From: amosdog@juno.com <amosdog@juno.com>
Sent: Friday, December 31, 2021 11:30 AM
To: Caswell, Lynne <Lynne.Caswell@legislature.maine.gov>
Subject: Re: Discontinued Roads Materials for Monday

This message originates from outside the Maine Legislature.

Hi, Lynne -
If I get something to you by close of business today, will it get posted with the other materials? I hope to have something ready on term definitions, particularly the ambiguous "private way" and "public easement."

Also, I'm still wondering if there is a way to get an Opinion from the AG and/or the Justices of the Supreme Court? Can you refer this question to the Committee? I've been asking for years how to reconcile the following:

Jordan v Canton **265 A.2d 96 (1970)** - public roads without public maintenance will inevitably be destroyed, which destroys property access, and in the absence of just compensation, that results in an unconstitutional taking.
Fayette v Manter, **528 A.2d 887 (1987)** footnote 1 - a public easement gives the public an unfettered right of access, but the public bears no responsibility for maintenance.
Lamb v New Sharon **606 A.2d 1042 (1992) -** Statutory abandonment under 23 MRS 3028 was deemed constitutional because there was no "taking" requiring compensation. But this ignores the future result of abandonment, i.e., the road becomes a public easement, open to "unfettered" public use with no public maintenance.
Brown v Warchalowski **471 A.2d 1026 (1984)** - Laying out of a private way (now known as a public easement) without a finding of common convenience and necessity is unconstitutional.
23 MRS 3028 - A way that has been abandoned under this statute, based on evidence which shows the public has had NO need for it for 30 years, becomes a public easement by reference to 23 MRS 3026. (The public then has an "unfettered right of access" over it, but the public bears no responsibility for maintenance.) What "common convenience and necessity" justifies the public easement?

Other related questions - perhaps these can be put to the Commission:

23 MRS 3021 - Private ways laid out pursuant to statute under 23 MRS 3001 and 3004 are public easements. 23 MRS 3022 says that public easements are for public access by foot or motor vehicle. Fayette v Manter says public easements give the public an "unfettered right of access." So which is it - foot or motor vehicle only, or unfettered public access? And does that "or" mean it is only to be one or the other, not both? I recall one case where a town specified that it was for foot only.

Originally, "private ways" were laid out at the request of a landowner, to give access to improved property not yet connected to the public road system. They were, therefore, always dead ends. There was little point for anyone to traverse these roads unless they had a reason to travel to the said improved property. It was therefore not seen as unreasonable for the owner of the said improved property to be responsible for maintenance of the road. By contrast, discontinued roads that automatically became public easements are often through roads, used by people who have no business with any property abutting the said road. Is it fair to expect the landowner to provide maintenance for the public's use, especially when he didn't even request the public way?

In Fayette v Manter, the Young Road was declared to be a public easement in 1987 because in 1945 the County Commissioners ordered that the road be "closed, to be retained as a private way subject to gates and bars." The Court said that a private way is a public easement as defined in 23 MRS 3021. But section 3021 specifies that, "Private ways created pursuant to former sections 3001 and 3004 prior to July 29, 1976 are public easements." Sections 3001 and 3004 did not exist in 1945, and the County did not follow the procedure required by those statutes or their predecessors. So since the process used in 1945 is not included in the definition in 3021, is it right for it to be declared a public easement? Isn't that ex post facto law, prohibited by the US Constitution?

Since the decision in Fayette v Manter, lower courts have declared roads in Lebanon and in Limington that were ordered "closed" or "subject to gates and bars" to be public easements, based on the Fayette decision, even though the words "private way" did not appear in those discontinuance orders. There may well be other cases as well where the Fayette decision was used to justify opening a road to "unfettered public use" decades after a discontinuance which was taken for years to have preserved only private access to properties. Is this right? In Goucher v Hanson, (537 A.2d 1142,) the Court said that the town of Mount Vernon could have retained a public easement by reserving a private way when it discontinued a road in 1887. How far back can section 3021 be used ex post facto to open roads that have had no public maintenance since the discontinuance? And what were those roads built for before they were discontinued? In the 1940's and earlier we had no ATV's, nor did we have 100,000 lb. log trucks. Shouldn't use of these roads now AT LEAST be restricted to vehicles of the type that were in existence when each road was last repaired at public expense?

Inland Fisheries now says that ALL public easements are open to use by ATV's. This has raised alarm in the town of Windham because it means if they use the private and special law passed by this committee to make their private roads into public easements so they can legally continue snow removal, then they will all be open not only to public vehicular use, but also to ATV use. ATV's are not supposed to operate within 200 feet of a dwelling, but Inland Fisheries says public easements are an exception. The Town of Jackson likewise has residents up in arms because they have declared all their discontinued roads to be open to ATV's, again running too close to dwellings. Is Inland Fisheries correct in opening all public easements to ATV use?

Thanks for passing this along.
Roberta Manter, Maine ROADWays