

Agenda

Item #6



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

October 22, 2007

Perry A. Lamb
890 Mere Point Road
Brunswick, ME 04011

Dear Mr. Lamb:

Thank you for your letter of September 2, 2007. The Ethics Commission's Counsel, Assistant Attorney General Phyllis Gardiner, and I have reviewed the materials you have submitted to the Commission. We have determined that they do not suggest a violation of the legislative ethics laws (1 M.R.S.A. §1014) or lobbyist reporting laws (3 M.R.S.A. §§ 313-17) that are within the jurisdiction of the Commission. I have copied the Maine Municipal Association so that it is aware of your dissatisfaction with its interpretation of the local highway law.

I will be informing the Commission of the staff determination on your inquiry at the next meeting of the Commission on Tuesday, October 30, 2007 at 9:00 a.m. You are welcome to make any comments you would like to the Commission at that time. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Wayne'.

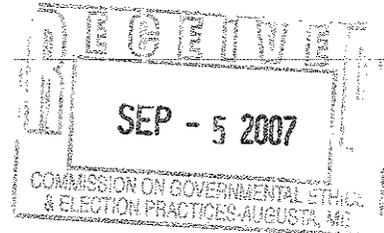
Jonathan Wayne
Executive Director

cc: Bill Livengood, Maine Municipal Association
Phyllis Gardiner, Commission Counsel

890 Mere Point Road
Brunswick, Maine 04011

September 2, 2007

Executive Director
Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, Maine 04333-0135



Dear Sir,

This letter is in reply to your letter of August 22, 2007 and will attempt to explain why I recently contacted your office.

My "SEVERAL INTERPRETATIVE AND CONSTRUCTION PROBLEMS WITH ONE OF MAINE'S TOWN ROAD CLOSING STATUTES" article addressed certain alleged irregularities regarding the creation of 23 M.R.S.A. Section 3028 and its 1991 amendment.

Section One of this article describes an instance wherein the wording of the easement clause in Section 3028 has been unexplainably modified by some unknown party to read differently than the text of the original document. This error was created sometime during the 1990's and has never been corrected.

Section Two of this article describes how changes in the wording of Section 3028's 1991 amendment caused numerous due process protection flaws in its road abandonment procedures.

Since my article involved legal concepts normally involving lawyers, it seemed logical that I send a copy of my article to Maine's Board of Overseers of the Bar. That I have done though without any reply as yet.

Since I assume that someone in the legislature should be concerned with the issues I have described, it appeared to me that with its lofty title your commission might be interested,- or maybe not. I must admit that the issues I have described arose about 15 years ago and don't seem to be specifically addressed in any of the statutes you sent me, or perhaps nowhere else.

May I make several suggestions? My article describes certain situations that should concern someone in state government. I would

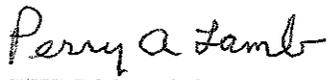
appreciate it if your commission would first find some legal authority to confirm or disprove my contentions. I believe they are accurate since I am reasonably competent in local roads issues and have taken care in writing my article as well as including my reasons for reaching conclusions therein.

If you find my contentions are accurate and someone has successfully misinterpreted wording in a statute for over a 15-year period, or if a statute has been passed by the legislature completely devoid of due process provisions, there should be concern by some office in state government.

I note that you sent a copy of my letter and article to the Maine Municipal Association. That might be a good place for you to start since MMA is well established as an authority on town road issues.

Thank you for your prompt reply to my original letter.

Sincerely yours,


PERRY A. LAMB



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

August 22, 2007

Perry A. Lamb
890 Mere Point Road
Brunswick, ME 04011

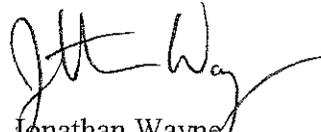
Dear Mr. Lamb:

Thank you for your letter of August 10, 2007 and attached article. This is to request more information so that I can determine whether there are any allegations in your letter which should be considered by the Maine Commission on Governmental Ethics and Election Practices.

Your letter refers to "relationships between non-lawyers and legislative committees which may exceed normally established boundaries." The Ethics Commission has jurisdiction to investigate violations of conflicts of interest, undue influence, and abuses of position as defined in 1 M.R.S.A. §1014 (attached). If you believe a member of the Maine Legislature has violated this provision, please provide more specific information.

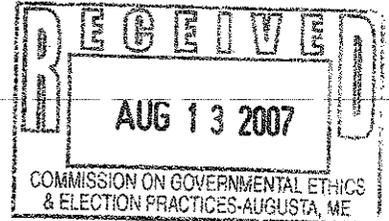
The Maine Ethics Commission also administers the lobbyist disclosure system, which includes lobbyist registration and monthly and annual reporting as described in 3 M.R.S.A. § 313- 317. It also may refer violations of § 318 to the State Attorney General for investigation. If you believe that lobbyists for the Maine Municipal Association have violated these provisions, please provide more specific information. Thank you.

Sincerely,


Jonathan Wayne
Executive Director

cc: Bill Livengood, Maine Municipal Association

890 Mere Point Road
Brunswick, Maine 04011



August 10, 2007

Director
Commission on Governmental Ethics
135 State House Station
Augusta, Maine 04333-0135

Dear Sir,

Attached is a copy of my article entitled "SEVERAL INTERPRETATIVE AND CONSTRUCTION PROBLEMS WITH ONE OF MAINE'S TOWN ROAD CLOSING STATUTES."

This article describes possible unethical relationships by some lawyers with their clients, the general public, other members of the legal profession, the courts and other agencies of this State. It also describes certain possible relationships between non-lawyers and legislative committees which may exceed normally established boundaries. It is for these reasons that this article is being sent separately to both the Board of Overseers of the Bar and the Commission on Governmental Ethics. I would hope that these two groups would work together whenever possible.

PART ONE of this article describes an obvious misinterpretation of Title 23 M.R.S.A. Section 3028's easement clause. This allows towns to retain public easements after Section 3028 abandonments without any consideration of damage payments to affected landowners. The correct reading of Section 3028's easement clause specifies the following procedure for an easement to be acquired during a statutory abandonment. It reads:

"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 at all times be 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."

As described in PART ONE of my article, someone, possibly associated with the Maine Municipal Association, modified this clause by eliminating the underlined second half and eliminating reference to the Section 3026 requirement in the first half. I mention MMA because of its close involvement with the creation and application of Section 3028 and its amendments since 1976. The net effect of these modifications would (and have) caused full public easements to be retained immediately after Section 3028

abandonments without any need for consideration of damages payments or any reference to the recreational easement limitation.

This interpretation has been accepted as valid by some attorneys and courts in litigation dealing with Section 3028 easement issues for at least the past 15 years. There are several reasons for this unusual degree of acceptance. This modification has been included in all versions of Maine Municipal Association's Municipal Roads Manual since 1992 which is generally accepted as the authority regarding municipal road laws. And during the past 15 years, requests to Maine governors or the Maine Department of Transportation for information regarding Section 3028's easement treatment are usually answered by sending copies of pertinent pages of MMA's Municipal Roads Manual to enquirers. This interpretation has also been used in annual road law seminars sponsored by the Maine State Bar Association.

It would be difficult to determine the number of landowners affected by this misinterpretation. Completed court actions can be determined by Shepardizing Section 3028, however, no such luck if actions were not completed. There are also an unknown number of instances where landowners asked town officials and were shown MMA's Municipal Roads Manual. It would take considerable research to determine the number of roads now classified as statutorily abandoned in error because of this misinterpretation. Such action, however, will be necessary.

PART TWO of this article describes procedural flaws created in the 1991 amendment to Section 3028 which allow towns to effectively have town roads abandoned without following required due process constitutional procedures. These flaws are described on pages 9, 10, and 11 of my article.

At first glance it might be assumed that the creation of this flawed amendment was the sole problem of the legislature. A further review, however, suggests that the Maine Municipal Association plays an important role in the creation and operation of town road statutes and for this reason it is essential that this closeness be closely examined to determine whether MMA has exceeded its legal boundaries as a lobbying agent. Or perhaps, whether the legislature has been lax in recognizing these boundaries.

Consider the reasons for MMA's existence. For example, in 1991, the Maine Municipal Association filed for and was granted to participate as an Amicus Curiae in my Law Court appeal against Franklin County and the Town of New Sharon. MMA's Motion to File contained a statement justifying this request. This very persuasive statement was obviously intended to impress the Law Court with MMA's close association with the creation and operation of Section 3028. Pertinent parts read as follows:

4. The MMA provides legal services to its members. Included in this service are seminars and publications addressing a municipality's use of 23 MRSA §3028, the statute which is the subject of this appeal.

5. The MMA, on behalf of its members, proposes and tracks legislation and in fact drafted legislation in the first regular session of the 115th Legislature which amended 23 MRSA §3028. (Author's note: This amendment changed the test period from 1946 to 1976 to any continuous 30 year period which made it more difficult for a landowner to prevail in a Section 3028 legal action.)

11. The MMA has extensive knowledge and expertise on- road related legal issues, and has participated in the development of 23 MRSA §3028.

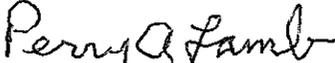
Issues of MMA's Municipal Roads Manual since 1992 contain the following statement:

"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."

This achievement may be comforting to MMA and most towns but has caused severe hardships to landowners who have been and will continue to be affected by this "informal" application of Section 3028's 1991 amendment as long as it is in existence.

I conclude this letter with the hope that the issues discussed in my article are important enough to receive maximum attention from all those who have had an interest in or have been part of the problems described therein . I have no way of knowing the extent to which simple or careless error, incompetence, or ethics have been involved in these issues. That is for others to decide.

Sincerely yours,


PERRY A. LAMB

1 ENCL: Easement article

**SEVERAL INTERPRETATIVE AND CONSTRUCTION PROBLEMS
WITH ONE OF MAINE'S TOWN ROAD CLOSING STATUTES**

BY: PERRY A. LAMB

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SEVERAL INTERPRETATIVE AND CONSTRUCTION PROBLEMS WITH ONE OF MAINE'S TOWN ROAD CLOSING STATUTES

By: Perry A. Lamb*

As with the introduction of any innovative type of legislation, some interpretive concerns are likely to develop. Such is the case with Title 23 M.R.S.A. Section 3028 which became law in 1976. This statute was developed to increase the town road closing capabilities of those already provided by Section 3026's town meeting discontinuance procedures as well as common law abandonments.

Some of the circumstances described in this article have been occurring over the past 15 years. For this reason I ask that readers excuse the slightly tedious manner in which I have written this article.

This article consists of three parts:

PART ONE is concerned with the question of what happens to a town road after it has been abandoned pursuant to Section 3028. The most widely accepted current opinion is that a public easement is retained immediately after a Section 3028 court decision is made. After extensive evaluation, it is my opinion that this is not the case.

PART TWO of this article is concerned with due process problems in the wording of the 1991 amendment to Section 3028.

PART THREE of this article addresses possible reasons as to how and why these problems of interpretation came about as well as some suggestions for resolving these problems.

A Review Of Pertinent Road Closing Procedures

Prior to 1976 there were two methods of closing a town road. The first was by common law abandonment and the second by a town meeting vote. Each of these has been in existence since Maine became a state.

Common law abandonment is based on the presumption that if a road had not been used for a period of time, it could be abandoned and no longer publicly maintained. The underlying abandoned right or way would revert to adjoining owners and no damages would need to be offered or paid to these owners. In order to securely establish that a town road had been abandoned, a Superior Court ruling to that effect would need to be made.

A town meeting discontinuance. Title 23 M.R.S.A. Section 3026 provides a statutory means for a town to discontinue a town road. This method of discontinuing a town road required a series of procedural steps before and during a town meeting including a determination of the amount of damages to be offered. It also required a decision as to whether a public easement would be retained by the town or reverted to adjacent landowners.

Creation Of Title 23 M.R.S.A. Section 2068 In 1967

Inasmuch as the Legislative Record did not include any extended discussions regarding the creation of the following statute I believe it reasonable to assume that it was created to cope with a potential problem of new purchasers buying property on old roads and demanding repairs.

In 1967 the Maine legislature created Title 23 M.R.S.A. Section 2068 which described procedures for town selectmen to cease public maintenance on any town roads deemed to be of limited use and value to the traveling public. This statute was also referred to as dealing with "Limited User Highways". There were sparse procedural requirements, public easements were retained, and no damages were offered or paid.

Section 2068 was declared unconstitutional in JORDAN V. TOWN OF CANTON, Me. 265 A.2d 96 (1970) and was declared unconstitutional in 1970. Pertinent findings by the Law Court included the following:

Page 98. "The statute is designed to permit a governmental entity to avoid the expense of maintaining and keeping certain designated roads open for travel and free from dangerous defects. Its responsibility for accident caused by such defects in a road so designated is removed. All this is accomplished without technical discontinuance of the public way and without terminating the public easement therein. No provision is made for compensation to abutting owners for the destruction of property rights."

Page 99. "The fact that a "limited-user highway" continues to have a legal status as a "public way" over which there continues to be a public easement of travel is meaningless if there is no longer any public responsibility for maintenance and repair. Without maintenance or repair, it is only a question of time before a public road will become impassable or unsafe for travel. The rigors of Maine weather, the action of frost and the erosion from rain and melting snow will speed the process of disintegration. The ability to use the road for vehicular travel and thus the abutter's easement of access to and over the road to the public road system will inevitably be destroyed.

In its findings the JORDAN Law Court stated that: "Our research and that of counsel fail to disclose the existence of a statute in any other jurisdiction similar to Section 2068." I have no knowledge regarding Maine Municipal Association's role in the creation of this statute except to note that an MMA attorney co-signed the Town of Canton's Law Court Brief in the JORDAN appeal. One should keep the JORDAN decision in mind while reading the remainder of this article.

PART ONE

What Happens To A Maine Town Road After It Has Been Abandoned?

In 1976, Section 3028 was created by the Maine Legislature. It specified that if a town road had not been maintained with public funds for a previous 30-year period, this statute could be used to cause such a road to be declared abandoned by a Superior Court action. This statute is somewhat similar to common law abandonment except that it is based on non-public maintenance whereas common law abandonment is based on non-use. Section 3028 contains an easement clause which specifies procedures regarding the future status of roadways abandoned by this statute.

It is this easement retention clause that is the issue addressed in this PART ONE.

Creation Of Section 3028's Easement Retention Clause

When the proposed Section 3028 was first introduced in the 107th Legislature in 1976 as part of Legislative Document No. 2108, it contained the following easement clause:

"A discontinuance of a town way by abandonment shall relegate the status of the way to that of a public easement for access to abutting property."

It appears that the majority vote on this amendment hesitated to abandon a town road and immediately retain a full public easement. Or perhaps the legislative committee realized that this amendment would require some type of damages consideration. Nevertheless, for whatever reasons, an amendment was then adopted to delete the originally proposed easement clause and replace it with the following:

"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.

For reasons best known to the legislative committees another amendment was added that resulted in the finally adopted easement clause. For purposes of clarity in this article, this clause is separated into its two pertinent parts, which read:

“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 at all times be 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.”

Two Opposing Interpretations Of Section 3028’s Easement Clause

Maine Municipal Association’s interpretation of Section 3028’s easement clause reads as follows:

“Status of a Road After Abandonment. 23 M.R.S.A. § 3028 provides that when a road is abandoned, it is relegated to the same status as it would have had following discontinuance under Section 3026. 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.”

This interpretation of Section 3028’s easement clause has been described in Maine Municipal Association’s Municipal Roads Manual in its 1989, 1992, and 1999 editions. The first test of this interpretation is to examine the significance of the September 3, 1965 date and its relationships with Sections 3026 and 3028.

The September 3, 1965 Date

A legislative amendment to Section 3026 made effective on September 3, 1965 reversed defaults for determining what would happen if a town meeting discontinuance order failed to specify the status of a discontinued road. In those instances before this date, failure to so specify would cause a default ruling specifying an easement reversion to adjoining landowners. After this date, failure to so specify would cause a default ruling specifying that a public easement be retained by the town.

The subject matter of this amendment was concerned with defaults and not voting results. MMA’s interpretations used the default settings without noting that each default setting was accompanied by wording that allowed voting in opposition to the default choice if so desired. In both the pre-1965 and the post-1965 versions of Section 3026, the statute included the words “and unless

otherwise stated in the order". Thus, during either time period, town voters had the option to accept either the default version at the time or its alternative. MMA's contention that retention of an easement based on the 1965 date could be determined prior to the conclusion of a Section 3026 discontinuation action is obviously in error.

MMA's Rewording Of Section 3028's Easement Clause

Although Section 3028's easement clause has two parts, MMA appears to have disregarded any reference to the second part which limits any easement obtained after a Section 3028 abandonment to one for recreational uses only.

One can only guess that MMA's reason for this deletion might have been its often-repeated opinion that the second part of the easement clause is curious and unclear. This reads, in pertinent part:

"There is a curious provision in 23 M.R.S.A. § 3028 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."

There are no valid reasons for MMA to have modified the wording and intent of the easement clause just because part of it was confusing. The complete wording of the easement clause remains the same as it was in 1976 when Section 3028 was created and this wording controls any easement creation procedures following a Section 3028 abandonment.

MMA's Interpretation Of The Easement Clause Avoids Use Of The Section 3026 Town Meeting Road Discontinuance Process.

The reason that the Section 3026 town meeting road discontinuance process is included in Section 3028's easement clause was to provide a means for determining damages to be paid to abutting landowners for the taking of an easement. See JORDAN at beginning of this article.

MMA's errors were threefold. It misinterpreted the significance of the September 3, 1965 date. It ignored the recreational easement limitation. It also deleted the mechanism for determining damages for taking of an easement by avoiding the Section 3026 process.

Ignoring these three problems provided MMA with the opportunity to improperly claim for over 20 years that a public easement was automatically retained after a Section 3028 abandonment.

My Interpretation. Oops! I Mean The Legislature's Interpretation.

Actually, the Legislature's opinion is expressed in the single two-part sentence in Section 3028's easement clause which specifies requirements for acquiring a public easement after a Section 3028 road abandonment. It reads:

"A way that has been abandoned under this section is relegated to the same status as it would have had after a discontinuance pursuant to Section 3026, except that this status is 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 further simplified interpretation of this easement clause would read as follows:

A town or its inhabitants would first have a choice as to whether they wanted to initiate a Section 3026 town meeting to consider a possible easement acquisition. If the town decided to continue, procedures set forth in Section 3026 would be followed to determine whether town voters wanted to consider acquiring an easement that would be limited to recreational uses and to determine the amount of damages to be offered to affected abutting landowners for the taking of the easement. Town voters would then have the opportunity to vote for or against the easement acquisition.

Now that I've explained how a town acquires an easement after a Section 3028 abandonment, I would add a few more comments about this process. To the best of my knowledge, I don't believe that anyone has used this process as described in the statute. For one thing, it would result in some very unhappy landowners who would not only lose town maintenance on the road but would no longer be able to use the road for farming or forestry purposes because of the recreational easement limitation. From the town's standpoint, the matter of how to determine damages might be more than some voters would want to consider.

An explanation for this situation might be that the legislature did not favor using Section 3028 for public easement acquisition purposes but needed more votes to get the basic statute approved. After all, Section 3028 was explained as a statutory version of common law abandonment which did not retain easements.

It might be that MMA was aware of this inadequacy and decided to just start out from scratch and make up its own easement clause.

PART TWO

Due Process Problems With The 1991 Amendment To Section 3028

In 1976, Title 23 M.R.S.A. Section 3028 was created by the Maine Legislature to provide means for a town or county road not maintained with public funds for a previous 30-year period to be declared abandoned by a Superior Court action. This statute is somewhat similar to common law abandonment except that it is based on non-public maintenance instead of non-use for a period of time.

Although this article is concerned with the 1991 amendment to this statute, a brief summary of the pertinent part of the original statute follows for introductory purposes. There were three sentences in the original statute dealing with the question of which parties were responsible for initiating court action. These read:

1. "Presumption of Abandonment. It is prima facie evidence that a town or county way 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 has been discontinued by abandonment."

This statement specifies what is needed to be proven in order to cause Section 3028 abandonments. It should be noted, however, that that it contains no directions as to the manner or time period in which the presumption of abandonment is created.

The next pertinent sentence explained how this presumption could be rebutted. It reads:

2. "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."

This sentence suggests that whoever is confronted with a presumption of abandonment has an option to rebut the presumption. One should note that the specification as to where, how, and when this rebuttal is to be made is again not mentioned in the statute.

The third and final pertinent sentence in the statute describes a means for someone affected by a presumption of abandonment to seek redress. It reads:

3. "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."

One should notice that the word “finally” included in the above text almost guaranteed contention as to what it meant. There were two opposing interpretations as to when the presumption of abandonment would become effective. One interpretation was that it would become effective as soon as it was created. My interpretation was that a presumption would not become effective until a court decision so ruled. Pointless use of the word “finally” has caused arguments over what this word meant for some time.

The 1991 amendment to Section 3028 was created to resolve this problem as to when the status of a road would be changed in a very simple way. It merely ordained that a road’s status would be changed as soon as a town created a presumption of abandonment.

The 1991 Amendment To Section 3028

It may be that the 1991 amendment was intended to clarify at least some of the confusion resulting from the wording in the original statute. It seems, however, that the new wording was more involved with creating due process problems than clarification. The text of Section 2 is the primary subject of this article. It reads:

“Section 2. Status of town way or public easement. The determination of the municipal officers regarding the status of a town way or public easement is binding on all persons until a final determination of that status has been made by a court, unless otherwise ordered by a court during the pendency of litigation to determine the status.”

One should notice that the word “final” included in the above text almost guarantees continued contention as to what it means. There is also one part of the wording of Section 2 deserving special comment. Use of the words “or public easement” might be interpreted as meaning that Section 2 could be used to create a public easement by use of its determination statement. This would not be possible since the subject of easement retention and its procedures and limitations are already specified in the main text of Section 3028.

One sentence in MMA’s 1999 Municipal Roads Manual (page 17) gives a very clear explanation of its interpretation of this amendment. It reads:

“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.”

This description may be comforting to MMA and most towns but has caused severe hardships to landowners who have been and will continue to be affected by this “informal” application of Section 3028 and its 1991 amendment.

Most of the remainder of this article discusses ramifications of this statement since the provisions of the 1991 amendment to Section 3028 certainly warrant discussion of the obvious disregard of constitutionality problems for towns' taking advantage of this "informal" process.

Due Process Considerations

There are three principal components of due process: notice, hearing, and an impartial tribunal. "Due process of law requires notice and opportunity for hearing and judgment of some authorized tribunal." *Inhabitants of York Harbor Village Corp. v. Libby*, 126 Me. 537 (1928). Also, "Notice and opportunity for hearing are of essence of due process of law." See *Warren v. Norwood*, 138 Me. 180, *Jordan v. Gaines*, 136 Me. 291.

Notice. Notice is an essential part of due process. However, the 1991 amendment to Section 3028 makes no reference to any type of notice regarding the municipal officers' action to create a determination of status statement.

Hearing. "It is a violation of due process for a judgment to be binding on a litigant who was not a party or privy and therefore has never had an opportunity to be heard." 16A Am Jur 2d Section 839. The 1991 amendment makes no reference to any type of hearing for the period starting with the creation of a determination statement and ending just moments before the final court action ruling.

The following case is directly on point. "No later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of the procedural due process has occurred. . . . The court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." *Fuentes v. Shevin*, 407 U.S. 82. The deprivation caused by a town's Section 2 presumption of abandonment starts at least months before an official hearing can be heard in a Superior Court lasts until the court order is issued and finalized.

Impartial Tribunal. The first part of Section 2 of the 1991 amendment includes a statement to the effect that: "The determination of the municipal officers regarding the status of a town way or public easement is binding on all persons" becomes operational immediately after town officials create their determination statement. From that moment on, subject road's status is changed from a regular town road to whatever status the determination statement specifies which is usually an unmaintained public easement.

Temporary Takings

In the event some readers might not be aware of the significance of temporary takings, this subject is briefly described as follows:

It is not possible to determine the extent of the taking period in advance since the issue is in limbo until the matter is finally decided by court action. As soon as a determination is made regarding the proposed new status of the town way or public easement, that status is immediately effective and will remain so until a final determination of that status is determined by a court. At bare minimum this period would likely be at least six months or more. The following instances of case law make it clear that deprivation is a taking regardless of how long it lasts:

"The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." *Fuentes v. Shevin*, 407 U.S., at 86. Quoted in *In Re The Oronoka*, 393 F.Supp. 1311 (1975). (A Maine case)

"Our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Connecticut v. Doehr*, 501 U.S.1 (1990)

"It is of no consequence for due process that deprivation of an interest within the protection of the Fourteenth Amendment is temporary and not final." *Gunter v. Merchants Warren National Bank et al*, 360 F.Supp 1085 (1973).

Burden Of Proof

The following instances of case law clearly show that the burden of proof is on the party desiring to change the status of a road.

Central Pacific Railroad v. Alameda County, 284 U.S. Reports 468 (1932): "The burden of sustaining the affirmative of this proposition plainly rests upon the party who asserts it, since proof of the establishment of a road raises a presumption of its continuance. That is to say, the respondents having shown the establishment by the county of a road through Niles Canyon in 1859, the continuing identity of that road must be presumed until overcome by proof to the contrary, the burden of which rests upon the petitioners. *Barnes v. Robertson*, 156 Iowa 730, 733; 137 N. W. 1018; *Beckwith v. Whalen*, 65 N. Y. 322, 332; *Eklon v. Chelsea*, 223 Mass. 213, 216; 111 N. E. 866;

***Taeger v. Riepe*, 90 Iowa 484, 487; 57 N. W. 1125; *Oyster Bay v. Stehli*, 169 App. Div. (N. Y.) 257, 262; 154 N. Y. S. 849.”**

Note: It is interesting to note that this appeal involved the first appearance by Earl Warren, then District Attorney for Alameda County, Calif. before the U.S. Supreme Court in 1932.

Davenhall v. Cameron, 366 A.2d 499 (NH 1976). Once a highway is established, it is presumed to exist until discontinued, and discontinuance is not favored in the law. Discontinuance is a fact that must be proved and the burden is upon the party who asserts discontinuance to prove it by clear and satisfactory evidence.

It should also be noted that Section 3028 is considered a statutory version of common law abandonment wherein the burden of action is on the town. Likewise, Section 3026's town meeting discontinuances are also required to be initiated by the town. To do otherwise would be a disservice to landowners.

The following case law suggests that there are probably many more road cases that may come to life, possibly because of this article. “In judging whether a statute satisfies constitutional requirements, we look to the possible and not merely the probable consequences which may flow there from. It is not what has been done, or ordinarily would be done, under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. *Bennett v. Davis* (1897) 90 Me. 102, 105. *JORDAN* contains a similar finding.

The sparse wording of the 1991 amendment allows for a wide variety of interpretations and techniques. It fails to pass just about any basic due process test involving notices, hearings, impartial tribunals, or who had the burden to proceed with appropriate action.. Only some of the ways that landowners are affected by this statute are known to date due to the fact that landowners do not always press concerns regarding road problems. For example, town selectmen could adopt a determination of abandonment at any selectmen's meeting without any notice or anyone in attendance or any need to tell anyone that the document will continue to be effective until such time it suits their interests. Or the town can take a different stance and do nothing after adopting a determination of abandonment until a landowner gives up and/or files the required court action, which is something he/she shouldn't have had to do because of the lines of authority referred to above.

PART THREE

My Relationships With MMA And Section 3028

It might help to explain why I am writing this article if I provide a few memories of my early contacts with MMA and Section 3028. In 1976 when a legislative committee was considering the adoption of an LD which eventually

became 23 M.R.S.A. Section 3028. I spoke against the proposal and an MMA representative spoke in favor of it.

In 1989, an amendment to Section 3028 changed the lack of public maintenance test period from a specific period between 1946 to 1976 to any 30-year period. And in 1991, another amendment was added which simplified the procedure for a town to process a presumption of abandonment.

Between 1987 and 1991 I had been involved in a New Sharon road abandonment case and was having reasonable success in questioning the original wording of Section 3028 relating to these two amendments. Some time later before his untimely death, Maine Municipal Association's Joe Wathen told me that he had resolved these problems by what he referred to as the Perry Lamb Amendments No. 1 and 2. Each of these amendments negated certain flaws I had raised in my road litigation. Acting pro se at the time, it took almost a decade thereafter for me to realize that the full significance of these amendments was that they both made it easier for a town to prevail in Section 3028 litigation.

MMA also participated as a Friend of the Court (and town) in my 1991 appeal to the Law Court. I am not aware of any other instances where MMA has joined other Section 3028 appeals in this manner.

JORDAN Lasted Six Years

As described in PART ONE of this article, the 1970 JORDAN decision declared a statute which permitted a town to avoid expense of maintaining and keeping certain designated roads open for travel free from dangerous defects without terminating public easement therein and without compensating abutting owners was unconstitutional.

With the passage of time and with the creation of Section 3028 in 1976 and its 1991 amendment, however, it again became possible for a town road to be abandoned and a public easement retained without compensation. This was possible since MMA's flawed interpretation of Section 3028's easement retention clause allowed retention of a public easement after a Section 3028 abandonments and the 1991 amendment to Section 3028's lax due-process procedures allowed towns to usually prevail in presumption of abandonment efforts.

So! What Happens Next?

Not much, until some preliminaries are taken care of first. I have identified two problems which need clarification.

PART ONE of this article described MMA's misinterpretation of Section 3028's easement clause. In order for the significance of this action to be

evaluated it is essential that MMA provides an explanation as to how and why this misinterpretation came about.

PART TWO of this article described various due process procedural shortcomings existing in the wording of the 1991 amendment to Section 3028. The reasons why this was possible needs to be explained by someone in the legislative system.

At first glance it might be possible to assume that MMA was completely responsible for the fact that its misinterpretation of the easement clause has survived for years, and that the legislative committee was solely responsible for its creation of the 1991 amendment.

It is more likely, however, that there have been more complex reasons involved. It may be that MMA has grown sufficiently in stature to consider itself part of state government instead of just being a lobbying organization, and it might also be that members of the legislature accepted MMA interpretations without applying normal safeguards when dealing with advice and assistance from a lobbying organization.

An additional complication in this matter is that it appears that the MMA interpretation regarding easement retention has been accepted as valid by what appears to be a majority of attorneys, legislators, lobbyists, state and town officials, and jurists between at least 1989 and the present date. I would hope that input from these groups regarding the contents of this article would be forthcoming eventually.

During the past seven years I have made numerous unsuccessful attempts to communicate with various segments of the legal and legislative communities to discuss Section 3028 and its problems, but to no avail. It may be that this same treatment will be given this article, however, I intend to do my best to see that the issues described in this article receive appropriate attention. There may or may not be any worms in this can when it is opened but it does need to be opened.

At this point I would like to add few words about the plight of landowners who have mislead by all layers of government about the status of roads running through their properties during past years.

Excluding Court Actions, How Many Landowners Have Been Misinformed About Their Town Road Property Rights During At Least The Past 15 Years?

One of the reasons for writing this article has been to determine how many landowners have been misinformed about their town road property rights during at least the past 15 years. For the most part rural landowners are not very informed or interested about the legal aspects of town road management and are

willing to live with less than factual explanations about the status of their road. For those landowners who have made some effort, short of court actions, to find out about the status of a road, the replies received are often based on the flaws described in PARTS ONE and TWO of this article; for example:

If a landowner asks about the easement status of the abandoned road, she will likely be told that a public easement now exists on the closed road. If questioned further, she may be shown a copy of MMA's Municipal Roads Manual's interpretation regarding easement retentions after statutory abandonments.

If a landowner questions why he was not aware that his road had been abandoned, he may be shown a copy of the 1991 amendment to 23 M.R.S.A. Section 3028 which does not require formal notice to anyone before adopting a determination of status of a road.

If a landowner decided to petition county commissioners to hold a Section 3652 road repair petition hearing to require a town to make repairs to a town road, Section 3028's 1991 amendment would allow town officials to submit a determination of abandonment which would block the hearing from continuing. And the hearing would remain blocked until someone went to court. Since the statute did not specify who had the burden of initiating the court action, it could be some time before the landowner could or would bother to reapply to the county commissioners for another road repair hearing.

Any investigation into the issues described in this article should include some means of specifically identifying and informing landowners who have been adversely misled by representations described herein and informing them more accurately of their road rights.

Is There Any Significance To The Fact That Certain Superior Court Findings And Associated Law Court Decisions Have Adopted Maine Municipal Association's Interpretation Of 23 M.R.S.A. Section 3028's Easement Clause?

I have included a discussion of this question in this article since I had at one time been confronted with a suggestion that even if a ruling by an appellate Court was in error, it was forever hereafter carved in granite. I doubt it.

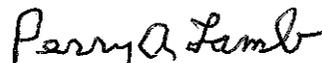
When Courts are confronted with some feature of a statute capable of having more than one interpretation, the Court may decide to include one particular interpretation in its findings. If this finding is also adopted by an appellate Court, there are several doctrines specifying that this interpretation will become the equivalent of case law. These are the Doctrines of Stares Decisis and Res Judicata, both of which are complicated enough to be beyond the scope of this article.

In order for any of the instances described in this article to be subject to either of these doctrines there would need to be some indication on record that the Courts explained why one version of Section 3028's easement clause was selected over another. It is obvious that this was not done since Courts simply used MMA's flawed interpretation without actually reviewing the actual Section 3028 easement clause. If the Courts had actually reviewed this easement clause they would have realized that this statute required a Section 3026 town meeting road discontinuance procedure that would have required damages consideration for acquisition of a public easement limited to recreational uses.

Why Don't I Go To Court To Resolve The Problems Raised In This Article?

No thanks! The problems I have described in this article have been caused by flawed relationships between various branches of state government, segments of the legal community, and the Maine Municipal Association. Landowners have already suffered from these problems and it is past time for those who have caused these problems to solve them.

I conclude this article with the hope that the issues discussed in this article are important enough to receive maximum attention from all those who have had an interest in or have been part of the problems described. I have no way of knowing the extent to which simple or careless error, incompetence, or ethics have been involved in this matter. That is for others to decide.


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