

**Chapter 2**  
***Municipal Roads Manual***  
**[Includes Supplement #1 April 2001 and Supplement #3 June 2004]**

**Creation of Municipal Roads**

There are three basic methods for creating municipal roads: (1) dedication and acceptance; (2) laying out and taking under State law (23 M.R.S.A. § § 3022 and 3023, which includes purchase and acceptance and eminent domain); and (3) prescriptive use (see *Town of Kittery v. MacKenzie*, 2001 ME 170, 785 A.2d 1251, 1254; *Stickney v. City of Saco*, 2001 ME 69, 770 A.2d 592, 601; *Longley v. Knapp*, 1998 ME 142, 713 A.2d 939; *Glidden v. Belden*, 684 A.2d 1306 (Me. 1996); and *Inhabitants of Town of Manchester v. Augusta Country Club*, 477 A.2d 1124 (Me. 1984)). The first two methods are “formal” in the sense that documents are executed and there is a prescribed process by which the road is accepted. The last method, prescriptive use, is “informal” in the sense that it occurs over time without following any statutory procedure, and usually does not involve the exchange or recording of documents.

In addition, town ways can be created by operation of law (23 M.R.S.A. § 3021(3)(B) regarding former county ways) or by MDOT reclassification (23 M.R.S.A. § § 53 and 3021(3)(C)). Also, a town way may result from the discontinuance of a State highway (23 M.R.S.A. § 651). These methods are outside the municipality’s control.

**Dedication and Acceptance (23 M.R.S.A. § 3025)**

By State statute, dedication and acceptance is a two-step process.

**Dedication.** First, the landowner must file with the municipal officers (selectmen or council) a “petition, agreement, deed, affidavit or other writing” describing the property that the owner intends to dedicate (give) to the municipality for highway purposes, and stating that the owner waives any claim for damages. Dedication also may be accomplished by the sale of lots with reference to a subdivision plan, recorded in the registry of deeds, which shows or describes the property as a road. (If more than one person has an interest in the road, all must join in the dedication.) In either event, the better practice is to memorialize the dedication in a deed that the municipality’s legislative body can accept (see Appendix A for a sample warrant article for acceptance and Appendix B for a sample road deed). (*from Supplement 3, June 2004*)

**Acceptance.** Second, in general, the legislative body of the municipality must vote to accept the dedication (*Glidden v. Belden*, 684 A.2d 1306 (Me. 1996); *Comber v. Inhabitants of Dennistown*, 398 A.2d 376 (Me. 1979); and *Harris v. City of South Portland*, 118 Me. 356, 108 A. 326 (1919)). After December 31, 1976, upon acceptance of the dedication, the municipality will acquire a fee simple interest in the property (see Chapter 1 for discussion of the nature of title interest) unless the dedication document (deed) or acceptance article states otherwise (23 M.R.S.A. § 3025). (For road acceptances prior to that date, municipalities generally acquired easement interests, except where the municipality acquired the fee interest in the so-called “rangeways” laid out by the colonial proprietors of Massachusetts or where a deed expressly conveyed the fee interest.) The acceptance article also should state whether the road is accepted as a town way or as a public easement (see Chapter 1 regarding types of roads). Therefore, make certain that the acceptance article states the legal status of the road (town way or public easement) **and** the legal interest the town will have (fee simple or easement interest). Municipalities should record the deed to the road and, although not required by law except for eminent domain and for discontinuance, should **record** a certification of the acceptance in the registry of deeds to create an official record of the acceptance.

**Alternative Means of Acceptance.** However, a vote by the legislative body is not the exclusive means by which a municipality may accept a dedication of property for road purposes. A municipality also may accept a dedication by prescription (at least twenty consecutive years of use by the public) (*Glidden v. Belden*), or by some affirmative act, such as the reconveying of the property subject to the rights of the public to use it as a public street (*Vachon v. Inhabitants of the Town of Lisbon*, 295 A.2d 255 (Me. 1972)). Because acceptance of a road as a town way creates significant municipal responsibilities and liabilities (discussed later in this manual), it is better for a municipality to affirmatively accept the dedication of a way by vote of its legislative body than to accept it informally by long public use or by some other affirmative act.

**Conditional Acceptances Not Valid.** A very important legal limitation on dedication and acceptance is that a road may not be accepted on a conditional basis, such as the occurrence of some future event. Maine courts have declared conditional acceptances void (*State v. Calais*, 48 Me. 456 (1860); and *Wardens of Christ's Church v. Woodward*, 26 Me. 172 (1846)). For example, a town meeting vote to accept a road provided (or on condition) that it is widened to 50 feet and paved is a conditional acceptance, and so is invalid.

### **Purchase and Acceptance (23 M.R.S.A. § 3030)**

A municipality may obtain property for road purposes by purchase and acceptance. This differs from a dedication in that the landowner is paid for the property — it is not a gift to the municipality. Purchase and acceptance is voluntary — the landowner agrees to sell and the municipality agrees to buy the property, as opposed to eminent domain, which is a forced “sale”.

The municipal officers should contact the owners of the land in question and discuss the purchase price. It may be appropriate for the municipal officers to hire an expert real estate appraiser, depending upon the type or amount of property to be purchased, in order to arrive at an agreed-upon fair price that will minimize the need for the municipality to take the property by eminent domain. At this point, the municipal officers cannot sign any contracts or otherwise bind the municipality to purchase the property unless the contract expressly is contingent upon approval by the legislative body. The municipal officers should make it clear to prospective sellers that the purchase will require approval of the legislative body, both to accept the property and to appropriate the money to buy it.

Appendix A contains a sample article authorizing purchase and acceptance of property for highway purposes. Make certain that the acceptance article states the legal status of the road (town way or public easement) and the legal interest the town will hold (fee simple or easement interest), since unless otherwise specified in the acceptance documents, title to land accepted by a municipality for road purposes after December 31, 1976 is in fee simple (23 M.R.S.A. § 3025). Appendix B contains a sample deed that can be used to convey property or interests to municipalities for road purposes.

### **Eminent Domain (23 M.R.S.A. § § 3022, 3023)**

Eminent domain, also called “laying out and acceptance” or “condemnation,” is a process which allows the municipality to purchase private land for public use even if the landowner objects. A municipality may use eminent domain to take property for many purposes (see for example 30-A M.R.S.A. § § 3101, 4746, 5108 and 5204) but the discussion in this manual is limited to road purposes. Eminent domain can be used to create either a town way or a public easement (23 M.R.S.A. § 3022). Title to land taken by eminent domain (for road purposes) after December 31, 1976 is in fee simple unless otherwise specified in the condemnation documents (23 M.R.S.A. § 3023).

Title 23 M.R.S.A. § § 3022, *et seq.* govern the use of eminent domain for road purposes. Section 3023 provides that eminent domain is available if “the municipal officers determine that public exigency (necessity) requires the immediate taking of such property interests, or if the municipality is unable to purchase it at what the municipal officers deem reasonable valuation, or if title is defective.” We recommend that the municipal officers first ask the owner to sell voluntarily for a reasonable price; if no reasonable amount is agreed upon, the municipality then may use eminent domain.

**Procedure:** By State statute, eminent domain is a multi-step process which is described below. Appendix C contains forms for this process.

- First, the municipal officers, either upon petition or on their own initiative, give written notice of their intentions to take certain property and describing the proposed way (23 M.R.S.A. § 3022). This notice must be posted for at least seven days in two public places in the municipality and in the vicinity of the proposed way.
- Second, they meet at the scheduled time and place to determine the location of the proposed way and whether circumstances require a taking.
- Third, they file with the clerk an order of condemnation, specifying the property to be taken and the damages to be paid to the landowners of record (23 M.R.S.A. § 3023). (The determination of damages is a critical matter and is discussed further below). In a town meeting community, a copy of the order is sent to the owners by registered mail, but no check is issued until the voters approve the transaction. In a town or city council municipality where the municipal officers have been granted the power of appropriation by charter, the condemnation order and a check for damages are *served* upon the owners.
- Fourth, and only in a town meeting municipality, the voters approve the taking and appropriate the money to pay damages, and a check is *served* upon the owners of record. (This is one of the rare instances in which the town meeting may vote to *increase* the dollar amount (for damages) in a warrant article).
- Finally, a deed or a certificate evidencing the taking and attested by the town clerk is recorded in the registry of deeds (23 M.R.S.A. § 3024). The taking is complete and title to the property passes: (1) to the town (in a town meeting community) when the check is served or the certificate is recorded, whichever occurs first, and (2) to the town or city in a council community when the order and check are served or the certificate is recorded, whichever occurs first (*Luce v. City of Portland*, 556 A.2d 656 (Me. 1989)).

**Damages.** Damages in an eminent domain proceeding are determined in accordance with 23 M.R.S.A. § 3029 and 23 M.R.S.A. § § 154-154E. The damages to which the landowner is entitled include not only the fair market value of the land taken, but also may include “severance damages,” which is the reduction in value to the remaining land as a result of the taking (*August Realty Inc. v. Inhabitants of Town of York*, 431 A.2d 1289 (Me. 1981)). Municipal officers should obtain the services of a real estate appraiser for any major taking, as an expert’s determination will be given great weight if the matter goes to court. Underestimating damages can be costly to the municipality, as the court may fix a substantially higher price than was anticipated and litigation can be costly. Also, an expert appraisal should provide the public with greater assurance of the fairness of the amount of damages being offered and may reduce the likelihood of appeals on the issue of damages.

**Appeals.** A party may appeal an eminent domain proceeding to Superior Court. The time allowed for an appeal depends upon whether the issue on appeal is the amount of damages or the necessity for the taking. For example, if the landowners feel that the award of damages was too low, they must appeal

this award within 60 days after the taking (23 M.R.S.A. § 3029). If, however, the landowners feel that the taking itself was not for a public use or a public exigency (necessity), they must appeal within 30 days of the taking pursuant to Rule 80-B of the Maine Rules of Civil Procedure (23 M.R.S.A. § 3029). The courts are unlikely to overturn the legislative body's determination that a public use and a public necessity exist to support the taking unless the determination has no rational basis (*Brown v. Warchalowski*, 471 A.2d 1026 (Me. 1984); and *Ace Ambulance Service, Inc. v. City of Augusta*, 337 A.2d 661 (Me. 1975)).

### **Prescriptive Use (23 M.R.S.A. § 3030; 14 M.R.S.A. § § 801, 812)**

A public road can be created by long-term public use, without any formal acceptance or taking by the municipality. Prescriptive use is recognized at common law and by statute (at 14 M.R.S.A. § 812 and 23 M.R.S.A. § 3030). A road created in this manner is called a "prescriptive easement," but should not be confused with the term "public easement" (a type of road) discussed in Chapter 1. Depending upon the type of use that has been made of the road, a road created by prescriptive use can be a town way, a public easement, or even a private right-of-way. These distinctions are discussed later in this section.

Prescriptive use is similar to adverse possession (commonly known as "squatter's rights"), except that the user is entitled only to the use of the property, not to full ownership and possession of it. For a detailed discussion of these concepts, see Creteau, *Principles of Real Estate Law* (1977); Cowan, *Maine Real Estate Law and Practice*, Vol. 1 (1990); and *McKenna v. Searsmont*, 349 A.2d 760 (Me. 1976).

**Elements of Prescriptive Use.** The requirements for creation of a public road by prescription parallel those for establishment of a prescriptive easement (*S.D. Warren Co. v. Vernon*, 1997 ME 161, 697 A.2d 1280). Prescriptive use has several elements: there must be continuous, uninterrupted use by the municipality, the general public or private individuals for at least 20 consecutive years, and that use must be "under a claim of right, adverse to the owner, with his knowledge and acquiescence, or a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed" (*Town of Kittery v. MacKenzie*, 2001 ME 170, 785 A.2d. 1251, 1255-1256; *Stickney v. City of Saco*, 2001 ME 69, 770 A.2d 592, 601; *Longley v. Knapp*, 1998 ME 142, 713 A.2d 939; *S.D. Warren Co. v. Vernon*; *King v. Town of Monmouth*, 1997 ME 151, 697 A.2d 837; *Taylor v. Nutter*, 687 A.2d 632 (Me. 1996); *Great Northern Paper Co. v. Eldredge*, 686 A.2d 1075 (Me. 1996); *Inhabitants of Town of Kennebunkport v. Forrester*, 391 A.2d 831 (Me. 1978); and *Inhabitants of Town of Manchester v. Augusta Country Club*, 477 A.2d 1124 (Me. 1984), quoting *Dartnell v. Bidwell*, 115 Me. 227, 230, 98 A. 743 (1916)).

A prescriptive easement will not arise where the use is with the landowner's permission or agreement. For example, if a municipality has plowed and maintained a school bus turn-around on privately-owned land adjacent to a public road for 25 years with the landowner's permission, the turn-around has not become part of the public way. Similarly, where a municipality has (illegally) plowed a private road for a number of years at the request of the homeowners along that road, the homeowners' permission to do so shows a lack of adverse use that may defeat their argument that the municipality must maintain their road.

A town way also will not arise by prescription where the municipality holds a right-of-way over property and simply permits the public to use it as access to a public facility. *See Town of Kittery v. MacKenzie*, 2001 ME 170, 785 A.2d. 1251. In *MacKenzie*, abutters argued that the Town was required to maintain the so-called "Dump Road" because for over 50 years, the Town had allowed the public to travel over this road in order to access the town dump. The Town did not accept the road as a right of way, nor did it own the fee in the road, nor had there been a dedication of a town way to the Town when it acquired the right-of-way. After the Town ceased to use the road for access to the dump, it closed the

road by placement of a pile of gravel and then ceased to keep the road in good repair (although it did perform some plowing and maintenance on the road at the request of abutters to this road). The Law Court observed that the use of the road by neighbors (one of whom owned the fee in the road) and by the public was permissive—not adverse—and so did not create a town way by prescription. (*from Supplement 3, June 2004*)

Sporadic, minor repairs financed by the municipality are not enough to create a town way or public easement by prescriptive use (*Comber v. Inhabitants of Plantation of Dennistown*, 398 A.2d 376 (Me. 1979)). Also, occasional recreational use by the public (hiking, hunting, fishing, cross-country skiing, snowmobiling or using all-terrain vehicles) is not sufficient to create a public way by prescription; there is a rebuttable presumption that such use is permissive, and not adverse (*S.D. Warren Co. v. Vernon*; *Comber v. Inhabitants of Plantation of Dennistown*; and *Inhabitants of Town of Kennebunkport v. Forrester*).

Prescriptive use can cut both ways. A municipality can rely on it to exercise legal control over a road and to keep abutters from blocking the road. On the other hand, it may be used against the municipality by landowners who assert that the municipality has a duty, based on past maintenance, to continue to repair and maintain a road.

While prescriptive use may obligate a municipality to maintain a town way, at common law neither prescriptive use nor adverse possession can be used to take interests in real property away from the State or municipalities (*Town of Sedgwick v. Butler*, 1998 ME 280, 722 A.2d 357; *Flower v. Town of Phippsburg*, 644 A.2d 1031 (Me. 1994); *Phinney v. Gardner*, 121 Me. 44 (1921); *Carey v. Whitney*, 48 Me. 516 (1860)). Title 23 M.R.S.A. § 2952, the “longtime buildings and fences” law, creates one exception to this doctrine that a person can not acquire property interests from the sovereign by adverse possession or by prescriptive use (this law is discussed further in Chapter 4 regarding road boundaries).

**Type of Road Created.** The type of road created by prescriptive use will depend on the particular facts of use and maintenance. If, for example, the general public uses a privately-owned road for 20 years in the requisite manner and the municipality maintains it at a level consistent with the maintenance of other town ways, then it is likely that the road will be declared a town way. However, unlike a private road established by prescription, the use of a town way “is not restricted by the type or extent of traffic which utilized the road during the prescriptive period”; the level of use of the public way may increase or decrease with the demands of the public (*King v. Town of Monmouth*, 1997 ME 151, 697 A.2d 837; and *McKenna v. Searsmont*, 349 A.2d 760, 762-763 (Me. 1976)).

Whether the town way or public easement is created by prescription rather than by dedication and acceptance, purchase and acceptance or eminent domain does not change the municipality’s obligation to maintain the road. The municipality’s obligation to maintain a town way and its right (but not the obligation) to maintain a public easement are based on the type of road (town way, public easement or private road), and not on how the municipality acquired its legal interest in the road. Therefore, the fact that a town way was created by prescription rather than by a formal method does not reduce the municipality’s maintenance obligation.

Not all roads created by prescriptive use are open to the public. For example, if a particular individual crosses a neighbor’s property in an open and notorious manner for over 20 years, that person may have obtained a private right to continue doing so, but this right is to use a private road, and is not available to the general public. The scope and nature of a prescriptive easement for a private road (as compared with a town way or public easement acquired by prescription) are determined by its use and its users during the prescriptive period (*Gutcheon v. Becton*, 585 A.2d 818, 822 (Me.1991); *Pace v. Carter*, 390 A2d 508 (Me. 1978); and *Pillsbury v. Brown*, 82 Me. 450, 19 A. 858 (1890)).

**How Prescriptive Use is Determined.** Proving prescriptive use is a complex factual matter, and can only be finally determined by a court. Usually, this is done through a declaratory judgment action pursuant to 14 M.R.S.A. § 5951, *et seq.* As noted above, the mere fact of use for 20 years is not alone sufficient to prove prescriptive use. The party seeking to prove prescriptive use also must establish the other elements. This can be difficult since there usually are no documents (deeds, town meeting records, and so on) accompanying the prescriptive use process. Municipal officials often must piece together the history of use and maintenance and make their own preliminary decision about the existence of a prescriptive easement and what type of road it is. That decision is subject to court review, if contested. Municipal officials may find that it is cheaper and faster to take a road by eminent domain rather than to litigate the issue of prescriptive use.

**Boundaries of Road Created by Prescriptive Use.** The actual use and maintenance of the road determine the width and location of a road created by prescriptive use. Ditches and areas beyond the traveled portion of the road may be part of the prescriptive easement, but only if the municipality has exercised control over those areas for the requisite time and manner. If there has been no maintenance or control of land outside the travel way (as is the often the case with public easements), then the public right of way is limited to the travel way only (see *Jost v. Resta*, 536 A.2d 113 (Me. 1988) (nature and scope of prescriptive easement, including width, are factual issues)).

## **Paper Streets**

The laws surrounding paper streets are complex. To understand how they operate, it is necessary first to understand what a paper street is. A “paper street,” referred to in State law as a “proposed, unaccepted way” (23 M.R.S.A. § 3031), is a road shown on the face of a subdivision or plan, but which never actually was constructed on the face of the earth. Upon the sale of lots with reference to a recorded subdivision plan, the public acquires rights of “incipient dedication” to accept the streets shown on the plan when and if the municipality’s legislative body deems it appropriate to do so (usually after the developer has constructed the road in accordance with local road standards). The individual lot owners also acquire private rights over all of the streets shown on the plan. (See *Glidden v. Belden*, 684 A.2d 1306 (Me. 1996); and *Callahan v. Ganneston Park Development Corp.*, 245 A.2d 274 (Me. 1968), which discuss the creation of public and private interests in rights-of-way through the depiction of “paper streets” on recorded subdivision plans.)

Title 23 M.R.S.A. § 3031 establishes the nature and duration of public and private rights in paper streets in subdivisions recorded on or after September 29, 1987. For subdivisions recorded prior to that date, the nature and duration of public and private rights in paper streets are established by 23 M.R.S.A. § 3032 and court decisions such as *Callahan v. Ganneston Park Development Corp.* and *Glidden v. Belden*. (See Chapter 3, “Disposing of Municipal Roads,” for a discussion of the nature and duration of public and private rights in paper streets.)

As to ownership of the land under the paper street, in general, the abutters own to the centerline (unless the developer has specifically reserved title; see 33 M.R.S.A. § § 460, 469-A), at least with regard to streets dedicated prior to December 31, 1976. In dedications of property or interests for highway purposes after December 31, 1976, unless otherwise provided by the municipality in the deed or acceptance article, upon accepting the way, the municipality acquires fee simple interest in the way (23 M.R.S.A. § 3025), and so will own all rights in the road (subject to utility easements) and the land beneath it upon acceptance. However, where the way was dedicated prior to that date (unless the way was a so-called “rangeway”; see *Glidden v. Belden*), where the fee is otherwise reserved after that date or where the municipality has not yet accepted the incipient dedication of the street, the abutters own to the centerline unless the developer has specifically reserved title.

Because many subdivision plans have been recorded depicting streets that never have been constructed or used, and yet lots in such subdivisions have been sold, questions have arisen frequently about the status of public and private rights in these roads. In addition, the existence of these paper streets has constituted a legal obstacle to other uses of the property that underlies them, given the uncertainty regarding the existence of public and private rights to pass over this property. For these reasons, terminating rights in paper streets is an important topic which is discussed in Chapter 3, "Disposing of Municipal Roads."