



**SELECTMEN'S MEETING e-Packet**  
**List of Files**  
**March 10, 2009**

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Page 1	List of Files
Page 2	Agenda
Page 3 & 4	Agenda Summary
Page 5 & 6	2009 Dog Warrant
Page 7 & 8	Town Report bid award
Page 9	Administrative abatements
Page 10-15	2009 Annual Meeting Warrant
Page 16-42	Road maintenance policy discussion
Page 43	Scholarship Fund information



**BOARD OF SELECTMEN**  
**AGENDA**  
Tuesday, March 10, 2009  
7:00 p.m.  
JSMS Broadcast Studio

**SELECTMEN'S MEETING**

- 1) Call to order.
- 2) Minutes of previous meeting dated February 24, 2009
- 3) New business.
  - a) Comprehensive Plan Implementation Committee update – Chair Christine McLellan
  - b) Executive Session – Consultation with Code Enforcement Officer on pending enforcement matters as authorized under 1 M.R.S.A. § 405(6) (H)
  - c) Consideration of 2009 Dog Warrant – Town Clerk Louise Lester
  - d) Town Report bid award – Town Clerk Louise Lester
  - e) Consideration of administrative abatements – Contract Assessor Michael O'Donnell
  - f) 2009 Annual Town Meeting Warrant for approval of remaining articles – Town Clerk Louise Lester
- 4) Old (unfinished) business.
  - a) Discussion of road maintenance policy for limited use dead end town roads – Selectman Joe Bruno
  - b) Discussion of Scholarship funding levels – Town Clerk Louise Lester
- 5) Town Manager Report and Communications.
  - a) none
- 6) Adjournment.

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The Selectmen may take items out of order at their discretion.



**BOARD OF SELECTMEN  
AGENDA SUMMARY**

Tuesday, March 10, 2009

7:00 p.m.

JSMS Broadcast Studio

**SELECTMEN'S MEETING**

- 1) Call to order.
- 2) Minutes of previous meeting dated February 24, 2009
- 3) New business.

**a) Comprehensive Plan Implementation Committee update – Chair  
Christine McLellan**

CPIC Chair Christine McLellan had hoped to bring some public attention to the upcoming CPIC Public Workshop (to review and discuss the DRAFT of the Commercial Corridor Design guidelines and standards and ordinance amendment proposals) being held on Thursday, March 5, 2009. Because of the shift in dates of the Selectmen's Meeting from the March 3 to March 10, this item is being tabled for now. She would like to come back before Annual Town Meeting and present her update then.

**b) Executive Session – Consultation with Code Enforcement Officer on  
pending enforcement matters as authorized under 1 M.R.S.A. § 405(6)  
(H)**

**c) Consideration of 2009 Dog Warrant – Town Clerk Louise Lester**

Attached to your e-packet is the town's annual dog warrant. Town Clerk Louise Lester will bring the detailed listing of unlicensed dogs to the meeting. This action is required under Title 7 § 3943. By signing this warrant the Selectmen will be instructing the Animal Control Officer to give warning to these dog owners to license their dogs or be summonsed.

**d) Town Report bid award – Town Clerk Louise Lester**

Attached to the e-packet is a summary of bids received in response to the town's recent solicitation for town report printing. Town Clerk Louise Lester recommends using Xpress of Maine, located in Portland, as they are the lowest bidder and they did a satisfactory job last year with the town report.

**e) Consideration of administrative abatements – Contract Assessor  
Michael O'Donnell**

Contract Assessor Mike O'Donnell will have a group of abatements for your consideration.

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The Selectmen may take items out of order at their discretion.

**f) 2009 Annual Town Meeting Warrant for approval of remaining articles – Town Clerk Louise Lester**

Town Clerk Louise Lester has prepared the first draft of the 2009 Annual Town Meeting Warrant for approval of remaining financial articles. The Board of Selectmen approved the municipal budget at their meeting held on February 24, 2009. There are also financial articles that appear on a reoccurring basis each year. These articles still need to receive a Board of Selectmen recommendation. The draft the Town Clerk has provided highlights the articles still needing to receive a recommendation.

**4) Old (unfinished) business.**

**a) Discussion of road maintenance policy for limited use dead end town roads – Selectman Joe Bruno**

Selectman Joe Bruno would like to discuss the possibility of exploring discontinuance of certain limited use dead end town roads that serve less than three houses. In many instances these historic roadways have devolved to essentially driveways servicing the existing homes from a practical standpoint. Information is attached to the e-packet outlining the legal process and procedure for discontinuance. Also included in the e-packet is a memo from Public Works Director Nathan White outlining per mile costs associated with each road in question.

**b) Discussion of Scholarship funding levels – Town Clerk Louise Lester**

Financial information from Finance Director Nancy Yates is included in the e-packet. This is the same information from earlier, included here for ease of reference.

**5) Town Manager Report and Communications.**

a) none

**6) Adjournment.**

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The Selectmen may take items out of order at their discretion.



401 Webbs Mills Road  
Raymond, Maine 04071  
207.655.4742  
655-3024 (Fax)

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MEMO

To: Board of Selectmen

Date: March 5, 2009

From: Louise Lester, Town Clerk

Subject: 2009 Dog Warrant

I have attached a copy of the 2009 Dog Warrant for your consideration. On Tuesday afternoon, March 10<sup>th</sup> I will prepare the list of dog owners who are not in compliance with Title 7 MRSA Chapter 721. This list will be acted upon by our Animal Control Officers after the warrant is signed.

It has been my policy to send postcards to each person on this list asking them to come in and license their dog(s). The Animal Control Officers will also be visiting them to ensure compliance.

All dog owners for whom I had a valid mailing address, and who hadn't licensed their dogs for 2009 as of the middle of December, received a reminder postcard in December. They also received a reminder postcard in January prior to the \$15 fine being in force.

**Town of Raymond  
Raymond, Maine  
Municipal Warrant For Prosecuting  
Unlicensed Dog Owners/Keepers**

State of Maine  
Title 7 MRSA Chapter 721 & Section 3943

Cumberland County, ss.

To Donald Alexander, Animal Control Officer of the municipality of Raymond, Maine.

In the name of the State of Maine and in accordance with the provisions of Title 7 MRSA Section 3943 as amended, you are hereby directed to send a notice of violation or call on, the attached list of owners/keepers of a dog (six months old as of January 1<sup>st</sup>, 2009) that are unlicensed in violation of Title 7 MRSA Chapter 721.

You are also hereby to make a demand on the owner of keeper to obtain a license from the municipal clerk within seven (7) days from the date of the demand and to remit to the clerk the license and recording fees plus a late fee of \$25.00 per dog licensed.

Finally, you are hereby directed to enter summons and complaint as soon as possible for those owners/keepers who fail to comply with the order.

And you will make return of this warrant, with your doings thereon, to the Municipal Officers of said Raymond by July 1<sup>st</sup> of 2009.

Given under our hands at Raymond in the County of Cumberland on the tenth day of March A.D. 2009.

For Municipal Officers of Raymond, Maine.

\_\_\_\_\_  
Mike Reynolds, Chairman

\_\_\_\_\_  
Joseph Bruno

\_\_\_\_\_  
Dana Desjardins

\_\_\_\_\_  
Mark Gendron

\_\_\_\_\_  
Lawrence Taylor



401 Webbs Mills Road  
Raymond, Maine 04071  
207.655.4742  
655-3024 (Fax)

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MEMO

To: Board of Selectmen

Date: March 5, 2009

From: Louise Lester, Town Clerk

Subject: Town Report Printing

Please find attached the three (3) bids which we have received. Our budget for this year is \$3,550. Hugh Coxe and Christine McClellan, CPIC chairman, has told me they would like to print their ordinances separately, if the Selectmen so approve. I'm not sure about the Fire Department ordinance but if it's short I feel it could be included.

I intend to print 500 copies and have them available to be picked up by the residents at the Town Office and the Library with other locations to be determined. I hope that we can go to print by April 15<sup>th</sup> and have them a week later which will give residents time to peruse the report.

I recommend using Xpress of Maine being the lowest bidder and their work last year was fine. John Hanley has done business with them before and had no problem with them. There is an added benefit from them in that if we want more books at any time, they will print them in any number for the same price.

2008 Town Report  
Printer Bids

03/05/2009

Submission	Printer	Address	Add2	CSZ	Phone	Email	90 pages	each	170 pages	each
2/5/09	Xpress of Maine	144 Fore St. Ste F	PO Box 7524	Portland, Me 04112	775-2444		\$1,235.00	\$2.47	\$0.02/pg	\$4.07
1/22/09	Walch Printing	40 Walch Drive		Portland, Me 04103	523-2505	<a href="mailto:jwhite@walch.com">jwhite@walch.com</a>	\$1,780.00	\$3.26	\$2,480.00	\$4.96
1/30/09	Minuteman Press	PO Box 1830		North Conway, NH 03860	603-356-2010	<a href="mailto:minuteman@ncmmp.com">minuteman@ncmmp.com</a>	\$2,183.63	\$4.37	\$3,027.38	\$6.05
	T. Pine	382 Leonard Bridge Rd.		Lebanon, CT 06249	860-642-7139	<a href="mailto:bob.harper@snet.net">bob.harper@snet.net</a>				
	Maine Label & Printing	141 Whites Bridge Rd		Standish, Maine 04084	892-1850					



TOWN OF RAYMOND Assessing Office

401 Webbs Mills Road Raymond, Maine 04071  
Phone 207.655.4742 x51 Fax 207.655.3024  
[assessor@raymondmaine.org](mailto:assessor@raymondmaine.org)

The following 3 abatements have been decided by the Raymond Board of Assessors.

Ab #	Acct#	Map	Lot	Sub	Owner	Reason	Year	Taxed Value	Abated Value	Abated Tax
21	G0390R	'031	'044	000	Crescent Lake Cottages	Duplicate assessment of Common land	2006-2007	164,700	\$164,700	3,359.88
22	D5017R	018	018	G00	Disanto, Anna	Lower grade on building	2008	359,100	\$67,200	725.76
23	L6010P	PP			Leclerc, John & Betty	trailer no longer in Raymond	2008	8,574	\$8,574	92.60
									TOTAL	4,178.24
									ALL 2008	11,548.24

Voted by the Raymond Assessors on: \_\_\_\_\_

**TOWN OF RAYMOND  
Wednesday, June 2, 2009**

**ANNUAL BUDGET/TOWN WARRANT**

TO: Nathan White, a resident of the Town of Raymond, in the County of Cumberland and State of Maine.

**GREETINGS:**

In the name of the State of Maine, you are hereby required to notify and warn the inhabitants of the Town of Raymond, qualified by law to vote in Town affairs, to meet at the Jordan-Small Middle School gymnasium, in said Town of Raymond on Tuesday, June 2, 2009 at 7:00 P.M., then and there to act on the following articles:

**ARTICLE 1:** To elect a moderator to preside at said meeting.

**ARTICLE 2: Ordinances ?**  
**Open Space Plan**  
**CPIC ordinances**  
**Fire Department Ordinance**

**ARTICLE 3:** To see if the Town will vote to authorize the Selectmen on behalf of the Town to sell and dispose of any property acquired by the Town for nonpayment of taxes pursuant to the policy adopted by the Selectmen, as may be amended from time to time, the policy to remain consistent with State statutes and laws. In all cases conveyance to be made by municipal quitclaim deed.

**The Selectmen**  
**The Budget Committee**

**ARTICLE 4:** To see what date taxes will be due and to set an interest rate for unpaid amounts.

The Selectmen recommend 1<sup>st</sup> half to be due October 31, 2009 and 2<sup>nd</sup> half to be due April 30, 2010 with interest at nine percent (9%) on any unpaid balances.

**The Selectmen**  
**The Budget Committee**

**ARTICLE 5:** To see if the Town will vote to set the interest rate to be paid by the Town on abated taxes at nine percent (9%) for the fiscal year.

**The Selectmen**  
**The Budget Committee**

**ARTICLE 6:** To see if the Town will vote to authorize the Board of Selectmen to dispose of Town owned personal property with value not to exceed \$35,000.

The Selectmen  
The Budget Committee

**ARTICLE 7:** To see what sum the Town will vote to authorize the Selectmen to borrow from or appropriate from fund balance (surplus) as they deem advisable to meet the unanticipated needs of the community that occur during the fiscal year.

The Selectmen                                 amount not over \$75,000.  
The Budget Committee                                 amount not over \$75,000.

**ARTICLE 8:** To see if the Town will authorize the Selectmen, for the fiscal year 2009 - 2010, to transfer funds between appropriation accounts as long as the grand total of all appropriations is not exceeded. Any such transfers to be approved only at a properly called public meeting of the Selectmen.

The Selectmen  
The Budget Committee

**ARTICLE 9:** To see if the Town will vote to authorize the use of Town employees and/or Town owned equipment or independent contractor(s) hired by the Town for maintenance on private roads in special and certain circumstances where in the public's interest.

**Note of explanation -- Three examples of when the use of Town employees and equipment is necessary include the following:**

- A. Tying in work done on a public road that intersects a private road;
- B. Plowing snow on a private road to clear the way for emergency response apparatus; and
- C. In rare or emergency situations, maintaining private roads for school bus access to special education students as deemed necessary.

The Selectmen  
The Budget Committee

**ARTICLE 10:** To see if the Town will vote to authorize the Tax Collector or Treasurer to accept prepayments of taxes not yet committed pursuant to 36 M.R.S.A. § 506.

The Selectmen  
The Budget Committee

**ARTICLE 11:** To see what sum the Town will vote to appropriate from the tax increment of the Pipeline/RT 302 Tax Increment Financing District for FY 2008 - 2009 projects proposed in the Tax Increment Financing District Development Program.

Amount requested: \$193,823

Note: Included in this item are: Raymond-Casco Historical Society	\$ 1,800
Raymond Waterways Association Milfoil Program	\$15,000

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 12:** To see what sum the Town will vote to raise and appropriate for the Administration account.

Amount requested: \$497,882

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 13:** To see what sum the Town will vote to raise and appropriate for the Assessing account.

Amount requested: \$66,337

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 14:** To see what sum the Town will vote to raise and appropriate for the Town Hall account.

Amount requested: \$33,621

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 15:** To see what sum the Town will vote to raise and appropriate for the Insurance account.

Amount requested: \$461,536

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 16:** To see what sum the Town will vote to raise and appropriate for the General Assistance account.

Amount requested: \$2,000

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 17:** To see what sum the Town will vote to raise and appropriate for the Technology Department account.

Amount requested: \$156,400

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 18:** To see what sum the Town will vote to raise and appropriate for the Community Development account.

Amount requested: \$47,027

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 19:** To see what sum the Town will vote to raise and appropriate for the Fire/Rescue Department account.

Amount requested: \$581,196

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 20:** To see what sum the Town will vote to raise and appropriate for the Animal Control account.

Amount requested: \$12,606

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 21:** To see what sum the Town will vote to raise and appropriate for the Infrastructure account.

Amount requested: \$21,220

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 22:** To see what sum the Town will vote to raise and appropriate for the Public Works account.

Amount requested: \$589,566

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 23:** To see what sum the Town will vote to raise and appropriate for the Solid Waste account.

Amount requested: \$470,991

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 24:** To see what sum the Town will vote to raise and appropriate for the Cemeteries account.

Amount requested: \$18,112

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 25:** To see what sum the Town will vote to raise and appropriate for the Parks & Recreation account.

Amount requested: \$16,535

Included are: Materials/Equipment	\$4,200
Contract Services	\$7,335
Raymond Rattlers Snowmobile	\$2,000
Raymond Baseball/Softball	\$1,000
Agawam mowing/soccer	\$2,000

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 26:** To see what sum the Town will vote to raise and appropriate for the Raymond Village Library.

Amount requested: \$30,900

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 27:** To see what sum the Town will vote to raise and appropriate for the Provider Agencies.

Amounts requested:	2009-2010 level
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*Raymond Extended Day Care	\$1,500
*Raymond Mentoring Partnership	\$1,000
Raymond Food Pantry	\$ 200

Amount requested: \$2,700

\*EXPLANATION: This funding will only be awarded if these groups raise equal matching funds.

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 28:** To see whether the Town will vote to carry forward any existing fund balance in the Capital Improvement Program (C.I.P.) account.

**The Selectmen**  
**The Budget Committee**

**ARTICLE 29:** To see what sum the Town will vote to raise and appropriate for the Capital Improvement account.

Amount requested: \$686,711

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 30:** To see what sum the Town will vote to raise and appropriate for the County Tax account.

Amount requested: \$560,674

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 31:** To see if the Town will vote to appropriate the total sum of \$1,698,675 from estimated non-property tax revenues to reduce the property tax commitment, together with all categories of funds which may be available from the federal government and any other sources.

The Selectmen recommend adoption of this Article.  
The Budget Committee recommends adoption of this Article.

**ARTICLE 32:** To see if the Town will vote to authorize the Selectmen to accept or reject grants, donations and/or gifts of money to the Town of Raymond and to expend monies donated for specific purposes.

The Selectmen  
The Budget Committee

**ARTICLE 33:** To see if the Town will vote to accept certain State Funds as provided by the Maine State Legislature during the fiscal year beginning July 1, 2009 and any other funds provided by any other entity included but not limited to:

- A. Municipal Revenue Sharing
- B. Local Road Assistance
- C. Emergency Management Assistance
- D. Snowmobile Registration Money
- E. Tree Growth Reimbursement
- F. General Assistance Reimbursement
- G. Veteran's Exemption Reimbursement
- H. State Grant or Other Funds

The Selectmen  
The Budget Committee

Given under our hands this 10<sup>th</sup> day of April AD 2009.

\_\_\_\_\_  
Mike Reynolds

\_\_\_\_\_  
Joseph Bruno

\_\_\_\_\_  
Dana Desjardins

\_\_\_\_\_  
Mark Gendron

\_\_\_\_\_  
Lawrence Taylor

Selectmen of Raymond

**Subject:** FW: roads

**From:** "Nathan White" <nathan.white@raymondmaine.org>

**Date:** Fri, 27 Feb 2009 11:00:25 -0500

**To:** "'Laurie Cook'" <laurie.cook@raymondmaine.org>

-----Original Message-----

**From:** Nathan White [mailto:nathan.white@raymondmaine.org]

**Sent:** Wednesday, November 19, 2008 8:26 AM

**To:** 'Don Willard'

**Subject:** roads

Good morning Don

Here is the list of roads that public works maintains with less then 3 houses

- 1- Mailman rd off North Raymond road 454.41'feet long with one house
- 2- McDermott Rd off Raymond hill road 424.87'feet long with one house
- 3- Frye road off North Raymond road 773.88'feet long with two houses
- 4- Chapel St off main St 736.18' feet long with three houses
- 5- Adams post Rd off Meadow road 258.12' feet long with two houses

All the roads listed are year round roads and receive maintains from this dept One two and three are gravel roads and four and five are paved and Adams post Rd was repaved with base pavement in 2007, all the gravel roads are graded spring and fall with material add as needed.

Thanks  
Nate

3/4/2009 12:14 PM





401 Webbs Mills Road  
Raymond, Maine 04071

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### MEMORANDUM

TO: Don Willard  
FROM: Nathan White  
DATE: March 6, 2009

This is the breakdown of cost for maintaining the four roads up for discussion on March 10th. Will Cook and I looked at Chapel and noticed that road services three homes and a four unit apartment building, with that we removed Chapel from the list.

1- Adams Post Road Length 258.12 feet long Cost \$5,705.00

Adams Post Road is off Rt. 121 just before Flynn Road and services two homes. In October of 2007 the town paved the road at a cost of \$5,705.00, without plowing it is the only money spent on the road in ten years.

2- Frye Road Length 773.88 feet long Cost \$3,391.00

Frye Road is off of North Raymond Road near the Pond Road and services two homes, one is unlivable at this time. In August of 2006 the Town made drainage improvement and regraded the road. Most of the cost was related to work done on North Raymond road to repair drainage.

3- McDermott Road Length 424.87 feet long Cost \$348.00

McDermott Road is off Mountain Road and services one home. In 2005 the town added gravel to the road and graded the road.

4- Mailman Road Length 454.41 feet long Cost \$900.00

Mailman Road is off North Raymond Road and services one home. In 1999 the town added gravel and graded the road.

All of the gravel roads have had some repair in the form of grading in the past ten years but only in the past five years have records been kept for just grading. The plowing had been handled by P&K up until 2003 when the town took over the plowing to save money on the last contract.

The plowing cost is a very difficult number to calculate. The truck that plows these roads is already in the area plowing other town assets so plowing of these short roadways can be done for little cost. My best cost estimate is \$750 per year for all four roadways.

The cost over ten years to maintain all four roads is approximately \$10,344.00

The total length is 1,911.28 feet or .36 miles.  
The annual cost of all four roads is \$1,034.



401 Webbs Mills Road  
Raymond, Maine 04071  
207.655.4742  
655-3024 (Fax)

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MEMO

To: Board of Selectmen

Date: March 5, 2009

From: Louise Lester, Town Clerk

Subject: Town Roads

Nathan White and I have discussed the "short" town roads below and discovered that they came to be town roads over a period of years from about 1950 to 1960. I haven't researched them in the town reports or other town records as yet.

Dyer, Mailman, and Frye Roads were a part of the original North Raymond Road. Nathan believes that sometime in the 1950's the state took it over and straightened North Raymond Road and the town picked up maintaining the resulting Mailman, Dyer and Frye Roads. He was told that the state relinquished North Raymond Road to Raymond during that time period.

McDermott Road was a part of an old County Road and was considered a town road when the county relinquished it to Raymond.

Chapel Street was not in existence in the late 1950's but a part of a farm adjacent to Main Street. It probably became a town road when that housing subdivision was created.

Adams Post Road was a part of Route 121 (Meadow Road) but was discontinued when the road was straightened in the 1950's or so.

207 774-1200 main  
207 774-1127 facsimile  
bernsteinshur.com

## BERNSTEIN SHUR

C O U N S E L O R S   A T   L A W

100 Middle Street  
PO Box 9729  
Portland, ME 04104-5029

Christopher L. Vaniotis  
207 228-7205 direct  
cvaniotis@bernsteinshur.com

March 2, 2009

Don Willard, Town Manager  
Town of Raymond  
401 Webbs Mills Road  
Raymond, Maine 04071

Re: Damages upon Discontinuance of Public Ways

Dear Don:

When a town discontinues a town way (which includes former county ways), 23 M.R.S.A. Section 3026 requires the town to specify “the amount of damages, if any, determined by the municipal officers to be paid to each abutter.” Those damages are determined the same way as the Maine Department of Transportation determines damages in the case of a taking for highway purposes. 23 M.R.S.A. § 3029. The Law Court several years ago held that “nothing in sections 3026 and 3029 limits the availability of damages for the discontinuance of a road to circumstances in which such discontinuance takes away all access to the landowner’s property.” Frustaci v. City of South Portland, 2005 ME 101, ¶ 16, 879 A.2d 1001, 1007 (emphasis added).

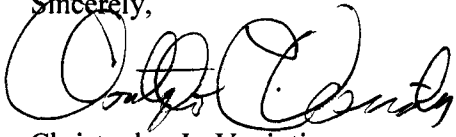
The Frustaci case involved a situation where the City of South Portland discontinued two City roads which abutted Frustaci’s property in Cape Elizabeth. Even though Frustaci had access to his property from town roads in Cape Elizabeth, the discontinuance of the South Portland streets made it harder for him to develop his property and reduced the number of lots he could develop. The City had awarded Mr. Frustaci no damages, on the theory that he still had access to his property from Cape Elizabeth. Frustaci sued the City and won a jury verdict in the amount of \$380,000.00.

Needless to say, the Frustaci case poses a warning to a municipality considering the discontinuance of any town way. The Town must assess all the facts and circumstances of the situation and determine what impact the discontinuance will have on the value of abutters’ properties, because that impact is compensable in damages even if the abutters retain other access to their properties.

Don Willard, Town Manager  
March 2, 2009  
Page 2 of 2

I hope this provides helpful background as you consider the several situations in Raymond.  
Feel free to give me a call if you would like to discuss this further.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Vaniotis", written in a cursive style.

Christopher L. Vaniotis

CLV/lc

Carpenter/CLV/Raymond/WillardLtr030209 5049.997

879 A.2d 1001, 2005 ME 101

Briefs and Other Related Documents

Supreme Judicial Court of Maine.

Joseph **FRUSTACI**

v.

CITY OF **SOUTH PORTLAND**

Docket No. Cum-04-640.

Argued: May 18, 2005.

Decided: Aug. 25, 2005.

**Background:** Landowner brought action against city, alleging several claims, including inverse condemnation, claim for statutory damages, and federal claims, concerning city's discontinuance of two roads that abutted landowner's property. City removed case to federal court. The United States District Court, District of Maine, Hornby, J., affirmed recommended decision of Cohen, J., Magistrate Judge, that dismissed federal claims and remanded case to state court. Following a jury trial on claim for statutory damages, the Superior Court, Cumberland County, Humphrey, C.J., entered judgment in favor of landowner. City appealed.

**Holdings:** The Supreme Judicial Court, Clifford, J., held that:

- (1) action seeking statutory damages concerning government's decisions that affect property is not limited to cases in which there has been taking of constitutional dimensions;
- (2) landowner's subsequent development of subdivision on his property was not relevant as to mitigation of damages; and
- (3) failure to give jury instruction stating that existence of alternative means of accessing landowner's property precluded award of statutory damages did not constitute prejudicial error.

Affirmed.

## West Headnotes

[1]  KeyCite Citing References for this Headnote

- 30 Appeal and Error
  - 30XVI Review
    - 30XVI(G) Presumptions
    - 30k915 Pleading
      - 30k919 k. Striking Out or Dismissal. Most Cited Cases

Supreme Judicial Court generally reviews the trial court's disposition of a motion to dismiss by examining the plaintiff's complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.

[2]  KeyCite Citing References for this Headnote

- 30 Appeal and Error
  - 30XVI Review
    - 30XVI(F) Trial De Novo
    - 30k892 Trial De Novo
    - 30k893 Cases Triable in Appellate Court

30k893(1) k. In General. Most Cited Cases

Supreme Judicial Court's review of the trial court's construction of a statute is de novo.

[3]  KeyCite Citing References for this Headnote

148 Eminent Domain

- 148IV Remedies of Owners of Property; Inverse Condemnation
  - 148k266 k. Nature and Grounds in General. Most Cited Cases

Action seeking damages pursuant to statute allowing landowner to seek de novo determination in Superior Court of entitlement to damages following municipality's administrative decision, including eminent domain cases, is not limited to cases in which there has been taking of constitutional dimensions. U.S.C.A. Const.Amend. 5; M.R.S.A. Const. Art. 1, § 21; 23 M.R.S.A. § 3029.

[4]  KeyCite Citing References for this Headnote

148 Eminent Domain

- 148I Nature, Extent, and Delegation of Power
  - 148k2 What Constitutes a Taking; Police and Other Powers Distinguished
    - 148k2.1 k. In General. Most Cited Cases

Proper procedure for analyzing constitutional taking questions is to determine the value of the property at the time of the governmental restriction and compare that with its value afterwards, to determine whether the diminution, if any, is so substantial as to strip the property of all practical value. U.S.C.A. Const.Amend. 5; M.R.S.A. Const. Art. 1, § 21.

[5]  KeyCite Citing References for this Headnote

268 Municipal Corporations

- 268XI Use and Regulation of Public Places, Property, and Works
  - 268XI(A) Streets and Other Public Ways
    - 268k657 Vacation or Abandonment
      - 268k657(6) k. Review. Most Cited Cases

Landowner's subsequent development of subdivision on his property was not relevant as to mitigation of damages in landowner's action that was brought against city and that sought statutory damages based on city's discontinuance of two roads that abutted landowner's property; development, which used alternative means of access, occurred several years after discontinuances, and development occurred only after landowner purchased another piece of property. 23 M.R.S.A. §§ 3026, 3029.

[6]  KeyCite Citing References for this Headnote

30 Appeal and Error

- 30XVI Review
  - 30XVI(I) Questions of Fact, Verdicts, and Findings
    - 30XVI(I)1 In General
      - 30k992 k. Questions Preliminary to Admission of Evidence. Most Cited Cases

Supreme Judicial Court reviews trial court determinations of relevancy-of-evidence questions for clear error.

[7]  KeyCite Citing References for this Headnote

- 30 Appeal and Error
  - 30XVI Review
    - 30XVI(H) Discretion of Lower Court
      - 30k970 Reception of Evidence
        - 30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases

Supreme Judicial Court reviews the ultimate decision to admit or exclude evidence, subject to other challenges, for a sustainable exercise of discretion.

[8]  [KeyCite Citing References for this Headnote](#)

- 268 Municipal Corporations
  - 268XI Use and Regulation of Public Places, Property, and Works
    - 268XI(A) Streets and Other Public Ways
      - 268k657 Vacation or Abandonment
        - 268k657(6) k. Review. Most Cited Cases

Trial court's failure to give jury instruction stating that existence of alternative means of accessing landowner's property precluded award of statutory damages for city's discontinuance of two roads that abutted landowner's property did not constitute prejudicial error; jury heard evidence regarding existence of alternative means of accessing property, jury was instructed that landowner is not entitled to particular form of access, but only suitable or reasonable means of access, and applicable statutes did not limit availability of damages to situations in which discontinuance takes away all access. 23 M.R.S.A. §§ 3026, 3029.

[9]  [KeyCite Citing References for this Headnote](#)

- 30 Appeal and Error
  - 30XVI Review
    - 30XVI(J) Harmless Error
      - 30XVI(J)18 Instructions
        - 30k1067 k. Failure or Refusal to Charge. Most Cited Cases

Supreme Judicial Court reviews a trial court's denial of a requested jury instruction for prejudicial error.

[10]  [KeyCite Citing References for this Headnote](#)

- 388 Trial
  - 388VII Instructions to Jury
    - 388VII(G) Construction and Operation
      - 388k295 Construction and Effect of Charge as a Whole
        - 388k295(1) k. In General. Most Cited Cases

Jury instructions are reviewed in their entirety to determine whether they fairly and correctly apprised the jury in all necessary respects of the governing law.

[11]  [KeyCite Citing References for this Headnote](#)

- 30 Appeal and Error
  - 30XVI Review
    - 30XVI(A) Scope, Standards, and Extent, in General
      - 30k838 Questions Considered
        - 30k840 Review of Specific Questions and Particular Decisions

30k840(4) k. Review of Questions of Pleading and Practice. Most Cited Cases

On appellate review, a party can demonstrate entitlement to a requested jury instruction only where the instruction was requested and not given by the court and it: (1) states the law correctly, (2) is generated by the evidence in the case, (3) is not misleading or confusing, and (4) is not otherwise sufficiently covered in the court's instructions.

[12]  KeyCite Citing References for this Headnote

- 200 Highways
  - 200III Vacation
    - 200k78 k. Operation and Effect. Most Cited Cases

Availability of damages to an abutting landowner for a discontinuance of a road is not limited to circumstances in which such discontinuance takes away all access to the landowner's property. 23 M.R.S.A. §§ 3026, 3029.

\***1002** James Haddow, Esq. (orally), Petruccelli, Martin & Haddow, Portland, for the plaintiff.

Mark Franco, Esq. (orally), Michael Saucier, Esq., Thompson & Bowie, Portland, for the defendant.

Panel: CLIFFORD, DANA, ALEXANDER, CALKINS, and LEVY, JJ. FN\*

FN\* Justice Paul L. Rudman sat at oral argument and participated in the initial conference, but retired before this opinion was adopted.

CLIFFORD, J.

[¶ 1] The City of **South Portland** appeals from a judgment entered in the Superior Court (Cumberland County, *Humphrey, C.J.* ) following a jury verdict in favor of Joseph **Frustaci** on **Frustaci's** claims for statutory damages pursuant to 23 M.R.S.A. § 3029 (1992) based on the City's discontinuance of two roads that abutted his property. The City contends that **Frustaci's** claim for statutory damages is precluded by the Superior Court's prior conclusion that **Frustaci** suffered no physical or regulatory taking as a result of the discontinuances. The City also contends that the court improperly excluded evidence regarding **Frustaci's** mitigation of damages and erred in its instruction to the **\*1003** jury. We discern no error and affirm the judgment.

#### I. BACKGROUND

[¶ 2] **Frustaci** owns a parcel of property located in Cape Elizabeth that abuts the **South Portland** boundary. Pursuant to 23 M.R.S.A. § 3026 (1992), the City of **South Portland** discontinued two public roads, Charlotte Street and Edgewood Road, both of which terminated at the boundary of **Frustaci's** property. The City did not award **Frustaci** any damages for the discontinuances. Following the discontinuances, **Frustaci** filed two complaints, later consolidated, in the Superior Court pursuant to M.R. Civ. P. 80B, and also alleged federal and State constitutional claims and State statutory causes of action including, *inter alia*, claims that the discontinuances amounted to unconstitutional takings and claims for statutory damages pursuant to 23 M.R.S.A. § 3029.

[¶ 3] Based on **Frustaci's** federal claims, the City removed the case to the United States District Court for the District of Maine. That Court ( *Hornby, J.* ) affirmed the recommended decision of the Magistrate Judge ( *Cohen, J.* ) dismissing the federal claims and remanding the case back to the Superior Court. The Superior Court affirmed the City's discontinuance orders and entered a judgment in favor of the City on all of **Frustaci's** remaining claims except the statutory damages claims as to both roads and the inverse condemnation claim as to Edgewood Road. In its decision, the court



determined that Frustaci had suffered neither a physical nor a regulatory taking as a result of the City's discontinuance of the roads. The City then moved to dismiss the remaining claims on the ground that they were precluded by the court's prior determination that **Frustaci** had suffered no taking. The court granted the City's motion to dismiss as to the inverse condemnation claim, but denied the motion as to the statutory damages claims.

[¶ 4] The parties proceeded to trial on **Frustaci's** statutory damages claims brought pursuant to section 3029. Prior to trial, and following motions in limine filed by both parties, the court ruled that it would admit evidence regarding **Frustaci's** mitigation of damages as it applied to the value of the property "immediately before and immediately after the discontinuance," but excluded evidence regarding **Frustaci's** later development of his property. Following a jury trial in September of 2004, at which **Frustaci** was awarded statutory damages of \$380,000, the City filed this appeal.

## II. DISCUSSION

### A. Statutory Damages

[1] [2] [¶ 5] The City contends that the court's finding that **Frustaci** suffered no physical or regulatory taking as a result of the City's discontinuance of Charlotte Street and Edgewood Road necessarily precludes an award of statutory damages pursuant to section 3029, and that the court was thus required as a matter of law to dismiss Frustaci's statutory damages claims as to both roads. Generally, we review the trial court's disposition of a motion to dismiss by examining the plaintiff's complaint "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 7, 843 A.2d 43, 46-47 (quotation marks omitted). The issue raised requires us to interpret the scope and applicability of a statute. Our review of the trial court's construction of a statute is de novo. *Commerce Bank & Trust Co. v. Dworman*, 2004 ME 142, ¶ 7, 861 A.2d 662, 665.

\*1004 [3] [¶ 6] The City discontinued Charlotte Street and Edgewood Road pursuant to 23 M.R.S.A. § 3026, which provides, in pertinent part:

1. General procedures. A municipality may terminate in whole or in part any interests held by it for highway purposes. A municipality may discontinue a town way or public easement after the municipal officers have given best practicable notice to all abutting property owners and the municipal planning board or office and have filed an order of discontinuance with the municipal clerk that specifies the location of the way, the names of abutting property owners and the *amount of damages, if any, determined by the municipal officers to be paid to each abutter.*

23 M.R.S.A. § 3026 (emphasis added). Thus, section 3026 provides for damages to be awarded to abutters who have been harmed by the discontinuance of a road. The City does not challenge Frustaci's status as an abutter.

[¶ 7] Section 3029 further authorizes such an abutter, who is awarded no damages or inadequate damages by the municipality pursuant to section 3026, to seek redress in the Superior Court:

Any person aggrieved by the determination of the damages awarded to owners of property or interests therein under this chapter may, within 60 days after the day of *taking*, appeal to the Superior Court in the county where the property lies. The court shall determine damages by a verdict of its jury or, if all parties agree, by the court without a jury or by a referee or referees and *shall render judgment for just compensation*, with interest where such is due, and for costs in favor of the party entitled thereto.

23 M.R.S.A. § 3029 (emphasis added). Frustaci sought damages pursuant to section 3029 after being awarded no damages by the City when it discontinued the two roads.

[¶ 8] The City contends that relief pursuant to section 3029 is available *only* in cases in which a taking of *constitutional* significance has occurred, and that because the court determined that Frustaci suffered no such taking, he was not entitled to any statutory damages for the discontinuance of the two roads. The City argues that the "taking" and "just compensation" language in section 3029 is based on language found in both the Federal and Maine Constitutions. The United States Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Similarly, the Maine Constitution provides that "[p]rivate property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." ME. CONST. art. 1, § 21.

[¶ 9] We disagree with the City's contention. Although section 3029 employs the terms "taking" and "just compensation," there is no other indication either in section 3026 or in section 3029 that a taking of constitutional significance is *required* for an award of damages, and indeed, when viewed in the context of the statutory scheme, the contrary construction is compelled. The statutory scheme of which section 3029 is a part supports the conclusion that the intent of the Legislature was that section 3029 damages be available to an abutter of a discontinued road even when the injury does *not* rise to the level of a constitutional taking. See *Blanchard v. Dep't of Transp.*, 2002 ME 96, ¶ 21, 798 A.2d 1119, 1125 (noting that the "terms of a statute will be given a meaning consistent with the overall statutory context and construed in light of the subject matter, the occasion and necessity for the law, and consequences of a particular interpretation").

\*1005 [4] [¶ 10] Because "just compensation" pursuant to section 3029 depends, first, on the municipality's award of damages pursuant to section 3026, or some other section of chapter 304, section 3029 essentially provides a subsequent procedure that allows for a de novo determination of damages. Section 3026, the underlying authority for the award of damages in this case involving road discontinuances, contains neither the word "taking" nor the phrase "just compensation," and does not implicate a takings analysis. As the Superior Court aptly noted, although a constitutional taking requires payment of compensation when the landowner is deprived of all practical value of his or her property, there is no such limitation on the award of damages pursuant to section 3026, which may be awarded for the discontinuance of a road merely to the extent that an abutter is harmed by the discontinuance. It would be an anomaly if, following a discontinuance pursuant to section 3026, damages could be awarded by the municipality to an abutter for harm that did not rise to the level of a taking, but a damage award could be sought in the Superior Court pursuant to section 3029 only when the municipality's discontinuance action amounted to a constitutional taking, i.e., when the discontinuance stripped the abutting property of "all practical value." <sup>FN1</sup> *Wyer v. Bd. of Env'tl. Prot.*, 2000 ME 45, ¶ 1, 747 A.2d 192, 193-94. We decline to import a constitutional takings analysis into section 3026, which is otherwise devoid of any taking references, constitutional or otherwise, because such a construction would be contrary to the letter and spirit of section 3026. The language and context of section 3026 indicate that an action seeking damages pursuant to section 3029 is not limited to cases in which there has been a taking of constitutional dimensions.

FN1. "The proper procedure for analyzing [Constitutional] taking questions is to determine the value of the property at the time of the governmental restriction and compare that with its value afterwards, to determine whether the diminution, if any, is so substantial as to strip the property of all practical value." *Wyer v. Bd. of Env'tl. Prot.*, 2000 ME 45, ¶ 1, 747 A.2d 192, 193-94 (quotation marks omitted).

[¶ 11] Moreover, contrary to the City's contention, section 3029 is not "merely a procedural vehicle for a cause of action seeking just compensation [when] discontinuation of a town way results in a 'taking.'" Section 3029 provides the authority for any landowner harmed by government action discussed in *any* provision in chapter 304 to seek a de novo determination of the entitlement to and appropriate amount of damages in the Superior Court following a municipality's administrative

decision, including eminent domain cases, see 23 M.R.S.A. § 3023 (1992). This application of section 3029 is not limited to eminent domain proceedings, however, but instead allows damages to be sought in the Superior Court from the many assorted government actions mentioned in chapter 304 that may involve no taking of constitutional significance, including the discontinuance or abandonment of town ways and the vacation of proposed town ways. See 23 M.R.S.A. §§ 3026, 3027, 3028 (1992).

[¶ 12] Further, causes of action for constitutional takings, including both inverse condemnation claims and those challenging a municipality's exercise of eminent domain, may be brought directly and independently of section 3029. See, e.g., *Larrabee v. Town of Knox*, 2000 ME 15, ¶ 4, 744 A.2d 544, 545; *Fitzgerald v. City of Bangor*, 1999 ME 50, ¶ 7, 726 A.2d 1253, 1254-55. Indeed, Frustaci's own complaint asserted both takings and inverse condemnation claims independent from his claims for statutory damages pursuant to section 3029. If the damages provisions of \*1006 sections 3026 and 3029 were applicable only when a taking of constitutional significance occurred, then those provisions would not be needed because any party who suffered a taking of constitutional significance could bring a cause of action for a taking without the need to invoke sections 3026 or 3029. Likewise, a party who did *not* suffer a taking of constitutional significance could not invoke sections 3026 and 3029, and those sections would have little application. See, e.g., *Finks v. Me. State Highway Comm'n*, 328 A.2d 791, 799 (Me.1974) ("In the construction of a statute, nothing should be treated as surplusage, if a reasonable interpretation supplying meaning and force is possible."). We have found nothing in the legislative history of sections 3026 or 3029, or in any prior case law, to support the conclusion that damages awarded pursuant to section 3029 are available only in matters involving constitutional takings. Damages pursuant to sections 3026 and 3029 are available if harm is proven, but proof of a constitutional taking is not essential.

#### B. Mitigation of Damages

[5] [6] [7] [¶ 13] The City also contends that the trial court erred in excluding evidence regarding **Frustaci's** subsequent development of a nineteen-lot subdivision on his property, which used an alternative means of access following the City's discontinuance of the two roads. That project is more substantial than the fifteen-lot subdivision **Frustaci** was precluded from developing as a result of the discontinuance of the two **South Portland** roads. "We review trial court determinations of relevancy of evidence questions for clear error, and we review the ultimate decision to admit or exclude evidence, subject to other challenges, for a sustainable exercise of discretion." *Coyne v. Peace*, 2004 ME 150, ¶ 13, 863 A.2d 885, 889-90.

[¶ 14] The trial court, however, did not preclude the City from offering *any* evidence regarding mitigation of damages. The court merely limited the scope of relevant damages to that period immediately preceding and immediately following the road discontinuances. **Frustaci's** subsequent development of his present nineteen-lot subdivision occurred in 2004, several years after the two road discontinuances, and only after **Frustaci** purchased another piece of property. The City was *not* prevented from presenting evidence as to the value of **Frustaci's** property immediately following the road discontinuances, including the potential of the property for further development, but no such evidence was presented. The court committed no error in limiting the time frame for mitigation of damages to the relevant period of immediately before and after the discontinuances.

#### C. Jury Instructions

[8] [9] [10] [11] [¶ 15] The City further contends that the court erred in failing to instruct the jury that the existence of an alternative means of accessing Frustaci's property precluded an award of damages for the discontinuances. We review the trial court's denial of a requested jury instruction for prejudicial error. *Lee v. Scotia Prince Cruises Ltd.*, 2003 ME 78, ¶ 15, 828 A.2d 210, 214. "Jury instructions are reviewed in their entirety to determine whether they fairly and correctly appraised the jury in all necessary respects of the governing law." *Id.* (quotation marks omitted). Further:

[o]n appellate review, a party can demonstrate entitlement to a requested instruction only where the instruction was requested and not given by the court and it: (1) states the law correctly; (2) is generated by the evidence in the case; (3) is not misleading or confusing; and (4) is not otherwise sufficiently covered in the court's instructions.

\***1007** *Clewley v. Whitney*, 2002 ME 61, ¶ 8, 794 A.2d 87, 90.

[12]  [¶ 16] No prejudicial error is apparent from the court's instruction. The jury heard evidence regarding the existence of an alternative means of accessing Frustaci's property, and was instructed that a landowner is not entitled to a particular form of access, but only to a "suitable or reasonable means of access." Finally, nothing in sections 3026 and 3029 limits the availability of damages for the discontinuance of a road to circumstances in which such discontinuance takes away all access to the landowner's property.

The entry is:

Judgment affirmed.

Me., 2005.

**Frustaci v. City of South Portland**  
879 A.2d 1001, 2005 ME 101

Briefs and Other Related Documents ([Back to top](#))

- [2005 WL 4912341](#) (Appellate Brief) Reply Brief of Defendant-Appellant City of South Portland (Mar. 23, 2005)
- [2005 WL 4912340](#) (Appellate Brief) Brief of Appellee (Mar. 9, 2005)
- [2005 WL 4912339](#) (Appellate Brief) Brief of Defendant-Appellant City of South Portland (Feb. 9, 2005)

END OF DOCUMENT

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**Subject:** [Fwd: Discontinuance of town ways (including former county roads)]  
**From:** Don Willard <don.willard@raymondmaine.org>  
**Date:** Mon, 02 Mar 2009 09:32:50 -0500  
**To:** Dana Desjardins <dana.desjardins@raymondmaine.org>, Joe Bruno <jbruno@communityrx.com>, "Lonnie Taylor (LTAYLOR@IDS.TC)" <LTAYLOR@IDS.TC>, Mark Gendron <markgendron@maine.rr.com>, mike\_reynolds@maine.rr.com, Mark Gendron <markyski@maine.rr.com>, Laurie Cook <laurie.cook@raymondmaine.org>, Nathan White <nathan.white@raymondmaine.org>, Will Cook <will.cook@raymondmaine.org>, Chris Vaniotis <cvaniotis@bernsteinshur.com>

Thank you Chris,

BOS-FYI The issue of future maintenance policy and disposition of "limited use-dead end roadways" will be on the next agenda March 10th with Joe as the sponsor.

--  
Don Willard  
Town Manager  
Town of Raymond  
401 Webbs Mills Road  
Raymond, Maine 04071

(207) 655-6994 v  
(207) 655-3024 f  
(207) 650-9001 m

----- Original Message -----

Subject: Discontinuance of town ways (including former county roads)  
Date: Fri, 27 Feb 2009 15:05:02 -0500  
From: Chris Vaniotis <cvaniotis@bernsteinshur.com>  
To: <donald.willard@raymondmaine.org>

Don,

I forgot to mention that the discontinuance of a town road requires a town meeting vote. Here's the applicable statute:

\*23 §3026. DISCONTINUANCE OF TOWN WAYS\*

\*1\*. \*General procedures.\* A municipality may terminate in whole or in part any interests held by it for highway purposes. A municipality may discontinue a town way or public easement after the municipal officers have given best practicable notice to all abutting property owners and the municipal planning board or office and have filed an order of discontinuance with the municipal clerk that specifies the location of the way, the names of abutting property owners and the amount of damages, if any, determined by the municipal officers to be paid to each abutter.

Upon approval of the discontinuance order by the legislative body, and unless otherwise stated in the order, a public easement shall, in the case of town ways, be retained and all remaining interests of the municipality shall pass to the abutting property owners to the center of the way. For purposes of this section, the words "public easement" shall include, without limitation, an easement for public utility facilities necessary to provide service.

\*2\*. \*Definition of best practicable notice.\* "Best practicable notice" means, at minimum, the mailing by the United States Postal Service, postage prepaid, first class, of notice to abutting property owners whose addresses appear in the

assessment records of the municipality.

---

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**Don Willard** <[don.willard@raymondmaine.org](mailto:don.willard@raymondmaine.org)>

Town Manager

Town of Raymond

**Chapter 3**  
***Municipal Roads Manual***  
**[Includes Supplement #1 April 2001 and Supplement #3 June 2004]**

**Disposing of Municipal Roads**

Municipalities are required to maintain town ways in a safe and passable condition, and may be liable for injuries resulting from improper or insufficient maintenance (Chapter 5 contains a full discussion of municipal liability for roads). To escape the costs of maintenance and exposure to legal liability, a municipality may want to dispose of a road by terminating its interests in that road or a portion of the road.

There are three methods for terminating a town's interest in a town way: the statutory process of discontinuance, the statutory presumption of abandonment, and the common law doctrine of abandonment by public non-use. Public easements may be extinguished as well, although this is less critical from a liability standpoint since the municipality has no maintenance obligation or responsibility for defective conditions on a public easement. Each of these methods is discussed below. Please note that these methods are not mutually exclusive. For example, a town can commence a formal discontinuance procedure even though it also asserts that the way was abandoned by non-maintenance or non-use.

**Discontinuance (23 M.R.S.A. § 3026)**

**Procedure.** Discontinuance is a formal procedure established by State law for the purpose of terminating the town way status of roads, in whole or in part. Title 23 M.R.S.A. § 3026 outlines the process for discontinuing town ways. We recommend that the discontinuance follow six basic steps:

- (1) The municipal officers must determine whose property abuts the road in question and the amount of damages that should be paid to those abutters. The estimation and payment of damages may be a critical issue and is discussed below.
- (2) The municipal officers must give best practicable notice of the proposed discontinuance to all abutting property owners and to the planning board. "Best practicable notice" means, at a minimum, mailing the notice through the U.S. Postal Service, postage prepaid, first class mail to abutting property owners whose addresses appear in the assessment records of the municipality (23 M.R.S.A. § 3026(2)). The municipal officers may rely on an address used in tax assessment records, but if they have knowledge or information that the person has moved, it is advisable to seek a current address and to send the notice to *both* places. This will minimize the risk that someone will later seek to reopen the discontinuance on the basis that the person was not notified and that the town's assessment records were outdated. It is not necessary to send the notice by certified mail, return receipt requested, but it is certainly allowed and may be a prudent measure to defend against claims of failure of notice. The law requires only that the notice be *sent*, and the municipality need not prove that it was actually *received*. If a return receipt is not used, it may be useful to keep a logbook or other record showing when the notice was sent, to whom, to where, and by what type of mail (first class, certified, and so on). This record may be a useful piece of evidence if someone claims that notice never was sent. The notice should indicate the road (or portion of road) proposed for discontinuance, and the date, time and place of the meeting at which the municipal officers will discuss the matter. Appendix D contains a sample notice.

(3) The municipal officers should meet to determine whether to order the discontinuance. This should be done at the meeting indicated in the notice sent to the abutters. This can be done at a regular meeting of the selectmen or council, or it can be done at a special meeting. In either case, the meeting is a "public meeting" subject to 1 M.R.S.A. § 401 *et seq.* (the Freedom of Access or "Right to Know" Law), so public notice and meeting requirements of that law must be observed.

The form of the municipal officers' vote should be on a motion to discontinue. For example, "I move that the Selectmen order the discontinuance of a portion of the Hankerson Road, said road being a town way approximately \_\_\_ feet wide including the right-of-way, from a point beginning at (identify a point) and extending in a generally northerly direction for a distance of approximately \_\_\_ miles (or yards or feet, as appropriate) and that the following damages be paid to abutting property owners as follows: John Bradley - \$300.00; Pete Coughlan - \$500.00." (Note that this example refers to a portion of the road, not the entire road.) The actual order of discontinuance should have been prepared before the meeting, and the motion should track the language of the order.

If the motion passes, a second motion should be made as follows: "I move that the Selectmen issue and file with the Town Clerk an Order of Discontinuance that accurately reflects the action taken by the Selectmen to discontinue a portion of the Hankerson Road, and that the Selectmen send abutting property owners best practicable notice of this action without delay." The order of discontinuance should be signed at this time.

(4) The order of discontinuance signed by the municipal officers must then be filed with the municipal clerk. At the same time, a notice of discontinuance should be mailed (regular or certified) to the abutting property owners, along with a copy of the order of discontinuance. Appendix D contains samples of each of these documents.

(5) The next step is for the legislative body (either the voters or the council, depending on the form of local government) to approve the order of discontinuance and the damage awards, and to appropriate the money to pay the damages. Until this critical step occurs, the discontinuance is incomplete; if the legislative body rejects the order, the discontinuance falls. Appendix D contains a sample warrant article for voting on the order of discontinuance at town meeting. As mentioned above, if the town meeting approves the order of discontinuance, it must also appropriate the necessary amount of money and designate the source of the funds. Appendix D also contains a sample warrant article for this purpose.

In a community where a council is the legislative body, the council votes on the order, on the amount of damages, and on the appropriation of money for damages.

(6) The final step, if the discontinuance is approved, is for the municipal clerk to record an attested certificate of road discontinuance in the registry of deeds. This certificate should describe the road and state the municipality's final action with respect to the road. This certificate must be recorded for the discontinuance to be effective against owners of record or abutting landowners who have not received notice (23 M.R.S.A. § 3024). Appendix D contains a sample certificate.

**Damages.** One very important factor in the discontinuance process is determining the amount of damages. Damages generally must be paid to abutting property owners because of the reduction in the



fair market value of their property as a result of the loss of a municipally maintained road. (In some instances, discontinuing all public rights of access to a road might increase the value of the abutting land, but usually there is a reduction in its value.)

Damages for discontinuance are calculated pursuant to 23 M.R.S.A. § 3029 and 23 M.R.S.A. § 154E (*August Realty v. Town of York*, 431 A.2d 1289 (Me. 1981)). The municipal officers should obtain the services of an appraiser to assist in determining damages. At a minimum, we recommend a call to MDOT's Right of Way Division (624-3620). The municipality's determination of damages is not final, and may be increased by the Superior Court (there is a right to jury trial on this issue). Therefore, it is important that the municipal officers accurately calculate damages *before* the final vote to discontinue. Once the discontinuance is approved, the municipality is legally obligated to pay compensation, and there is no way to revoke the discontinuance if the Superior Court awards a higher amount of damages than the legislative body awarded.

**Appeals.** Any person aggrieved by the municipality's decision to discontinue (or by its failure to do so) may appeal to Superior Court within 30 days after the decision (23 M.R.S.A. § 3029 and Rule 80B, Maine Rules of Civil Procedure). Any person aggrieved by the municipality's measure of damages may appeal to Superior Court within 60 days after the legislative body approves the discontinuance order (23 M.R.S.A. § 3029).

**Legal Status of a Discontinued Road.** Depending upon when a road was discontinued and the language of the article of discontinuance, the municipality may retain a public easement over a discontinued road or portion of road and a utility easement may remain.

(1) **Public Easement.**

**Discontinuance before September 3, 1965.** A discontinuance which occurred before September 3, 1965 (under 23 M.R.S.A. § 3004, the predecessor of § 3026) left no public easement, and case law dictated that ownership of the way reverted to the abutters on each side to the centerline of the road. The abutters may legally bar the public from using the road in this situation (*Frederick v. Consolidated Waste Services, Inc.* 573 A.2d 387 (Me. 1990)(1950 discontinuance resulted neither in public nor private easement); *Brooks v. Bess*, 135 Me. 290, 195 A. 361 (1938); *Burnham v. Burnham*, 132 Me. 113, 167 A. 693 (1933); and *Dyer v. Mudgett*, 118 Me. 267, 107 A. 831 (1919)). However, there is an exception to this rule: a public easement is retained in a pre-1965 discontinuance if the article authorizing the discontinuance specifically provided for the retention of one.

**Discontinuance occurring on or after September 3, 1965.** By contrast, a discontinuance occurring *on or after* September 3, 1965 terminates the municipality's maintenance obligation, but leaves a public easement *automatically*, unless the article authorizing the discontinuance specifically rejects retention of a public easement. That is, abutters cannot legally bar public use of the road. The municipality has the right or option, but not the obligation, to maintain this public easement (23 M.R.S.A. § 3026(1)).

It is possible to extinguish the public easement that automatically is retained in a post-1965 discontinuance. This can be done at the time of the discontinuance by inserting the appropriate language in the discontinuance order and article (remember that the amount of

damages may differ depending on whether or not a public easement is retained). This also can be done later (even years later) by separate article, but damages would have to be calculated and paid again. Appendix D contains suggested warrant article language for extinguishing the public easement.

(2) **Utility Easement.** In 1977, the discontinuance law was amended to provide that the public easement retained after a discontinuance also includes an easement for public utility facilities necessary to provide service (23 M.R.S.A. § 3026(1)). This allows utilities to maintain and replace existing installations and to construct new installations, even if the town does not maintain the road. (Therefore, a public easement which resulted automatically from a discontinuance between September 3, 1965 and October 24, 1977 does not include an easement for public utility facilities. In such cases, the utility must obtain an easement from whomever holds title in fee simple (see Chapter 1 for discussion of title interests).) Similarly, in 1987, the Legislature enacted a new provision as part of the State's public utility laws which states that unless the order of discontinuance of a public way provides otherwise, the public easement automatically retained under 23 M.R.S.A. § 3026 "includes an easement for public utility facilities" (35-A M.R.S.A. § 2308). (Two years later, the Legislature enacted 33 M.R.S.A. § 458, which provides that for easements or rights of way established in writing after January 1, 1990, the owner has no easement by implication to install utilities on or under the easement or right of way unless the right to do so is expressly included in the written instrument.)

**Defective Discontinuance.** The municipality should comply strictly with all steps in the discontinuance procedure to ensure that the road is effectively discontinued. If an abutter (or anyone else, for that matter) can prove that a discontinuance was defective and that the road is still a town way, it could be very expensive for the municipality to resume maintenance and repair of the way.

The discontinuance law has changed over time, and did not always require the same steps as are now necessary. Therefore, when someone challenges the validity of a discontinuance, it is important to *identify with certainty the statutes in effect at the time of the discontinuance*. For example, the Law Court has upheld the validity of road discontinuances that did not state the amount of damages paid where the abutters' predecessors in title had a right of appeal but did not appeal the order of discontinuance (see *Whalen v. Town of Livermore*, 588 A.2d 319 (Me. 1991), *cert. den.* 112 S. Ct. 422; and *Town of Fayette v. Manter*, 528 A.2d 887 (Me. 1987), *cert. den.* 108 S.Ct. 1116, *app. dis.* 108 S. Ct.1285).

If a discontinuance is found to be defective, the municipality still may be able to treat the road as abandoned under 23 M.R.S.A. § 3028. For example, if a discontinuance was improperly done in 1933 but since that time the town has not maintained the road (mistakenly believing it to be discontinued), the road can be presumed abandoned on the basis that it has not been maintained at public expense for over 30 years (see, for example, *Lamb v. Town of New Sharon*, 606 A.2d 1042 (Me. 1992)). Abandonment is discussed below.

#### **Statutory Abandonment (23 M.R.S.A. § 3028)**

A municipality may be relieved of the obligation to maintain a town way by operation of 23 M.R.S.A. § 3028. Under this law, a town way which has not been kept passable for motor vehicles at public expense for a period of 30 or more consecutive years is *presumed* abandoned. This method of disposing of roads is "informal" in the sense that it requires no vote of the municipality, nor are any documents recorded or damages paid. Abandonment occurs by the passage of time coupled with lack of public maintenance. The Maine Supreme Court has upheld the validity of this law in *Lamb v. Town of New Sharon*. In that

case, an abutter to an abandoned road sued the town, claiming among other things that the statute allowed an unconstitutional taking of his property by reducing its value (through the loss of public maintenance of the road) without compensation. The Court soundly rejected this claim, recognizing that the abandonment law essentially tracks the common law doctrine of abandonment by public non-use.

**Determination of Presumed Abandonment.** The municipal officers initially determine whether a road is presumed abandoned. Often, the question arises when a new resident asks the town to repair or maintain a road on which no one has lived for many years. If a review of the facts reveals that the road (or a portion thereof) has not been maintained at public expense for 30 or more consecutive years, the municipal officers may make a determination under 23 M.R.S.A. § 3028 that the road is presumed abandoned and that the town has no further obligation to repair or maintain the way. Through this determination, the municipal officers can take the position that the town is not liable for defects in the road, since it has lost its status as a town way. Section 3028 provides that neither the municipality nor its officials will be liable for failing to maintain or repair a way if they rely in good faith on the presumption of abandonment. The municipal officers should make this determination after research and a public hearing, and should memorialize their decision in a notice of determination of presumption of abandonment and should record this notice in the registry of deeds. Appendix E contains a Sample Notice of Determination of Presumption of Abandonment.

In making this determination, the municipal officers must review the evidence (factual history) and make a decision based on that evidence. Political factors (e.g., a selectman's son owns property on the road) or financial factors (e.g., it will cost a lot to repair the road) cannot properly be considered in this decision. Although there are no cases on this issue, MMA Legal Services staff believes that the municipal officers' determination that a road is presumed abandoned is not a quasi-judicial decision and is not an appealable decision. If a person believes the determination is wrong, that person is free to file a declaratory judgment suit in Maine Superior Court to ask the court to determine the parties' rights and obligations with regard to the road (see 23 M.R.S.A. § 3028 and 14 M.R.S.A. § § 5951 *et seq.*). Also, while statute does not address the issue directly, we advise that if information subsequently becomes available that makes the municipal officers question their previous determination that a road is presumed abandoned, they may, and should, revisit that decision.

**Litigating the Presumption of Abandonment.** Section 3028 creates a *rebuttable* presumption of abandonment. The municipality bears the initial burden of establishing the presumption of abandonment (*Earwood v. Town of York*, 1999 ME 3, 722 A.2d 865). Once this presumption arises, the burden of proving that the road is a town way is on the person seeking to have the way repaired or maintained (*Town of South Berwick v. White*, 412 A.2d 1225 (Me. 1980)). Title 23 M.R.S.A. § 3028 provides that any person affected by the presumption of abandonment may seek declaratory relief (14 M.R.S.A. § § 5951 *et seq.*) in Superior Court. The county commissioners have no jurisdiction to hear these cases.

The presumption of abandonment can be rebutted by evidence which shows a clear intent by the municipality and the public to consider or use the way as if it were a public way. However, isolated acts of maintenance are not sufficient to rebut the presumption of abandonment. There is no simple test to determine the amount or type of evidence necessary to rebut the presumption of abandonment, nor does the law define "isolated acts of maintenance." As a rule of thumb, the more substantial the repair or more regular the maintenance, the more likely it is that the presumption of abandonment will be deemed rebutted. Court decisions provide some guidance:

Where a road had been kept passable for motor vehicles at public expense through the 1950's and graded on an annual basis and plowed, though irregularly, during the winter months into the 1960's, there was no abandonment (*Lamb v. Euclid Ambler Associates*, 563 A.-2d 365 (Me. 1989); also see *Earwood v. Town of York*, 1999 ME 3, 722 A.2d 865 (in

which the Maine Supreme Judicial Court held that evidence that the Town graded the road once or twice each year for 17 of the 30 years meant that the Town had failed to establish the presumption of abandonment). Also, with regard to the recent case of *Earwood v. Town of York*, although it generated a substantial amount of press coverage for a road abandonment case, this case did not establish any new legal principles. It stands only for the long-recognized proposition that a municipality first must establish the presumption of abandonment before the burden shifts to other parties to rebut the presumption of abandonment.

Where the town "at various times" within the 30-year period had expended funds for bridge reconstruction, ditch scraping, brush cutting and other repairs, there was no abandonment (*Town of South Berwick v. White*, 412 A.2d 1225 (Me. 1980); this decision led to the statutory amendment that added the "isolated acts of maintenance" language to Section 3028).

The town's intermittent and minor repairs of a road and use of the road for logging purposes and for recreational purposes (snowmobiles and ATVs) did not demonstrate a clear intent to consider or use the way as a public way, thus the presumption of abandonment was upheld (*Whalen v. Town of Livermore*, 588 A.2d 319 (Me. 1991), *cert. den.* 502 U.S. 959).

As noted above, while the municipal officers make the initial determination of abandonment, the final determination can only be made by a court. Contrary to popular belief, the county commissioners do not have the authority to review or reverse the municipal officers' determination of abandonment or to determine the legal status of a road, although the issue of abandonment may arise where persons seek to have the commissioners order a municipality to repair a way under 23 M.R.S.A. § § 3651-3653 (see *Board of Selectmen of the Town of China v. Kennebec County Commissioners*, 393 A.2d 526 (Me. 1978)).

**Sources of Evidence.** The determination that the presumption of abandonment has arisen – or has been rebutted – must be based on evidence about the history of the road. This evidence may come from several sources. For example, records of past town meetings or council meetings may indicate that money was raised and appropriated for repair or maintenance of the road in question. Records of the selectmen, council or treasurer may reflect expenditures for a particular road. The municipality may have included the road in question when it requested local road assistance reimbursement from the State. Likewise, road commissioners and public works directors often keep road repair and maintenance logs showing what was done and when. Also useful are statements from people who use or live along the road in question. Longtime residents may be a wealth of information about the roads in municipality, as can be former road commissioners, road workers or public works personnel. When the information is a person's recollection, make a point to put it in writing, date it, and have it signed. This will preserve the information in the event that the person dies or moves away.

**Status of a Road After Abandonment.** 23 M.R.S.A. § 3028 provides that when a road is abandoned, it is relegated to the same status as it would have had following discontinuance under Section 3026. Thus, if the abandonment occurred before September 3, 1965, the property reverted back to the abutters (to the centerline) and there is no public right of access remaining. If the abandonment occurred on or after September 3, 1965, a public easement remains. In determining when abandonment occurs, look at the end point, not the starting point, of the statutory 30-year period (*Town of Cornville v. Gervais*, 661 A.2d 1127 (Me. 1995)).

There is a curious provision in 23 M.R.S.A. § 3028 that an abandoned road "is at all times subject to an

affirmative vote of the legislative body of the municipality ... making that way an easement for recreational use." This language was added in the 1975-76 overhaul of the law, but its intent is unclear. MMA Legal Services staff believes that may raise constitutional issues. For example, if a road was abandoned in 1931 (thus reverting to private property without a public easement) and is currently a potato farm, is it an unconstitutional "taking" of property if the municipality now votes to allow a recreational easement across the farm, without payment of compensation to the landowner? The question has never been addressed in court, so in view of these issues we recommend that the municipality consult an attorney before creating a recreational easement under this law.

### **Common Law Doctrine of Abandonment**

Discussed above was the *statutory* presumption of abandonment. Maine court decisions (common law) also recognize that roads may be abandoned by long periods of non-use by the public. Only a court can make the final determination on abandonment by public non-user. This common law doctrine of abandonment differs from statutory abandonment in three major respects.

**No Specific Time for Lack of Public Use.** First, there is no clearly established time period necessary for abandonment; it varies depending on how the road was created. For a town way originally created by prescriptive use, the Court in *Piper v. Voorhees*, 130 Me. 305, 155 A. 556 (1931) held that an unexplained failure by the public to use a way for 20 years resulted in a surrender of the way as a public way. In *Smith v. Dickson*, 225 A.2d 631 (Me. 1967), the Court concluded that the public rights to a way created by statutory method were lost after 100 years of non-use. See also *Wooster v. Fiske*, 115 Me. 161, 98 A. 378 (1916) and *Pratt v. Sweetser*, 68 Me. 344 (1878). More recently, the Maine Supreme Judicial Court has affirmed the Superior Court's finding that 20 years of public nonuse of a road is sufficient to give rise to common law abandonment of that road (*Shadan v. Town of Skowhegan*, 1997 ME 187, 700 A.2d 245). (The *Shadan* opinion also confirms that the doctrine of common law abandonment remains a viable alternative to statutory abandonment.)

**Focus is on Public Non-use.** The second difference is that the common law doctrine focuses on public non-use, rather than public non-maintenance (which is the focus of statutory abandonment). It appears that in adopting the statutory presumption of abandonment, the Legislature looked to the expenditure of public funds for maintenance of the road as an objective measure of whether the public was actually using the way.

**No Public Easement Retained.** The third difference is that the public likely does not acquire a public easement upon common law abandonment of a town way. As noted above, State statute (23 M.R.S.A. § 3028) provides that for a post-September 5, 1965 abandonment of a road, a public easement is retained. However, in all Maine cases that have addressed the issue, a road deemed abandoned by public non-use reverted to the ownership of the abutters to the centerline (*Shadan v. Town of Skowhegan*; see *Martin v. Burnham*, 631 A.2d 1239 (Me. 1993) for a discussion of these cases). In other jurisdictions as well, abandonment of a public way by non-use does not result in a public easement. Perhaps the difference in focus between the presumptive abandonment (demonstrated by lack of public maintenance expenditures) and common law abandonment (demonstrated by actual public nonuse) is the reason why a public easement is retained in the case of the former, but not in the case of the latter.

**Private Easements May Exist.** When a road is discontinued or abandoned, a public easement may or may not exist, as discussed above. Even when this occurs, however, private individuals may have a right to continue using the road. A private easement might result from prescriptive use (for example, where the person used the way long before it became a public way), by necessity, by implication or by a deed in favor of the landowner. It is important not to confuse private easements with the public easement. The municipality should not spend public funds protecting (i.e., litigating) these private rights, but it can

suggest to the parties that private rights may exist.

### **Vacation of Paper Streets**

Paper streets have been a significant source of title problems over the years because of the uncertainty associated with public and private rights of access. This is because at common law, once a lot is sold with reference to a recorded subdivision plan, there is an incipient dedication of the ways shown on that plan, and that incipient dedication is of infinite duration (*Bartlett v. Bangor*, 67 Me. 460, 464-465 (1878)), once lots are sold, the public has a vested right in the right-of way that cannot be interrupted or destroyed by the seller, cannot be released by the purchasers of lots and cannot be lost by "mere non-use"). The Legislature acted in 1903 to provide for termination of the public and private rights through the "vacation" process (R.S. 1903, c. 39, now codified at 23 M.R.S.A. § § 3027 and 3027-A). The Law Court has observed that vacation is the exclusive process for the termination of the public right of incipient dedication once a lot has been sold with reference to the subdivision plan (*Callahan v. Ganneston Park Development Corp.*, 245 A.2d 274, 277 (Me. 1968)).

However, because vacation of a paper street is an expensive, time-consuming, case-by-case process, in 1987, the Legislature amended the State road and title statutes in an attempt to resolve the title problems associated with ancient paper streets (see P.L. 1987, c. 385; especially 23 M.R.S.A. § 3035: "Sections 3031 to 3034 shall be liberally construed to affect [sic] the legislative purpose of enhancing the title to land by eliminating the possibility of ancient claims to proposed, unaccepted, unconstructed ways that are outstanding on the record but unclaimed."). As explained below, these amendments provide for a deemed vacation of older subdivision ways and, prospectively, provide for the termination of unaccepted dedications of public rights and of unused private rights in subdivision ways.

**Methods of Vacation.** Paper streets can be vacated by formal action of the municipal officers, can be deemed vacated and can be vacated by the passage of time.

**Formal Vacation.** This process is outlined in 23 M.R.S.A. § § 3027 and 3027-A. The process can be commenced by the municipal officers directly, or by petition of the abutters or other persons claiming an interest in the way. This procedure consists of several steps.

1. The municipal officers must give notice of the proposed vacation to the planning board and must give best practicable notice to all owners of record *in the subdivision* (not just to abutters on the paper street) and to their mortgagees of record. The substance of the notice is set out in Section 3027, and Appendix F includes a Sample Notice of Proposed Vacation.
2. The municipal officers then file an order of vacation with the town clerk. The municipal officers may determine that damages should be paid to affected landowners. These damages are paid by the petitioners if the vacation process was begun by petition. The legislative body of the municipality does not vote on the matter. Appendix F includes a Sample Order of Vacation.
3. The vacation order is then recorded in the registry of deeds pursuant to 23 M.R.S.A. § 3027-A. Any person seeking to contest the vacation order or assert the right to use the way must, within 1 year of the recording date, file in the registry a statement specifying the basis of the claim. Then, within 180 days after this statement is recorded, the claimant must bring a civil action in Superior Court.

Once a paper street has been vacated in this manner, the municipality ceases to have the right to accept public rights in the street, and title to the fee simple interest passes to the abutters to the centerline, unless the original grantor reserved title (see 33 M.R.S.A. § 469-A). However, subdivision lot owners

often have private rights in paper streets (see *Callahan v. Ganneston Park Development Corp.*, 245 A.2d 274 (Me. 1968)). Under 23 M.R.S.A. § 3027-A, the recording of a vacation order starts the time running within which a notice to preserve private rights must be recorded and a lawsuit filed in order to preserve private rights. Thus, the act of vacation does not itself terminate private rights in a right of way, but commences the deadlines for the taking of actions to preserve those rights.

**Deemed Vacation.** With regard to subdivisions recorded before September 29, 1987, 23 M.R.S.A. § 3032 provides that paper streets in such subdivisions shall be deemed vacated unless constructed or used and accepted by the municipality as a public way *by the later of* September 29, 1997 or 15 years after the subdivision plan was recorded. The municipal officers may extend this time period by up to 40 years (an initial 20-year period and a subsequent 20-year period) under Section 3032(2). However, if the municipal officers did not extend the right to accept the paper street before this deadline (before September 29, 1997 for subdivisions recorded before September 29, 1982, and 15 years after recording for subdivisions recorded between September 29, 1982 and September 29, 1987), then the paper street, and therefore the public's right to accept it, is deemed vacated.

As to the private rights in the streets that are "deemed vacated," 23 M.R.S.A. § 3033 provides as follows. For subdivisions recorded before September 29, 1987, where a way is deemed vacated, a person claiming to own some or all of a paper street that has been deemed vacated must record a notice in the registry of deeds that complies with 23 M.R.S.A. § 3033, along with an alphabetical listing of the names of the current record owners of all lots in the appropriate subdivision plan and their mortgagees of record. That person must mail a copy of the notice to these parties. A person receiving such a notice who wishes to preserve a private right over the way must (1) record a statement under oath of the claimed interest within one year after recording of the notice, and (2) file suit within 180 days after recording of the statement. Thus, 23 M.R.S.A. § 3033 provides a method by which persons claiming to own ways that are deemed vacated can assert their rights and extinguish the claims of other people, including claims of ownership of a private way. See *Hartwell v. Stanley*, 2002 ME 29, 790 A.2d 607, 609-612 for a detailed description of how the deemed vacation statute affects private rights-of-way. (*from Supplement 3, June 2004*)

Any disputes about private rights in vacated paper streets should be handled by the private parties. Sample language for vacation notices and vacation orders is included in Appendix F.

**Passage of Time.** Certain paper streets may be vacated by the passage of time even if the municipal officers take no action. 23 M.R.S.A. § 3031 governs the vacation of paper streets in subdivision plans recorded *on or after* September 29, 1987, and it provides as follows. Section 3031 states that once a subdivision plan is recorded, both public and private rights in paper streets are acquired. To have full use of the paper street as a *public* way, the paper street must be accepted (though not necessarily built) by the municipality within 20 years from the recording date of the plan. If the municipality does not accept the way within that time, all public rights terminate. *Private* rights in a paper street terminate unless within 20 years from the date of recording of the plan: (1) the proposed, unaccepted way is constructed, and (2) the private rights are not constructed and utilized as such. Upon termination of the public and private rights, title to the property passes to the abutters to the centerline, unless the developer has reserved his rights under 33 M.R.S.A. § 469-A. 23 M.R.S.A. § 3031(3) and (4) allow the developer or the local planning board to designate shorter durations for the existence of public and private rights in paper streets.

**Outstanding Issues.** The 1987 amendments raise several legal questions, some of which have not been clearly answered by the courts or by the Legislature.

- **Long-time buildings and fences.** Under 23 M.R.S.A. § 3034, a structure located on a paper street

for more than 20 years may remain there lawfully. The question is whether 23 M.R.S.A. § 2952 (the "longtime building and fences law") effectively prevents a paper street from ever being used as a public way if a subdivision lot owner constructed a fence across a paper street and that fence stood undisturbed for more than 40 years. Is a paper street a way "appropriated to public use" within the meaning of 23 M.R.S.A. § 2952 such that this statute governs, or does Title 23 M.R.S.A. § 3034, which was added in 1987, accomplish this result? (Section 3034 discusses "structures" located on paper streets, but it is unclear whether this was intended to include fences as well, or was intended to place paper streets outside the operation of Section 2952 altogether.)

- **Is retention of old paper streets a revival by the municipality of long-lost rights?** In 1997, many municipalities exercised their authority under 23 M.R.S.A. § 3032 to reserve the right to accept paper streets for 20 years in order to avoid the deemed vacation of these ways. However, some of these paper streets were shown on subdivision plans recorded 40 or more years prior to the September 29, 1997 deadline for filing such notices. May a municipality still accept the incipient dedication made by the sale of lots with reference to a long-ago recorded plan, or did a municipality lose the right to accept an incipient dedication of a paper street by the passage of time, so that it must lay the way out and purchase it or take it by eminent domain in order to (re) acquire the right to accept it?

This issue arises from a series of Law Court cases. In *Bartlett v. Bangor*, the Law Court clearly stated that an incipient dedication does not lapse by mere non-use. Section 3032 and the Law Court's decision in *Glidden v. Belden* imply that a municipality still may accept these ways. However, in a line of cases after *Bartlett*, including *Kelley v. Jones*, 110 Me. 360, 86 A. 252 (1913), *Harris v. City of South Portland*, 118 Me. 356 (1919) and *Burnham v. Holmes*, 137 Me. 183, 16 A.2d 476 (1940)), the Law Court decided that a reasonable time for acceptance of the public rights had passed such that an incipient dedication had lapsed and public rights had ceased to exist. In those cases, the Law Court ruled that public rights in a paper street were lost because there was no action by the municipality to use or accept the road within a reasonable time; however, the Law Court refused to establish a specific test for whether a reasonable time had passed, and held that the issue of whether a reasonable time for acceptance has expired must be considered on a case-by-case basis.

The Law Court recently addressed this issue in *Ocean Point Colony Trust, Inc. v. Inhabitants of the Town of Boothbay*, 1999 ME 152. In this case, the Superior Court had upheld the right of the Town of Boothbay to reserve its ability to accept a way that was shown on a subdivision plan recorded in 1924. The plaintiff property owners had argued unsuccessfully to the Superior Court that the incipient dedication had lapsed due to the passage of a reasonable period of time after dedication without acceptance, and that the statute, by reviving lapsed rights, therefore effected an unconstitutional taking of property without just compensation. On appeal, the Law Court affirmed the Superior Court's decision, holding that adverse possession will cause an incipient dedication to lapse, but that "mere non-use or use that is not inconsistent with the premise that the public may later open the path will not cause the incipient dedication to expire." Thus, it distinguished the Boothbay situation, in which the paper street had not been used in a manner inconsistent with the possibility that the Town might later accept it, from the *Burnham*, *Harris* and *Kelley* cases, in which the parties had used the paper streets for their own purposes for a number of years, and concluded that the dedication had not lapsed when Boothbay extended its right to accept the paper street.

- **Taxation and zoning considerations.** Two additional issues that remain regarding deemed vacations are whether the property that had been subject to an incipient dedication but for which



the public dedication has been deemed vacated by operation of law may be: (1) taxed by the municipality, and (2) counted by the abutting property owner for zoning purposes. (This applies to ways shown on subdivision plans recorded on or before September 27, 1987 where the municipality has not reserved the right to accept the way. Under the deemed vacation statute, 23 M.R.S.A. § 3032, unless the municipality recorded a reservation of its right to accept some or all of a paper street in an older subdivision, and unless someone claiming through a grantor who had reserved title to the paper street had filed a notice of ownership, the owner of the lot abutting the vacated way is deemed to own to the centerline of the paper street.)

Thus, one question is after a deemed vacation of a paper street, can the abutting property owner be assessed for the value of the portion of the formerly dedicated way that the property owner now owns to the centerline by operation of law? The other question is from the opposite perspective – can the abutting property owner use the property to the centerline for determination of compliance with local zoning dimensional standards (setbacks, lot area, and percentage of lot coverage or impervious surface)?

Two considerations indicate that the answer to each of these issues probably is “no” unless there is proof that the abutting property owner indeed has title to the portion to the centerline and has taken the steps necessary to eliminate any private rights-of-way in the street.

One consideration is that unlike a formal vacation under 23 M.R.S.A. § § 3027 and 3027-A, a deemed vacation does not automatically start the clock running for the termination of private rights. Instead, a person who seeks to assert a claim to a portion of a way deemed vacated under § 3032 will, pursuant to § 3033, record a notice in the registry of deeds (apparently at any time) and within 20 days of recording the notice, mail a copy of the notice to all current owners of record of subdivision lots and their mortgagees of record. A person who, upon receiving the notice, wishes to claim a private right-of-way in the way or portion of way deemed abandoned must record a claim in the registry within one year from the recording of the notice and must commence a law suit within 180 days thereafter to establish rights in the way.

The other consideration is that there are instances in which the grantor of the lot abutting a paper street may have retained the fee in the proposed way. For conveyances on or after October 3, 1973, except for those made by reference to a recorded subdivision plan, the grantor must expressly reserve title to the way. For conveyances prior to this date, those claiming through the grantor had to have filed a notice in the registry of deeds within two years expressing the intent to reserve title to the way. 33 M.R.S.A. § § 460-463. Those who intended to reserve title to paper streets (or who claim rights through such a person), but who did not expressly state this intent had until September 29, 1989 to record notice of this intent. 33 M.R.S.A. § 469-A.

Therefore, it would not be correct to assume that each property owner along a proposed, unaccepted way deemed vacated under State law owns the abutting former way to the centerline free of any encumbrances such as private rights-of-way. A grantor may have expressly reserved rights in this street or may have recorded a notice of intent to reserve an interest in the way. The municipality may have recorded an extension of the ability to accept the paper street. The way may not yet be deemed vacated; with regard to paper streets shown on subdivision plans recorded between October 28, 1984 and September 29, 1987, there has been no deemed vacation since 15 years have not passed since the date of recording of the subdivision plan. Further, until a private property owner starts the timeline

for action on private rights-of-way, all ways deemed vacated still are subject to private rights. Even then, the statutory process to terminate these private rights-of-way only affects the existence of a private right-of-way over the portion of the way in front of the property owner's lot, not over all of the way deemed vacated. Because the answer to all of these questions would require a thorough search of title for each affected subdivision lot, it probably would be better to presume that the area of a paper street deemed vacated and abutting a particular lot is neither subject to taxation by the municipality nor available to the property owner for determination of compliance with zoning standards unless there is proof that the abutter indeed owns the property free of any private right-of-way encumbrance.

Scholarship Funds  
Standings as of 12/31/2008

	Principal as of 6/30/2008 (includes contributions)	Contributions During 7/1/08-12/31/08	Principal as of 12/31/2008
Alvah Clough	3,282	258.95	3,540.95
Collins-Day	12,982	258.95	13,240.95
George Woods	18,987	166.60	19,153.60
Carleton E Edwards	15,162	166.60	15,328.60
Torstein Johannas	2,332	166.59	2,498.59
Grand Total	52,745	1,017.69	53,762.69

	Accrued Income as of 6/30/2008	Interest Income 7/1/08 – 12/31/08	Change in FMV 7/1/08 – 12/31/08	Accrued Income as of 12/31/2008	Scholarships disbursed 2008-2009	Available for disbursement as of 12/31/2008
Alvah Clough	1,448	73.63	-565.36	956.27	0	956.27
Collins-Day	9,944	471.78	-3,622.34	6,793.44	2,100	4,693.44
George Woods	5,871	470.45	-3,612.11	2,729.34	2,000	729.34
Carleton E Edwards	3,604	356.00	-2,733.41	1,226.59	900	326.59
Torstein Johannas	1,920	70.19	-538.93	1,451.26	0	1,451.26
Grand Total	22,787	1,442.05	-11,072.15	13,156.90	5,000	8,156.90