# Excerpts

from the Maine Municipal Association

# GUIDE TO MUNICIPAL ROADS MANUAL©

November 2009 edition | (2016 and 2018 supplements incorporated)

MMA Legal Services

# PART 1. Ownership, Creation, Termination and Description of Roads

# CHAPTER 1 – Municipal Ownership of Roads and Types of Roads

## Municipal Ownership of Roads

Questions often arise about who "owns" a road or the land on which a road sits. As pertains to municipalities, the law does not use the term "ownership," rather, it looks at the municipality's legal title or legal interest in the road. Municipalities will have either a *fee simple interest* or an *easement interest.*[1]

### Fee Simple Interest

A fee simple interest is an absolute and unqualified interest in the land. At common law, this interest extends infinitely both above and below the surface of the earth, and includes mineral rights. The owner of a fee simple interest can use the land for any lawful purpose.

All roads accepted or taken by a municipality after December 31, 1976 are held in fee simple interest, unless the acceptance, deed or order of condemnation states otherwise.[2]

### Easement Interest

An easement interest is much more limited than a fee simple interest. An easement is the right to use land owned by someone else for a specified purpose. In the case of roads, the easement allows the public to travel over land owned by someone other than the municipality.

Most municipal roads in Maine "rest on" an easement interest rather than a fee simple interest. This is because most municipal roads are held as easements over property. Some roads accepted or taken before January 1, 1977 may be held in fee simple, but this must be stated clearly in the deed or other document by which the municipality obtained the property.[3]

In some cases, municipalities own the fee interest in ancient roads and so-called "rangeways" that were established by grants of land from the English monarchy to the colonial proprietors of early Maine settlements. (In rare instances, the municipality may own the fee interest in the land beneath the road (e.g., through tax lien foreclosure); however, this does not necessarily mean that the road over such land is a town way unless the land has been accepted for road purposes.)

Because a municipality can accept an easement interest in a road rather than the entire fee to the road, the road so created may not include utility rights. Therefore, the deed conveying the easement and the warrant article accepting the conveyance should include those utility rights expressly:[4] The owner of an easement or right-of-way interest created by deed executed on or after January 1, 1990 that does not expressly reserve the right to install utility services will not have that right by implication.

## Types of Roads

Though the legal interest held by a municipality is important, it is the road type that determines the town's maintenance obligation. Whereas legal *interest* defines or characterizes ownership rights, road type defines or characterizes legal *status*. It is the legal status of a road that decides whether a municipality is obligated to maintain a road or whether maintenance is discretionary. Questions about the municipality's legal interest in a road generally arise with regard to activities in the right of way (cutting trees and brush, for example) and responsibilities for repair, plowing and maintenance of the road.

This Manual focuses on three types of local roads: (1) town ways; (2) public easements; and **(1)** privately owned roads. The "type" of road refers to its legal status, not to its physical condition (paved or gravel). State statute and case law identify other types of roads (such as "public ways" and state and state-aid highways), and these are discussed later in this Manual.

### Town Way

A town way is defined[5] as:

(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 and state-aid highways, or both, which shall be classified town ways as of July 1, 1982, or thereafter, pursuant to 23 M.R.S.A. § 53.

Most town ways are created by some action of the municipality, such as dedication and acceptance, purchase and acceptance, eminent domain, or prescriptive use. These methods of creating roads are discussed in detail in Chapter 2, "Creation of Municipal Roads."

Some town ways came into existence by operation of State law.[6] County ways were transformed into town ways and effectively took the counties out of the road business in organized areas. This transformation of county roads into town ways only applies to those county roads which had not been abandoned or discontinued before July 29, 1976. So, it is important to review the history of any such road before deciding whether to maintain it.

Town ways also may be created by State classification.[7] State law allows MaineDOT, through a rule-making procedure, to reclassify state and state-aid highways as town ways, or just the reverse, namely, to classify town ways as state-aid or state highways.[8]

A municipality must keep all town ways "in repair so as to be safe and convenient for travelers with motor vehicles"[9] and keep such ways passable if they become "blocked or encumbered with snow."[10] Road maintenance obligations are discussed further in Chapter 5, "Road Maintenance and Repair," and liability for failure to maintain town ways is discussed in Chapter 9, "Liability."

A public easement differs from a town way in that while the general public has a right of unobstructed access by motor vehicle or foot over a public easement, a municipality is not obligated to maintain the easement.

**Public Easement.** A public easement is defined in State law 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 enjoyed by the public with respect to private ways created by statute" prior to July 29, 1976.[11] Do not confuse the term "public easement" with "easement interest," which is a type of legal interest in property (see the first section of this chapter).

Prior to 1976, public easements were called "private ways" or "private roads subject to gates and bars." This term should not be confused with "private roads" or "privately-owned roads," which are discussed further below. Note that neither State statute nor local ordinances are consistent in the use of the term "private way."

A public easement differs from a town way in that while the general public has a right of unobstructed access by motor vehicle or foot[12] over a public easement, the municipality is not obligated to maintain or repair a public easement. A municipality's legislative body *may* authorize the repair and maintenance of public easements, but it is not required to do so.[13] When a municipality does maintain public easements, it is not required to maintain them to the same level or degree of maintenance as town ways. Since the decision to maintain is discretionary, the level of maintenance is likewise up to the legislative body. Additionally, the

municipality is not liable for defects in or lack of repair to public easements[14] but may be liable for injuries caused by negligent acts or omissions in its ownership, maintenance or use of vehicles or machinery and equipment on such roads.[15] Liability is discussed in Chapter 9.

> Private landowners cannot prohibit public access to public easements, but they can erect gates and bars for the purpose of discouraging excessive traffic.

As to the "gates and bars" language often found in older references to private ways, the purpose of gates and bars was to allow abutting owners to "lessen the hazard of unwarranted or casual intrusion on their property due to it being opened to easy access from the main highway. In spite of the erection of gates and bars the public still would have the right to use the way in the same manner as the parties who are primarily interested in it."[16] The Legislature removed this phrase from the public easement statute in 1976 (P.L. 1975, c. 711).

### Private Road

A privately owned road, commonly called a "private road," is a road over which neither the municipality nor the general public has the right to pass by vehicle or on foot. Anyone using or repairing a privately owned road without the owner's permission is subject to an action by the owner for trespass.[17]

In general, a municipality has no legal right to spend public funds to repair, maintain or plow privately owned roads.[18] In emergency cases, such as a house fire in the winter, it is probably legal to send a snowplow down a privately owned road so that the fire truck can get in, but the owner is responsible for ensuring that the road is sufficiently maintained to allow the plow to get through. This and other issues, such as school bus and mail access, are discussed in Chapter 5, "Road Maintenance and Repair."

## Other References to Roads

As previously discussed, the term "town way" is defined in State law. Sometimes State law includes within this definition the terms "way" and "public way." For example, the term "public way" used in the criminal statutes includes town ways and public easements, and also includes roads to which the public has access as invitees or licensees, such as the access roads and parking lot of a shopping center.[19] In the statutes regulating motor vehicles, the term "way" means the entire width between boundary lines of a road, highway, parkway, street or bridge, whether public or private.[20] Also, a municipal ordinance may use the terms "road" or "street" differently than does any State law. It is important, therefore, to read local ordinances carefully and to be aware of possible discrepancies between the ordinance and State law. For

example, roads in a subdivision may be "public ways" for subdivision review purposes, but unless or until accepted by the municipality, they are not necessarily town ways which the municipality must accept or maintain.

## Determining the Legal Status of a Road

There is no simple formula for determining the legal status of a particular road. One road, over portions of its total length, may be a combination of a town way, a public easement and a privately owned road. The status of a road depends on its creation, its history of use and maintenance, and its discontinuance, if any. It may even require court action to finally resolve the legal status of a road or portion of a road. Chapter 10 of this Manual, "Creating and Maintaining a Road Inventory," describes some techniques that local officials can use to determine a road's status.

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[1] It is theoretically possible to have a leasehold interest as the basis of a public road, but we are not aware of this form of legal interest in Maine; therefore, we will not discuss it further in this manual.
[2] 23 M.R.S.A. § § 3023 and 3025.
[3] See 33 M.R.S.A. § 460, where it provides that effective October 3, 1973, a conveyance of property abutting a town or private way conveys all of the grantor's interest in the abutting way, unless the grantor expressly reserves title to the way.
[4] See 33 M.R.S.A. § 458.
[5] 23 M.R.S.A. § 3021.
[6] 23 M.R.S.A. § 3021(3)(B).
[7] 23 M.R.S.A. § 3021(3), which cites 23 M.R.S.A. § 53.
[8] Under 23 M.R.S.A. § 754, these highways must be in good repair when the State "turns back" state or state-aid highways to a municipality.
[9] 23 M.R.S.A. § 3651.
[10] 23 M.R.S.A. § 3201.
[11] 23 M.R.S.A. § 3021.
[12] 23 M.R.S.A. § 3022 and 17-A M.R.S.A. § 505.
[13] 23 M.R.S.A. § 3105. Although 23 M.R.S.A. § 3105 refers to the "town meeting" as authorizing the repair of public easements, it should be read to include city or town council actions as well. See also 23 M.R.S.A. § 2.
[14] 23 M.R.S.A. § § 3651, 3655.
[15] 14 M.R.S.A. § 8104-A(1).
[16] *Browne v. Connor*, 138 Me. 63, 67-68, 21 A.2d 709 (1941); *Franklin Property Trust v. Foresite, Inc.,* 438 A.2d 218; 48 Me. L. Rev. 197.
[17] See 14 M.R.S.A. § § 7551-B and 7552; and *Hatch v. Donnell*, 74 Me. 163 (1882); *Massachusetts Bay Ins. Co. v. Ferraiolo Constr. Co*., 584 A.2d 608 (1990).
[18] See opinion of the Justices, 560 A.2d 552 (Me. 1989).
[19] 17-A M.R.S.A. § 505.
[20] 29-A M.R.S.A. § 101(92).

# CHAPTER 3 – Disposing of Municipal Roads

Municipalities are required to maintain town ways in a safe and passable condition. They may be liable for damages resulting from improper or insufficient maintenance of town ways. (Chapter 9 contains a full discussion of municipal liability for roads). To escape the costs of maintenance and exposure to legal liability, a municipality may want to dispose of a road by terminating its interests in that road or a portion of the road.

There are three methods for terminating a municipality's interest in a town way: (1) The statutory process of discontinuance; (2) The statutory presumption of abandonment; (3) The common law doctrine of abandonment by public non-use.

Public easements may be extinguished as well, although this is less critical from a liability standpoint since the municipality has no maintenance obligation or responsibility for defective conditions on a public easement. Each of these methods is discussed below. Please note that these methods are not mutually exclusive. For example, a municipality can commence a formal discontinuance procedure even though it also asserts that the way was abandoned by non-maintenance or non-use.

## Statutory Discontinuance

### Procedure

Discontinuance is a formal procedure established by State law for the purpose of terminating town ways, in whole or in part.[1] Note that Maine law has been amended over time to alter the necessary steps required in the formal discontinuance process. It is important to ascertain the law in effect at the time a discontinuance was approved before making a judgment as to the validity of the discontinuance. In 2016, the previous discontinuance statute, 23 M.R.S.A. § 3026 was replaced with a new § 3026-A effective July 29, 2016. (See P.L. 2015, c. 464). Additional changes to the law were made in 2018 which become effective for discontinuances occurring after October 1, 2018. (See P.L. 2017, c. 345). For any discontinuance occurring after that date, Maine law now requires that the discontinuance process follow seven basic steps outlined below. See Appendix D7 for a flow chart summarizing the process.

1. The municipal officers must determine whose property abuts the road in question and begin consideration of the amount of damages that should be paid to those abutters. The reason for considering damages is that abutting property owners are presumed to have a reduction in the fair market value of their property as a result of the loss of a municipally maintained road. It may be the case, however, that discontinuing all public rights of

access to a road will in fact increase the value of the abutting land due to the land's enhanced privacy following discontinuance.

Due to recent legislative changes (see below) extending the timeline applicable to some discontinuances by one year, the municipal officers may wish to wait to order an appraisal and finalize damages until step 3 in the process. See paragraph 3 below.

Damages for discontinuance are calculated pursuant to a statutory formula.[2] The municipal officers should obtain the services of an appraiser. For a list of appraisal companies, contact MaineDOT Property Office Division at (207) 624-3460.

As part of planning for a discontinuance, the municipal officers should incorporate funding for an appraisal in the municipal budget.

The municipality's determination of damages is not final, and may be increased by the Superior Court (there is a right to jury trial on this issue). Therefore, it is important that the municipal officers accurately calculate damages *before* the final vote to discontinue. Once the discontinuance is approved, the municipality is legally obligated to pay compensation, and if on appeal Superior Court awards a higher amount of damages than was awarded by the municipal legislative body, there is no way to revoke the discontinuance in order to avoid paying damages twice.

2. The municipal officers must give best practicable notice of the proposed discontinuance to all abutting property owners. "Best practicable notice" means, at a minimum, mailing the notice through the U.S. Postal Service, postage prepaid, first class mail to abutting property owners whose addresses appear in the assessment records of the municipality.[3] The municipal officers may rely on an address used in tax assessment records, but if they have knowledge or information that the person has moved, it is advisable to seek a current address and to send the notice to *both* places. This will minimize the risk that someone will later seek to reopen the discontinuance on the basis that the person was not notified and that the town's assessment records were outdated. It is not necessary to send the notice by certified mail, return receipt requested, but it is certainly allowed and may be a prudent measure to defend against claims of failure of notice. The law requires only that the notice be mailed, and the municipality need not prove that it was actually *received*. If a return receipt is not used, it may be useful to keep a logbook or other record showing when the notice was sent, to whom, to where, and by what type of mail (first class, certified, and so on). This record may be a useful piece of evidence if someone claims that notice never was sent.

The notice should indicate the road (or portion of road) proposed for discontinuance. Legislation enacted in 2018 (applicable to any road discontinued after October 1, 2018) requires that the initial notice provided to abutters contain information regarding the potential discontinuance or retention of a public easement, including maintenance obligations for and the right of access to the way depending on retention or discontinuance of the public easement along with discontinuance of the road. Thenotice also must contain information regarding the rights of abutting property owners to enter into agreements regarding maintenance and access to the way. 23 M.R.S. § 3026-A(1).

If all property abutting the road **is otherwise accessible by another public way**, the municipal officers may, without waiting one year, immediately proceed to the next step in the process after sending the initial notice of the proposed discontinuance. In that case, the initial notice can also provide the date, time and place that the municipal officers will meet to consider the discontinuance. Appendix D1-B contains a sample notice for use when all property abutting a road **is** accessible by another public way.

If any property abutting the road to be discontinued is not otherwise accessible by another public way, the notice must include information concerning the right of abutting property owners to create private easements to provide for access. The notice must also state that if any property abutting the road to be discontinued is not otherwise accessible by another public way, the law requires that the **discontinuance process be paused for one year after the notice is sent.** The one-year waiting period is intended to allow abutting property owners to confirm their private access to property and, if necessary, to secure private easements to allow access for abutting property owners and their lessees and guests. **After one year has passed** from the date the notice is sent, the process may be resumed. See below.

The sample notice in Appendix D1-A contains required information to notify abutters when any property abutting a road **is not** otherwise accessibly by another public way. After the one-year waiting period elapses the discontinuance process may be resumed. It is recommended that a second notice be sent to abutters alerting them of the date the board will meet to resume the process. It is also recommended that the municipal officers check assessment and property records in the registry to determine if property has changed hands during the one-year waiting period. Notice that the process will be resumed should be sent to current abutters. See the sample notice in Appendix D1-C.

3. The municipal officers meet to discuss the proposed discontinuance at a public meeting and finalize damages to be paid to abutters. If they determine to proceed with the discontinuance, they should order the discontinuance.

   If all property abutting the road is otherwise accessible by another public way, notice of this meeting can be given in the initial notice that a discontinuance is proposed as discussed above. See Appendix D1-B.

   However, if any property abutting the road to be discontinued **is not** otherwise accessible by another public way, this meeting of municipal officers must take place **at least one year after the initial notice** (Appendix D1-A) discussed in paragraph 2 was sent. After one year has passed, the municipal officers may opt to proceed with the discontinuance provided that either: (1) a public easement in the road will be retained; or (2) if no public easement will be retained, the municipal officers have verified that "private easements run with the title of the property owners' land for the purpose of allowing travel along the way for all abutting property owners and their lessees and guests" and that these easements have been filed in the registry of deeds. 23 M.R.S. § 3026-A(1-A). The municipal officers should review assessment and property records in the registry to update the list of abutters and provide written notice to current abutters that the board will meet to resume the discontinuance process. See sample in Appendix D1-C.

   If the municipal officers determine to proceed with the discontinuance, they should order the discontinuance and finalize the amount of damages to be paid to abutters.

   The form of the municipal officers' vote should be on a motion to discontinue. For example, "I move that the Selectmen order the discontinuance of a portion of the Hankerson Road, said road being a town way approximately feet wide including the right-of-way, from a point beginning at (identify a point) and extending in a generally northerly direction for a distance of approximately_____miles (or yards or feet, as appropriate) and that the following damages be paid to abutting property owners as follows: John Bradley - $300.00; Pete Coughlan - $500.00." (Note that this example refers to a portion of the road, not the entire road.) If the road to be discontinued contains a bridge, the motion should expressly note that fact and indicate that the bridge will be discontinued also. The actual order of discontinuance should have been prepared before the meeting, and the motion should track the language of the order.

   If the motion passes, a second motion should be made as follows: "I move that the Selectmen issue and file with the Town Clerk an Order of Discontinuance that accurately reflects the action taken by the Selectmen to discontinue a portion of the Hankerson

Road, and that the Selectmen send abutting property owner's best practicable notice of this action without delay." The order of discontinuance should be signed at this time.

The order of discontinuance must specify: (1) the location of the town way or public easement, (2) the names of abutting property owners, (3) the amount of damages, if any, determined by the municipal officers to be paid to each abutting property owner, and (4) the location of any bridge as defined in 23 M.R.S. § 562 and the status of negotiations with MDOT regarding disposition of the bridge after discontinuance, (5) whether or not a public easement is retained, (6) that the notice requirements of 23 M.R.S. § 3026-A have been complied with, and (7) if a public easement will not be retained, the notice should state that the municipal officers have verified that private easements providing access to the road for abutters, their lessees and guest that "run with title" are on file at the registry of deeds. The practical effect of this requirement is that if the abutters have not confirmed or secured access within one year, a discontinuance that proposes to extinguish a public easement cannot proceed. Note that if the order of discontinuance does not explicitly discontinue a public easement in the road, a public easement is automatically retained. See Appendix D2 for a sample Order of Discontinuance.

4. The order of discontinuance signed by the municipal officers must then be filed with the municipal clerk. At the same time, a notice of discontinuance should be mailed (regular or certified) to the abutting property owners, along with a copy of the order of discontinuance and notice of the public hearing to be held by the municipal officers (discussed below in paragraph 5). Appendices D2 and D3 contain samples of each of these documents.

5. The municipal officers must hold a public hearing on the order of discontinuance which was filed with the municipal clerk. The law does not specify any particular type of notice that must be given prior to the hearing. We recommend that notice of the hearing be given to abutting property owners by including hearing notice with the order of discontinuance mailed to them (discussed above). Public notice of the hearing should also be given consistent with requirements of Maine's Freedom of Access Act, and any local ordinances or customs.

6. The next step is for the legislative body (either the town meeting or the council, depending on the form of local government) to approve the order of discontinuance and the damage awards, and to appropriate the money to pay the damages. Approval by the legislative body may not occur until at least 10 business days after the municipal officers have held the public hearing on the order of discontinuance discussed above. In town

meeting towns, the vote to approve the discontinuance must occur at the next regularly scheduled **annual** town meeting that is at least 10 business days after the public hearing on the discontinuance. If the legislative body rejects the order, the discontinuance fails. Appendix D4 contains a sample warrant article for voting on the order of discontinuance at town meeting.

As mentioned above, if the town meeting approves the order of discontinuance, it must also appropriate the necessary amount of money and designate the source of the funds. Appendix D4 also contains a sample warrant article for this purpose.

In a municipality where a council is the legislative body, the council votes on the order, on the amount of damages, and on the appropriation of money for damages.

7. The final step, if the discontinuance is approved, is for the municipal clerk to record an attested certificate of road discontinuance in the registry of deeds. This certificate must describe the road and state the municipality's final action with respect to the road or easement discontinued. This certificate must be recorded for the discontinuance to be effective against owners of record or abutting landowners who have not received notice.[4] Effective July 29, 2016, the law now makes the date that the certificate of discontinuance is filed in the registry of deeds as the date the discontinuance becomes effective. Previously, the date the municipal legislative body voted to approve the discontinuance was the date the road was discontinued absent language to the contrary in the warrant article or council order. Appendix D5 contains a sample certificate.

   Effective July 29, 2016, the municipal clerk is now required to provide a copy of the certificate of discontinuance to the Maine Department of Transportation, Bureau of Maintenance and Operations.

## Appeals

Any person aggrieved by the municipality's decision to discontinue (or by its failure to do so) may appeal to Superior Court within thirty days after the decision.[5] Any person aggrieved by the municipality's measure of damages may appeal to Superior Court within sixty days after the legislative body approves the discontinuance order.[6]

## Legal Status of a Discontinued Road

Depending upon when a road was discontinued and the language of the article (order) of discontinuance, the municipality may retain a public easement over a discontinued road or portion of road and a utility easement may remain.

### (1) Public Easement

- **Discontinuance before September 3, 1965.** A discontinuance which occurred before September 3, 1965[7] left no public easement, and case law dictated that ownership of the way reverted to the abutters on each side to the centerline of the road. The abutters may legally bar the public from using the road in this situation.[8] However, there is an exception to this rule: a public easement is retained in a pre-1965 discontinuance if the article (order) authorizing the discontinuance specifically provided for the retention of one.

- **Discontinuance occurring on or after September 3, 1965.** By contrast, a discontinuance occurring *on or after* September 3, 1965 terminates the municipality's maintenance obligation, but leaves a public easement *automatically*, unless the article (order) authorizing the discontinuance specifically rejects retention of a public easement. That is, abutters cannot legally bar public use of the road. The municipality has the right or option, but not the obligation, to maintain this public easement.[9]

  It is possible to extinguish the public easement that automatically is retained in a post-1965 discontinuance. This can be done at the time of the discontinuance by inserting the appropriate language in the discontinuance order and article (remember that the amount of damages may differ depending on whether or not a public easement is retained). This also can be done later (even years later) by separate article, but damages would have to be calculated and paid again. Appendix D6 contains suggested warrant article language for extinguishing the public easement.

### (2) Utility Easement

The public easement retained after discontinuance also includes an easement for public utility facilities necessary to provide service.[10] This allows utilities to maintain and replace existing installations and to construct new installations, even if the town does not maintain the road. Note: The retaining of an easement for public utilities was not provided for in the law creating the September 3, 1965 demarcation, but was put in place several years later, on October 24, 1977.

Therefore, a public easement which resulted automatically from discontinuance between September 3, 1965 and October 24, 1977 does not include an easement for public utility facilities. In such cases, the utility must obtain an easement from whomever holds title in fee simple (see Chapter 1 for discussion of title interests). Note also that from October 24, 1977 until July 28, 2016, the State's public utility laws stated that unless the order of discontinuance of a public way provided otherwise, the public easement automatically retained under State law[11] included an "easement for public utility facilities."[12] Effective July 29, 2016, a new provision in the State road discontinuance statute, 23 M.R.S.A. § 3026-A(6), now automatically retains an easement for public utility facilities in all discontinued town ways, regardless of whether a public easement is retained by the municipality. (Note that the previous rule, in 35-A M.R.S.A. § 2308, was not repealed, but was likely superceded by the new rule recently enacted in 23 M.R.S.A. § 3026-A(6)).

### Defective Discontinuance

The municipality should comply strictly with all steps in the discontinuance procedure to ensure that the road is effectively discontinued. If an abutter (or anyone else, for that matter) can prove that a discontinuance was defective and that the road is still a town way, it could be very expensive for the municipality to resume maintenance and repair of the way.

The discontinuance law has changed over time, and did not always require the same steps as are now necessary. Therefore, when someone challenges the validity of a discontinuance, it is important to *identify with certainty the statutes in effect at the time of the discontinuance*. For example, the Law Court upheld the validity of road discontinuances that did not state the amount of damages paid where the abutters' predecessors in title had a right of appeal but did not appeal the order of discontinuance.[13]

If a discontinuance is found to be defective, the municipality still may be able to treat the road as abandoned.[14] For example, if a discontinuance was improperly done in 1933 but since that time the town has not maintained the road (mistakenly believing it to be discontinued), the road can be presumed abandoned on the basis that it has not been maintained at public expense for over thirty years.[15] Abandonment is discussed below.

## Statutory Abandonment

The focus of statutory abandonment is on non-maintenance.

A municipality may be relieved of the obligation to maintain a town way by operation of Maine law.[16] Under this law, a town way which has not been

kept passable for motor vehicles at public expense for a period of thirty or more consecutive years is *presumed* abandoned. This method of disposing of roads is "informal" in the sense that it requires no vote of the municipality, nor are any documents recorded or damages paid. Abandonment occurs by the passage of time coupled with lack of public maintenance. The Maine Supreme Court has upheld the validity of this law in the case of *Lamb v. Town of New Sharon*. In that case, an abutter to an abandoned road sued the town, claiming among other things that the statute allowed an unconstitutional taking of his property by reducing its value (through the loss of public maintenance of the road) without compensation. The Court soundly rejected this claim, recognizing that the abandonment law essentially tracks the common law doctrine of abandonment by public non-use.

## Determination of Presumed Abandonment

The municipal officers initially determine whether a road is presumed abandoned. Often, the question arises when a new resident asks the municipality to repair or maintain a road on which no one has lived for many years. If a review of the facts reveals that the road (or a portion thereof) has not been maintained at public expense for thirty or more consecutive years, the municipal officers may make a determination that the road is presumed abandoned and that the municipality has no further obligation to repair or maintain the way.[17] Through this determination, the municipal officers can take the position that the municipality is not liable for defects in the road, since it has lost its status as a town way. The law on abandonment provides that neither the municipality nor its officials will be liable for failing to maintain or repair a way if they rely in good faith on the presumption of abandonment. The municipal officers should make this determination after research and a public hearing, and should memorialize their decision in a notice of determination of presumption of abandonment and should record this notice in the registry of deeds. Appendix E contains a Sample Notice of Determination of Presumption of Abandonment.

In making this determination, the municipal officers must review the evidence (factual history) and make a decision based on that evidence. Political factors (e.g., a selectman's son owns property on the road) or financial factors (e.g., it will cost a lot to repair the road) cannot properly be considered in this decision. Also, while state law does not address the issue directly, we advise that if information subsequently becomes available that makes the municipal officers question their previous determination that a road is presumed abandoned, they may, and should, revisit that decision.[18]

In the event the municipal officers determine that a town way has become abandoned pursuant to 23 M.R.S.A. § 3028(1), an amendment to the statutory discontinuance law (effective July 29, 2016) now requires the municipal clerk to file a record of the officers' determination with

the registry of deeds, and to send a copy to the Maine Department of Transportation, Bureau of Maintenance and Operations. See 23 M.R.S.A. § 3028(5). Prior to 2016 amendment, this filing was not required by the law. The new law provides that a road may be considered abandoned even if a record of the determination of abandonment has not been filed at the Registry of Deeds.

## Litigating the Presumption of Abandonment

Maine law[19] creates a *rebuttable* presumption of abandonment. The municipality bears the initial burden of establishing the presumption of abandonment.[20] Once this presumption arises, the burden of proving that the road is a town way is on the person seeking to have the way repaired or maintained.[21] Any person affected by the presumption of abandonment may seek declaratory relief in Superior Court.[22] The county commissioners have no jurisdiction to hear these cases.

The presumption of abandonment can be rebutted by evidence which shows a clear intent by the municipality and the public to consider or use the way as if it were a public way. However, isolated acts of maintenance are not sufficient to rebut the presumption of abandonment. There is no simple test to determine the amount or type of evidence necessary to rebut the presumption of abandonment, nor does the law define "isolated acts of maintenance." As a rule of thumb, the more substantial the repair or more regular the maintenance, the more likely it is that the presumption of abandonment will be deemed rebutted. Court decisions provide some guidance:

- Where a road had been kept passable for motor vehicles at public expense through the 1950's and graded on an annual basis and plowed, though irregularly, during the winter months into the 1960's, there was no abandonment as of the 1980's.[23]

- Where the Town graded the road once or twice each year for seventeen of the thirty years, the Town had failed to establish the presumption of abandonment.[24]

- Where the town "at various times" within the thirty-year period had expended funds for bridge reconstruction, ditch scraping, brush cutting and other repairs, there was no abandonment.[25]

- The town's intermittent and minor repairs of a road and use of the road for logging purposes and for recreational purposes (snowmobiles and ATVs) did not demonstrate a clear intent to consider or use the way as a public way, thus the presumption of abandonment was upheld.[26]

As noted above, while the municipal officers make the initial determination of abandonment, the final determination can only be made by a court. Contrary to popular belief, the county commissioners do not have the authority to review or reverse the municipal officers' determination of abandonment or to determine the legal status of a road, although the issue of abandonment may arise where persons seek to have the commissioners order a municipality to repair a way.[27]

## Sources of Evidence

The determination that the presumption of abandonment has arisen —or has been rebutted— must be based on evidence about the history of the road. This evidence may come from several sources. For example, records of past town meetings or council meetings may indicate that money was raised and appropriated for repair or maintenance of the road in question. Records of the selectmen, council or treasurer may reflect expenditures for a particular road. The municipality may have included the road in question when the road was included in the municipal maintenance inventory reported to the State at the time the municipality requested local road assistance reimbursement from the State. Likewise, road commissioners and public works directors often keep road repair and maintenance logs showing what was done and when. Also useful are statements from people who use or live along the road in question. Longtime residents may be a wealth of information about the roads in a municipality, as can be former road commissioners, road workers or public works personnel. When the information is a person's recollection, make a point to put it in writing, date it, and have it signed. This will preserve the information in the event that the person dies or moves away.

## Status of a Road After Abandonment

When a road is abandoned, it is relegated to the same status as it would have had following discontinuance.[28] Thus, if the abandonment occurred before September 3, 1965, the property reverted back to the abutters (to the centerline) and there is no public right of access remaining. If the abandonment occurred on or after September 3, 1965, a public easement remains. In determining when abandonment occurs, look at the end point, not the starting point, of the statutory thirty year period.[29]

There is a curious provision in the statutory abandonment provisions that provides that an abandoned road "is at all times subject to an affirmative vote of the legislative body of the municipality...making that way an easement for recreational use." This language was added in the 1975-76 overhaul of the law, but its intent is unclear. MMA Legal Services staff believes that may raise constitutional issues. For example, if a road was abandoned in 1931 (thus reverting to private property without a public easement) and is currently a potato farm, is it an unconstitutional "taking" of property if the municipality now votes to allow a recreational

easement across the farm, without payment of compensation to the landowner? The question has never been addressed in court, so in view of these issues we recommend that the municipality consult an attorney before creating a recreational easement under this law.

## Common Law Doctrine of Abandonment

The focus of the common law doctrine of abandonment is on public non-use.

Discussed above was the *statutory* presumption of abandonment. Maine court decisions (common law) also recognize that roads may be abandoned by long periods of non-use by the public. Only a court can make the final determination on abandonment by public non-use. This common law doctrine of abandonment differs from statutory abandonment in three major respects.

### No Specific Time for Lack of Public Use

First, there is no clearly established time period necessary for abandonment; it varies depending on how the road was created. For a town way originally created by prescriptive use, the Supreme Judicial Court held that an unexplained failure by the public to use a way for twenty years resulted in a surrender of the way as a public way.[30] In another case, the Court concluded that the public rights to a way created by statutory method were lost after one hundred years of non-use.[31] More recently, the Maine Supreme Judicial Court has affirmed the Superior Court's finding that twenty years of public non-use of a road is sufficient to give rise to common law abandonment of that road.[32] [33]

### Focus is on Public Non-use

The second difference is that the common law doctrine focuses on public non-use, rather than public non-maintenance (which is the focus of statutory abandonment). It appears that in adopting the statutory presumption of abandonment, the Legislature looked to the expenditure of public funds for maintenance of the road as an objective measure of whether the public was actually using the way.

### No Public Easement Retained

The third difference is that the public likely does not acquire a public easement upon common law abandonment of a town way. As noted above, State law provides that for a post-September 5, 1965 abandonment of a road, a public easement is retained.[34] However, in all Maine cases that have addressed the issue, a road deemed abandoned by public non-use reverted to the ownership of the abutters to the centerline.[35] In other jurisdictions as well, abandonment of a public way by non-use does not result in a public easement. Perhaps the difference in focus between statutory abandonment (demonstrated by lack of public maintenance expenditures)

and common law abandonment (demonstrated by actual public non-use) is the reason why a public easement is retained in the case of the former, but not in the case of the latter.

**Private Easements May Exist**

When a road is discontinued or abandoned, a public easement may or may not exist, as discussed above. Even when this occurs, however, private individuals may have a right to continue using the road. A private easement might result from prescriptive use (for example, where the person used the way long before it became a public way), by necessity, by implication or by a deed in favor of the landowner. It is important not to confuse private easements with the public easement. The municipality should not spend public funds protecting (i.e., litigating) these private rights, but it can suggest to the parties that private rights may exist.

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[1] Title 23 M.R.S.A. § 3026-A outlines the process for discontinuing town ways.

[2] 23 M.R.S.A. § 3029 and 23 M.R.S.A. § 154E (*August Realty Inc. v. Inhabitants of Town of York,* 431 A.2d 1289 (Me. 1981).

[3] 23 M.R.S.A. § 3026-A(1).

[4] 23 M.R.S.A. § 3024.

[5] 23 M.R.S.A. § 3029 and Rule 80B, Maine Rules of Civil Procedure.

[6] 23 M.R.S.A. § 3029.

[7] Under 23 M.R.S.A. § 3004, the predecessor of 23 M.R.S.A. § 3026-A.

[8] *Frederick v. Consolidated Waste Services, Inc*. 573 A.2d 387 (Me. 1990) (1950 discontinuance resulted neither in public nor private easement); *Brooks v. Bess,* 135 Me. 290, 195 A.361 (1938); *Burnham v. Burnham,* 132 Me. 113, 167 A.693 (1933); and *Dyer v. Mudgett,* 118 Me. 267, 107 A.831 (1919); see Maine Roads and Easements, 48 Me. L. Rev. 197 (1996).

[9] 23 M.R.S.A. § 3026-A(2).

[10] 23 M.R.S.A. § 3026-A.

[11] 23 M.R.S.A. § 3026-A.

[12] 35-A M.R.S.A. § 2308. Two years later, the Legislature enacted 33 M.R.S.A. § 458, which provides that for easements or rights of way established in writing after January 1, 1990, the owner has no easement by implication to install utilities on or under the easement right of way unless the right to do so is expressly included in the written instrument.

[13] See *Whalen v. Town of Livermore*, 588 A.2d 319 (Me. 1991), *cert den*. 112 S. Ct. 422; and *Town of Fayette v. Manter*, 528 A.2d 887 (Me. 1987), *cert. den*. 108 S. Ct. 1116, *app. dis*. 108 S. Ct. 1285.

[14] 23 M.R.S.A. § 3028.

[15] See, for example, *Lamb v. Town of New Sharon,* 606 A.2d 1042 (Me. 1992).

[16] 23 M.R.S.A. § 3028.

[17] 23 M.R.S.A. § 3028.

[18] A revision to the law on presumptive abandonment by the 124th Maine Legislature provides that the determination of the municipal officers regarding the status of a town way or public easement is a quasi-judicial act under the Maine Tort Claims Act. The summary of the bill enacting this law change clarifies that municipal officers are not liable for any decision relating to an abandoned road under the Maine Tort Claims Act. Because the stated purpose concerns the issue of tort liability, MMA Legal Services believes that this law change does not create a decision subject to appeal under Rule 80B. If a person believes the determination is wrong, that person is free to file a declaratory judgment suit in Maine Superior Court to ask the court to determine the parties' rights and obligation with regard to the road. See 23 M.R.S.A. §

3028 and 14 M.R.S.A. § § 8104-B and 5951 *et seq*.

[19] 23 M.R.S.A. 3028.

[20] *Fuller v. Town of Buxton*, 2002 Me. Super. Lexis 100 (Me. Super. Ct. May 8, 2002); *Earwood v. Town of York*, 1999 ME 3, 722 A.2d 865.

[21] *Town of South Berwick v. White,* 412 A.2d 1225 (Me. 1980).

[22] 23 M.R.S.A. § 3028 and 14 M.R.S.A. § 5951, *et. seq*.

[23] *Lamb v. Euclid Ambler Associates,* 563 A.2d 365 (Me. 1989).

[24] *Earwood v. Town of York*, 1999 ME 3, 722 A.2d 865. *Earwood*, although it generated a substantial amount of press coverage for a road abandonment case, it did not establish any new legal principles. It stands only for the long-recognized proposition that a municipality first must establish the presumption of abandonment before the burden shifts to other parties to rebut the presumption of abandonment.

[25] *Town of South Berwick v. White,* 412 A.2d 1225 (Me. 1980); this decision led to the statutory amendment that added the "isolated acts of maintenance" language to Section 3028).

[26] *Whalen v. Town of Livermore,* 588 A.2d 319 (Me. 1991), *cert. den*. 502 U.S. 959.

[27] Under 23 M.R.S.A § § 3651-3653 (see *Craig v. Davis,* 649 A.2d 1096 (Me. 1994); and *Board of Selectmen of the Town of China v. Kennebec County Commissioners*, 393 A.2d 526 (Me. 1978).

[28] 23 M.R.S.A. § 3028 and § 3026-A.

[29] *Town of Cornville v. Gervais*, 661 A.2d 1127 (Me. 1995).

[30] *Piper v. Voorhees,* 130 Me. 305, 155 A.556 (1931). For a contrasting opinion see *Lyons v. Baptist Sch. of Christian Training*, 2002 ME 137.

[31] *Smith v. Dickson,* 225 A.2d 631 (Me. 1967); See also *Wooster v. Fiske,* 115 Me. 161, 98 A.378 (1916) and *Pratt v. Sweetser,* 68 Me. 344 (1878).

[32] *Shadan v. Town of Skowhegan,* 1997 ME 187, 700 A.2d 245. The *Shadan* opinion also confirms that the doctrine of common law abandonment remains a viable alternative to statutory abandonment.

[33] See Feature: Easements Ain't So Easy, 15 Maine Bar J.52 (2000). For a general discussion of issues relating to public acquisition of land by prescription, see *Portland Water Dist. v. Inhabitants of Standish*, 2005 Me. Super. Lexis 154.

# Part II. Municipal Road Responsibility and Regulation

# CHAPTER 5 – Road Maintenance and Repair

This Chapter discusses municipal road maintenance and repair obligations. Several topics are covered, including summer and winter maintenance, state and state-aid roads, brush cutting, and bidding and contracting practices. Related topics are discussed in Chapter 6 and Chapter 9.

## Legal Obligation to Maintain and Repair Roads

A municipality's obligation to maintain and repair a road varies depending on the type of road: town way, public easement, or privately owned road. These are addressed separately below.

### Town Ways

Maine law requires that town ways be kept open and in repair so as to be "safe and convenient" for travelers with motor vehicles.[1] If a municipality fails to meet this repair obligation, three or more responsible persons may petition the county commissioners to order the municipality to repair the town way.[2] If, after notice and hearing, the county orders the municipality to repair the way and yet the municipality fails to do so, the county commissioners may have the work performed by their agent and then may send the bill for repairs to the municipality.[3]

Additionally, if a town way is "blocked or encumbered" with snow, it must be opened and made passable within a reasonable time.[4] This obligation to remove snow from town ways also requires the removal of snow and ice from sidewalks; however, the municipality is immune from liability for accidents caused by ice and snow on streets and sidewalks[5] and is liable only for injury caused by a defect in the sidewalk.[6] The process for closing roads to winter maintenance in order to avoid having to keep some or all of certain ways clear of snow is discussed later in this Chapter.

### No Private Maintenance of Town Ways

Municipal officials are often asked whether private citizens can repair and maintain public ways at their own expense, and what rights and liabilities this involves. There is no statute on point, but the case law is clear that private individuals have no right to repair or reconstruct town ways; this may only be done by the municipality or a person acting with authority of the municipality.[7] This result is logical, since the municipality is responsible for defects in the town way, and so the municipality should be able to control the repair of a town way and the resultant liability.

**Public Easements**

The voters of a town or village corporation *may* authorize the selectmen or assessors to use municipal equipment to maintain and repair private ways (public easements) within the town or village corporation.[8] The voters can determine the level of maintenance the town will provide, as there is no requirement that public easements be kept "safe and passable" on a year-round basis. The voters can designate that some public easements (or portions thereof) be maintained at public expense, while others are not. In short, municipalities have broad discretion in deciding how to care for public easements.

In contrast with town ways, private individuals may repair or reconstruct public easements. It would seem that private individuals should be able to do so in order to permit them to use the easement, especially since the municipality is not obligated to maintain public easements and is not liable for any maintenance it does provide or for any defect in a public easement. Further, these same private individuals often have private easement rights in the same way, and at common law, an easement holder has the right (and generally, the duty) to maintain the easement.[9] The Maine Superior Court determined that upon discontinuance of a public way, the individuals abutting the way have "very broad rights, including the right to maintain the way with respect to width and character that was sufficient to them so long as their exercise has some reasonable basis and was within the scope of the prior public use."[10]

However, in the event that private repairs are performed improperly and cause injury, the person who made the repairs to a public easement (or contracted for them) may be personally liable. In addition, there are other related questions that as yet are unanswered, such as:
(1) Whether it is possible to "overburden" or "surcharge" a public easement (in other words, to increase its use beyond that for which it originally was intended) as could occur if a landowner were to create a major subdivision on a lot abutting the public easement;
(2) Whether a person could widen the traveled portion of the public easement right-of-way; or (3) Whether a person could improve a public easement both for purposes of personal use and to accommodate additional traffic.[11] The position of MMA Legal Services staff is that a municipality should not prevent private parties from maintaining a public easement but should not act to authorize or condone private maintenance either, and that a municipality may act to prevent a private party from damaging a public easement when it becomes aware of potential damage (as could happen if logging trucks were to use a public easement during mud season).

**Privately Owned Roads**

The Maine Supreme Court has stated that because of constitutional limitations, public funds or equipment may not be used to maintain or plow privately owned roads.[12] This is true even if the public is not prevented by signs or gates from using the road. The Court's reasoning was that the "implied consent of access" is transitory at best, and one or more of the road's owners

could at any time restrict access. For example, the municipality might make substantial repairs to a private camp road open to the public, only to find that the very next day the road was closed to public access. Therefore, the Court held that the proposed use of public funds to maintain a private road would represent an unconstitutional expenditure of public funds for a private purpose, thereby violating the "public purpose" doctrine of the Maine Constitution.

Maine law, however, permits repairs to private roads for the limited purposes of protecting or restoring a great pond. The law allows municipal repair of a private road if (1) the road is within the watershed of a great pond, (2) the great pond is identified by the Department of Environmental Protection (DEP) as at risk, threatened or impaired, (3) the DEP or the municipality has determined that the road is contributing to degradation of the great pond's water quality, (4) the repair complies with the DEP's best management practices, and (5) the road is maintained by an organized private road association.[13] A "great pond" is an inland water body with a surface area greater than 10 acres in its natural state or, if artificially formed or increased, with a surface area greater than 30 acres.[14] Since great ponds are public property and their protection is deemed to be a public trust,[15] the use of public funds to repair a private road to prevent pollution of a great pond presumably satisfies the Maine Constitution's "public purpose" clause. (The public purpose clause requires that public funds be expended for public purposes.[16] )

Note that this law authorizes only road repairs, not maintenance or snow removal. Routine maintenance, including plowing, is the responsibility of a road association or of private road owners (see above). (See "Plowing Private Roads & Driveways Revisited," *Maine Townsman*, "Legal Notes," November 2003.)

The Maine Supreme Court opinion has raised many questions, particularly in municipalities that traditionally have maintained privately owned roads. Some of the commonly asked questions are addressed below:

- **People on private roads pay taxes, too; doesn't that entitle them to have their roads plowed?** No. A municipality is not legally required to provide identical services to all roads, just as some parts of town may have public sewer and water, while others do not. Property without those services, however, should not be assessed as though it had them. In other words, the lack of public maintenance of the road may become a consideration in calculating the "just value" of the property for tax purposes. (In some cases, the increased privacy or exclusivity resulting from lack of public maintenance actually may enhance the value of the property.)

- **What can landowners on private roads do to get road maintenance?** The landowners have three general options.
  First, they can arrange for private plowing and maintenance. They can do this by informal agreement, or by creating a formal road association for that purpose. State law authorizes members of road associations to call a meeting of abutters to select a "commissioner," who may determine what repairs are to be done and may order the private way repaired. This commissioner may assess the cost of repairs, and the association may raise funds by assessing the abutting owners and may collect assessments in the same manner in which town taxes are collected.[17]

  Second, the landowners can request that the municipal legislative body accept the road as a public easement, which could then be maintained at public expense. This option will depend on three events: first, all of the abutters on the private road must agree to grant the public easement; second, the legislative body must vote to accept the way as a public easement; third, the legislative body must vote to authorize maintenance of the public easement, since it is not required by law.

  A third option, though unlikely, is to ask the legislative body to accept the road as a town way, perhaps after the road is improved to municipal standards at the expense of the abutters. If so accepted, the municipality assumes the legal obligation to maintain the road in a safe and passable condition.

- **What about access for emergency vehicles, buses, and other municipal vehicles?** The Supreme Judicial Court has not addressed this point. MMA Legal Services staff is of the opinion that it is probably permissible to send the plow down a privately-owned road ahead of a fire truck, police car or ambulance, since opening the road is necessary to provide the emergency service and the provision of that service represents an isolated occurrence for the purpose of saving life or limb, and does not constitute, therefore, a regular practice. But because the Supreme Judicial Court has ruled that public money cannot be used for the benefit of private roads, we recommend that persons living on private roads keep them open, as there is no guarantee that town vehicles can get through in an emergency. It is important to remember that a municipality is not liable for the failure to provide emergency services.[18]

  Nor should a municipality plow privately owned roads to allow access for school buses, garbage trucks, or other non-emergency municipal vehicles. People living on a private road are responsible themselves for keeping it open for those vehicles, or else to bring their children, trash, etc., out to the public road for pick-up.[19]

- **Is it legal to maintain privately owned roads if the road owners pay the municipality for road maintenance services?** MMA Legal Services recommends against this practice. Generally speaking, Maine court cases have determined municipalities should not compete against the private sector unless the service provided to private individuals is one of public necessity, convenience and welfare and the subject matter is of such a nature that the difficulty which individuals encounter in providing for themselves constitutes an exigency, e.g., fuel, water, electricity, food and other necessities. In the cases where courts condoned municipalities competing in the private business sector, an ordinance or law justifying the activity was in place. In those cases, the reason for the ordinance or law was the necessity of specific, basic services for the general welfare of the community and either the lack of those services or their inconsistent provision. [20]

- **What legal problems may the municipality encounter if it continues to maintain privately owned roads without a contract?** The municipality exposes itself to broader liability when it maintains privately owned roads. Such liability includes:

  **Possible Loss of Tort Claims Act Protections**. There are no cases on point, but it is arguable that the Maine Tort Claims Act will not protect either the municipality or the municipal employee while performing what is essentially a private service. For example, if a plow driver negligently injures a pedestrian on a private road, to the extent that the municipality is not immune from liability, the $400,000 cap on municipal liability in the Tort Claims Act may not apply.[21] Also, the municipality's insurance may not cover occurrences on privately owned property on the basis that such work is not a public activity. Moreover, because work on a private road is outside the scope of government activity, the grant of specific immunities and the $10,000 limit of liability for a municipal employee may not apply to any personal injury or property damage that might occur. *In other words, both the municipality and its road employees could be liable without limitation and without insurance coverage (for defense costs and for damages) for any personal injury or property damage caused by them in the plowing of a private road*.

  **Anti-trust Liability.** Another potential problem is violation of federal anti-trust laws. Since the municipality usually gets its bituminous mix, gravel, salt, sand, gasoline and other supplies at a good price (bulk amounts and no taxes), it can perform road plowing and maintenance for less than a private contractor charges. A private contractor who maintains private roads for a living could argue that municipal maintenance of private roads is an anti-competitive practice. The municipality has an inherently unfair advantage because of its position as a governmental entity. The U.S. Supreme Court held in *Community Communications, Inc. v. City of Boulder,* 102 S. Ct. 835 (1982) that a municipality is not exempt from anti-trust liability unless it can show that there is a

precise and affirmatively expressed state grant of power to engage in anti-competitive actions. We are aware of no road-related anti-trust cases involving a Maine community, but the potential exists.

## Closing Roads

Sometimes the best way to maintain or repair a road is to close it or limit its use. Three laws address this subject.

The winter closing process contains four steps: (1) list roads for closing; (2) public hearing; (3) order; (4) vote.

**Closing Roads to Winter Maintenance**.[22] The legislative body of the municipality may designate that certain roads (or portions) be closed to winter maintenance. Under this law, maintenance of a road can be discontinued for a specific number of months from November to April, inclusive. The winter closing process requires four steps. The law specifies that some of these steps be taken between May 1 and October 1. To be safe, we recommend that the entire process be done in that time period.

- First, the municipal officers themselves, or upon petition of at least seven voters, draw up a list of roads proposed to be closed. The issue is whether it is "unnecessary" to maintain a road in view of its population, use and travel in winter.

- Second, the municipal officers schedule a public hearing to discuss the list of proposed winter closings. They must place written notice of this hearing in some conspicuous public place at least seven days before the hearing.

- Third, after the public hearing the municipal officers file with the clerk an order specifying the road (or portion thereof) to be closed to winter maintenance. This order also must specify the months of non-maintenance and the number of years the closing order will be in effect. A winter closing can run from one to ten years; if the order fails to specify, it is for one year only.

- Fourth, the legislative body must vote to approve each order, or vote to provide that each order made by the municipal officers is a final determination. In a town meeting town, this step will require a town meeting vote.

Sample orders and articles pertaining to this process are included in Appendix G.

A winter closing order can be altered, but only *after* one year from the date the legislative body has approved it. Alteration of an order can be proposed by the municipal officers or upon petition of seven voters. The steps in the alteration process are the same as those in the initial approval process. Any order by the municipal officers to annul, alter or modify a road closure shall not become final until the legislative body approves the order or makes all such orders by the municipal officers a final determination.

A winter closing order or alteration order may be appealed to the county commissioners within thirty days of this final determination by the legislative body. The appeal must be brought by petition of seven voters to the county commissioners. The county commissioners will conduct a *de novo* hearing on the appeal of the order, and so the municipality should be prepared to prove that the road closing or alteration meets the statutory standard.

There is some confusion about who can use roads that have been closed to winter maintenance. It is not uncommon for private citizens to volunteer to plow a closed road at their own expense, in order to use the road for logging or some other purpose, but we recommend that the municipality not authorize or condone plowing such roads for easier access. The reason for this advice is that a plowed road may appear open and safe to passersby, when in fact it is poorly plowed and hazardous to travel. The municipality would likely be sued in the event of an injury, and even if not liable it would incur legal fees in defending itself. The safe approach is to disallow closed roads to be privately plowed.[23]

Snowmobiles and allterrain vehicles (ATVs) are a different matter. In both cases, snowmobiles and ATVs may operate on any public way which has been closed for winter maintenance.[24] Maine law is silent about whether other vehicles may use snowbound roads that have been closed for winter.

## Temporary Closings and Weight Restrictions.[25]

Many roads are vulnerable to damage during certain times of the year. Maine law allows municipalities to close a road to all traffic during these seasons, or to impose restrictions upon the gross weight, speed, operation and equipment of vehicles, as determined by the municipal officers.

> Closing roads requires adoption of an ordinance or regulations; posting signs is insufficient.

Also, although this section no longer specifically authorizes only a temporary closure that was its original intent, and so MMA Legal Services staff is of the opinion that this law only authorizes a temporary closing. (If year-round regulation of a road is necessary to protect the public health,

safety and welfare, the municipal officers may adopt a traffic ordinance under 30-A M.R.S.A. § 3009.) However, this temporary closing may be at any time of the year—it is no longer limited to springtime or "mud season." The law allows posting of bridges as well as of roads.

A temporary closing/weight restriction may be accomplished by regulations or an ordinance adopted by the municipal officers. MMA's Road Weight Limits/Seasonal Road Closings Information Packet contains sample forms, a sample ordinance and other information on this topic. When restricting the weight limit for vehicles on a road or bridge, we recommend that the *registered weight* of the vehicle be used as the guideline. This will avoid the need for scales or other devices to measure the vehicle's actual weight.

Some weight-limit regulations provide that a permit can be obtained to use an otherwise off-limits road. The permit should require the vehicle owner to post a bond or other security to repair any damage to the road, as authorized by state law.[26] For example, a logging operation could be allowed to use a dirt road in the spring if the logger agrees to pay for any road or drainage damage resulting from his operation. To protect the town, we recommend that a bond or other surety be required to cover the full cost of all potential damage, not just surface damage.

Typically, road weight regulations contain exceptions for emergency vehicles, fuel deliveries and utility trucks. State law now specifically exempts vehicles delivering home heating fuel from having to obtain a local permit so long as they operate in accordance with a permit issued by MaineDOT.[27] It also specifically exempts "a person operating a vehicle that is transporting well-drilling equipment for the purpose of drilling a replacement water well or for improving an existing water well on property where that well is no longer supplying sufficient water for residents or agricultural purposes" from county or municipal permit requirements if the operation is during a period of drought emergency as declared by the Governor.[28] Also, some regulations allow vehicle passage when the road is *"solidly frozen."* This term should be clearly defined if used; see the sample ordinance in Appendix H.

Violation of a posting or permit under the temporary closings and weight restrictions law is a traffic infraction punishable by a *mandatory minimum fine* of $250.

Any ordinances adopted by the municipal officers pursuant to the traffic and parking regulation authority provided them under law[29] should contain a penalty clause, and it should state that all penalties accrue to the municipality; otherwise, the State will keep any fines recovered.

The law allowing restrictions on weight does not specifically mention permanent or year-round restrictions on the use of a road, but such restrictions are allowed by an ordinance adopted by the selectmen using the authority given to them under State law to enact traffic ordinances.[30]

**Closings for Emergency or Special Events**.[31]

A police officer may close or restrict the use of a road as necessary for public safety during emergencies, accidents or special events. The law does not define "special events"; that determination apparently is left to the discretion of the police officer.

A municipality may want to close a road for non-emergency special events, such as parades, festivals, block parties and the like. The municipal officers have this authority by ordinance (they must adopt an ordinance for this purpose under their traffic and parking regulation powers; see Chapter 6).

A municipality cannot permit persons to stop traffic on a public way to solicit contributions from, or to sell merchandise to, motorists. However, State law does allow fundraising by charitable non-profit organizations incorporated in or recognized by the State that have received municipal and local law enforcement authorization.[32]

Towns without quick access to police officers often ask whether in an emergency, the municipal officers can close a road under the same authority that allows police officers to close or restrict traffic for non-emergency special events. No, they cannot. However, State law provides elsewhere that municipal officers have the authority to respond to an emergency through the road commissioner or on their own, if the road commissioner fails to take steps to eliminate safety hazards within twenty-four hours.[33]

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[1] 23 M.R.S.A. § 3651.
[2] 23 M.R.S.A. § 3652.
[3] 23 M.R.S.A. § 3654.
[4] 23 M.R.S.A. § 3201; See also *Alexander v. Mitchell*, 2007 ME 108; *Ouelette v. Miller,* 183 A.341, 134 Me. 162 (1936), and *Rogers v. Newport,* 62 Me. 101 (1873).
[5] 23 M.R.S.A. § § 1005-A and 3658.
[6] See *Ouelette v. Miller*.
[7] See *Lamb v. Euclid Ambler Associates,* 563 A.2d 365 (Me. 1989; *Hunt v. Rich,* 38 Me. 195 (1854); and *Harris v. Larrabee,* 109 Me. 373 (1912).
[8] 23 M.R.S.A. § 3105. At the time of publication of this manual, MMA Legal Services understands that the Maine Department of Environmental Protection intends to submit legislation that would repeal 23 M.R.S.A. § 3105 and re-enact it as a new law (23 M.R.S.A. § 3105-A) that omits any reference to "private roads," but otherwise restores the provisions of 23 M.R.S.A. § 3105 to allow the use of municipal equipment to maintain and repair private ways (public easements). This proposed change eliminates the problem created by the 124th Maine Legislature, 1st Regular Session, when it amended 23 M.R.S.A. §

3105, authorizing the use of municipal equipment on private roads, in violation of the *Opinion of the Justices,* 560 A.2d 552 (Me. 1989). MMA Legal Services further understands that the proposed legislation will be submitted before the 124th Maine Legislature, 2nd Regular Session.

[9] See Creteau, *Principles of Real Estate Law* (1977) at 145; and *Dana v. Smith*, 114 Me. 262, 95 A.1034 (1915).

[10] *Wade v. Wenal*, No. CV-96-056 (Me. Super. Ct., Wal. Cty. Jan. 13, 1999)). Indeed, in *Browne v. Connor*, 138 Me. 63, 21 A.2d 709 (1941), the Law Court upheld the constitutionality of the public easement statute (now found at 23 M.R.S.A. § 3022) and implicitly allowed private citizens to improve a public easement (then called a "private way") at their own expense.

[11] *Wade v. Wenal* indicates that surcharge of a public easement may be possible.

[12] See *Opinion of the Justices,* 560 A.2d 552 (Me. 1989).

[13] 23 M.R.S.A. § 3106.

[14] See 38 M.R.S.A. § 480-B(5).

[15] See 38 M.R.S.A. § 1841.

[16] See *Common Cause v. State*, 455 A.2d 1 (Me. 1983).

[17] 23 M.R.S.A. § § 3101-3103. (These statutes invite confusion because although they appear in the "private ways" provisions they clearly mean "private roads.").

[18] See 14 M.R.S.A. § 8104-B.

[19] See *Collins v. Westmanland School Committee,* No. CV-90-268 (Me. Super. Ct., Aro. Cty. July 12, 1991).

[20] *Morrison v. City of Portland*, 286 A.2d 334; *Ace Ambulance Service, Inc., v. City of Augusta*, 337A.2d 661; and *Laughlin v. City of Portland*, 111 Me. 486.

[21] 14 M.R.S.A. § 8105.

[22] 23 M.R.S.A. § 2953.

[23] This advice is consistent with the reasoning in *Lamb v. Euclid Ambler Associates,* 563 A.2d 365 (Me. 1989).

[24] 12 M.R.S.A. § 13106-A(5)(C) states that snowmobiles may operate on any public way which has been closed in accordance with 23 M.R.S.A. § 2953. All terrain vehicles (ATVs) have this same right under 12 M.R.S.A. § 13157-A(6)(C).

[25] 29-A M.R.S.A. § 2395.

[26] 29-A M.R.S.A. § 2388(2).

[27] See 29-A M.R.S.A. § 2395(4).

[28] See 29-A M.R.S.A. § 2395(4-A).

[29] 30-A M.R.S.A. § 3009.

[30] 29-A M.R.S.A. § 2395 and 30-A M.R.S.A. § 3009.

[31] 29-A M.R.S.A. § 2078.

[32] 29-A M.R.S.A. § 2109.

[33] 23 M.R.S.A. § 2701.

# CHAPTER 6 – Control of the Roads

This Chapter concerns control over the use of municipal roads. Among the topics discussed are traffic and parking ordinances, setbacks, excavations, road standards ordinances, barriers and obstructions.

## Mail Routes and Mailboxes

A municipality has no particular obligation to plow roads to allow for mail delivery. Similarly, a municipality has no authority to plow privately owned roads just because mail is delivered on the road. An archaic requirement to maintain an apparatus for opening snowbound ways served by a mail route is still on the books but its validity is uncertain.[27] This early 19th Century statute appears to merely require municipalities to keep and maintain some type of snow-clearing apparatus in certain locations. The law does not require municipalities to remove snow from mail routes that are not on town ways. Furthermore, there are likely constitutional issues that would prohibit a municipality from spending public funds to purchase equipment for private use or to remove snow from private roads. *See e.g.*, *Opinion of the Justices,* 560 A. 2d 552 (Me. 1989).

A municipality is not generally liable for damage done to mailboxes located in the road right-of-way. Conversely, a municipality is responsible for damage it causes to mailboxes located outside the right-of-way (if any such mailboxes exist). To maintain good public relations, some municipalities pay a portion of the replacement cost of a damaged mailbox even if it is located inside the right-of-way.

## Damage to Roads by Oversized and Overweight Vehicles

The laws on motor vehicles regulate the height, width, length and weight of vehicles on public ways.[39]

### Damage to Public Easements

Operating a motor vehicle in a manner that damages a public easement is a Class E crime (except when involving law enforcement officers and emergency responders in performance of their lawful duties). See 17 M.R.S.A. § 3853-D.

In addition, owners of property abutting a discontinued or abandoned road in which a public easement exists may bring a civil action against a person who damages the road in a manner that impedes reasonable vehicular access to the abutting property owner's property. Damages equal to restoration costs, attorneys' fees and injunctive relief may be imposed by the court. See 23 M.R.S.A. § 3029-A. Note that the right to bring suit does not apply to damage caused

by a law enforcement officer or emergency responder operating a motor vehicle on a public easement in an emergency and within the scope of the officer's/responder's employment.

## Barriers

### Barriers on Town Ways and Public Easements

Some towns put cables or wires across roads that have been discontinued or closed to winter maintenance. These cables can injure snowmobilers or other off-road vehicle users. Maine law requires a municipality to clearly mark any cables or other barriers across a town way with fluorescent tape or similar material so as to be visible at a "reasonable stopping distance" to persons on snowmobiles, ATVs, dirt bikes and similar vehicles.[46] The law only mentions town ways, but we recommend marking barriers across public easements as well. The statute requires the municipal officers to cause these barriers to be inspected periodically to ensure that the markings remain visible.

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[1] Title 30-A M.R.S.A. § 3009.
[2] 30-A M.R.S.A. § 3009.
[3] 29-A M.R.S.A. § § 2068-2069.
[4] 23 M.R.S.A. § 1351.
[5] 30-A M.R.S.A. § 3009.
[6] 30-A M.R.S.A. § 282.
[7] 30-A M.R.S.A. § 2671.
[8] 29-A M.R.S.A. § 1851, *et seq*.
[9] 30-A M.R.S.A. § 3009.
[10] 29-A M.R.S.A. § 101(42).
[11] 30-A M.R.S.A. § 3009.

[27] 23 M.R.S.A. § 3202.
[39] Title 29-A M.R.S.A. § § 2350-2383.

# PART III. Municipal Liability for Roads

# CHAPTER 9 – Liability

Municipal liability for road-related injuries and damage is governed primarily by the Maine Tort Claims Act and the Highway Liability for Damages Act. These and related laws are discussed below.

## Maine Tort Claims Act

The Tort Claims Act contains two road-related exceptions: (1) negligence during road construction, cleaning and repair; and (2) negligent operation of vehicles.

The Maine Tort Claims Act[1] provides municipalities with broad immunity from liability for negligent acts or omissions. However, there are exceptions to the general rule of governmental entity immunity, and these exceptions are strictly construed.[2] Where these exceptions exist, the Tort Claims Act sets a liability cap of the greater of $400,000 for the municipality and $10,000 for municipal employees individually, or the limits of any insurance that the municipality has purchased.[3] The details of the Tort Claims Act are complex. Any claims against the municipality should be referred immediately to the municipality's insurance agent and attorney.

Under the Tort Claims Act municipalities may be held liable for (1) negligence occurring during road construction, cleaning and repair and (2) negligent operation of motor vehicles.

### Road Construction, Cleaning and Repair

The Tort Claims Act provides as follows:

> A governmental entity is liable for its negligent acts or omissions arising out of and occurring during the performance of construction, street cleaning or repair operations on any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of those ways including, but not limited to, street signs, traffic lights, parking meters and guardrails. A governmental entity is not liable for any defect, lack of repair or lack of sufficient railing in any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway or in any appurtenance thereto.

Under this law, two elements must exist for liability to attach: (1) there must be construction, street cleaning or repair operations performed in a negligent manner, and (2) the injury must arise out of and occur during such operations. Both the injury and the negligence must occur during the cleaning, repair or construction operations.[4]

"Construction" includes the initial building or rebuilding of a bridge or road, as well as the building or rebuilding of ditches, shoulders and other components of the road. "Repair operations" includes maintenance paving, ditching, shoulder work, culvert replacement and the like. "Street cleaning" means the removal of debris from roads or sidewalks, *but does not include snowplowing*.[5]

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[1] 14 M.R.S.A. § § 8101-8118.
[2] *J.R.M., Inc. v City of Portland,* 669 A.2d 159 (Me. 1995).
[3] 14 M.R.S.A. § § 8104-D, 8105 and 8116.
[4] *Rivard v. City of Lewiston,* 516 A.2d 555 (Me. 1986).
[5] *Goodine v. State of Maine,* 468 A.2d 1002 (Me. 1982).