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Legislative Document

No. 1325

H.P. 903

House of Representatives, April 14, 2015

**An Act To Ensure a Public Process When Discontinuing or
Abandoning a Public Road**

Reference to the Committee on State and Local Government suggested and ordered printed.

A handwritten signature in cursive script that reads "R B. Hunt".

ROBERT B. HUNT
Clerk

Presented by Representative NADEAU of Winslow.
Cosponsored by Senator VALENTINO of York and
Representatives: CHENETTE of Saco, LONGSTAFF of Waterville, McCABE of Skowhegan,
PICKETT of Dixfield, SAUCIER of Presque Isle, SHORT of Pittsfield, WARREN of
Hallowell.

1 **Mandate preamble.** This measure requires one or more local units of government
2 to expand or modify activities so as to necessitate additional expenditures from local
3 revenues but does not provide funding for at least 90% of those expenditures. Pursuant to
4 the Constitution of Maine, Article IX, Section 21, 2/3 of all of the members elected to
5 each House have determined it necessary to enact this measure.

6 **Be it enacted by the People of the State of Maine as follows:**

7 **Sec. 1. 23 MRSA §2060, sub-§2,** as enacted by PL 1999, c. 188, §2, is amended
8 to read:

9 **2. Effect and exceptions.** Upon discontinuance, all interests of the county or
10 municipality pass to the abutting property owners to the center of the way, including any
11 public easement, in accordance with section ~~3026~~ 3026-A. When the Department of
12 Transportation is an abutting owner, then the interests in the way pass to the property
13 owner opposite the department's ownership in accordance with a plan showing the right-
14 of-way line established for the new highway location by the department. The plan must
15 be referenced in the order of discontinuance.

16 **Sec. 2. 23 MRSA §3021, sub-§1-A** is enacted to read:

17 **1-A. Municipal legislative body.** "Municipal legislative body" has the same
18 meaning as in Title 30-A, section 2001, subsection 9.

19 **Sec. 3. 23 MRSA §3021, sub-§2,** as enacted by PL 1975, c. 711, §8, is amended
20 to read:

21 **2. Public easement.** "Public easement" means an easement held by a municipality
22 for purposes of public access to land or water not otherwise connected to a public way,
23 and includes all rights enjoyed by the public with respect to private ways created by
24 statute prior to ~~the effective date of this Act July 29, 1976~~. Private ways created pursuant
25 to ~~former sections 3001 and 3004 prior to the effective date of this Act July 29, 1976~~ are
26 public easements.

27 **Sec. 4. 23 MRSA §3026,** as repealed and replaced by PL 1981, c. 683, §1, is
28 repealed.

29 **Sec. 5. 23 MRSA §§3026-A** is enacted to read:

30 **§3026-A. Discontinuance of town ways**

31 A municipality may terminate in whole or in part any interests held by it for highway
32 purposes. A municipality discontinuing a town way or public easement in this State must
33 meet the following requirements.

34 **1. Notification of discontinuance to abutting property owners.** The municipal
35 officers shall give best practicable notice to all abutting property owners of a proposed
36 discontinuance of a town way or public easement. As used in this subsection, "best
37 practicable notice" means, at minimum, the mailing by the United States Postal Service,

1 postage prepaid, first class, of notice to abutting property owners whose addresses appear
2 in the assessment records of the municipality.

3 **2. Municipal officers meet to discuss proposed discontinuance and file order of**
4 **discontinuance.** The municipal officers shall discuss a proposed discontinuance of a
5 town way or public easement at a public meeting and file an order of discontinuance with
6 the municipal clerk that specifies:

7 A. The location of the town way or public easement;

8 B. The names of abutting property owners;

9 C. The amount of damages, if any, determined by the municipal officers to be paid to
10 each abutter;

11 D. For a town way, whether or not a public easement will be retained. If the existing
12 legal rights of abutting property owners to access their property will be eliminated, a
13 public easement or right-of-way for the abutting property owners must be retained;
14 and

15 E. If a public easement is to be retained:

16 (1) The extent of municipal maintenance and liability responsibilities, if any; and

17 (2) The restrictions on how the public may use the public easement, if any.

18 If a proposal includes the discontinuance of a public easement, that must be stated
19 explicitly in the order of discontinuance.

20 **3. Public hearing.** The municipal officers shall hold a public hearing on the order of
21 discontinuance of a town way or public easement filed pursuant to subsection 2.

22 **4. Approval of order of discontinuance and damage awards.** Ten or more
23 business days after the public hearing pursuant to subsection 3, the municipal legislative
24 body must vote upon the order of discontinuance submitted to it:

25 A. To approve the order of discontinuance, including the public easement and the
26 restrictions set in the order and the damage awards, and to appropriate the money to
27 pay the damages; or

28 B. To disapprove the order of discontinuance.

29 If the order of discontinuance of a public easement is approved, the abutters of that public
30 easement must be granted a right-of-way prior to the filing of the certificate of
31 discontinuance pursuant to subsection 5.

32 **5. Certificate of discontinuance filed.** The municipal clerk shall record an attested
33 certificate of discontinuance after a vote by the municipal legislative body under
34 subsection 4 in the registry of deeds and with the municipality. The certificate must
35 describe the town way or public easement, any rights-of-way granted and the final action
36 by the municipal legislative body. The date the certificate of discontinuance is filed is the
37 date the town way or public easement is discontinued. The registry of deeds shall record
38 a certificate of discontinuance under the name of the town way or public easement, the
39 name of the municipality and the names of the abutters.

1 **1. Presumption of abandonment.** ~~It~~ Except as provided by subsection 1-A, it is
2 prima facie evidence that a town or county way not kept passable for the use of motor
3 vehicles at the expense of the municipality or county for a period of 30 or more
4 consecutive years has been discontinued by abandonment. A presumption of
5 abandonment may be rebutted by evidence that manifests a clear intent by the
6 municipality or county and the public to consider or use the way as if it were a public
7 way. A proceeding to discontinue a town or county way may not prevent or estop a
8 municipality from asserting a presumption of abandonment. A municipality or its
9 officials are not liable for nonperformance of a legal duty with respect to such ways if
10 there has been a good faith reliance on a presumption of abandonment. Any person
11 affected by a presumption of abandonment, including the State or a municipality, may
12 seek declaratory relief to finally resolve the status of such ways. A way that has been
13 abandoned under this section is relegated to the same status as it would have had after a
14 discontinuance pursuant to section 3026, except that this status retains a public easement
15 and all remaining interests of the municipality pass to the abutting property owners in fee
16 simple to the center of the way. A way that has been abandoned under this section is at
17 all times subject to an affirmative vote of the legislative body of the municipality within
18 which the way lies making that way an easement for recreational use. A presumption of
19 abandonment is not rebutted by evidence that shows isolated acts of maintenance, unless
20 other evidence exists that shows a clear intent by the municipality or county to consider
21 or use the way as if it were a public way.

22 **Sec. 8. 23 MRSA §3028, sub-§1-A** is enacted to read:

23 **1-A. Termination through discontinuance process only.** For a town way that does
24 not meet the requirements of subsection 1 as of January 1, 2020, a municipality may
25 terminate in whole or in part any interests held by it for highway purposes only through
26 the discontinuance process pursuant to section 3026-A. This subsection is not intended to
27 modify common law regarding abandonment of a road.

28 **Sec. 9. 23 MRSA §3028, sub-§5** is enacted to read:

29 **5. Filing.** If after the effective date of this subsection the municipal officers, either
30 on their own or after being presented with evidence of abandonment or discontinuance,
31 determine that a town way has been discontinued by abandonment pursuant to subsection
32 1, the municipal clerk shall file a record of this determination with the registry of deeds
33 and the municipality. The registry of deeds shall record a document regarding an
34 abandoned town way under the name of the town way, the name of the municipality and
35 the names of the abutters. If a municipality provides records obtained from the registry of
36 deeds, the municipality may charge a reasonable fee for these records.

37 **Sec. 10. 23 MRSA §3029-A** is enacted to read:

38 **§3029-A. Damage to public easement; cause of action**

39 **1. Cause of action.** An owner of property abutting a discontinued or abandoned
40 road in which a public easement exists may bring a civil action in Superior Court for
41 damages and injunctive relief against a person who causes damage to the road in a way

1 that impedes reasonable access by the property owner to the property owner's property by
2 motor vehicle as defined in Title 29-A, section 101, subsection 42.

3 **2. Damages.** Damages may be sought pursuant to subsection 1 in an amount
4 reasonably necessary to restore the road to its condition prior to the use by the person
5 against whom the action is brought.

6 **3. Attorney's fees and costs.** If the plaintiff under subsection 1 is the prevailing
7 party, the plaintiff may be awarded reasonable attorney's fees and costs.

8 **Sec. 11. 35-A MRSA §2308**, as amended by PL 2011, c. 623, Pt. B, §9, is further
9 amended to read:

10 **§2308. Protection of utility facilities upon discontinuance of public ways**

11 In proceedings for the discontinuance of public ways, public ways may be
12 discontinued in whole or in part. The discontinuance of a town way must be pursuant to
13 Title 23, section ~~3026~~ 3026-A. Unless an order discontinuing a public way specifically
14 provides otherwise, the public easement provided for in Title 23, section ~~3026~~ 3026-A
15 includes an easement for public utility facilities and for the permitted facilities of entities
16 authorized under section 2301 to construct lines. A utility or entity may continue to
17 maintain, repair and replace its installations within the limits of the way or may construct
18 and maintain new facilities within the limits of the discontinued way, if it is used for
19 travel by motor vehicles, in order to provide utility or telecommunications service, upon
20 compliance with the provisions of sections 2503, 2505, 2506, 2507 and 2508.

21 **Sec. 12. Municipalities to develop list of town ways.** A municipality may
22 prepare a list of all town ways in that municipality that are currently maintained with
23 public funds; a list of all town ways that have been discontinued since 1965 and whether
24 or not a public easement was retained, if known; and a list of all town ways that have
25 been abandoned since 1965 and whether or not a public easement was retained, if known.
26 A municipality shall publish any such lists on its publicly accessible website or make
27 copies available at the municipal office. A municipality may charge a reasonable fee for
28 the lists. A municipality shall record the lists at the appropriate county registry of deeds.
29 The registry of deeds shall record these lists under the name of the municipality. The
30 Department of Transportation may provide a municipality a list of that municipality's
31 state and state aid highways and individual town ways.

32 **SUMMARY**

33 This bill changes the laws governing discontinued and abandoned roads.

34 Under current law, a presumption of abandonment exists if a municipality fails to
35 keep a way passable for the use of motor vehicles at the expense of the municipality for a
36 period of 30 or more years. This bill eliminates that presumption for ways that have not
37 met that statutory requirement by January 1, 2020. Instead, for all other public ways, the
38 bill provides a new discontinuance process, which will be the only means for a
39 municipality to actively terminate its interests in a public way. The new discontinuance
40 process specifies 5 steps a municipality must follow to discontinue a road: the notification

1 of proposed discontinuance to the abutting property owners; a meeting of municipal
2 officers to discuss the proposed discontinuance and the filing of an order of
3 discontinuance specifying whether or not there will be a public easement and any public
4 use restrictions or municipal maintenance and liability responsibilities for the public
5 easement; a public hearing on the discontinuance; approval of the order of discontinuance
6 by the municipal legislative body; and the filing of the certificate of discontinuance by the
7 municipal clerk in the registry of deeds and with the municipality. The bill requires the
8 abutters of a public easement that is discontinued to be granted a right-of-way. The
9 municipality may charge a reasonable fee to fulfill any request for records obtained by the
10 municipality from the registry of deeds.

11 The bill continues to exempt a municipality from liability for nonperformance of a
12 legal duty with respect to a town or county way that has not been kept passable for the
13 use of motor vehicles at the expense of that municipality for a period of 30 or more years.

14 It requires that a public easement must be retained in a discontinued road if abutting
15 property owners need to use it to access their property. It also provides that a public
16 utility easement will be in place whenever a road is discontinued, regardless of whether a
17 public easement is retained.

18 A way that is presumptively abandoned retains a public easement, as is the default
19 position under current law. The bill does not modify common law abandonment.

20 The bill allows a municipality to prepare a list of all town ways in that municipality
21 that are currently maintained with public funds; a list of all town ways that have been
22 discontinued since 1965 and whether or not a public easement was retained, if known;
23 and a list of all town ways that have been abandoned since 1965 and whether or not a
24 public easement was retained, if known. If a municipality prepares a list, the municipality
25 must publish the list on its publicly accessible website or make copies available at the
26 municipal office, for which the municipality may charge a reasonable fee. The
27 municipality must record the list at the county registry of deeds.