Regulation of Town Roads

Maine Townsman - January, 1982

Please Note: Despite this article's original publication date, it remains a valid resource on the relevant subject matter. Recent cases and statutory changes are noted to reflect current law. (9/98)

Question: What will be the effect of the New State Road Assistance Program on municipal regulation of weight limits and seasonal closing on those roads turned over to the municipality?

Answer: On July 1, 1982, as part of the new State Local Road Assistance Program, many state or state aid roads that primarily serve local traffic will be reclassified as town ways (23 MRSA §53, P.L. 1981 c. 492 §28). Municipalities will then have the responsibility to maintain those roads. To minimize the wear and damage caused by heavy vehicles, municipalities will have to be more cognizant than ever to the need to enforce weight violations and the need to post roads which cannot sustain heavy loads.

The state law which sets weight limits and governs the enforcement of those limits is applicable to town ways. See 29 MRSA §§ 1652 and 1656 to1656 [Repealed] generally.

Although local law enforcement officials can conduct enforcement operations, the complexity of the weight law and the need to actually weigh a vehicle suspected of being overweight combine to suggest that enforcement operations be left to the Maine State Police. The State Police have considerable experience enforcing the weight law and have seven portable and semi-portable weighing units which they use throughout the state on both state and town roads. Any municipality suspects that someone is violating the state law should contact the nearest Maine State Police barracks for assistance. One limitation on such requests is that the State Police will not use their equipment to weigh vehicles at municipal landfill operations.

In addition to enforcing the state law, municipalities may want to post weight limits which are stricter than state law on a limited number of specified roads, either during the spring or on a year-round basis. In some cases, a municipality may want to close a road to commercial traffic.

Title 30 MRSA § 2151 generally authorizes a municipality to enact police power ordinances and paragraph 3(C) of that section grants the municipal officers of towns the exclusive power to enact ordinances regulating the operating of all vehicles in the public way and on publicly owned property. (See Townsman Nov. 1979, Legal Note, for the procedure required to enact traffic ordinances.) Paragraph 3(C) further provides that . . .

"Seven days' notice of the meeting at which said ordinances are to be proposed shall be given in the manner provided for town meetings and such ordinances shall be effective immediately. A village corporation shall have the same powers and duties as a municipality under this section."

To assist towns which want to impose permanent weight limits that are stricter than state law on certain roads, MMA has created a sample ordinance regulating the weight of vehicles on certain town ways and public easements. As a general rule, there should be no need to post stricter weight limits on state or state aid roads which are turned over to a municipality, as the state law is carefully designed to prevent damage to such roads.

Another protective technique available to municipalities is seasonal closings. Title 29 MRSA § 902 [Repealed. Authority of municipal officers to enact ordinances currently found at 29-A M.R.S.A. § 2395.] authorizes municipal officials "to promulgate such reasonable rules and regulations as in their judgment may be necessary to insure the proper use and to prevent abuse of all highways under their maintenance or supervision by motor driven and animal drawn vehicles during such seasons of the year as said highways require such special protection. These rules and regulations shall be kept on file." In our opinion such rules and regulations should be passed in the form of an ordinance and according to the procedure noted above in Title 30 M.R.S.A. § 2151(3)(C) [Repealed and replaced by 30-A M.R.S.A. § 3009.].

MMA has a copy of the State DOT rules and regulations restricting heavy loads on posted roads between November 15th and June 1st. Those rules and regulations provide a useful framework for a seasonal closing ordinance. In addition to rules and regulations, the statute also requires that "a notice, specifying the designated sections of a way or bridge, the periods of closing and prescribed restrictions or exclusion shall be conspicuously posted at each end thereof ." DOT has such notices available for use by municipalities.

The opinions printed above are written with the intent to provide general guidance as to the treatment or issues or problems similar to those stated in the opinion. The reader is cautioned not to rely on the information contained therein as the sole basis for handling individual affairs but he should obtain further counsel and information in solving his own specific problems.

Developing a Road Inventory

Maine Townsman - April, 1991

It happens to every municipal officer at some point: a couple walks in to the town hall and demands to know why the town hasn't fixed the road where they have built a new home, and if it isn't fixed soon, their lawyer will sue the town.

This situation causes aggravation and confusion in the town office, since no one is sure how to quickly determine the town's legal rights and responsibilities with respect to a particular road or street. The municipal officers are called on to determine the status of the road, and they need the answer as soon as possible.

One way to deal with this situation is to develop and maintain a "road inventory," which is a book (or computer disc) containing information needed to answer legal questions about roads. A road inventory can also be kept for physical maintenance purposes (which roads need what repair), but that is not the subject of this article. The Local Roads Center of the MDOT should be contacted at 289-2151 for information about a physical maintenance road inventory.

This article explains why and how a town should keep a road inventory for legal purpose, and what information is needed to determine the status of a road.

Why have a road inventory? The goal of a road inventory is to reduce problems and arguments associated with roads. In other words, it should make it easier for the selectmen or road commissioner to determine the status of a road and respond to questions from the public. By collecting and compiling all road-related information into a single volume or disc, you can provide quick and accurate answers to what may now be thorny and time-consuming questions.

State law does not require that a road inventory be kept at all. Many towns keep an informal inventory, while others rely only on the road commissioner's memory for guidance. The drawback with this is that, when the road commissioner goes, so does all your information. It is much better to have that information available in writing for future use, so that you need not "re-invent the wheel" every time the legal status of a road is in question.

There are three main areas in which a road inventory should prove useful:

1) As a source of information for assisting and educating the public. For example, if new residents have questions about what maintenance to expect on their particular road, the inventory would provide that information quickly and succinctly.

2) An inventory helps municipal officials plan for the future. For example, the town has 50 miles of roads which have fallen into disrepair, and the selectmen want to know whether they can discontinue or abandon those roads The information needed to decide this could be found in the road inventory

3) To provide information relating to the town's legal liability (for potholes, defects, accidents and so on) and legal rights. For example, a question may arise about an obstruction in a road, and the inventory would help the town official decide what steps the town can or should take Since a town's legal rights and obligations vary depending on the status of the road and its boundaries, it is beneficial to have that information within easy reach.

What information should the inventory contain? The goal of the inventory is to help answer legal questions, so the inventory should contain at least the following basic information: name of road, its status (as either a town way, public easement, or privately-owned road), its width including the right of way, approximate length, and a designation of whether it was ever abandoned or discontinued. It may also be useful to take a town map, block it into numbered grids, and give each road a grid reference for easier location.

An inventory can contain as much information as is considered useful. For example, it could identify buildings, driveways and culverts along a particular road, it could state whether a road is posted or closed in the winter, or it could indicate whether the town owns the road in fee simple or by easement only. The inventory should refer to deeds, surveys, maps or other documents if these exist. The key is to keep the inventory accurate and manageable—too much information may destroy its usefulness.

How should the inventory be structured? There is no right or wrong way to structure the inventory, but like any filing system it needs to be convenient and understandable to the people using it A typical inventory is simply a chart with separate squares for the name of the road, status of road, and other pertinent information. An alphabetical listing of roads is most commonly used and is well-suited to updates and new listings. Information which is too bulky to fit on the chart can be kept elsewhere and referenced in the chart. For example, if you have a deed describing the road by metes and bounds, or a record of the town's acceptance of the road, these documents could be referred to by book and page number, or by the year of the town report where the full text can be located. This would allow the user to find the full text of the document without cluttering up the inventory.

How is the road inventory actually created? This will require a joint effort by municipal officials. One person can be in charge of putting information into a book or onto a disc, but getting that information in the first place will be a time-consuming task for one. This problem—collection of the necessary information—is difficult but not impossible. The key is to start with a manageable inventory and build it up, rather than trying to do a complete and perfect list the very first time. The status and boundaries of many roads may not be in question, so those can be inventoried fairly easily. Other roads may require research before accurate information is found, but these can be done as time and resources permit. A road inventory is never be truly "complete" since information will always be added or deleted. Once an inventory is started, it will be less work to maintain and update it.

In some cases, information will be missing or incomplete. The inventory should refer to notes that reflect what was found and not found, and the scope of the search. This will save some other official from wasting time on a fruitless search, and it may also help an official make a decision. For example, if there is a question about whether a road is abandoned, and the selectmen look back over fifty years' of records and find no evidence of regular maintenance, they could deem the road to be abandoned. A person opposing this decision would have the burden of producing rebuttal evidence, and it is unlikely that any such evidence exists or it would have been discovered by the selectmen. If such evidence is produced, then the inventory could be corrected accordingly.

What are the sources of information? Information for the road inventory comes from several sources. First and foremost, look at past Town Reports for references to particular roads or the budget for roads. This may answer questions about what maintenance, if any, has been done over the years. Likewise, Town Reports should contain articles about accepting or discontinuing roads. The vote on the article may appear in the Report, or be found in the Clerk's minutes for that town meeting. Also, look for any notes or records from past Selectmen's meetings as well as those kept by former road commissioners.

A second source of road information is the public. Longtime residents or former municipal officials may remember what was done (or not done) on particular roads. Likewise, developers putting in new roads will usually have good information —surveys, deeds, and the like—about those roads. Getting this now may avoid a headache ten years from now. Much of the information obtained from the public will be oral (memory and recollection) rather than written,

but it can be good evidence nonetheless. It may be worthwhile to get an affidavit from a person whose health or memory is failing, in case that information is needed several years hence.

A third source of information about roads 16 is the records of other town boards. For example, the records of a case before the Planning Board or Board of Appeals may contain road descriptions, deeds, surveys, agreements or other evidence useful in the road inventory.

Records from the county or state governments may also be useful, particularly since many town ways were at one time state or county roads. Records in question include maintenance reports, discontinuance actions, surveys and deeds, and road budget documents. The town may find information which establishes that a road was discontinued at the county level and never became a town way.

The Registry of Deeds is the central source of recorded information. This includes deeds, plats subdivision plans, easements, surveys and other documents related to land transactions. The boundaries of a road may be determined by the deeds of abutters along the road. Formal action by the town to create or discontinue a road will also be recorded in the Registry.

Finally, do not overlook Superior and District court records involving land or boundary disputes Title and boundary disputes are usually heard in Superior court, but not always Those cases may refer to the boundaries or legal status of a road, even if the case itself involved a different matter. Obviously, if a case concerns the status of a road specifically, the Court's decision should be noted in the inventory

What is the process for determining the status of a road? The municipal officers (selectmen or councilors) are responsible for making the initial determination of a road's status A final determination can be made only by a judge.

At the local level, the first step is to identify and pinpoint the road or potion of road in question Then, review both written and oral information about that road. Critical items include records of laying out and acceptance, history of maintenance, and records of discontinuance, if any. The third step is to reach a conclusion based on the available evidence. Even if the records are sparse, it is important to note what was found. Make copies of any pertinent documents found in the Registry, at court or in other places outside the town office.. Likewise, make notes or get affidavits if the information is a person's recollection.

Once a decision as to the road's status is made, any person opposing that decision will have the burden of producing evidence in rebuttal. That person will have to go to court for a final decision unless the municipal officers are convinced otherwise by the new evidence.

What are the rules about road status? The goal is to determine whether a road is a town way, public easement, or privately-owned road. The following is a list of general legal principles in this regard:

Creation of roads: town roads can be created by formal action of the town (eminent domain, laying out and acceptance, or dedication and acceptance) or informally by prescriptive use. The

formal methods must be approved by the voters, so there should be documents to this effect in the town reports and Registry of Deeds. Read those documents carefully as they often indicate whether a road is a town way or public easement. Prescriptive use requires that the town maintain a road in an "open and notorious" manner for at least 20 consecutive years. Evidence of this may be in town reports or from residents' recollections.

Discontinuance: formal town action is required to discontinue a road. Records of a discontinuance will be recorded in the Registry, and should be found as well in the minutes of the annual or special town meetings of the years in question. Review these records carefully to make certain that the procedure was done in accordance with the laws in effect at that time. The laws have changed over the years and present law may require something not required when the discontinuance took place.

Abandonment: abandonment occurs without formal action of the town. What is required is that no regular maintenance occur for a period of 30 consecutive years. Sporadic maintenance such as patching potholes or replacing a culvert will not rebut a presumption of abandonment. Much of the evidence in abandonment cases is personal recollection, although a review of town reports (particularly road budgets) should be done. A thorough search is always recommended as it builds the town's case and also reveals evidence against the town.

For more details on the legal principles governing road status, see MMA's Municipal Roads Manual and see Title 23, Maine Revised Statutes Annotated (the State law).

What does the road inventory not do? A road inventory should not be considered the final word on road-related questions. The inventory is a guide to make better decisions, but only a Court can make final and binding decisions with respect to legal rights and obligations With a good inventory, however, you may be able to keep a dispute from going to court. Even if litigation occurs, a road inventory saves time and legal fees by providing information quickly.

Posting Roads

Maine Townsman - March, 1999

’Tis the season (mud season, that is), and we at Legal Services are receiving our annual ration of inquiries from baffled local officials wondering what they can do to protect fragile road surfaces from the ravages of heavy vehicle traffic.

Suggestion: See the February 1998 Maine Townsman for a Legal Note on this subject ("Road Weight Limits/Seasonal Road Closings"). The article summarizes the two legal options and refers the reader to two other valuable resources: MDOT’s Maine Local Roads Center (287-2151) and MMA’s "Information Packet" on road weight limits and seasonal road closings. Our packet includes, among other things, an excellent sample ordinance for restricting vehicle weight on posted ways.

Both last year's Townsman article and our packet, including the sample ordinance, are available by mail and on MMA's web site at www.memun.org. (By. R.P.F.)

Law Court Road Case Not News

Maine Townsman - February, 1999

Media reports last month that the Maine Supreme Court had signaled a sea change in local road law were, to paraphrase Mark Twain, greatly exaggerated. Actually, the Law Court reaffirmed several longstanding principles governing the discontinuance and abandonment of town ways.

The press was reporting on Earwood v. Town of York, 1999 ME 3, a case in which certain abutters demanded town maintenance of a road that the Town argued had been both discontinued by formal vote and abandoned by non-maintenance. The Court held that the discontinuance, in 1977, was ineffective as to the abutters because the Town had not given actual notice to them or recorded a certificate of discontinuance in the registry of deeds, as the law (23 M.R.S.A. § 3024) has long required. One reporter wrote that the decision "puts municipal officials on notice that before they abandon (sic) a road, they must notify every property owner." Not so. This part of the decision dealt with discontinuance, not abandonment, and municipalities continue to have the statutory option of either giving actual notice or recording a certificate.

The press also said of the case, "The Supreme Court decided that even occasional road maintenance prevents the town from later claiming it can abandon the road out of convenience." Again, not so. The Court did reject the Town's claim of abandonment, but not because of isolated acts of maintenance, which the law (23 M.R.S.A. § 3028) states do not rebut the claim. Instead, the Court found that until 1977 the Town had in fact kept the road passable during the summer months and had graded the road several times a year. The Town had therefore not satisfied the requisite statutory 30-year period of abandonment.

Contrary to the reportage, this case does not change the law of local road discontinuance or abandonment one iota. (By R.P.F.)

Designating Public Ways to 'ATV-Access Routes'

Maine Townsman - May, 2005

Question: We've been asked by some ATVers to open some of our local roads to ATV use. May or must we?

Answer: You may, but you are not required to do so – the discretion rests exclusively with the

municipal officers (selectmen or councilors).

Title 12 M.R.S.A. § 13157-A(6)(H) authorizes the “appropriate governmental unit” (i.e., the municipal officers in the case of municipal roads) to designate a public way as an “ATV-access route,” provided they determine that ATV travel on the extreme right of the way “may be conducted safely and will not interfere with vehicular traffic,” and provided further that the way is posted conspicuously at regular intervals with highly visible signs designating the access route.

Whether or not the municipal officers designate a municipal road as an ATV-access route is a completely discretionary matter. (If they do so, however, they must first make the required determination about safety and vehicular traffic, and they must provide for the required signage.) The law does not require them to designate any access routes at all. On the other hand, if they do so and someone is injured as a result, neither the municipality nor its officials or employees can be held liable because the Maine Tort Claims Act provides complete immunity from liability for, among other things, “discretionary functions” (see 14 M.R.S.A. §§ 8104-B(3), 8111(1)(C)).

Incidentally, there is an analogous procedure for designating “snowmobile-access routes” (see 12 M.R.S.A. § 13106-A(5)(G)). The same discretion and immunity from liability applies to snowmobile-access routes as to ATV-access routes. (By R.P.F.)

ATVs & Public Ways

Maine Townsman - July, 2007

All-terrain vehicles (ATVs) generally may not be operated on public ways except under certain limited circumstances, such as to cross the road (see 12 M.R.S.A. § 13157-A(6)). As we reported two years ago, however, the law authorizes "the appropriate governmental unit" (the municipal officers in the case of municipal roads) to designate any public way as an "ATV-access route" provided certain findings are made and signs are erected (see " Designating Public Ways as ATV-Access Routes," Maine Townsman, May 2005). In fact, under a new law (PL 2007, c. 33, eff. Sept. 20, 2007), any portion of a public way, including the vehicle travel way, may be designated an ATV-access route.

We've received several inquiries lately about the role of the public (ATVers and abutters) in this process, so let's reiterate something from the earlier piece: Whether or not the municipal officers (selectmen or councilors) designate a particular road as an ATV-access route is entirely within their discretion - the decision rests exclusively with them.

The public of course may attempt to influence their decision, but the municipal officers' choice is not delegable to or subject to override by the voters. When it comes to regulating the use of local roads, the municipal officers are in the driver's seat regardless of the municipality's form of government.

It also bears repeating that while factors such as safety, noise and dust may be legitimate considerations in making such a decision, potential liability is not. Under the Maine Tort Claims

Act, neither municipalities nor their officials can be held liable for "discretionary" acts such as designating ATV-access routes.

A final point: State law preempts all other municipal regulation of ATVs (including the operation of ATVs on private property) except on municipal property and rights of way held by the municipality (see "Municipal Regulation of ATVs Preempted by State," Maine Townsman, July 2003). (By R.P.F.)

Road Weight Limit/Seasonal Road Closings

Maine Townsman - February, 1998

The month of February is probably not too early for municipalities to begin preparing for (with a view toward preventing) the damage that can result to local roads from the combination of heavy vehicles and the spring thaw. There are two legal options for doing so, and both belong exclusively to the municipal officers.

First, 29-A M.R.S.A. § 2395 authorizes the municipal officers to adopt "rules" for temporarily closing or restricting vehicle weight on local roads "whenever those ways require special protection." Then, as necessary, the municipal officers may designate those roads or portions of roads that are to be closed or restricted. Notice of the designation must be posted at each end of the road and must specify the period of closing and the restrictions. The Maine Local Roads Center (287-2151), an office of the MDOT, Technical Services Division, has an excellent publication on this topic entitled "Heavy Loads and Local Roads in Maine" and an accompanying video called "Guidelines for Spring Highway Use," both available free-of-charge.

The other option is an ordinance. Title 30-A M.R.S.A. § 3009 authorizes the municipal officers, after notice and hearing, to enact traffic ordinances. The notice must be given seven days in advance of the hearing, in the same manner as for town meetings (i.e., signed by a majority of the municipal officers, directed to a constable or resident, with an attested copy posted in some conspicuous public place, with a return). MMA’s Legal Services has a free "Information Packet" on road weight limits and seasonal road closings including a Model Ordinance Restricting Vehicle Weight on Posted Ways. The packet is available by mail or on the MMA web site, www.memun.org.

Under either option, municipalities may provide exemptions for certain types of vehicles (e.g., fire trucks, ambulances, school buses, etc.) or for vehicle owners who have a demonstrated need to use a posted road and who have tendered a bond or other security to cover the cost of any damage they may cause. There is no legal obligation to make such exceptions, however, and they should probably be granted sparingly, depending on the particular circumstances.
(By R.P.F.)

Local Roads in Mud Time

Maine Townsman - March, 2008

It's news to nobody that Maine's roads have taken a real beating this winter. Now that spring (and mud season) is officially underway, here are some important road-related reminders:

Potholes and frost heaves. A municipality can be held liable for damage or injury caused by highway "defects" but only if (1) the road is a town way and (2) the municipality had at least 24 hours' advance notice of the defect and failed to warn of or repair it (see 23 M.R.S.A. § 3651-3655, the "Pothole Law"). A defect can include a pothole or frost heave (among other things) as well as an obstruction (such as fallen tree limbs or other debris), but it does not include snow or ice (for which municipalities have no liability, see 23 M.R.S.A. § 1005-A). Liability is limited to $6,000 ($25,000 for death).

Posting roads. The municipal officers (selectmen or councilors) must adopt regulations or an ordinance in order to post and enforce vehicle weight limits on local roads (speed limits are exclusively within the State's jurisdiction, however). For details, including a sample ordinance, see our "Information Packet" on this subject, available on MMA's website

Street cleaning and repairs. A municipality can be held liable for its negligence during the performance of road construction, street cleaning or repairs (see 14 M.R.S.A. § 8104-A(4)). This of course includes work performed by a contractor on a municipality's behalf, so contracts should require the contractor to provide proof of liability insurance in the amount of at least $400,000 and naming the municipality as an additional insured.

Rural Road Initiative funds. State funds distributed to municipalities under the Rural Road Initiative Program may be used only for capital improvements that have a life expectancy of at least 10 years or that restore load-carrying capacity (see 23 M.R.S.A. § 8103-B(1)(A)(2)). Routine road maintenance and repair are ineligible for these funds.

Maine Local Roads Center. For expert advice and technical assistance on construction, maintenance and repair of local roads and bridges, contact MDOT's Maine Local Roads Center at 624-3270 or visit their website at http://maine.gov/mdot/mlrc/mlrc-home.php. (By R.P.F.)

Potholes and Frost Heaves and Road Postings! Oh, My!

Maine Townsman - March, 2009

Little Dorothy uttered a similar line (about lions and tigers and bears) in "The Wizard of Oz." But unlike the yellow brick road, Maine's roads are no fantasy, and keeping them repaired and

liability-free each spring requires more than ruby-slipper magic. So, let's pull back the curtain once again on some springtime road-related topics we've aired before.

Potholes and frost heaves. A municipality can be held liable for damage or injury caused by highway "defects" but only if (1) the road is a town way and (2) the municipality had at least 24 hours' advance notice of the defect and failed to warn of or repair it (see 23 M.R.S.A. §§ 3651-3655, the "Pothole Law"). A defect can include a pothole or frost heave (among other things) as well as an obstruction (such as fallen tree limbs or other debris), but it does not include snow or ice (for which municipalities have no liability, see 23 M.R.S.A. § 1005-A). Liability is limited to $6,000 ($25,000 for death).

Posting roads. The municipal officers (selectmen or councilors) must adopt regulations or an ordinance in order to post and enforce vehicle weight limits on local roads (speed limits are exclusively within the State's jurisdiction, however). For details, including a sample ordinance, see our "Information Packet" on this subject, available on MMA's website (www.memun.org).

Road construction, street cleaning and repairs. A municipality can be held liable for negligence during the performance of road construction, street cleaning or repairs (see 14 M.R.S.A. § 8104-A(4)). This of course includes work performed by a contractor on a municipality's behalf, so contracts should require the contractor to provide proof of liability insurance in the amount of at least $400,000 and naming the municipality as an additional insured.

Rural Road Initiative funds. State funds distributed to municipalities under the Rural Road Initiative Program may be used only for capital improvements that have a life expectancy of at least 10 years or that restore load-carrying capacity (see 23 M.R.S.A. § 1803-B(1)(A)(2)). Routine road maintenance and repair are ineligible for these funds.

Maine Local Roads Center. For expert advice and technical assistance on construction, maintenance and repair of local roads and bridges, contact MDOT's Maine Local Roads Center at 624-3270, or visit their website at http://maine.gov/mdot/mlrc/mlrc-home.php. (By R.P.F.)

The 'Pothole Law'

Maine Townsman - April, 2014

Maine's "Pothole Law" (aka the Highway Defect Act, see 23 M.R.S.A. § 3655) provides a cause of action or right to sue for personal injury or property damage caused by "any defect or want of repair or sufficient railing" in any town way.

The right to recover under the Pothole Law is contingent on three prerequisites: (1) the road must be a town way; (2) the injury or damage must have been caused by a defect in the way; and (3) the municipal officers (selectmen or councilors) or road commissioner must have had at least 24 hours' notice of the defect prior to the incident.

A “town way” is a public road that a municipality is legally obligated to maintain, as opposed to a public easement (which a municipality may, but is not required to, maintain) or a private road (which a municipality cannot legally maintain).

A “defect” may include a defect in the surface of a road (such as potholes, cracks or frost heaves) or an obstruction on a road (such as fallen trees or other debris) or absent or inadequate railings. Ice and snow are not highway defects, however (see Wells v. City of Augusta, 135 Me. 314 (1938)), nor are trees, structures and other legal objects within the way (see 23 M.R.S.A. § 3651(1)). Also, the failure to erect or replace traffic control devices (such as stop signs) is not a highway defect (see Stickney v. City of Portland, 600 A.2d 405 (Me. 1991)).

The reason for the 24 hours’ prior notice requirement is to give municipal authorities a reasonable opportunity to repair the defect or warn motorists of it before potential liability arises (think patched potholes and those ubiquitous orange “bump” signs all over Maine each spring).

Also in order to recover, any claimant must notify the municipal officers in writing, specifying the nature of damages and the nature and location of the defect, within 180 days after the incident and must file suit within one year after the incident. Any notice of claim received by a municipality should be reported to the municipality’s insurance carrier right away. Liability is capped at $6,000 for personal injury or property damage and $25,000 for death.

We should note that although the Maine Tort Claims Act clearly states a municipality is not liable for highway defects (see 14 M.R.S.A. § 8104-A(4)), it is just as clear the Pothole Law (which predates it) survives as a remedy where there is full compliance with its requirements (see Paschal v. City of Bangor, 2000 ME 50).

We should also note that the Pothole Law is not a strict liability law, where claimants can recover no matter what their own conduct. Municipalities must keep town ways reasonably safe and convenient, but motorists also have a duty to exercise reasonable care.

For the record, there is no equivalent to the Pothole Law for roads and highways the State is legally responsible for maintaining (see Hodgon v. State, 500 A.2d 621 (Me. 1985)).

For more on liability and local roads, including links to our “Information Packet” on posting roads and to the MDOT’s Maine Local Roads Center, see “Potholes and Frost Heaves and Road Postings! Oh, My!,” Maine Townsman, “Legal Notes,” March 2009. (By R.P.F.)

The ‘Pothole Law’ Redux

Maine Townsman - May, 2014

Since our nutshell summary of Maine’s “Pothole Law” last month (see “The ‘Pothole Law’,” Maine Townsman, “Legal Notes,” April 2014), a sharp-eyed reader has asked whether the requirement for 24 hours’ prior notice of a highway defect before potential liability arises includes weekends and holidays. We’ve never been asked, but it’s a fair question.

We’re not aware of any Maine court decision on point, but we’re quite confident the answer is yes, the notice includes any 24-hour period, including weekends and holidays.

The general rule for statutory time periods of less than seven days is that intermediate Saturdays, Sundays and legal holidays don’t count (see 1 M.R.S.A. § 71(12), incorporating Rule 6(a), Maine Rules of Civil Procedure). We don’t think this rule applies to the 24-hour notice under the Pothole Law, however, for a couple of reasons. For one, the Pothole Law’s notice is specified in hours, not days. This was likely deliberate – to differentiate it from the customary rule for counting days.

Also, unlike most other statutory notices, which relate to official proceedings when of course government offices are open, the Pothole Law’s 24-hour notice is about the condition of the highways, which never close (and which are often busier on weekends and holidays). The Pothole Law is, in short, about mitigating imminent public safety hazards, not matters that can wait until the next business day.

As we noted here last month, the reason for the 24 hours’ prior notice requirement is to give municipal authorities a reasonable opportunity to repair the defect or warn motorists of it before potential liability arises. So if municipal staff or officials get actual notice, whether oral or written, of a highway defect, they should act immediately, no matter what day of the week it is. (By R.P.F.)

Plowing Private Roads & Driveways Revisited

Maine Townsman - November, 2003

It’s been a long time (almost 15 years) since we’ve reminded readers about the legalities and liabilities of plowing private roads and driveways at public expense, so let’s revisit the topic.

In 1989 the Maine Supreme Court confirmed what MMA attorneys and others had long advised: that maintenance, including plowing, of private roads at public expense is an illegal expenditure of public funds for a private purpose, in violation of the State Constitution’s “public purpose”

clause (see Opinion of the Justices, 560 A.2d 552 (Me. 1989)). This clause authorizes the State to impose taxes (of which the property tax is one example) but only for public purposes. The Court reasoned that there is no public purpose in maintaining a private road because, even if it is not posted or gated, public access can be restricted at any time (a private road is, after all, private property).

The constitutional problem is not avoided by granting "permission" to the municipality to plow a private road – consent does not confer a public right of access, and it can be withdrawn at will.

Nor can the prohibition against plowing private roads at public expense be overcome by popular vote (say, by town meeting or referendum) because no such vote can supercede the State Constitution.

And it is irrelevant that the practice has been longstanding – there is no "grandfathering" of a continuing constitutional violation.

Besides the constitutional problem, there is a very practical reason why municipalities should not be plowing private roads. The Maine Tort Claims Act (14 M.R.S.A. §§ 8101-8118) limits the liability of municipalities and their agents and employees while engaged in legitimate governmental activities, such as plowing public roads. (The limit is $400,000 for municipalities and $10,000 for employees.) Because plowing private roads is not an authorized public activity, it is conceivable that a municipality and its agents and employees would not be protected by the MTCA or covered under the municipality's insurance policy. In other words, a municipality and its agents and employees might be held liable without limitation and without insurance coverage for personal injury or property damage caused while plowing private roads.

For more on plowing and maintenance of private roads, see MMA's Municipal Roads Manual, available free to members on MMA's web site at www.memun.org. (By R.P.F.)

Winter Road Budgets

Maine Townsman - March, 2014

It's been a punishing winter here in Maine this year, and many local officials are fretting about overspending their winter road budgets. Hard winters, of course, are nothing new for most of us, and budgeting enough to pay for them is a recurrent if not perennial challenge. Here's what we advised here the last time this was a common predicament, in March 2011:

With the return of an old-fashioned winter to most of Maine, municipal snow removal budgets are rapidly being depleted. What are the options if your winter road budget can't keep pace with the weather?

Well, to begin with, the municipal officers (selectmen or councilors) have no general or inherent authority under State law to exceed appropriations (see "Budget Overdrafts," Maine Townsman,

"Legal Notes," May 2008).

In addition, MDOT rural road assistance funds, which are generally limited to capital improvements, may be used for winter highway maintenance only if there are no rural state aid minor or major collector roads in the municipality and the municipal legislative body has voted that its ways and bridges are in sufficiently good repair so as not to require significant repair or improvement for at least 10 years (see 23 M.R.S.A. § 1803-B(1)(A)(2)).

That said, the longstanding law authorizing up to a 15% overdraft in municipal road budgets was amended in 2009 to include road maintenance as well as repairs (see 23 M.R.S.A. § 2705). Thus, the road commissioner may now, with the consent of the municipal officers, spend up to 15% more than what was appropriated if that amount is insufficient for road maintenance, including snow removal, or repairs. (But note that even with this authority, any overdraft must still eventually be funded by supplemental appropriation. The authority to overdraft the budget simply constitutes authority to spend more than what was originally appropriated – it does not, by itself, actually fund the overdraft.)

Moreover, if the municipal legislative body (town meeting or town or city council) has established a contingency account or has authorized expenditures from other accounts in case of emergency, the municipal officers may utilize these funds for unanticipated snow removal costs.

If there is no contingency fund or emergency spending authority and the statutory 15% overdraft has been exhausted, the municipal officers may have to seek additional funding from the legislative body. Funds may be appropriated from any available source, including surplus, unexpended balances in other accounts, even borrowing (but not additional taxes if taxes have already been committed for the year). The municipal officers may want to couple this request with a request for emergency spending authority in the event that even the additional funds are insufficient.

Where the voters are the legislative body, the municipal officers should, if at all possible, request extra funding before the winter road budget is overdrawn. Waiting until afterwards for the voters to ratify an overdraft is risky strategy unless the municipal officers are confident of the voters' after-the-fact approval. (By R.P.F.)

Private Road Maintenance

Maine Townsman - April, 2007

Question: Is there a State law requiring that private roads be maintained?

Answer: No. Many municipalities require the establishment of private road associations to ensure that new subdivision roads are adequately maintained, but there is no statute requiring maintenance of either new or existing private roads.

It is in the natural self-interest of those who use or abut private roads to maintain them, but this is

largely a voluntary undertaking. Abutters to a private road may, by agreement, bind themselves to certain maintenance obligations, or they may invoke the process for assessing and collecting for repairs as set out in 23 M.R.S.A. §§ 3101-3104, but absent either of these, private road maintenance is at best spontaneous and unpredictable.

The statutory process is available only if the road serves at least four parcels and at least three of these parcels are owned by different persons. It authorizes at least three of the owners to petition for a meeting, called by a warrant issued by a notary, to choose a road commissioner, approve a budget and assess costs among the owners. Assessments may be collected either by suit or in the same manner as taxes are collected (by lien). However, this process is available only for repairs and does not include improvements such as paving or routine maintenance such as snowplowing.

There is no legal authority for municipalities to plow or otherwise maintain private roads at public expense. In fact, it's a violation of the Maine Constitution and a risky practice in terms of potential liability (see "Plowing Private Roads & Driveways Revisited," Maine Townsman, November 2003).

Moreover, there is no municipal liability if, due to poor or nonexistent maintenance, a private road is impassable to public safety and emergency vehicles. Those who live on a private road but neglect to maintain it do so at their own risk.

For more on this subject, see Chapter 5 of MMA's Municipal Roads Manual, available free of charge to members on our website at www.memun.org. (By R.P.F.)

Private Road Repair at Public Expense OK'd If...

Maine Townsman - August, 2009

A new law authorizes municipalities to repair private roads at public expense, but only to prevent pollution of great ponds.

The new law (PL 2009, c. 225, eff. Sep. 12, 2009) permits municipal repair of a private road if (1) the road is within the watershed of a great pond, (2) the great pond is identified by the Department of Environmental Protection (DEP) as at risk, threatened or impaired, (3) the DEP or the municipality has determined that the road is contributing to degradation of the great pond's water quality, (4) the repair complies with the DEP's best management practices, and (5) the road is maintained by an organized private road association.

A "great pond" is an inland water body with a surface area greater than 10 acres in its natural state or, if artificially formed or increased, with a surface area greater than 30 acres (see 38 M.R.S.A. § 480-B(5)). Since great ponds are public property and their protection is deemed to be a public trust (see 38 M.R.S.A. § 1841), the use of public funds to repair a private road to prevent pollution of a great pond presumably satisfies the Maine Constitution's "public purpose" clause. (The public purpose clause requires that public funds be expended for public purposes, see

Common Cause v. State, 455 A.2d 1 (Me. 1983).)

Note that the new law authorizes only road repairs, not maintenance or snow removal. Routine maintenance, including plowing, is the responsibility of the road association, which is required (see above).

The new law is an exception to the general rule that maintenance or repair of private roads at public expense is illegal (see "Plowing Private Roads & Driveways Revisited," Maine Townsman, "Legal Notes," November 2003).

The new law is found at 23 M.R.S.A. § 3106. (By R.P.F.)

Plowing Private Roads

Maine Townsman - December, 2015

Question: We've heard that if a municipality has been plowing a private road for a certain number of years, it must continue doing so. Can this be true?

Answer: We sometimes hear this too, but it is not and never has been true. Plowing or otherwise maintaining private roads at public expense is a violation of the Maine Constitution's "public purpose" clause, which requires that public funds be expended only for public purposes (see Opinion of the Justices, 560 A.2d 552 (Me. 1989)). There is no statute, case law or legal theory to support the claim that plowing a private road for any period of time somehow obligates a municipality to continue doing so despite the law. Nor does a history of plowing a private road in some way "grandfather" or permit a municipality to continue the practice.

The source of this misunderstanding is likely the doctrine of prescriptive use, by which a municipality may acquire a public easement over a private road by continuously using it for at least 20 consecutive years. But two crucial points: First, a prescriptive easement does not exist unless and until suit has been filed and a court declares it so. Second, a prescriptive easement cannot arise where the municipality's use has been with the owner's consent, which is virtually always the case with public plowing of private roads. Also, even if a court were to declare that a prescriptive easement exists, this would not require public plowing, it would merely permit it.

Another myth about plowing private roads is that if emergency vehicles such as fire and rescue cannot gain access to persons or property due to snowbound roads, the municipality can be held liable. This of course is nonsense. Municipalities have no legal duty to ensure access to private roads. Those who live on private roads but neglect to maintain them do so at their own risk.

For more on why plowing private roads is both illegal and inadvisable from a liability standpoint, see "Plowing Private Roads & Driveways Revisited," Maine Townsman, Legal Notes, November 2003. (By R.P.F.)

Road Commissioners' Duties

Maine Townsman - September, 1985

Question: We understand that the Legislature passed a law to clarify the relationship between municipal officers and the road commissioner. How will this change the situation?

Answer: The authority of municipal officers over road commissioners often has been a source of conflict. The conflict is due in part to the fact that while municipal officers and the road commissioners are both elected, the selectmen have final authority on road work on town ways, but the selectmen cannot remove from office or otherwise discipline a road commissioner who neglects his or her duties. The Legislature has attempted to alleviate this difficult situation by enacting P.L. Ch. 80 which amends 23 M.R.S.A. § 2701. This amendment clarifies that, under the direction of a majority of the selectmen, the road commissioner is in charge of the repair of all highways and bridges within the town. The amended law specifically provides that in the absence of a statute, charter provision or ordinance to the contrary, any decision involving the duties and responsibilities of the road commissioner shall be made by a majority of the selectmen whose decision shall be final.

The law grants the road commissioner the authority to employ the necessary personnel and equipment and purchase needed material for the road work. Thus the relationship between the selectmen and the road commissioner is very similar to that between the selectmen and the town manager: the selectmen make policy and the road commissioner implements it.

The selectmen determine what road work must be done and set the number and qualifications of the road crew; the road commissioner administers the board's directives (i.e., hiring, setting a work schedule, and purchasing supplies and equipment).

Sometimes municipalities have problems with road commissioners who, for whatever reason, refuse to perform their duties. Holding a meeting between the selectmen and the road commissioner soon after the local election to draw up a work schedule and allocate money for that work can help to avoid problems and misunderstandings. But if such a meeting proves futile, the new law provides a degree of remedy by empowering the municipal officers to act to correct a safety problem if the road commissioner fails to act. If a majority of the selectmen determine that a condition exists in a town way which creates a hazard, the selectmen must give written notice to the road commissioner and order him or her to eliminate it or take interim measures to protect the public within 24 hours. If the road commissioner fails to act as directed, a majority of the selectmen may take any steps necessary to eliminate the hazard.

Finally, the law requires that the road commissioner be bonded to the satisfaction of the selectmen and be responsible to them for the expenditure of money and the discharge of his or her duties generally. The legislative body must provide for the road commissioner's salary. The commissioner must give the selectmen monthly statements detailing his or her expenditures and is prohibited from receiving any money from the treasury unless the selectmen approve. Present

law (23 M.R.S.A. §2703) requires the road commissioner to keep accurate accounts, showing in detail all monies paid out, to whom and for what purpose. Road commissioners must settle their accounts on or before February 20th of each year and must report their accounts in detail in the annual report. Ordinarily road commissioners should request a disbursement prior to actual expenditure or before incurring a binding obligation in the performance of their duties. Following this procedure would give the selectmen a certain amount of control over categorical expenditures to ensure that they were being made in accordance with the overall policy guidelines established by the selectmen.

It may be worthwhile for your municipality to develop administrative guidelines that clearly outline the duties and relationship between the selectmen and the road commissioner. MMA has a model policy which is contained in its Municipal Roads booklet, which covers several other aspects of the road commissioner's responsibilities and other road-related issues. The booklet may be obtained by contacting MMA's legal secretary.

The opinions printed above are written with the intent to provide general guidance as to the treatment of issues or problems similar to those stated in the opinion. The reader is cautioned not to rely on the information contained therein as the sole basis for handling individual affairs but he/she should obtain further counsel and information in solving his/her own specific problems.

Prescriptive Easements for Public Recreational Uses

Maine Townsman - October, 2002

A sharply divided Maine Supreme Court has made it more difficult for recreational users to claim a public prescriptive easement over unposted, undeveloped private land.

In Lyons v. Baptist School of Christian Training, 2002 ME 137, various members of the public sued after a church camp blocked access to a road across its 150-acre wooded property. There was no dispute that the public had used the road for many years, without permission, for hunting, fishing and snowmobiling. Of the five elements required to prove a public prescriptive easement – (1) continuous use; (2) by people inseparable from the general public; (3) for at least 20 years; (4) under a claim of right adverse to the owner; and (5) with the owner's knowledge and acquiescence, or with a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed – only the fourth (adverse use) was in dispute. A use is adverse where, without permission, someone uses property the way the owner would, disregarding the owner's claims entirely.

The Court noted that in the case of a private prescriptive easement, the use is presumed to be adverse if it has been open, known and continuous for at least 20 years. But where a public easement is claimed, a rebuttable presumption of permissive use arises because, in the majority's view, the public recreational use of unposted fields and woodland has long been considered

permissive in Maine. Those asserting a public prescriptive easement for recreational uses must therefore affirmatively prove that their use was under a claim of right adverse to the owner's.

The dissent chided the majority for ignoring the evidence and narrowing the presumption of permissiveness, which it said had heretofore applied to all uses of wild and uncultivated lands regardless of the nature of the use. Whether the majority's opinion in fact alters the traditional presumption of permissiveness, or whether it will henceforth be easier for non-recreational and even commercial users to acquire public prescriptive easements over private land, as the dissent suggested, remains to be seen.

Meanwhile, readers should note that, with one exception (23 M.R.S.A. § 2952, the "longtime buildings and fences" law), Maine law holds that it is legally impossible to acquire private rights to public property by prescriptive use or adverse possession. (By R.P.F.)

No Adverse Possession/Prescriptive Use Claims Against Municipalities

Maine Townsman - February, 2003

The Maine Supreme Court has reaffirmed the longstanding common law principle that one cannot assert a claim to municipal property by adverse possession or prescriptive use.

In Loavenbruck v. Rohrbach, 2002 ME 73, the plaintiffs claimed title to a portion of the defendant's abutting property by adverse possession. (They had used it as part of their driveway since the early 1950's.) To prevail, they had to prove "possession for a 20-year period that is actual, open, visible, notorious, hostile, under a claim of right, continuous and exclusive." The disputed property, however, was actually owned by the Town of Rockport from 1951 to 1990. Citing a line of cases beginning with Phinney v. Gardner, 121 Me. 44 (1921) and continuing to Town of Sedgwick v. Butler, 1998 ME 280, 722 A.2d 357, the Law Court held that those years could not be included within the 20-year period necessary to prove adverse possession because one cannot assert a claim of adverse possession or prescriptive rights against a municipality.

This rule has important implications for municipalities, especially with respect to public ways because abutters frequently use and "improve" land within the legal right of way as if it were their own. In addition, municipal properties such as town forests, recreation lands and tax-acquired property are often subject to unauthorized or unmonitored use by private citizens. The bar against adverse possession or prescriptive use claims to municipal property ensures that no matter what the circumstances, the private use of municipal lands will not result in their loss or compromise from a title standpoint.

There is one important exception, though – the "Longtime Buildings and Fences Law." Title 23 M.R.S.A. § 2952 provides that where road boundaries are unknown and cannot be made certain by records or monuments, buildings or fences fronting on the road and existing for more than 20

years will be deemed to be the true bounds of the road. Where road boundaries are known, buildings or fences encroaching within the bounds and existing for more than 40 years will be deemed to be the true bounds of the road. For more on the Longtime Buildings and Fences Law, see MMA's Municipal Roads Manual (November 1999), available free-of-charge to members on MMA's web site (www.memun.org). (By R.P.F.)

Do Abutters to a Private Road Deserve a Tax Break?

Maine Townsman - March, 2004

Question: Since we do not plow or otherwise maintain private roads at public expense, are the abutters entitled to a property tax break on account of their road maintenance costs?

Answer: No. First of all, you're right not to plow or otherwise maintain private roads at public expense – it's been ruled unconstitutional (see "Plowing Private Roads & Driveways Revisited," Maine Townsman, November 2003).

Secondly, the property tax is an ad valorem (according to value) tax that has little or no relationship to the value of public services provided or the cost of private, substitute services. The Maine Constitution (Article IX, Section 9) requires all property to be assessed equally according its "just" (fair market) value, without regard to public services that may (or may not) be available.

It may be that in some instances properties on a private road are less valuable because they do not receive public services. However, it may also be true that properties on a private road are more valuable, for example, because they are more private or have a more desirable setting. The point is that assessors are not permitted simply to set off the cost of private road maintenance (or anything else) against property taxes. The only consideration, with or without public services, is the property's just or fair market value as determined by a uniform, reliable methodology such as comparable sales.

For more on assessing and just value, see MMA's Municipal Assessment Manual, which is available to members on MMA's website at www.memun.org. (By R.P.F.)

Eminent Domain

Maine Townsman - August, 1992

The Maine Constitution, Art. I, Sec. 21 provides: "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." A number of state laws authorize eminent domain. They are summarized in this note. Mention is also made of some

repealed eminent domain laws.

Before setting out the statutes, several points merit mention. First, in most circumstances a municipality should seek to purchase the land or interest in land by agreement with the landowner(s) before exercising the power of eminent domain. (23 MRSA Section 3023 requires efforts at negotiated purchase and sale unless the municipal officers determine that "public exigency requires the immediate taking" of the property interest concerned.) Second, the statutes should be reviewed carefully, to ensure that any limitations on the particular power exercised are understood. Third, a municipality embarking on an eminent domain taking should consider engaging legal counsel to assist the town in the process and to ensure that all parties with an interest in the real estate that is to be taken are identified. Fourth, the services of a competent real estate appraiser should be engaged. The appraiser should be willing to defend her appraisal in court if necessary (and should be prepared to point out deficiencies in any appraisal done for the landowner); and, preferably, the appraiser should be experienced in such courtroom "Battles of the experts." Fifth, a condemnation order must be filed with the municipal clerk, and necessary monies must be appropriated. Moreover, in municipalities where the town meeting has the legislative power of appropriation, the voters must, at a properly called meeting, approve an article generally describing the property interest to be taken and stating the amount of the damages to be paid. The town meeting may not amend the article except to increase the amount of damages to be awarded. (This is the rare exception to the general rule of town meeting procedure that an article stating a specific amount cannot be amended to increase the amount.) These procedural ground rules concerning condemnation orders and town meeting (and there are other rules, which should be reviewed) are set out in 23 MRSA Section 3023, which is usually invoked as the source of procedures by the subject-matter-specific statutes listed below. In each case, however, check the subject-matter-specific statute to see if it includes any variations on the basic procedure.

Here are the general statute giving eminent domain powers to municipalities, and some related statutes setting out the procedure for takings under the general statute.

30A MRSA Section 3101: This is the general eminent domain statute. It should be used when no other, more subject-matter-specific statute is available (they are listed below). Note that it includes limitations which generally do not apply to the other statutes. The principal limitation is that eminent domain power may not be exercised under this statute if at the time of the taking the owner or the owner's family resides in a dwelling house located on the land. The other limitation is that, with one exception, land taken under this statute may not be used for any purpose other than the purposes for which it was originally taken (The exception is that land taken for a public park may, on the majority vote of the municipal legislative body, be conveyed to the Federal Government to become part of a national park). Section 3101 takings are expressly to be accomplished by the procedures for the taking of land or interests in land for a town way. These are set out in 23 MRSA Sections 3021 et seq.

23 MRSA Section 3024: Recording of eminent domain proceedings. This statute provides that no municipal taking shall be valid against owners of record or abutters who have not received actual notice, unless there is recorded in the registry of deeds for the county where the land lies either a deed, or a certificate attested by the municipal clerk, describing the property and stating the final

action of the municipality with respect to it. (This was formerly 23 MRSA Section 3503.) 33 MRSA Section 654 authorizes the register of deeds to accept for filing Certified copies of the proceedings of any. . . municipal body . . . through or by which the right of eminent domain "is exercised" to affect the title to real estate as this statute certainly governs takings for town ways or public easements, and takings under 30A MRSA Section 3101, as well as takings under any other statutes that specifically refer to chapter 304 of Title 23. It may apply more broadly, to any taking Consultation with MMA Legal Services staff or another attorney is advised on this point.

23 MRSA Section 3029: Damages and appeals. This statute provides that damages (the compensation to be paid for a taking) shall be determined using the methods of 23 MRSA Sections 154 through 154E. It also authorizes appeals by any person aggrieved either by the determination of the amount of damages for a taking or by the action or nonaction of municipal officers or a municipal legislative body, and it sets or incorporates by reference the deadlines for filing the two kinds of appeals allowed. Like 23 MRSA Sections 3021 and 3024, this statute would apply to any taking under 30A MRSA Section 3101, and may apply to takings under some of the other statutes mentioned below.

Here, with only a few, brief comments, are the subject-matter-specific statutes authorizing eminent domain:

13 MRSA Sections1181-1184: Cemeteries

20A MRSA Sections 16101-16105: Schools.

23 MRSA Section 2801: Landings.

23 MRSA Section 2802: Parking places.

23 MRSA Sections 3021-3024: Town ways, public easements.

23 MRSA Section 3151: Bridle paths trails.

23 MRSA Section 3251: Ditches, drains and culverts—land or easement for them to divert water away from roads.

30A MRSA Section 3102: Erosion control and navigation.

30A MRSA Section 3252: Trees along ways and water. Note that an issue with this statute is whether the limitations of 30A MRSA Section 3101 (discussed above) apply.

30A MRSA Section 3351: Public dumping grounds.

30A MRSA Section 3402: Sewers and drains (for sewage); compare 23 MRSA Section 3251, listed above.

30A MRSA Section 3510: Transit district eminent domain powers.

30A MRSA Section 4746: Housing authority eminent domain powers.

30A MRSA Section 5108: Urban renewal authority eminent domain powers.

30A MRSA Section 5403: Parking facilities, water and sewer systems, telecommunications systems, airports, and energy facilities under the Revenue Producing Municipal Facilities Act. Note that interests in land can also be taken for parking places under 23 MRSA 2802, listed above.

38 MRSA Sections 1151-1154: Sanitary district eminent domain powers.

Additional notes:

23 MRSA Section 3026: Discontinuance of roads. Note that this requires the payment of money damages, if any are due. Road discontinuance involves procedural steps that are borrowed from the eminent domain laws relating to creation of a public roadway. See discussion in MMA's Municipal Roads Manual.

23 MRSA Section 2103: The "Lost Boundaries" statute. This is the statute that effectively authorizes municipal officers to treat a town way or public easement as a 3-rod road, centered on the center line of the traveled portion of the way, where the true boundaries cannot be ascertained. It provides that where the municipal officers use a portion of the way that is outside the improved (i.e., built or wrought) portion but still within the one and one-half rods on a side of the center line, "they shall award damages to the owner as provided in section 3005." Section 3005 is now 23 MRSA Section 3029, discussed above.

30A MRSA Section 3201: Acquisition of lands for forestation or forest reclamation. This is not an eminent domain statute. It provides only that municipalities may "acquire" (i.e., buy) lands "for forestation or reclaiming and planting forest trees." Where a landowner is unwilling to sell, however, as with any public municipal purpose, a municipality can use 30A MRSA 3101, the general eminent domain statute, discussed above. The advantage of the existence of this statute is that there should be no controversy in such a taking that the taking is for a public purpose—the existence of Section 3201 is tantamount to a legislative declaration that acquisition of lands for forestation or for forest reclamation is for a public purpose.

23 MRSA Sections 3501 and 3502: Land and materials for highway construction. These have been repealed and, in effect, replaced by 23 MRSA Sections 3021-3024. Note that although repealed Sections 3501 or 3502 seemingly made clear that a town could take land for road construction materials (e.g., gravel), that is not clear under the current 3021-3024. For that reason, it is perhaps advisable that 30A MRSA 3101, and not 23 MRSA 3021-3024, be used for obtaining materials (alternatively, use the 2 in conjunction). Of course, the use of Section 3101 will subject the taking to the limitations in that statute.

23 MRSA Sections 2252 and 2303: These statutes authorized eminent domain for toll houses and ferries, respectively. They were repealed in 1981, and apparently have not been replaced by any

statute which confers express eminent domain power in this area.

30 MRSA Section 3552: Eminent domain power could be inferred for recreation purposes from this statute. It was repealed before the re-codification of Title 30 into the new Title 30A, and no counterpart is now known. Use 30A MRSA Section 3101 for recreation eminent domain purposes.

30 MRSA Sections 4001-4003: Parks, playgrounds, libraries and buildings for municipal purposes. Like 30 MRSA Section 3552 (immediately above), these were repealed before the re-codification of Title 30 into Title 30A, and no counterpart is now known. Use 30A MRSA Section 3101 for these purposes.

14 MRSA Section 868: Statute of limitations. This statute establishes an outside time limit for commencing a suit for damages caused by a taking. The limit is 3 years after the cause of action for damages occasioned by an eminent domain taking first accrues to a plaintiff. It also limits any claims to compensation to the 3 years preceding the commencement of the action for damages. The statute is an affirmative defense and as such must be raised by a defendant municipality, else it is deemed to have been waived as a defense to an action. This statute appears to apply to all takings. For formal, direct eminent domain takings, much shorter times than this 3-year limit are established by statute or rule of court for appeals.

Notice Requirements for Public Proceedings

Maine Townsman - January, 1990

This legal note outlines notice requirements for various types of public proceedings. Before discussing these requirements, however, it is helpful to review some commonly-used terms.

The terms "public meeting" and "public hearing" are often used but have no clear legal distinction or definition. The general rule of thumb is that members of the public may attend public meetings (selectmen's meetings, planning board meetings, etc.) but have no absolute right to speak: at a public hearing, however, the public does have a right to speak, because that is the purpose of the hearing. Note that a local charter or ordinance may define "public meeting" or "public hearing," and in that event those definitions should be consulted in conjunction with any notice provisions in the charter or in local ordinances to determine what notice is required by local law.

Public meetings and public hearings are both "public proceedings" as defined in 1 MRSA § 402 (part of the Right-to-Know Law). The public must be notified of such proceedings pursuant to 1 MRSA § 406. Issues other than notice and hearings are not discussed here. For further information. see the April 1976 MAINE TOWNSMAN article entitled 'How to Conduct a Public Hearing.'

The General Rule

MRSA § 406 requires public notice for a "meeting of a body or agency consisting of 3 or more persons." The statute does not require a particular form or medium of notice, but sets a general standard:

'This notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned. In the event of an emergency meeting, local representatives of the media shall be notified of the meeting whenever practical, the notification to include time and location, by the same or faster means used to notify the members of the agency conducting the public proceeding" (emphasis added).

The body responsible for calling the meeting can determine what manner of notice is best. Circumstances to consider include: cost and availability of radio, television or print media, amount of time available, and past notification practices. However, the municipal officers or the voters may prefer to establish a uniform method for giving notice.

In some municipalities, the best method might be to simply post a notice at the town hall, town dump, local coffee shop, and any other place where members of the public are likely to see it. In other municipalities, the daily paper or local radio station might be the better way to reach the public.

The foregoing general rule is exactly that - a rule to use when there is no statute or local ordinance or regulation which sets more specific notice requirements. Any local rule must meet the requirement of 1 MRSA §406 that the notice be reasonably calculated to notify the public.

Specific Requirements

The following list is a compilation of state law which require particular time frames or forms of notice for public proceedings. This list is not all-inclusive, but does cite some commonly-encountered laws. The laws are listed alphabetically by subject matter, with a brief description of the notice requirement. This is not intended to be used as a substitute for reading the full text of the statute. All time periods stated (e.g., "7 days") are minimums.

Charter Commission. 30-A MRSA §2103(2): 7 days notice of organizational meeting. 30-A MRSA § 2103(5): 10 days notice of public meeting, newspaper publication required. 30-A MRSA § 2104(5): amendments to charter require 7 days notice, newspaper publication.

Comprehensive Plan. 30-A MRSA §4324(8): public hearing for proposed plan requires 30 days notice, newspaper publication.

Ordinances. 30-A MRSA § 3002 requires 7 days notice by posting for enactment or revision by the legislative body of a municipality.

Ordinances. For ordinances that can be enacted by Municipal Officers (i.e., Selectmen or Council): 30-A MRSA § 3008 (cable TV) requires 7 days posted notice of meeting. 30-A MRSA § 3009 (traffic regulation) requires 7 days posted notice of meeting. Although not specifically

required by statute. 7-day notice should also be given before adopting General Assistance Ordinances.

Referendum Question. For towns which have adopted 30-A MRSA § 2528. 30-A MRSA § 2528(5) requires at least 7 days notice of public hearing on the subject of the referendum. The hearing must be at least 10 days before the vote.

Subdivision Regulations. Where no local subdivision ordinance has been adopted, 30-A MRSA § 4403(2) requires 7 days notice of hearing to adopt, amend, or repeal regulations. 30-A MRSA § 4403(4) requires 7 days notice by newspaper publication of any public hearing to approve subdivision application.

Town Meetings. For annual and special town meetings. 30-A MRSA § 2523 requires at least 7 days notice by posting warrant in one or more conspicuous public places in town.

Zoning. For a rezoning by either conditional or contract zoning, 30-A MRSA §4352(8) requires public hearing, two notices by newspaper publication (the first of which must appear at least 7 days before the hearing), and posting of notice in the municipal office at least 14 days before the hearing. Notice to abutters is also required.

In addition to the foregoing, public hearings or meetings are required for such municipal activities as the issuance of licenses and permits. These include automobile graveyard permits, victualer's licenses, special amusement licenses, and the like. For further information on the specific requirements of these activities, see the MMA Licensing/Permitting Manual (1989).

In conclusion, a three-step process is recommended when you are unsure of the type or method of notice required for a public proceeding. First, read your local ordinance or charter for guidance; second, check the state statutes for particular requirements; finally (if you find nothing specific to guide you), follow the general rule outlined in 1 MRSA § 406. Bear in mind, however, that no local provision can undercut or relax the Maine Right-to-Know Law's requirements that notice be given of every meeting of a municipal body which consists of three or more members, and that "3 or more" refers to the total number of members of the body, not just the number expected to appear at any particular meeting. (By J.J.W./E.P.C.)