the conditions under which a government may take private property. These limits are discussed in Part III of this report.

C. Interests of the Public

Overall public policy must balance the valid concerns of both types of landowners as well as the larger public good. On one hand, full access is desirable because it is one of an owner's legally protected property rights and benefits him financially, and often society benefits as well from economic expansion through creation of jobs and a larger tax base. On the other hand, the law must protect landowners whose property rights would be diminished if access were given to another, and society no longer favors full economic development under all conditions but instead may place a higher value on environmental concerns. In addition, access for one individual may require a new road at the public's expense, and taxpayers may not believe there is enough benefit to warrant that cost.

Therefore, public officials facing this complex array of competing interests, often equally valid, must make tough choices of which interests will predominate when laws are made and in deciding individual cases under those laws.

III. DISCUSSION OF FINDINGS AND RECOMMENDATIONS

A. Introduction

Although there are many dimensions to the question of access, the study committee chose to focus on the aspects that led to its formation, abandoned rights of way. People generally understand they cannot insist on using another person's private road for access to their own land because of the importance of private property rights. However, it is much more frustrating to see an old public way whose roadbed is still visible, which has previously been used for access, and to be told their land is now essentially inaccessible because they may no longer use the road. The confusion is heightened because the landowner does not understand the complex interplay of statutes that turn a once public road into a neighbor's private property. The resulting confusion and frustration have led to sustained political pressure for legislators to "do something about it".

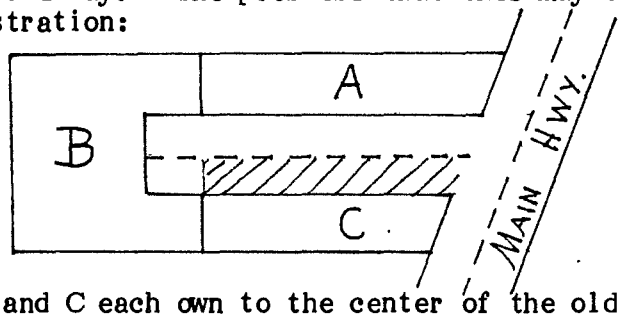
The study committee focussed on two issues: 1) The rights of access remaining when a public way is abandoned or discontinued, and 2) The ability of public officials to assist people with access problems in general.

B. Rights of Access Remaining When a Public Way is Abandoned or Discontinued

The laws on abandonment and discontinuance of public roads are so confusing it is hard to understand them without working with the facts of a specific case. There exist differing laws for town and county roads, the body of common law cases, separate statutes for abandonment and discontinuance, and constant changes over the years so that completely different results occur depending on when the road was abandoned or discontinued.

1. Common Law

If no statute or deed covers the situation, common law dictates that the public loses its easement rights to use a public way once it is abandoned or discontinued. The rights revert to the abutting landowner , who each owns the land bordering his property to the center line of the old way. The problems that this may cause as best shown with an illustration:



In this drawing, if A and C each own to the center of the old road, they could refuse to let B use the road, resulting in B being "landlocked" with no access to another roadway.

2. Statutory Discontinuance.

Statutes allow a governmental entity to discontinue roads and thereby end its responsibility for maintenance if it follows statutory procedures that ensure citizens notice and an opportunity to be heard. (See Appendix A for full text of statutes.)

For counties, the statutory process is found in 23 M.R.S.A. c. 203 (§2051 et seq.), having to do with the "laying out, altering or discontinuing" of highways. The discontinuance may be either on motion or by petition (§2051), and may or may not accompany the construction of a new state road (§2060). There are requirements for notice, proceedings, a return to be filed, and damages paid (§2052 et seq.).

Discontinuances of town ways come under 23 MRSA c. 303 (§3021 et. seq.). Municipalities must give notice to abutters and planning boards and file an order with the clerk (§3026), paying damages as required (§3029). A deed or certificate must be recorded in the Registry of Deeds in order for the discontinuance order to be effective against owners without actual notice (§3024). There is a special provision regarding vacation of proposed town ways in a land subdivision (§3027). §3026 provides that after discontinuance of a town way a public easement shall be retained. "Town way" is defined in §3021 to include all town or county ways not discontinued or abandoned before July 29, 1976. §3021 defines "public easement" as an easement held by a municipality for purposes of public access to land or water not otherwise connected to a public way and includes all rights previously enjoyed by the public with respect to "private ways", as public easements were called before 1976. This has been in effect since July 29, 1976. Its predecessor, 23 MRSA §3004, in effect from September 3, 1965 to July 29, 1976, created a presumption that after discontinuance, the way was relegated to the status of a private way.

Thus, if a way has been discontinued since September 3, 1965, there remains a public easement that would protect a landowner such as B from becoming landlocked, but if the way was discontinued before that time, B becomes landlocked due to the operation of the common law.

3. Statutory Abandonment.

Under common law, in the absence of statute, mere abandonment of public property could never extinguish the public's rights. Now statutes in most states make abandonment equivalent to discontinuance where there is some action or inaction by the government over time, such as failure to maintain a road, along with some indication of intent to abandon. Maine's current law is in 23 MRSA §3028:

"§3028. Abandonment of public ways

It shall be prima facie evidence that a town or county way established prior to January 1, 1946, and not kept passable for the use of motor vehicles at the expense of the municipality or county for a period of 30 or more consecutive years next prior to January 1, 1976, has been discontinued by abandonment. A presumption of abandonment may be rebutted by evidence that

manifests a clear intent by the municipality or county and the public to consider or use the way as if it were a public way. A proceeding to discontinue a town or county way shall not prevent or stop a municipality from asserting a presumption of abandonment. No municipality or its officials shall be liable for nonperformance of a legal duty with respect to such ways if there has been a good faith reliance on a presumption of abandonment. Any person affected by a presumption of abandonment, including the State or a municipality, may seek declaratory relief to finally resolve the status of such ways. A way that has been abandoned under this section shall be relegated to the same status as it would have had after a discontinuance pursuant to section 3026, except that this status shall be at all times subject to an affirmative vote of the legislative body of the municipality within which the way lies making that way an easement for recreational use. A presumption of abandonment is not rebutted by evidence which shows isolated acts of maintenance, unless other evidence exists which shows a clear intent by the municipality or county to consider or use the way as if it were a public way."

The next to last sentence states that once abandoned, a way is relegated to the same status as after a §3026 discontinuance, discussed in the previous section.

4. Summary

It is especially hard for a landowner to live with the fact that the timing of an abandonment or discontinuance can make such a dramatic difference in his rights of access. If a public way was abandoned or discontinued on or after Sept. 3, 1965, a public easement remains to protect property from becoming landlocked, but if done before that time the common law operates to give all property rights to the center of the way to the abutting landowner. No public easement remains to protect other landowners by providing rights of access.

C. The Ability of Public Officials to Assist with Access Problems

1. General.

Abandonment or discontinuance of a public way may result in landlocked property, but these landowners are not the only ones requesting assistance from public officials. In other cases, a landowner previously had access under a private agreement that comes to an end due to the other person's death, a less cooperative new owner, or disagreements about the scope of the permissive use. Or perhaps the owner did not use her property before but now wants to cut the wood or build on the land. How are public officials at the local or state level to help landowners with their needs, yet balance out the competing interests of other landowners and the public?

2. Finding No. 1: Abandonment and Discontinuance Statutes Should Remain Unchanged.

The study committee decided to make no changes in the present abandonment and discontinuance statutes despite some criticism of them,

especially of 23 MRSA §3028. This section creates a presumption of abandonment if a town or county way established before January 1, 1946 and was not kept passable for motor vehicles at government expense for a period of 30 or more consecutive years next prior to January 1, 1976. As the time period following January 1, 1976 increases, more roads will not fit in this category and it is unclear how abandonment may otherwise be proved.

Despite shortcomings, the committee believes it is not wise to amend these statutes at this time. After a statute is enacted, it takes several years for attorneys and courts to understand the new law and develop a body of caselaw interpreting it that will give guidance to citizens. If statutes are amended too often, it can short-circuit the common law's ability to refine laws to fit individual cases. Lawyers working with municipal and property law are just now beginning to understand the 1976 revision of 23 MRSA ch. 304 and cases are now in progress; another revision so soon may create too much confusion.

Further, many attorneys practicing in this area believe the current statutes already provide sufficient recourse through the §3022 petition process (to be discussed in next section). Also, the current statutes have been amended to contain the public easement provisions to protect landowners. Furthermore, although it seems unfair to people that a person's access rights are cut off if the road was abandoned or discontinued before 1976 but a public easement remains if done after that date, it would be unconstitutional to change this retroactively. At the time the way discontinued under the old laws all rights were transferred to abutting landowners and none were retained by the government. If the Legislature now changes this law retroactively to provide for a public easement, it is taking away the abutters' property rights. This runs afoul of constitutional protections against taking property without just compensation.

3. Finding No. 2: Statute Allowing Municipal Officials to Be Petitioned to Lay Out a Public Easement Should Be Amended

The study committee believes 23 MRSA §3022 can be amended to enable public officials to adequately assist people with access problems. The concept of a public easement, or private way as it was called prior to 1976, has been a part of state law since 1821. The Legislature has consistently supported the important public policy of ensuring access to hard-to-reach land, and each time the matter has come before it, the Supreme Judicial Court has upheld 23 MRSA §3022 or its predecessor which allows certain people to petition municipal officials to lay out a public easement for their own and public access. The statute was last reworked in 1975 when the term "public easement" replaced the older term "private way," but there has been no substantial change in the scope of who may petition officials to lay out the easement, or the purposes for which it may be laid out, since 1857.

Current statutes read as follows:

23 MRSA §3021, sub-§2 defines a public easement as:

"2. Public easement. "Public easement" means an easement held by a municipality for purposes of public access to land or water not otherwise connected to a public way, and includes all rights enjoyed by the public with respect to private ways created by statute prior to the effective date of this Act. Private ways created pursuant to sections 3001 and 3004 prior to the effective date of this Act are public easements."

23 MRSA §3022 reads:

"The municipal officers may, personally or by agency, lay out, alter or widen town ways. They shall give written notice of their intentions posted at least 7 days in 2 public places in the municipality and in the vicinity of the way and shall in the notice describe the proposed way.

The municipal officers may, upon the petition of any person, lay out, alter or widen a town way.

The municipal officers may on petition therefor, personally or by agency, lay out a public easement for any occupant of land or for owners who have cultivated land in the municipality if the land will be connected to a town way or highway after the establishment of the public easement.

After a public easement has been laid out, it may be taken pursuant to section 3023. Notwithstanding any other provision of this chapter, public easements laid out under this section shall be limited to rights of access by foot or motor vehicle as defined in Title 29, section 1."

Older statutes used almost identical language but included further detail on who would be responsible for paying damages to affected landowners, as with this language from the Revised Statutes of 1857 which remained unchanged for 119 years. "The damages...are to be paid...for a private way by those for whose benefit it was stated in the petition to be, or wholly or partly by the town...."This language was omitted in the 1976 revision.

Draft legislation recommended by the study committee keeps this useful concept intact but expands on its scope in recognition of the much increased value of land as a resource and the consequent importance of keeping it accessible to individual owners and the public. This policy is served by several changes in 23 MRSA §§3022 and 3023:

a) While current law allows only an occupant of land or an owner of cultivated land to petition officials to lay out a public easement, the bill allows a petition by any municipal resident. Officials may thus consider petitions from owners needing access to their lands for many purposes, including wood harvesting, recreational uses, home building, or from other residents of the municipality. Consequently, a much wider variety of residents will fulfill the initial statutory requirement and at least be allowed to put their requests before local officials for consideration.

b) The bill eliminates the current phasing "if the land will be connected to a town way or highway after the establishment of a public easement" since the same restriction is already contained in the 23 MRSA §3021 definition of a public easement.

c) Under this legislation, public easements may be laid out for any public purpose rather than limited only to rights of access by foot or motor vehicle. Town officials will decide if enough public purpose is present under the facts of a given situation to sustain a taking of property.

d) After a public easement is laid out, it may be taken under the eminent domain procedures of §3023. If municipal officials determine that damages are owed a landowner whose property rights are diminished by the public easement, damages may be paid by those benefited directly by the easement or wholly or partly by the town. The bill adds the language present in state statute from 1857 until the 1976 revision to make it clear that this concept is still a part of Maine's public easement law.

This bill resulted from the study committee's policy decision that much greater latitude should be given to local municipal officials to consider public easement petitions from a wide variety of citizens for a wide variety of purposes and to determine what, if any, damages are owned if a petition is granted. For public officials to grant a petition for a public easement and take it under the government's eminent domain powers, constitutionally there must be a public purpose present. Local officials are in a better position than the Legislature to determine if the required public purpose is present under the fact of a given case in their municipality. Narrow statutory limits on who may petition for access and for what purpose are holdovers from a time when land was cheap and almost limitless, and should no longer preclude people from petitioning for needed access to land. Under this legislation, more people will be able to pass the initial statutory hurdles and be able to be heard by local public officials, who are most familiar with the facts in a given case and thus better able than state officials to decide if a public easement is needed.

The study committee believes that expanding the scope of the public easement petition process and focussing more decision-making authority in local officials will provide an adequate relief mechanism for landowners needing access, while allowing public officials to also weigh the competing interests of other landowners and the general public.

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APPENDIX A

TITLE 23, ch. 203
COUNTY HIGHWAYS

CHAPTER 203

LAYING OUT, ALTERING OR DISCONTINUING HIGHWAYS

Section

§ 2051. Power of commissioners

County commissioners may lay out, alter, close for maintenance or discontinue highways within the unorganized areas of their counties and grade hills in any such highway. The county commissioners may close county roads for maintenance and preserve the right-of-way for the use of abutting landowners, and any others using said way for the access to their property, and public utilities and corporations with facilities legally located within said way, at their own risk. Responsible persons may present, at their regular session, a written petition describing a way and stating whether its location, alteration, grading, closing for maintenance or discontinuance is desired, or an alternative action, in whole or in part. The commissioners may act upon it, conforming substantially to the description, without adhering strictly to its bounds.

R.S.1954, c. 89, § 35; 1965, c. 168; 1975, c. 711, § 1.

Historical Note

The 1965 amendment, in the first sentence inserted "close for maintenance", inserted the second sentence, in the former third sentence inserted

§ 2052. Notice

Being satisfied that the petitioners are responsible and that an inquiry into the merits is expedient, the county commissioners shall cause 30 days' notice to be given of the time and place of their meeting by posting copies of the petition, with their order thereon, in 3 public places in each town in which any part of the way is, by serving one on the Department of Transportation and serving one on the clerks of such towns and publishing it in some newspaper, if any, in the county. The fact that notice has been so given, being proved and entered of record, shall be sufficient for all interested, and evidence thereof.

R.S.1954, c. 89, § 36; 1971, c. 593, § 22.

§ 2053. Costs

When their decision is against the prayer of the petitioners, the county commissioners shall order them to pay to the treasurer of the county, at a time fixed, all expenses incurred on account of it, and if they are not then paid, they shall issue a warrant of distress against the petitioners therefor.

R.S.1954, c. 89, § 37.

§ 2054. Proceedings; return; durable monuments erected

The county commissioners shall meet at the time and place appointed and view the way, and there, or at a place in the vicinity, hear the parties interested. If they judge the way to be of common convenience and necessity or that any existing way shall be altered, graded or discontinued, they shall proceed to perform the duties required; make a correct return of their doings, signed by them, accompanied by an accurate plan of the way, and state in their return when it is to be done the names of the persons to whom damages are allowed, the amount allowed to each and when to be paid. When the way has been finally established and open to travel, they shall cause durable monuments to be erected at the angles thereof.

R.S.1954, c. 89, § 38.

§ 2055. Return filed; appeal

The return of the commissioners, made at their next regular statute session after the hearing provided for in section 2054, shall be placed on file and remain in the custody of their clerk for inspection without record. The case shall be continued to their next regular term of record, and at any time on or before the 3rd day thereof, if no appeal from the location be taken, all persons aggrieved by their estimate of damages shall file their notice of appeal. If no such notice is then presented or pending, the proceedings shall be closed, recorded and become effectual; all claims for damages not allowed by them be forever barred; and all damages awarded under sections 2051 to 2061, 2101, 2151 and 2152 paid out of the county treasury except as provided in section 2101. If an appeal from the location be taken in accordance with section 2063, then notice of appeal on damages may be filed with the clerk of the county commissioners within 60 days after the final decision of the appellate court in favor of such way as has been certified to him, to the Superior Court in the county where the land is situated, which court shall determine the same in the same manner as is provided in section 2058, when no appeal on location is taken.

R.S.1954, c. 89, § 39; 1959, c. 317, § 37.

§ 2056. Damages; increase

When a notice of appeal for increase of damages is presented within the time allowed, the case shall be further continued until a final decision respecting damages is made. If the county commissioners then are of opinion that their proceedings, or any part thereof, ought not to take effect, subject to such damages as have been assessed, they shall enter a judgment that the prayer of the petitioners or any part thereof, designating what part, is not granted for that reason. Upon such judgment no damages shall be allowed for that part of the prayer of the petitioners not granted, but the costs shall be paid by the county; or if of opinion that such increase of damages should prevent a confirmation of a part or parts only of their proceedings, they shall designate such part or parts, and enter judgment accordingly; and the whole proceedings shall be recorded and become effectual. This section shall not apply when a location has been determined by a committee of the Superior Court upon appeal from the decision of the county commissioners thereon. In such case, proceedings regarding the location shall become effectual as if no appeal for increase of damages had been taken.

R.S.1954, c. 89, § 40.

§ 2057. —estimation and award

If any person's property is damaged by laying out, altering or discontinuing a county highway, the county commissioners shall estimate the amount, and in their return state the share of each separately. Damages shall be determined as if the land were taken for highway purposes under chapter 3.[1] Damages shall be allowed to the owners of reversions and remainders and to tenants for life and for years in proportion to their interests in the estate taken. Said commissioners shall not order such damages to be paid, nor shall any right thereto accrue to the claimant, until the land over which the highway or alteration is located has been entered upon the possession taken for the purpose of construction or use.

R.S.1954, c. 89, § 41; 1975, c. 431, § 10; 1975, c. 711, §§ 2, 3.

§ 2058. —appeals

Any person aggrieved by the estimate of damages by the county commissioners, on account of the laying out or discontinuing of a way, may appeal therefrom, at any time within 30 days after the commissioners' return is made, to the Superior Court, in the county where the land is situated, which court shall determine the same by a committee of reference if the parties so agree, or by a verdict of its jury, and shall render judgment for the damages recovered, and judgment for costs in favor of the party entitled thereto, and shall issue execution for the costs only. The appellant shall file notice of his appeal with the county commissioners within the time above limited, and shall include in the complaint a statement setting forth substantially the facts, upon which the case shall be tried like other cases. The clerk shall certify the final judgment of the court to the county commissioners, who shall enter the same of record and order the damages therein recovered to be paid as provided in section 2057. The party prevailing recovers costs to be taxed and allowed by the court, except that they shall not be recovered by the party claiming damages, but by the other party, if on such appeal by either party, said claimant fails to recover a greater sum as damages than was allowed to him by the commissioners. The committee shall be allowed a reasonable compensation for their services to be fixed by the court upon the presentation of their report and paid from the county treasury upon the certificate of the clerk of courts.

R.S.1954, c. 89, § 42; 1959, c. 317, § 38.

§ 2059. Removing growth and opening way

The owners of land taken under sections 2051 to 2060 shall be allowed not exceeding one year after the proceedings regarding the location are finally closed to take off timber, wood or any erection thereon. A time not exceeding 2 years shall be allowed for making and opening the way.

R.S.1954, c. 89, § 43; 1959, c. 378, § 58.

§ 2060. Discontinuance where new state highway

When the Department of Transportation has constructed a highway over substantially the same route as that of a county or town way and has recorded the plans of same in the registry of deeds, the county commissioners or municipal officers may, on their own motion, after notice and hearing, proceed to alter or discontinue the portion of said way not within the limits of said highway. They shall give notice and proceed as provided in this chapter or chapter 304,[1] as applicable, including serving any public utility having facilities located in said portion to be discontinued, and any aggrieved person shall have an appeal as therein provided. The plans prepared by the department and on record in the registry of deeds may be referred to in describing those portions of the county or town way to be discontinued.

1959, c. 136; 1971, c. 593, § 22; 1975, c. 711, § 4.

§ 2061. Discontinuance before damages paid; proceedings

When the way is discontinued before the time limited for the payment of damages, the commissioners may revoke their order of payment, and estimate the damages actually sustained and order them paid. Any person aggrieved may have them assessed by a committee or jury as provided.

R.S.1954, c. 89, § 44.

§ 2062. Repealed. 1975, c. 711, § 5

§ 2063. Hearings; appeals; stay

Parties interested may appear, jointly or severally, at the time of hearing before the commissioners on a petition for laying out, altering, grading or discontinuing a highway. Any such party may appeal from their decision thereon within 30 days after it has been placed on file to the Superior Court in said county, which appeal may be prosecuted by him or by any other party who so appeared. All further proceedings before the commissioners shall be stayed until a decision is made in the appellate court.

R.S.1954, c. 89, § 59; 1959, c. 317, § 41.

§ 2064. Proceedings on appeal

If no person appears to prosecute the appeal provided for in section 2063, the judgment of the commissioners may be affirmed. If the appellant appears, the court may appoint a committee of 3 disinterested persons, who shall be sworn, and if one of them dies, declines or becomes interested, the court may appoint some suitable person in his place. They shall give such notice as the court has ordered, view the route, hear the parties and make their report to the court within 60 days or such further time as the court allows after their appointment, whether the judgment of the commissioners should be in whole or in part affirmed or reversed; which, being accepted and judgment thereon entered, shall forthwith be certified to the clerk of the commissioners.

R.S.1954, c. 89, § 60; 1959, c. 317, § 42.

§ 2065. Judgment on appeal

If the judgment of the commissioners in favor of laying out, grading or altering a way, as prayed for, is wholly reversed on appeal, they shall proceed no further. In all cases when the judgment of the commissioners is reversed on appeal, no petition praying substantially for the same thing shall be entertained by them for 2 years thereafter. If their judgment is affirmed in whole or in part, they shall carry into effect the judgment of the appellate court. In all cases they shall carry into full effect the judgment of the appellate court in the same manner as if made by themselves. The party appealing or prosecuting shall pay the costs incurred since the appeal, if so adjudged by the appellate court, which may allow costs in such cases to the prevailing party, to be paid out of the county treasury. The committee provided for in section 2064 shall be allowed a reasonable compensation for their services, to be fixed by the court upon the presentation of their report and paid from the county treasury upon the certificate of the clerk of courts. The costs allowed the prevailing party and the fees of the committee shall be collected as provided in section 2053. This section shall not apply to any case where the judgment has been reversed on account of informality in the proceedings.

R.S.1954, c. 89, § 61.

TITLE 23, ch. 304
MUNICIPAL WAYS

CHAPTER 304

ACQUISITION OF PROPERTY FOR HIGHWAY PURPOSES

Section
3021. Definitions.
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3023. Eminent domain.
3024. Recording of proceedings.
3025. Dedication and acceptance.
3026. Discontinuance of town ways.
3027. Vacation of proposed town ways in land subdivision.
3028. Abandonment of public ways.
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Chapter 304, Acquisition of Property for Highway Purposes, was enacted by Laws 1975, c. 711, § 8.

§ 3021. Definitions

As used in this chapter, unless the context clearly indicates otherwise, the following words shall have the following meaning.

1. Highway purposes. "Highway purposes" means use as a town way and those things incidental to the laying out, construction, improvement, maintenance, change of location, alignment and drainage of town ways, including the securing of materials therefor; provision for the health, welfare and safety of the public using town ways; provision for parking places, rest areas and preservation of scenic beauty along town ways.

2. Public easement. "Public easement" means an easement held by a municipality for purposes of public access to land or water not otherwise connected to a public way, and includes all rights enjoyed by the public with respect to private ways created by statute prior to the effective date of this Act. Private ways created pursuant to sections 3001 and 3004 prior to the effective date of this Act are public easements.

3. Town way. "Town way" means:

A. An area or strip of land designated and held by a municipality for the passage and use of the general public by motor vehicle;

B. All town or county ways not discontinued or abandoned before July 29, 1976; and

C. All state or state aid highways, or both, which shall be classified town ways as of July 1, 1982, or thereafter, pursuant to section 53.

1981, c. 702, § Z, 2, eff. May 4, 1982.

1981 Amendment. Subsection 3: Repealed and replaced by c. 702.

Notes of Decisions

1. In general

A town way is not substantially the same thing as a highway. Waterford v. Oxford County Commrs. (1871) 59 Me. 450.

§ 3022. Laying out of town ways and public easements

The municipal officers may, personally or by agency, lay out, alter or widen town ways. They shall give written notice of their intentions posted at least 7 days in 2 public places in the municipality and in the vicinity of the way and shall in the notice describe the proposed way.

The municipal officers may, upon the petition of any person, lay out, alter or widen a town way.

The municipal officers may on petition therefor, personally or by agency, lay out a public easement for any occupant of land or for owners who have cultivated land in the municipality if the land will be connected to a town way or highway after the establishment of the public easement.

After a public easement has been laid out, it may be taken pursuant to section 3023. Notwithstanding any other provision of this chapter, public easements laid out under this section shall be limited to rights of access by foot or motor vehicle as defined in Title 29, section 1.

1975, c. 711, § 8; 1979, c. 127, § 153, eff. April 23, 1979.

Historical Note

The 1979 amendment repealed and replaced this section, in effect changing the former third paragraph to the fourth paragraph and the former fourth paragraph to the third paragraph.

Derivation:

R.S.1954, c. 96, § 29.
Former § 3001 of this title.

Cross References

Inhabitant defined, see title 1, § 1.
Municipal officers defined, see title 30, § 1901.
Powers of county commissioners over highway changes, see § 2051 of this title.
Railroad land, notice required, see § 2901 of this title.
Refusal of municipal officers to laying out private way for building purposes, see title 30, § 3803.
Ski areas, access, see § 703 of this title.
Unincorporated, unorganized places and plantations, changes in roads, see § 4001 et seq. of this title.

Library References

Highways ⇐49. C.J.S. Highways § 64.

§ 3023. Eminent domain

A municipality may take property or interests therein for highway purposes if the municipal officers determine that public exigency requires the immediate taking of such property interests, or if the municipality is unable to purchase it at what the municipal officers deem reasonable valuation, or if title is defective.

In municipalities where the municipal officers have the legislative power of appropriation, the municipal officers shall file with the municipal clerk a condemnation order that includes a detailed description of the property interests to be taken, which shall specify its location by metes and bounds, the name or names of the owner or owners of record so far as they can be reasonably determined and the amount of damages determined by the municipal officers to be just compensation for the property or interest therein taken. The municipal officers shall then serve upon the owner or owners of record a copy of the condemnation order and a check in the amount of the damages awarded. In the event of multiple ownership, the check may be served on any one of the owners. Title shall pass to the municipality upon service of the order of condemnation and check or upon recordation in accordance with section 3024, whichever occurs first.

In towns where the town meeting has the legislative power of appropriation, the municipal officers shall file the condemnation order described in the previous paragraph with the town clerk and send a copy to the owner or owners of record by registered mail. No interest shall pass to the town unless an article generally describing the property interest to be taken and stating the amount of damages to be paid has been approved by a duly called town meeting. The town meeting may not amend the article, except to increase the amount of damages to be paid. If the article is approved, a check in the amount of damages authorized shall be served immediately upon the owner or owners of record. In the event of multiple ownership, the check may be served on any one of the owners. Title shall pass to the town upon service of the check or upon recordation in accordance with section 3024, whichever occurs first.

Unless specifically provided in the order of condemnation or unless the property or interests to be taken include land or right-of-way of a railroad corporation or a public utility, title to property taken for town ways after December 31, 1976, shall be in fee simple absolute.

In all proceedings under this section, an award of damages by the municipal legislative body shall be considered an appropriation for that purpose.

1975, c. 711, § 8; 1975, c. 770, § 98.

§ 3024. Recording of proceedings

No taking of property or interests therein by a municipality, or the discontinuance of a town way except by abandonment, after September 12, 1959, shall be valid against owners of record or abutting landowners who have not received actual notice, unless there is recorded in the registry of deeds for the county where the land lies either a deed, or a certificate attested by the municipal clerk, describing the property and stating the final action of the municipality with respect to it.

1975, c. 711, § 8.

§ 3025. Dedication and acceptance

No property or interests therein may be dedicated for highway purposes unless the owner of such property or interest has filed with the municipal officers a petition, agreement, deed, affidavit or other writing specifically describing the property or interest and its location, and stating that the owner voluntarily offers to transfer such interests to the municipality without claim for damages, or has filed in the registry of deeds an approved subdivision plot plan which describes property to be appropriated for public use.

A municipality may accept a dedication of property or interests therein by an affirmative vote of its legislative body.

Unless specifically provided by the municipality, title to property accepted for highway purposes after December 31, 1976 shall be in fee simple.

1975, c. 711, § 8.

§ 3026. Discontinuance of town ways

1. General procedures. A municipality may terminate in whole or in part any interests held by it for highway purposes. A municipality may discontinue a town way or public easement after the municipal officers have given best practicable notice to all abutting property owners and the municipal planning board or office and have filed an order of discontinuance with the municipal clerk that specifies the location of the way, the names of abutting property owners and the amount of damages, if any, determined by the municipal officers to be paid to each abutter.

Upon approval of the discontinuance order by the legislative body, and unless otherwise stated in the order, a public easement shall, in the case of town ways, be retained and all remaining interests of the municipality shall pass to the abutting property owners to the center of the way. For purposes of this section, the words "public easement" shall include, without limitation, an easement for public utility facilities necessary to provide service.

2. Definition of best practicable notice. "Best practicable notice" means, a minimum, the mailing by the United States Postal Service, postage prepaid, first class, of notice to abutting property owners whose addresses appear in the assessment records of the municipality.

1981, c. 683, § 1, eff. April 15, 1982.

1981 Amendment. Repealed and replaced by c. 683.

§ 3027. Vacation of proposed town ways in land subdivision; revocation of dedication

1. Vacation of ways. Where proposed town ways have been described in a recorded subdivision plan and lots have been sold with reference to the plan, the municipal officers, with the approval of the municipal planning board or office, may, on their own initiative, on petition of the abutting property owners or on petition of any person claiming a property interest in the proposed way, vacate in whole or in part proposed ways that have not been accepted. The municipal officers shall give best practicable notice, as defined in section 3026, subsection 2, of the proposed vacation to owners of lots on the recorded subdivision plan and their mortgagees of record. The notice shall conform in substance to the following form:

NOTICE

(The municipal officers of) (A petition has been filed with the municipal officers of)

_____

(Name of Town or City)

(proposed to) (to vacate) the following (ways) (way) shown upon a subdivision plan (named) (dated) (and) recorded in the _____ County Registry of Deeds, Book of Plans, Volume _____, Page _____.

(Herein list or describe ways to be vacated)

If the municipal officers enter an order vacating (these ways) (this way) any person claiming an interest in (these ways) (this way) (adverse to the claims of the petitioners) must, within one (1) year of the recording of the order, file a written claim thereof under oath in the _____ County Registry of Deeds and must, within one hundred eighty (180) days of the filing of the claim, commence an action in the Superior Court in _____ County in accordance with the Revised Statutes, Title 23, section 3027-A.

The municipal officers shall file an order of vacation with the municipal clerk that specifies the location of the way, the names of owners of lots on the recorded subdivision plan and the amount of damages, if any, determined by the municipal officers to be paid to each lot owner or other person having an interest in the way. Damages and reasonable costs as determined by the municipal officers shall be paid by the petitioners, if any.

2. **Revocation of dedication.** A dedication of property or interest therein to the municipality described in a recorded subdivision plot plan may not be revoked or vacated by the dedicator unless no lot has been sold with reference to the plan, and unless an amended subdivision plan has been approved by the municipal subdivision review authority and recorded in the appropriate registry of deeds.

1981, c. 683, § 2, eff. April 15, 1982.

1981 Amendment. Repealed and replaced by c. 683.

§ 3027-A. Recording of vacation orders; rights of action; prior orders

1. Recording of vacation order. A copy of the order of vacation by the municipal officers entered under section 3027 shall be recorded in the registry of deeds where the plan of subdivision is recorded and shall contain an alphabetical listing of the names of the subdivision lot owners and their mortgagees of record whose interests may be affected by the order. The register of deeds shall make a cross-reference to the order of vacation upon

or attached to the face of the subdivision plan. The register of deeds shall also index the order under the names of the lot owners whose names appear in the body of the order. Any order of vacation entered prior to the effective date of this section may be recorded by the municipal officers in the same manner and with the same effect set forth in this section.

2. **Rights of action.** All persons are forever barred from maintaining any action at law or in equity to establish, recover, confirm or otherwise enforce any right claimed to or in a proposed or described vacated way by reason of the ownership by the claimant or by an [1] predecessor in title of a lot or parcel of land shown on a recorded subdivision plan, unless, within one year of the date of recordation of the order of vacation, the claimant files in the registry of deeds where the subdivision plan is recorded a statement under oath specifying the nature, basis and extent of the claimed interest in the way. The claim is forever barred unless, within 180 days after the recording of the statement, the claimant or any other person acting on behalf of the claimant commences an action in equity under Title 14, chapter 723[2], to establish the rights asserted to or in the way. These limitation periods are not tolled or interrupted by any disability, minority, lack of knowledge or absence from this State of any claimant. Upon the trial of an action, the court shall grant judgment for the claimant only if it finds that the claimant has acquired an interest in the proposed way and that the deprivation of rights in the proposed way unreasonably limits access from a public way, a public body of water or common land or facility to the land of the claimant shown on the recorded subdivision plan. Any judgment rendered by the court in the action may, in the discretion of the court, grant the claimant reasonable damages instead of establishment of the claimant's rights.

3. **Prior orders.** A person claiming an interest in a proposed unaccepted way vacated under section 3027 prior to the effective date of this section may cause an attested copy of that order to be recorded in the registry of deeds where the subdivision plan describing or showing the way is recorded. That person shall append to the order to be recorded an alphabetical listing of the names of the current subdivision lot owners and their mortgagees of record whose interest in the way may be affected by the order. The register of deeds shall also index the order under the names of the lot owners appearing in the appendix.

Within 20 days of the recording of a prior order, the person causing the order to be recorded shall give notice of his claim to all current owners of lots on the subdivision plan and their mortgagees of record by mailing by the United States Postal Service, postage prepaid, a notice informing them of his claim and advising them that, to preserve any claim adverse to his, they must file a claim and commerce an action as required by subsection 2. The notice shall conform in substance to the following form:

NOTICE

On _____, 19____, the municipal officers of _____
(Name of Town or City)
entered an order vacating the following (ways) (way) shown upon a subdivision plan (named) (dated) (and) recorded in the _____ Registry of Deeds Book of Plans, Volume _____, Page _____
(Herein list vacated ways)
The undersigned claims to own the (ways) (way) described above. A copy of the order of the municipal officers was recorded in the _____ Registry of Deeds on _____, 19___, and any person claiming an interest in (these ways) (this way) adverse to the claims of the undersigned must, within one (1) year of the date of the recording of the above order, file a written claim under oath in the Registry of Deeds and must, within one hundred eighty (180) days thereafter, commence an action in the Superior Court in _____ County in accordance with the Revised Statutes, Title 23, section 3027-A.

4. **Applicability.** This section applies to ways described or shown in recorded subdivision plans proposed before and after the effective date of this section.

1981, c. 683, § 3, eff. April 15, 1982.

deeds shall also index the order under the names of the lot owners appearing in the appendix.

Within 20 days of the recording of a prior order, the person causing the order to be recorded shall give notice of his claim to all current owners of lots on the subdivision plan and their mortgagees of record by mailing by the United States Postal Service, postage prepaid, a notice informing them of his claim and advising them that, to preserve any claim adverse to his, they must file a claim and commerce an action as required by subsection 2. The notice shall conform in substance to the following form:

NOTICE

On _____, 19____, the municipal officers of _____

(Name of Town or City)

entered an order vacating the following (ways) (way) shown upon a subdivision plan (named) (dated) (and) recorded in the _____ Registry of Deeds Book of Plans, Volume _____, Page _____.

(Herein list vacated ways)

The undersigned claims to own the (ways) (way) described above. A copy of the order of the municipal officers was recorded in the _____ Registry of Deeds on _____, 19___, and any person claiming an interest in (these ways) (this way) adverse to the claims of the undersigned must, within one (1) year of the date of the recording of the above order, file a written claim under oath in the Registry of Deeds and must, within one hundred eighty (180) days thereafter, commence an action in the Superior Court in _____ County in accordance with the Revised Statutes, Title 23, section 3027-A.

4. **Applicability.** This section applies to ways described or shown in recorded subdivision plans proposed before and after the effective date of this section.

1981, c. 683, § 3, eff. April 15, 1982.

[1] So in enrolled bill; probably should read "any".

[2] Section 6651 et seq. of title 14.

Library References

Highways ⇐79(1).
C.J.S. Highways §§ 130 to 135.

§ 3028. Abandonment of public ways

It shall be prima facie evidence that a town or county way established prior to January 1, 1946, and not kept passable for the use of motor vehicles at the expense of the municipality or county for a period of 30 or more consecutive years next prior to January 1, 1976, has been discontinued by abandonment. A presumption of abandonment may be rebutted by evidence that manifests a clear intent by the municipality or county and the public to consider or use the way as if it were a public way. A proceeding to discontinue a town or county way shall not prevent or estop a municipality from asserting a presumption of abandonment. No municipality or its officials shall be liable for nonperformance of a legal duty with respect to such ways if there has been a good faith reliance on a presumption of abandonment. Any person affected by a presumption of abandonment, including the State or a municipality, may seek declaratory relief to finally resolve the status of such ways. A way that has been abandoned under this section shall be relegated to the same status as it would have had after a discontinuance pursuant to section 3026, except that this status shall be at all times subject to an affirmative vote of the legislative body of the municipality within which the way lies making that way an easement for recreational use. A presumption of abandonment is not rebutted by evidence which shows isolated acts of maintenance, unless other evidence exists which shows a clear intent by the municipality or county to consider or use the way as if it were a public way.

1979, c. 629.