

STATE OF MAINE

IN THE YEAR OF OUR LORD  
TWO THOUSAND AND TWELVE

S.P. 522 - L.D. 1596

Resolve, To Review Laws and Policies Related to Discontinued and  
Abandoned Roads

Sec. 1. Department of Conservation stakeholder group on discontinued and abandoned roads. Resolved: That the Department of Conservation shall convene a stakeholder group of no more than 10 members to review laws and policies related to discontinued and abandoned roads. The stakeholder group shall examine issues relating to continued road access through public easements, damage to a road caused by use by abutting property owners, damage to a road caused by members of the public, maintenance of a private road that has a public easement, methods to address problems of road damage and ways to maintain access for intermittent users who need access to a road. The stakeholder group must include representatives from the Department of Transportation, up to 2 residents who own property on a discontinued or abandoned road with a public easement and members from statewide organizations representing municipalities, small woodlot owners, producers of forest products, snowmobilers and other interested parties. The Department of Conservation shall fund the work of the stakeholder group from within existing resources. The Department of Conservation shall report the stakeholder group's findings and any recommendations to the joint standing committee of the Legislature having jurisdiction over state and local government matters no later than January 15, 2013. The joint standing committee of the Legislature having jurisdiction over state and local government matters is authorized to report out legislation to the First Regular Session of the 126th Legislature.



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DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY

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COMMISSIONER

L.D 1596 - Abandoned and Discontinued Roads Stakeholders Group

Walter "Skip" Varney, Chair  
Director of Engineering and Real Property  
Department of Agriculture, Conservation and Forestry  
Division of Parks and Public Lands

Toni Kemmerle, Chair  
Chief Legal Counsel  
Maine Department of Transportation

Bob Meyers  
Executive Director, Maine Snowmobiling Association

Kate Dufour, Senior Legislative Advocate, Maine Municipal Association  
Michael Schultz, Attorney  
Attended 2<sup>nd</sup> and 3<sup>rd</sup> meeting on behalf of Maine Municipal Association

Tom Doak  
Executive Director, Small Woodlot Owners Association of Maine

Greg Foster  
Forest Products: Maine Forest Products Council

Roberta Manter  
Interested Party/Property Owner along Abandoned or Discontinued Road

Bruce Bell  
Interested Party/Property Owner along Abandoned or Discontinued Road

John Cunningham  
Interested Party/Attorney  
Attended initial meeting, but did not participate in later deliberations or the adoption of the report.

Sandra Guay, Esq.  
Interested Party/Attorney, Woodman, Edmands, Danylik  
Unable to attend due to scheduling conflict and did not participate in the adoption of the report.

L.U.O.



PAUL R. LEPAGE  
GOVERNOR

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January 15, 2013

Honorable Senator Colleen M. Lachowicz (D-Kennebec), Chair  
Honorable Representative Anne P. Graham (D-North Yarmouth), Chair  
Joint Standing Committee having jurisdiction over state and government matters.

Re: Abandoned and Discontinued Roads Stakeholders Group Report

Dear Senator Lachowicz, Representative Graham, and Members of the Joint Standing Committee having jurisdiction over state and local matters, I am writing this letter to provide information on the Abandoned and Discontinued Roads Stakeholders Group recommendations.

Attached please find the Abandoned and Discontinued Roads Stakeholders Group report submitted pursuant to L.D. 1596 passed into law by the 125<sup>th</sup> Legislature. The L.D. required the Department of Agriculture, Conservation and Forestry to convene a stakeholder group of no more than 10 members to review laws and policies relating to abandoned and discontinued roads and to report the group's findings and recommendations to the joint standing committee having jurisdiction over state and local government matters. This report includes the findings and recommendations for legislative consideration.

Please let me know if you need more information.

Sincerely,

Walter 'Skip' Varney, Co-chair  
Department of Agriculture, Conservation and Forestry  
Division of Parks and Public Lands

State of Maine

# Abandoned and Discontinued Roads Report

Report to the Joint Standing Committee having  
jurisdiction over state and local matters.

1/15/2013

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: January 23, 2012

To: State and Local Government Committee

From: Anna Broome, Legislative Analyst

LD 1596 An Act to Amend the Laws Governing Discontinued Town Ways

SUMMARY:

Under existing law, a public easement is retained on discontinued town ways. This bill authorizes municipal officers to propose placing restrictions on the public easement, such as limiting motorized vehicle traffic, as part of the discontinuance order approved by the local legislative body.

TESTIMONY:

Proponents:

- Municipalities need to have authority to restrict types on use on discontinued and abandoned roads. Municipalities can extinguish public easement or keep ROW but nothing in between.
- Fayette selectmen support amending the bill to apply to both.
- Property owner maintains the road at private expense so they can get to their property but public access results in damage to the road.
- Road isn't discontinued; only the public maintenance. Abandoned roads are worse – no meeting means no opportunity to extinguish public access.
- Private roads are different – can be gated off to the public.
- No guarantee that town meeting will agree to restrictions of use.
- Towns should be given a period of time to declare the status of all roads in the town.

Opponents:

- Language in the bill doesn't go far enough – easement should be relinquished. If the public want access to a road, should be responsible for the condition of the road. If not; private owners should be left alone.
- Manters have spent \$80,000 over 40 years to maintain the Young Road in Fayette.

NFNA:

- MMA's LPC hadn't met on LD 1596 [since then support the bill as drafted only].
- Amendment request would revert to September 1965 law. That law came from court pressure to ensure access to property.
- Concern that local governments could place conditions that are incompatible with timber management and harvesting; growing trees takes a while.
- Most harvesting is done in a responsible way; try to have good contractual relationships with landowners.

ADDITIONAL INFORMATION:

Discontinued roads 23 MRS §3026: formal procedure to terminate the town's interest in a town way. Municipal officers must give best practicable notice to all abutting property owners and includes the amount of damages to be paid to each abutter (for loss of fair market value as a result of the loss of municipal maintenance of the road). Discontinuance order must be approved by the legislative body. Unless otherwise stated in the discontinuance order, public easement is retained (this is the paragraph that the Manters want repealed). 23 MRS §3029: Any person aggrieved by the determination of the damages awarded to owners may, within 60 days after the day of taking, appeal to the Superior court in the county where the property lies.

Public easement of discontinued roads: Before 3<sup>rd</sup> September 1965, a discontinuance left no public easement and ownership reverted to the abutters on each side to the centerline of the road. A public easement is retained in a pre-1965 discontinuance if the article authorizing the discontinuance specifically provided for the retention of one.

On or after 3<sup>rd</sup> September 1965, a discontinuance terminates the municipality's maintenance obligation but leaves a public easement automatically unless the article authorizing the discontinuance specifically rejects retention of a public easement. The municipality can extinguish the easement at the time of the discontinuance or later (may affect damages and would be recalculated).

Law amended in 1977 to provide for the public easement to include an easement for public utility facilities necessary to provide service.

Abandoned roads 23 MRSA §3028: A town or county way not kept passable for motor vehicles at the expense of a municipality or county for a period of 30 $\geq$  years has been discontinued by abandonment. Passage of time combined with lack of maintenance. Determined by the municipal officers and does not require a vote of the municipality. Municipalities bear the initial burden of establishing the presumption of abandonment. Once the presumption arises, the burden of proving that a road is a town way is on the person seeking to have the road repaired or maintained. The person affected by the presumption of abandonment may seek declaratory relief in Superior court.

A road that has been abandoned under this section is relegated to the same status as if it is discontinued with respect to public easement (including 1965 differentiation).

Common law doctrine of abandonment: Maine court decisions also recognize roads may be abandoned by long periods of non-use by the public. Differs from statutory abandonment – no clearly established time period (may only be 20 years), focus on public non-use rather than public non-maintenance, no public easement retained, private easements may exist.

#### **FISCAL IMPACT:**

OFPR: No fiscal impact.

# Department of Agriculture, Conservation and Forestry

## Abandoned and Discontinued Roads Stakeholders Group Report

The Department of Agriculture, Conservation and Forestry was charged to convene a 10 member stakeholder group to review laws and policies related to discontinued and abandoned roads. The group examined issues relating to continued road access through public easements, damage to a discontinued road caused by use by abutting property owners, damage to a discontinued road caused by members of the public, private repair of a road that has a public easement, methods to address problems of road damage and ways to maintain access for intermittent users who need access over a road.

Discontinued and abandoned roads have been an issue for a number of years in the State of Maine. There have been numerous attempts to develop cures by crafting statutes to assist municipalities in dealing with this issue; these have met with limited success and have been problematic for certain property owners. Currently, municipalities can employ common law abandonment, statutory discontinuance and statutory abandonment to change the status of a public road. In many instances these mechanisms have not only added uncertainty and complexity to this issue but have shifted the cost and burden of maintaining former municipal roads to private citizens while still allowing unlimited access and use through a public easement.

Since Maine became a State, towns have had legislative authority to discontinue town ways. County Commissioners have had similar powers over county ways. Prior to 1965, nothing in the law gave either towns or counties the authority to retain a private way or public easement over a discontinued road; however, towns and counties sometimes attempted to reserve these rights when a road was discontinued in order to avoid the necessity of compensating land owners for loss of access. In 1965, the law regarding discontinuance of town ways was changed to provide: "The discontinuance of a town way shall be presumed to relegate the town way to the status of a private way unless the town meeting article specifically stated otherwise". Unfortunately, the wording of this

law at times resulted in townspeople unwittingly voting to keep a private way because the article neglected to state otherwise.

In 1975, a new statute (Title 23 MRSA Section 3021) was enacted that changed all county ways not discontinued or abandoned prior to July 29, 1976 to town ways. From this point forward, when a road that had been a county way was discontinued, it became subject to the 1965 change which automatically retained a private way. That same year, revision of the law governing discontinuance of town ways also changed the term "private way" to "public easement," resulting in retained rights for public use with no municipal obligations for ongoing maintenance or repair. Ceasing to provide maintenance or repair of a public road will inevitably result in loss of access due to the harshness of Maine weather, normal use by motor vehicles and recreational activity.

There are no requirements that municipalities maintain a public easement in order to keep it safe and convenient for travelers. Municipalities typically abandon or discontinue a road due to lack of use or financial constraints. Roads that are not part of a municipality's annual maintenance program are very expensive to restore and are, therefore, sometimes discontinued. The long history of discontinuing public roads and retaining unrestricted public use without an obligation to provide maintenance, management, and repair leads to many inequities because the burden often falls upon abutters to assume liability and keep the road in repair.

This Stakeholders Group has developed the following recommendations when a governing body chooses to retain a public easement when a road is discontinued:

1. Municipalities should be given 2 years to complete the process of developing a list of all municipal roads that they intend to keep in repair with public funds. After 2 years, the roads not included in the list will become automatically discontinued with no public easement. Abutters have 2 years from the date of the publication of the list to file a claim with the governing body.

2. Title 23 MRSA Section 3028 regarding abandonment of public ways should be repealed. Title 23 MRSA Section 3026 regarding discontinuance of town ways/roads, should no longer automatically retain a public easement; rather, an easement can only be retained by an affirmative vote to do so by the governing body.
3. If a governing body (municipality) determines it would like to retain a public easement after discontinuance of a town way, the governing body must assume liability and responsibility for the easement to the extent of its intended uses. A public easement must come with fiscal and maintenance responsibilities, and abutting land owners must be notified of proposed action. Failure to maintain the easement for 2 years will automatically extinguish the public's interest.
4. When a municipality chooses to end its maintenance responsibility for a road via a discontinuance process under Title 23 MRSA Section 3026, the municipality's rights will be extinguished.
5. Courts have declared that access to property is a property right attached to the land; therefore, if a road is discontinued and a municipality no longer retains any interest in the property, an easement must be given to property owners requiring access to their property. Continued use of the previously existing access may not be precluded unless an equivalent access is available.
6. Future municipal decisions to discontinue or abandon a municipal road must be by an affirmative vote by the governing body. There will be no assumption of abandonment or automatic conclusion that a public easement does not exist due to the lack of maintenance or lack of use of the road.

Taxation has long been part of our society in one form or another. Taxes are collected from citizens that own real property within a given municipality. These taxes are then used to pay for the various services provided by the municipality. The governing body of

the community must decide on how to equitably divide the available funds obtained through taxes given the wants and needs of the community. When retaining a public easement over property, governing bodies must not only decide upon the level of interest the municipality would like to retain, but must also decide on how the maintenance and management of these rights will fit within their numerous other financial obligations.

Are current laws and statutes fair and equitable? Is everyone involved paying their fair share for use, maintenance and management of a public easement? Is the burden being shifted to private citizens with no recourse because it is easier and less expensive? Municipalities should not be allowed to rely on flawed statutes to rid themselves of public responsibilities and costs or to unfairly shift the financial burden to individuals while still retaining public access rights. This Stakeholders Group strongly believes that it is in the overall best interest to maintain, enhance, or provide adequate access to public or private lands and resources, provide for future trail and/or access needs, and to protect or establish corridors to ensure continued access while respecting the needs of the user and abutting land owners.

The Abandoned and Discontinued Roads Stakeholders Group recommends that the joint standing committee of the Legislature having jurisdiction over state and local government matters report out legislation to the First Regular Session of the 126<sup>th</sup> Legislature based on the recommendations provided in this report.