

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

CHAPTER 1 – Municipal Ownership of Roads and Types of Roads

Municipal Ownership of Roads

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

Fee Simple Interest

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

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

Easement Interest

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

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

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

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

Types of Roads

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

This Manual focuses on three types of local roads: (1) town ways; (2) public easements; and (3) privately owned roads. The "type" of road refers to its legal status, not to its physical condition (paved or gravel). State statute and case law identify other types of roads (such as "public ways" and state and state-aid highways), and these are discussed later in this Manual.

Town Way

A town way is defined⁵ as:

- (A) An area or strip of land designated and held by a municipality for the passage and use of the general public by motor vehicle;
- (B) All town or county ways not discontinued or abandoned before July 29, 1976; and
- (C) All state and state-aid highways, or both, which shall be classified town ways as of July 1, 1982, or thereafter, pursuant to 23 M.R.S.A. § 53.

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

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

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

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

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

Public Easement. A public easement is defined in State law as “an easement held by a municipality for purposes of public access to land or water not otherwise connected to a public way, and includes all rights enjoyed by the public with respect to private ways

created by statute” prior to July 29, 1976.¹¹ Do not confuse the term “public easement” with “easement interest,” which is a type of legal interest in property (see the first section of this chapter).

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

A public easement differs from a town way in that while the general public has a right of unobstructed access by motor vehicle or foot¹² over a public easement, the municipality is not obligated to maintain or repair a public easement. A municipality’s legislative body *may* authorize the repair and maintenance of public easements, but it is not required to do so.¹³ When a municipality does maintain public easements, it is not required to maintain them to the same level or degree of maintenance as town ways. Since the decision to maintain is discretionary, the level of maintenance is likewise up to the legislative body. Additionally, the

municipality is not liable for defects in or lack of repair to public easements¹⁴ but may be liable for injuries caused by negligent acts or omissions in its ownership, maintenance or use of vehicles or machinery and equipment on such roads.¹⁵ Liability is discussed in Chapter 9.

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

As to the “gates and bars” language often found in older references to private ways, the purpose of gates and bars was to allow abutting owners to “lessen the hazard of unwarranted or casual intrusion

on their property due to it being opened to easy access from the main highway. In spite of the erection of gates and bars the public still would have the right to use the way in the same manner as the parties who are primarily interested in it.”¹⁶ The Legislature removed this phrase from the public easement statute in 1976 (P.L. 1975, c. 711).

Private Road

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

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

Other References to Roads

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

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

Determining the Legal Status of a Road

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

¹ It is theoretically possible to have a leasehold interest as the basis of a public road, but we are not aware of this form of legal interest in Maine; therefore, we will not discuss it further in this manual.

² 23 M.R.S.A. § § 3023 and 3025.

³ See 33 M.R.S.A. § 460, where it provides that effective October 3, 1973, a conveyance of property abutting a town or private way conveys all of the grantor’s interest in the abutting way, unless the grantor expressly reserves title to the way.

⁴ See 33 M.R.S.A. § 458.

⁵ 23 M.R.S.A. § 3021.

⁶ 23 M.R.S.A. § 3021(3)(B).

⁷ 23 M.R.S.A. § 3021(3), which cites 23 M.R.S.A. § 53.

⁸ Under 23 M.R.S.A. § 754, these highways must be in good repair when the State “turns back” state or state-aid highways to a municipality.

⁹ 23 M.R.S.A. § 3651.

¹⁰ 23 M.R.S.A. § 3201.

¹¹ 23 M.R.S.A. § 3021.

¹² 23 M.R.S.A. § 3022 and 17-A M.R.S.A. § 505.

¹³ 23 M.R.S.A. § 3105. Although 23 M.R.S.A. § 3105 refers to the “town meeting” as authorizing the repair of public easements, it should be read to include city or town council actions as well. See also 23 M.R.S.A. § 2.

¹⁴ 23 M.R.S.A. § § 3651, 3655.

¹⁵ 14 M.R.S.A. § 8104-A(1).

¹⁶ *Browne v. Connor*, 138 Me. 63, 67-68, 21 A.2d 709 (1941); *Franklin Property Trust v. Foresite, Inc.*, 438 A.2d 218; 48 Me. L. Rev. 197.

¹⁷ See 14 M.R.S.A. § § 7551-B and 7552; and *Hatch v. Donnell*, 74 Me. 163 (1882); *Massachusetts Bay Ins. Co. v. Ferraiolo Constr. Co.*, 584 A.2d 608 (1990).

¹⁸ See opinion of the Justices, 560 A.2d 552 (Me. 1989).

¹⁹ 17-A M.R.S.A. § 505.

²⁰ 29-A M.R.S.A. § 101(92).