

# 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.
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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.<sup>1</sup> We recommend that the discontinuance follow six basic steps:

1. The municipal officers determine whose property abuts the road in question and the amount of damages that should be paid to those abutters. Damages must be paid to abutting property owners because of the reduction in the fair market value of their property as a result of the loss of a municipally maintained road. (In some instances, discontinuing all public rights of access to a road might increase the value of the abutting land, but usually there is a reduction in its value.)

Damages for discontinuance are calculated pursuant to a statutory formula.<sup>2</sup> The municipal officers should obtain the services of an appraiser or contact MaineDOT Property Office Division for assistance in calculating damages, at telephone (207) 624-3460.

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.

To assist in the calculation of damages, the municipal officers should contact MaineDOT Property Division.

2. The municipal officers must give best practicable notice of the proposed discontinuance to all abutting property owners and to the planning board. “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.<sup>3</sup> 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 *sent*, 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, and the date, time and place of the meeting at which the municipal officers will discuss the matter. Appendix D contains a sample notice.
3. The municipal officers meet to discuss the proposed discontinuance at a public meeting. If they determine to proceed with the discontinuance, they should order the discontinuance.

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.) 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 owners best practicable notice of this action without delay.” The order of discontinuance should be signed at this time.

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. Appendix D contains samples of each of these documents.
5. The next step is for the legislative body (either the voters 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. Until this critical step occurs, the discontinuance is incomplete; if the legislative body rejects the order, the discontinuance fails. Appendix D 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 D 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.

6. 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 should describe the road and state the municipality’s final action with respect to the road. This certificate must be recorded for the discontinuance to be effective against owners of record or abutting landowners who have not received notice.<sup>4</sup> Appendix D contains a sample certificate.

**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.<sup>5</sup> 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.<sup>6</sup>

**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<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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 D 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.<sup>10</sup> 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). Similarly, the State’s public utility laws state that unless the order of discontinuance of a public way provides otherwise, the public easement automatically retained under State law<sup>11</sup> “includes an easement for public utility facilities.”<sup>12</sup>

**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.<sup>13</sup>

If a discontinuance is found to be defective, the municipality still may be able to treat the road as abandoned.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

**Litigating the Presumption of Abandonment.** Maine law<sup>19</sup> creates a *rebuttable* presumption of abandonment. The municipality bears the initial burden of establishing the presumption of abandonment.<sup>20</sup> 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.<sup>21</sup> Any person affected by the presumption of abandonment may seek declaratory relief in Superior Court.<sup>22</sup> 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.<sup>23</sup>
- 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.<sup>24</sup>
- 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.<sup>25</sup>
- 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.<sup>26</sup>

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.<sup>27</sup>

**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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32 33</sup>

**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.<sup>34</sup> 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.<sup>35</sup> 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.

## **Vacation of Paper Streets**

Paper streets have been a significant source of title problems over the years because of the uncertainty associated with public and private rights of access. This is because at common law, once a lot is sold with reference to a recorded subdivision plan, there is an incipient dedication of the ways shown on that plan, and that incipient dedication is of infinite duration.<sup>36</sup> The Legislature acted in 1903 to provide for termination of the public and private rights through the “vacation” process.<sup>37</sup> The Law Court has observed that vacation is the exclusive process for the termination of the public right of incipient dedication once a lot has been sold with reference to the subdivision plan.<sup>38</sup>

However, because vacation of a paper street is an expensive, time-consuming, case-by-case process, in 1987, the Legislature amended the State road and title statutes in an attempt to resolve the title problems associated with ancient paper streets.<sup>39</sup> As explained below, these amendments provide for a deemed vacation of older subdivision ways and, prospectively, provide for the termination of unaccepted dedications of public rights and of unused private rights in subdivision ways.

**Methods of Vacation.** Paper streets can be vacated by formal action of the municipal officers, can be deemed vacated and can be vacated by the passage of time.

**Formal Vacation.** This process is outlined in State law.<sup>40</sup> The process can be commenced by the municipal officers directly, or by petition of the abutters or other persons claiming an interest in the way. This procedure consists of several steps.

1. The municipal officers must give notice of the proposed vacation to the planning board and must give best practicable notice to all owners of record *in the subdivision* (not just to abutters on the paper street) and to their mortgagees of record. The

substance of the notice is set out in the law.<sup>41</sup> Appendix F includes a Sample Notice of Proposed Vacation.

2. The municipal officers then file an order of vacation with the town clerk. The municipal officers may determine that damages should be paid to affected landowners. These damages are paid by the petitioners if the vacation process was begun by petition. The legislative body of the municipality does not vote on the matter. Appendix F includes a Sample Order of Vacation.
3. The vacation order is then recorded in the registry of deeds.<sup>42</sup> Any person seeking to contest the vacation order or assert the right to use the way must, within one year of the recording date, file in the registry a statement specifying the basis of the claim. Then, within 180 days after this statement is recorded, the claimant must bring a civil action in Superior Court.

Once a paper street has been vacated in this manner, the municipality ceases to have the right to accept public rights in the street, and title to the fee simple interest passes to the abutters to the centerline, unless the original grantor reserved title.<sup>43</sup> However, subdivision lot owners often have private rights in paper streets.<sup>44</sup> Under State law,<sup>45</sup> the recording of a vacation order starts the time running within which a notice to preserve private rights must be recorded and a lawsuit filed in order to preserve private rights. Thus, the act of vacation does not itself terminate private rights in a right of way, but commences the deadlines for the taking of actions to preserve those rights.

**Deemed Vacation.** With regard to subdivisions recorded before September 29, 1987, State law provides that paper streets in such subdivisions shall be deemed vacated unless constructed or used and accepted by the municipality as a public way *by the later of* September 29, 1997 or fifteen years after the subdivision plan was recorded.<sup>46</sup> The municipal officers may extend this time period by up to forty years (an initial twenty-year period and a subsequent twenty-year period).<sup>47</sup> However, if the municipal officers did not extend the right to accept the paper street before this deadline (before September 29, 1997 for subdivisions recorded before September 29, 1982, and fifteen years after recording for subdivisions recorded between September 29, 1982 and September 29, 1987), then the paper street, and therefore the public's right to accept it, is deemed vacated.

As to the private rights in the streets that are "deemed vacated," State law provides as follows: For subdivisions recorded before September 29, 1987, where a way is deemed vacated, a person claiming to own some or all of a paper street that has been deemed vacated must record a notice in the registry of deeds that complies with statutory requirements,<sup>48</sup> along with an alphabetical listing of the names of the current record owners of all lots in the appropriate subdivision plan and their mortgagees of record. That person must mail a copy of the notice to these parties. A person receiving such a notice

who wishes to preserve a private right over the way must (1) record a statement under oath of the claimed interest within one year after recording of the notice, and (2) file suit within 180 days after recording of the statement. Thus, State law provides a method by which persons claiming to own ways that are deemed vacated can assert their rights and extinguish the claims of other people, including claims of ownership of a private way. See the case of *Hartwell v. Stanley* for a detailed description of how the deemed vacation statute affects private rights-of-way.<sup>49</sup>

Any disputes about private rights in vacated paper streets should be handled by the private parties. Sample language for vacation notices and vacation orders is included in Appendix F.

**Passage of Time.** Certain paper streets may be vacated by the passage of time even if the municipal officers take no action. For subdivision plans recorded on or after September 29, 1987, State law explains that once a subdivision plan is recorded, both public and private rights in paper streets are acquired.<sup>50</sup> To have full use of the paper street as a *public* way, the paper street must be *accepted* (though not necessarily built) by the municipality within twenty years from the recording date of the plan. If the municipality does not accept the way within that time, all public rights terminate.

A person who acquires title in land shown on a subdivision plan recorded in the registry of deeds acquires a private right-of-way over the ways laid out in the plan. If a proposed, unaccepted way is not constructed within twenty years from the date of recording of the plan, and if the private rights created by the recording of the plan are not constructed and utilized as private rights within that twenty-year period, the private rights-of-way terminate.<sup>51</sup>

Upon termination of the public and private rights, title to the property passes to the abutters to the centerline, unless the developer has reserved his rights.<sup>52</sup>

State law allows the developer or the local planning board to designate shorter durations for the existence of public and private rights in paper streets.<sup>53</sup>

**Outstanding Issues.** The 1987 amendments raise several legal questions, some of which have not been clearly answered by the courts or by the Legislature.

- **Longtime buildings and fences.** Under Maine law,<sup>54</sup> a structure located on a paper street for more than twenty years may remain there lawfully. The question is whether the longtime building and fences law<sup>55</sup> effectively prevents a paper street from ever being used as a public way if a subdivision lot owner constructed a fence across a paper street and that fence stood undisturbed for more than forty years. Is a paper street a way “appropriated to public use” within the meaning of the longtime building

and fences law such that this statute governs, or does the law allowing a structure to remain on a paper street after twenty years accomplish this result?<sup>56</sup>

- **Is retention of old paper streets a revival by the municipality of long-lost rights?** In 1997, many municipalities exercised their authority under Maine law to prevent a deemed vacation of proposed unaccepted ways in order to reserve the right to accept paper streets for a twenty-year period.<sup>57</sup> However, some of these paper streets were shown on subdivision plans recorded forty or more years prior to the September 29, 1997 deadline for filing such notices. May a municipality still accept the incipient dedication made by the sale of lots with reference to a long-ago recorded plan, or did a municipality lose the right to accept an incipient dedication of a paper street by the passage of time, so that it must lay the way out and purchase it or take it by eminent domain in order to (re)acquire the right to accept it?

This issue arises from a series of Law Court cases. In an early opinion (*Bartlett v. Bangor*), the Law Court clearly stated that an incipient dedication does not lapse by mere non-use.<sup>58</sup> Furthermore, the statutory provision that creates a deemed vacation in unaccepted ways (mentioned above), coupled with the Law Court's decision in *Glidden v. Belden*, implies that a municipality still may accept these ways. However, in a line of cases after *Bartlett*, the Law Court decided that a reasonable time for acceptance of the public rights had passed such that an incipient dedication had lapsed and public rights had ceased to exist.<sup>59</sup> In those cases, the Law Court ruled that public rights in a paper street were lost because there was no action by the municipality to use or accept the road within a reasonable time; however, the Law Court refused to establish a specific test for whether a reasonable time had passed, and held that the issue of whether a reasonable time for acceptance has expired must be considered on a case-by-case basis.

The Law Court more recently addressed this issue in a case where the Superior Court had upheld the right of the Town of Boothbay to reserve its ability to accept a way that was shown on a subdivision plan recorded in 1924.<sup>60</sup> The plaintiff property owners had argued unsuccessfully to the Superior Court that the incipient dedication had lapsed due to the passage of a reasonable period of time after dedication without acceptance, and that the statute, by reviving lapsed rights, therefore effected an unconstitutional taking of property without just compensation. On appeal, the Law Court affirmed the Superior Court's decision, holding that adverse possession will cause an incipient dedication to lapse, but that "mere non-use or use that is not inconsistent with the premise that the public may later open the path will not cause the incipient dedication to expire." Thus, it distinguished the Boothbay situation, in which the paper street had not been used in a manner inconsistent with the possibility that the Town might later accept it, from the later line of cases in which the parties had in fact used the paper streets for their own purposes for a number of years. In the

Boothbay case, the Court concluded that the dedication had not lapsed when Boothbay extended its right to accept the paper street.

- **Taxation and zoning considerations.** The question of whether the property that had been subject to an incipient dedication but for which the public dedication has been deemed vacated by operation of law may be: (1) taxed by the municipality or (2) counted by the abutting property owner for zoning purposes remains unsettled. (This applies to ways shown on subdivision plans recorded on or before September 27, 1987 where the municipality has not reserved the right to accept the way. Under the deemed vacation statute, 23 M.R.S.A. § 3032, unless the municipality recorded a reservation of its right to accept some or all of a paper street in an older subdivision, and unless someone claiming through a grantor who had reserved title to the paper street had filed a notice of ownership, the owner of the lot abutting the vacated way is deemed to own to the centerline of the paper street.)

Thus, one question is after a deemed vacation of a paper street, can the abutting property owner be assessed for the value of the portion of the formerly dedicated way that the property owner now owns to the centerline by operation of law? The other question is from the opposite perspective, can the abutting property owner use the property to the centerline for determination of compliance with local zoning dimensional standards (setbacks, lot area, and percentage of lot coverage or impervious surface)?

Two considerations indicate that the answer to each of these issues probably is “no” unless there is proof that the abutting property owner indeed has title to the portion to the centerline and has taken the steps necessary to eliminate any private rights-of-way in the street.

One consideration is that unlike a formal vacation<sup>61</sup> a deemed vacation does not automatically start the clock running for the termination of private rights. Instead, a person who seeks to assert a claim to a portion of a way deemed vacated will, pursuant to the vacation statute, record a notice in the registry of deeds (apparently at any time) and within twenty days of recording the notice, mail a copy of the notice to all current owners of record of subdivision lots and their mortgagees of record.<sup>62</sup> A person who, upon receiving the notice, wishes to claim a private right-of-way in the way or portion of way deemed abandoned must record a claim in the registry within one year from the recording of the notice and must commence a lawsuit within 180 days thereafter to establish rights in the way.

The other consideration is that there are instances in which the grantor of the lot abutting a paper street may have retained the fee in the proposed way. For conveyances on or after October 3, 1973, except for those made by reference to a recorded subdivision plan, the grantor must expressly reserve title to the way. For

conveyances prior to this date, those claiming through the grantor had to have filed a notice in the registry of deeds within two years expressing the intent to reserve title to the way.<sup>63</sup> Those who intended to reserve title to paper streets (or who claim rights through such a person), but who did not expressly state this intent had until September 29, 1989 to record notice of this intent.<sup>64</sup>

Therefore, it would not be correct to assume that each property owner along a proposed, unaccepted way deemed vacated under State law owns the abutting former way to the centerline free of any encumbrances such as private rights-of-way. A grantor may have expressly reserved rights in this street or may have recorded a notice of intent to reserve an interest in the way. The municipality may have recorded an extension of the ability to accept the paper street. The way may not yet be deemed vacated; with regard to paper streets shown on subdivision plans recorded between October 28, 1984 and September 29, 1987, there has been no deemed vacation since fifteen years have not passed since the date of recording of the subdivision plan. Further, until a private property owner starts the timeline for action on private rights-of-way, all ways deemed vacated still are subject to private rights. Even then, the statutory process to terminate these private rights-of-way only affects the existence of a private right-of-way over the portion of the way in front of the property owner's lot, not over all of the way deemed vacated. Because the answer to all of these questions would require a thorough search of title for each affected subdivision lot, it probably would be better to presume that the area of a paper street deemed vacated and abutting a particular lot is neither subject to taxation by the municipality nor available to the property owner for determination of compliance with zoning standards unless there is proof that the abutter indeed owns the property free of any private right-of-way encumbrance.

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<sup>1</sup> Title 23 M.R.S.A. § 3026 outlines the process for discontinuing town ways.

<sup>2</sup> 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)).

<sup>3</sup> 23 M.R.S.A. § 3026(2).

<sup>4</sup> 23 M.R.S.A. § 3024.

<sup>5</sup> 23 M.R.S.A. § 3029 and Rule 80B, Maine Rules of Civil Procedure.

<sup>6</sup> 23 M.R.S.A. § 3029.

<sup>7</sup> Under 23 M.R.S.A. § 3004, the predecessor of § 3026.

<sup>8</sup> *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).

<sup>9</sup> 23 M.R.S.A. § 3026(1).

<sup>10</sup> 23 M.R.S.A. § 3026(1).

<sup>11</sup> 23 M.R.S.A. § 3026.

<sup>12</sup> 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

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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.

<sup>13</sup>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.

<sup>14</sup>23 M.R.S.A. § 3028.

<sup>15</sup>See, for example, *Lamb v. Town of New Sharon*, 606 A.2d 1042 (Me. 1992).

<sup>16</sup>23 M.R.S.A. § 3028.

<sup>17</sup>23 M.R.S.A. § 3028.

<sup>18</sup>A revision to the law on presumptive abandonment by the 124<sup>th</sup> 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.*

<sup>19</sup>23 M.R.S.A. 3028.

<sup>20</sup>*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.

<sup>21</sup>*Town of South Berwick v. White*, 412 A.2d 1225 (Me. 1980).

<sup>22</sup>23 M.R.S.A. § 3028 and 14 M.R.S.A. § 5951, *et. seq.*

<sup>23</sup>*Lamb v. Euclid Ambler Associates*, 563 A.2d 365 (Me. 1989).

<sup>24</sup>*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.

<sup>25</sup>*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.

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

<sup>27</sup>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).

<sup>28</sup>23 M.R.S.A. § 3028 and § 3026.

<sup>29</sup>*Town of Cornville v. Gervais*, 661 A.2d 1127 (Me. 1995).

<sup>30</sup>*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.

<sup>31</sup>*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).

<sup>32</sup>*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.

<sup>33</sup>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.

<sup>34</sup>23 M.R.S.A. § 3028.

<sup>35</sup>*Shadan v. Town of Skowhegan*; see *Martin v. Burnham*, 631 A.2d 1239 (Me. 1993) for a discussion of these cases.

<sup>36</sup>*Bartlett v. Bangor*, 67 Me. 460, 464-465 (1878), discusses the notion that once lots are sold, the public has a vested right in the right-of-way that cannot be interrupted or destroyed by the seller, cannot be released by the purchasers of lots and cannot be lost by "mere non-use." Also see *Rutland v. Mullen*, 2002 ME 98.

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- <sup>37</sup> R.S. 1903, c. 39, now codified at 23 M.R.S.A. § § 3027 and 3027-A.
- <sup>38</sup> *Callahan v. Ganneston Park Development Corp.*, 245 A.2d 274, 277 (Me. 1968).
- <sup>39</sup> See P.L. 1987, c. 385; especially 23 M.R.S.A. § 3035: “Sections 3031 to 3034 shall be liberally construed to affect [sic] the legislative purpose of enhancing the title to land by eliminating the possibility of ancient claims to proposed, unaccepted, unconstructed ways that are outstanding on the record but unclaimed.”
- <sup>40</sup> 23 M.R.S.A. § § 3027 and 3027-A.
- <sup>41</sup> Section 3027.
- <sup>42</sup> 23 M.R.S.A. § 3027-A.
- <sup>43</sup> See 33 M.R.S.A. § 469-A.
- <sup>44</sup> See *Murch v. Nash*, 2004 ME 139 and *Callahan v. Ganneston Park Development Corp.*, 245 A.2d 274 (Me. 1968).
- <sup>45</sup> 23 M.R.S.A. § 3027-A.
- <sup>46</sup> 23 M.R.S.A. § 3032.
- <sup>47</sup> Section 3032(2).
- <sup>48</sup> 23 M.R.S.A. § 3033.
- <sup>49</sup> *Hartwell v. Stanley*, 2002 ME 29, 790 A.2d 607, 609-612.
- <sup>50</sup> 23 M.R.S.A. § 3031 governs the vacation of paper streets in subdivision plans recorded *on or after* September 29, 1987.
- <sup>51</sup> 23 M.R.S.A. 3031(2).
- <sup>52</sup> 33 M.R.S.A. § 469-A.
- <sup>53</sup> 23 M.R.S.A. § 3031(3) and (4).
- <sup>54</sup> 23 M.R.S.A. § 3034.
- <sup>55</sup> 23 M.R.S.A. § 2952.
- <sup>56</sup> The law that allows structures to remain discusses “structures” located on paper streets, but it is unclear whether this was intended to include fences as well, or was intended to place paper streets outside the operation of the longtime building and fences law altogether.
- <sup>57</sup> 23 M.R.S.A. § 3032.
- <sup>58</sup> *Bartlett v. Bangor*, 67 Me. 460, 464-465 (1878).
- <sup>59</sup> See *Kelley v. Jones*, 110 Me. 360, 86 A.252 (1913), *Harris v. City of South Portland*, 118 Me. 356 (1919) and *Burnham v. Holmes*, 137 Me. 183, 16 A.2d 476 (1940).
- <sup>60</sup> *Ocean Point Colony Trust, Inc. v. Inhabitants of the Town of Boothbay*, 1999 ME 152.
- <sup>61</sup> Under 23 M.R.S.A. § § 3027 and 3027-A.
- <sup>62</sup> Under 23 M.R.S.A. § 3033.
- <sup>63</sup> 33 M.R.S.A. § § 460-463.
- <sup>64</sup> 33 M.R.S.A. § 469-A.