Maine Law Review

Volume 48 | Number 2 Article 3

April 2018

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I. INTRODUCTION

Black's Law Dictionary[1] defines an easement as a right of use over the property of another. An easement is a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property right in the owner.[2] It is an interest that one person has in the land of another.[3] A primary characteristic of an easement, that its burden falls upon the possessor of the land from which it issued, is expressed in the statement that the land constitutes a servient estate or tenement and the easement a dominant tenement.[4] The servient estate may utilize the easement area for its own purposes or in conjunction with the dominant estate as long as such use does not interfere with the dominant estate.[5] An easement is distinguishable from a "license," which merely confers personal privilege to do some act on the land. Easements do not allow exclusive possession of the area. They are categorized as incorporeal hereditaments. Ease-

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The authors would like to thank Mr. Joseph J. Wathen, Esq., Staff Attorney with the Maine Municipal Association; Mr. Bruce VanNote, P.L.S., Esq., Staff Attorney with the Maine Department of Highways, and Mr. John T. Mann, P.L.S. and Mr. Reubon Wheeler of Mann Associates for their help, review, and comments in preparing this Article.

1. BLACK'S LAW DICTIONARY (6th ed. 1990).

2. In Hill v. Lord, 48 Me. 83 (1861), the court held:

> The distinction between an interest in the soil, or a right to a profit in it, and an easement, is not always palpable. The line of separation is sometimes obscure, in some points unsettled, with no established principles by which to determine it.
>
> All rights of way are easements. So is the right to enter the close of another and erect booths upon public days; or to dance, or to play at any lawful games and sports.

Id. at 99 (citations omitted).

3. Bonney v. Greenwood, 96 Me. 335, 341, 52 A. 786, 789 (1902) ("An easement may be concisely defined as 'a privilege without profit which one has for the benefit of his land in the land of another.' ").

4. *Id.* ("It is among the essential qualities of every easement that there are two distinct tenements or estates, the dominant to which the right belongs, and the servient upon which the obligation is imposed.").

5. Badger v. Hill, 404 A.2d 222 (Me. 1979).

ments also are known as rights-of-way[6] and servitudes, although there is some distinction among these terms. While roads for the most part are easements devoted to access and travel,[7] not all easements are roads.

Easements, more so than other forms of title, often are difficult to identify, research, and locate. This difficulty exists for three reasons. First, easements ordinarily are not contiguous to other easements. The records usually provide no references to adjoining easements that can be relied upon to correct a defective or vague description. Second, an easement is a nonpossessory estate that is shared with other persons. Public easements are enjoyed by all, and private easements do not necessarily restrict the servient estate from using the same area in any manner that will not interfere with the exercise of the dominant estate.[8] As a result, it usually is not possible or desirable to spend time and money to mark the boundaries, set up barriers such as fences or walls, or clearly document the easement to prevent trespass and perpetuate the easement's boundaries, as normally would be done with a possessory estate. Third, the amount of effort required in title research or a survey is inversely proportional to the effort and care that went into the original description. Scriveners normally spent very little time preparing the original descriptions so that great effort may be required in subsequent title searches and surveys.

The primary reason for the casual preparation of the original description of the easement is the fact that most easements have no separable value. In fact, an easement could not exist without supporting some property or some party to the detriment of some other property. The easement derives its value from the property or party it serves and from its capacity to enhance the enjoyment of that property or party. The result is twofold: (1) the easement is no more valuable than the property it supports and (2) care and concern for the easement usually come second to the property that it supports.

In many instances the shape of an easement contributes to description problems. Most easements exist as a strip. The full enjoyment of the easement does not necessarily require the use of the full width or length of the easement strip. Because the precise location of the easement's boundary does not necessarily increase the benefit enjoyed, many easements seldom are precisely defined or located.

Determining and defining easements requires extraordinary effort due in part to the fact that many easements, especially access or

6. Shepherd Co. v. Shibles, 100 Me. 314, 318, 61 A. 700, 702 (1905) ("A right of way is an easement.").

7. Some roads exist as fee simple title, especially some of the recently created public. *See, e.g.*, ME. REV. STAT. ANN. tit. 23, §§ 3023, 3025 (West 1992).

8. Ricker v. Barry, 34 Me. 116, 121-22 (1852).

road easements, are ancient. Some have existed beyond any living memory or reasonably available records.[9] The road easements were created to serve the original settlements and continue to provide service to the present time. As the court noted in *MacKenna v. Inhabitants of Town of Searsmont*:[10]

> When a highway is first established in some unfrequented locality, it may exist for a time as a rude road, with a narrow track, and only occasionally used. With the growth of population and business, and the transformation of the lonely neighborhood into a thriving, increasing city, the highway may also go through the transformations of being turnpiked, planked, macadamized, and paved for its entire width. From bearing an occasional rude cart, it may come to sustain an endless succession of wagons, drays, coaches, omnibuses, and other vehicles of travel and traffic. There is a continual march of improvement in streets and in vehicles.[11]

Despite the difficulties surrounding easements, nearly every piece of property in Maine must rely on private or public easements for access and enjoyment. Consequently, the practitioner must be familiar with certain aspects of title regarding easements and their use. This Article will discuss various concepts regarding the use, creation, and extinguishment as well as other problems often associated with easements.

II. Easement Terms and Classifications

Terms commonly associated with easements are "servient estate" or "servient tenement" and "dominant estate," "tenement," or "party." The servient estate is the land the easement crosses and burdens. The dominant estate is the land or person benefited by the easement.

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9. In many instances the available documents regarding an easement and its limitations are sparse and of poor quality by normal standards of acceptance. The courts have recognized this fact and often require less evidence of ancient easements. In Piper v. Voorhees, 130 Me. 305, 155 A. 556 (1931), the court said:

> The admissibility . . . is sanctioned because the rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time, and therefore direct proof of their existence ought not to be required; because, in local matters in which the community are interested, all person living in the neighborhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interest would lead to contradiction from others if the statements were false; thus a trustworthy reputation may arise from the concurrence of many parties, unconnected with each other, who are all interested in investigating the same subject.

Id. at 307-08, 155 A. at 558.

10. 349 A.2d 760 (Me. 1976).

11. *Id.* at 763 n.1 (quoting Briggs v. Lewiston & A. Horse R.R., 79 Me. 363, 366-67, 10 A. 47, 48 (1887)).

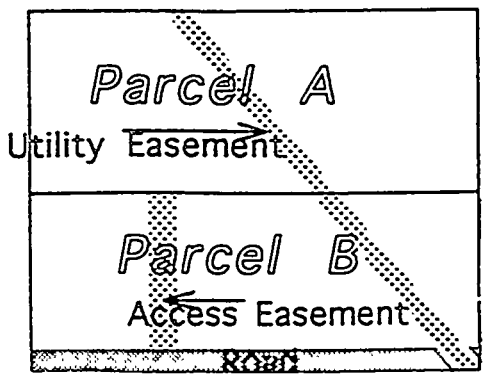
Easements may be classified by reference to their use (for example, road, utility), the manner of creation (for example, prescription, dedication), and their effect (for example, negative easement). In this Article, two classifications will be used: (1) appurtenant easements and easements in gross and (2) public and private easements. These classifications generally have legal connotations that affect the permitted use and location of the easement.

A. Appurtenant Easements and Easements in Gross

Appurtenant easements benefit a property rather than a person. The easement attaches to the land and belongs to the property; it is inseparable and incapable of use without the appurtenant property.[12] The property benefited by the easement is known as the "appurtenant property." In the accompanying figure, Parcel A is the appurtenant property and dominant estate for the access easement while Parcel B is the servient property.

An easement in gross benefits a person rather than a parcel of land.[13] An example of an easement in gross is a utility easement where the utility company benefits from the easement. In Figure 1, the utility company is the dominant party while Parcel A and Parcel B are the servient estates.

FIGURE 1



The utility easement is an easement in gross while the access easement is an appurtenant easement for parcel A. Both parcel A and parcel B are servient to the utility easement. Parcel B is servient to the access easement and the public road easement.

12. Ring v. Walker, 87 Me. 550, 558, 33 A. 174, 176 (1895) ("[A]n easement that is appurtenant is incapable of existence separate and apart from the particular messuage or land to which it is annexed, there being nothing for it to rest upon.").

13. In LeMay v. Anderson, 397 A.2d 984 (Me. 1979), the court said:

> An easement in gross may generally be described as an interest in land which "is not appurtenant to any estate in land or not belonging to any person by virtue of his ownership of an estate in other land, but is a mere personal interest in or right to use the land of another . . . ."

Id. at 987 n.2 (quoting Reed v. A.C. McLoon & Co., 311 A.2d 548, 552 (Me. 1973)).

As a rule, in cases of doubt the easement is presumed to be an appurtenant easement rather than an easement in gross.[14] This presumption can be rebutted by appropriate evidence.

B. Public Easements and Private Easements

Public easements and private easements are relatively simple classifications that have their greatest relevance in regard to roads. Public easements are easements that the public can use at its pleasure.[15] Private easements are easements that may be used by one or more persons but not by the general public.

In the past there were three recognized categories of public road easements in Maine:[16] (1) state roads; (2) county roads; and (3) town roads. Further, there were at least three historical statutory categories of town roads:[17] (1) town ways;[18] (2) private ways (now public easements);[19] and (3) winter roads.[20] All three levels of government had the power and responsibility to accept, open, maintain, and extinguish public roads.[21] After July 29, 1976, the responsibility

14. *Id.* at 987 ("The traditional rules of construction for grants or reservations of easements require that whenever possible an easement be fairly construed to be appurtenant to the land of the person for whose use the easement is created.").

15. Note, however, the public easement within the meaning of title 23, section 3021 of the Maine Revised Statutes does not refer to title; instead, it refers to the municipality's maintenance obligations.

16. Because this Article focuses solely on Maine roads and easements, all statutory references are to Maine statutes.

17. Additionally, municipalities had power to establish bridle paths, trails, landings, and parking places. See R.S. ch. 84, §§ 34-38 (1944).

18. Title 23, § 3021(3) (West 1992) states:

> "Town way" means . . . [a]n area or strip of land designated and held by a municipality for the passage and use of the general public by motor vehicle; . . . [a]ll town or county ways not discontinued or abandoned before July 29, 1976; and . . . [a]ll state or state aid highways, or both, which shall be classified town ways as of July 1, 1982, or thereafter, pursuant to section 53.

19. *Id.* § 3021(2) states: " 'Public easement' means an easement held by a municipality for purposes of public access to land or water not otherwise connected to a public way, and includes all rights enjoyed by the public with respect to private ways created by statute prior to the effective date of this Act."

20. R.C. ch. 84, § 30 (1944) states:

> The municipal officers may lay out a way as aforesaid for the hauling of merchandise, hay, wood, or lumber, to be used only when the ground is so covered with snow that such hauling shall not break the soil. When so laid out, they shall state in their return the purposes for which it is laid, and that it shall be used only in the winter season, and shall order the person for whose accommodation it is laid to pay into the town treasury an amount equal to the damages of such location for the benefit of the owner of the land over which it is laid and the expenses of such location, and it shall not be accepted by the town until such amount is so paid. No town shall be liable for damage to any person traveling on such way.

21. *See, e.g.*, title 23, § 2051 (West Supp. 1974), *amended by* P.L. 1975, ch. 711, § 1, which states:

for county roads (except in the unorganized parts of the county) was transferred to the towns.[22]

III. Easement Status and Uses

One of the first tasks a practitioner must perform when attempting to retrace roads, utilities, railroads, and other corridors of use is to determine the status of the title. Many corridors of use such as railroads, utility lines, and roads may exist either as an easement or in fee simple. Retracement of corridors of use that exist as fee simple title is no different from other property held in fee simple title. Such cases lead the practitioner to other documents detailing property title and boundaries. The analysis of easements, however, is somewhat different from the analysis of land title.

A. Easement or Fee Simple Title

To determine the status of the title (fee simple versus easement), a two step process is appropriate. First, the practitioner should examine the operative records (usually the original records). This is seldom an easy task. Records often cannot be found, or, if found, are not complete. Even when complete records are found, practitioners sometimes discover that the government failed to create or extinguish properly a public easement, placing its current status in doubt.[23] If the records are not discovered or the information re-

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> County Commissioners may lay out, alter, close for maintenance, or discontinue highways within the unorganized areas of their counties and grade hills in any such highway. The county commissioners may close county roads for maintenance and preserve the right-of-way for the use of abutting landowners, and any others using said way for the access to their property, and public utilities and corporations with facilities legally located within said way, at their own risk. Nothing in any city charter shall be so construed as to deprive them of the power to lay out, alter, close for maintenance or discontinue county roads within the limits thereof.

See also Craig v. Davis, 649 A.2d 1096, 1097 (Me. 1994); Town of Fayette v. Manter, 528 A.2d 887 (Me. 1987).

22. *See* P.L. 1975, ch. 711, § 1. See also Craig v. Davis, 649 A.2d 1096, where the court said:

> As part of that same enactment, section 2051 was amended to eliminate the county commissioners' former jurisdiction over laying out and discontinuing county ways except in unorganized areas of their counties, P.L. 1975, ch. 711, § 1, and a new provision, 23 M.R.S.A. § 3026, gave the municipalities the power to discontinue "town ways" defined by the new provision 23 M.R.S.A. § 3021(3)(B) to include "[a]ll town or county ways not discontinued or abandoned before July 29, 1976," the effective date of the new act. Section 3026 further provided that when the municipality discontinued a town way that "unless otherwise stated in the [discontinuance] order, a public easement shall . . . be retained . . . ."

Id. at 1097.

23. The legal procedures required to extinguish a road are not simple. In Town of Fayette v. Manter, 528 A.2d 887 (Me. 1987), the court said:

quired is missing, the second step in determining the status of title is to analyze the information within the context of the common law as modified by statute.

1. *Operative Records*

The status of the title expressly described in the operative records generally controls.[24] A practitioner should exercise care to locate and use the operative records. In the past, practitioners who had difficulty discerning the operative records often made assumptions about the title, width, and allowable use of various roads, utilities, and other corridors of use. The assumptions, right or wrong, were documented, often without clear explanation, and now the information appears in the records to be factual.

2. *Common Law*

Under the common law, nearly all private roads such as those shown on subdivision plans and public roads that were conveyed, dedicated,[25] or condemned were taken as easements.[26] However,

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Chapter 79, § 35 directed the Commissioners in the event of a discontinuance to "state in their return when it is to be done, the names of the persons to whom damages are allowed, the amount allowed to each, and when to be paid." Parties aggrieved by the Commissioners' decision had statutory rights of appeal to the Superior court with respect to both an order of discontinuance (Ch. 79, §§ 56, 57) and of damages (Ch. 79 §§ 36, 39). An appeal from an order of discontinuance had to be prosecuted "at any time after it [the order of discontinuance] has been placed on file and before the next term of superior court in said county . . ." R.S. 1944 Ch. 79 § 56. An appeal from the estimate of damages by the Commissioners had to be taken

> at any time before the 3rd day of the regular term succeeding that at which the Commissioners' return is made, to the term of the superior court, first held in the county where the land is situated, more than 30 days after the expiration of the time within which such appeal may be taken, excluding the 1st day of its session . . .

R.S. 1944, Ch. 79 § 39. If no notice of appeal from the estimate of damages was filed in a timely manner the proceedings were to "be closed, recorded, and become effectual; all claims for damages not allowed by them be forever barred . . ." R.S. 1944, Ch. 79, § 36.

Id. at 889.

24. Title 23, § 3031(3), (4) (West 1992 & Supp. 1995-1996).

25. Dedication is a conveyance to the public through a gift or for a nominal sum resulting in an appropriation by a pubic entity for public use. For a more detailed discussion of dedication, see *infra* notes 238-252 and accompanying text.

26. *See* City of Rockland v. Johnson, 267 A.2d 382, 384 (Me. 1970) (" 'The owner of land over which a highway is laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public.' " (quoting Burr v. Stevens, 90 Me. 500, 503, 38 A. 547, 548 (1897))).

In Lamb v. Euclid Ambler Assocs., 563 A.2d 365 (Me. 1989), the court said:

> Under the common law, at least presumptively, the owner of land abutting a public way owned the fee under the way. "[T]he common law rule is that the public acquires only an easement in land taken for the establish-

the legislature reversed the common law for public roads. All dedicated roads created after December 31, 1976, are taken in fee simple unless the municipality accepting the dedication specifically provides otherwise.[27] However, the developer or other person recording a plan in the registry may dedicate rights of lesser extent, provided that the subdivision plan is recorded and the extent of those rights is described on the face of the subdivision plan or any conveyance of land (including a reservation of the fee to the developer).[28] Similarly, after December 31, 1976, all roads taken by eminent domain are taken in fee simple unless the order of condemnation specifically provides otherwise or the property or interests to be taken include the land or right-of-way of a railroad corporation or a public utility.[29] The post-December 1976 changes in the common law were not retroactive, and therefore do not affect the status of existing roads.[30] Additionally, the statutory changes have no effect on the status of roads obtained by prescription or the common law status of roads created by conveyances between private parties.

3. *Range-Ways and Range-Roads*

Range-ways and range-roads present special problems for determining the status of title. In laying out conveyances, the original proprietors of land frequently placed what are known as "range-ways"—strips of land, sometimes eight or more rods[31] in width[32]—along all or parts of the lots laid out.[33] Range-ways are thought of in a general sense as "paper streets" because they exist only on paper, in the description of the conveyance.

The purpose of range-ways appears to have been to provide potential access from the various proprietors' lots to the roads and rivers used for commerce. A range-way that is or has been used for travel is referred to as a "range-road." For purposes of determining

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ment of the highway except as the rule has been changed by statute in some states."

Id. at 367 (quoting City of Rockland v. Johnson, 267 A.2d 382, 384 (Me. 1970)). *See also* Brooks v. Bess, 135 Me. 290, 291, 195 A. 361, 361 (1937) (presumptively, the adjoining landowner owns the soil to the center of a public way).

27. Title 23, § 3025 (West 1992).

28. *Id.* § 3031. The statutory language appears to set up a conditional estate whereby the owner adjoining a road to be dedicated has title by implication subject to divestiture of his title when the municipality accepts the inchoate dedication.

29. *Id.* § 3023.

30. City of Rockland v. Johnson, 267 A.2d at 382.

31. A "rod" is defined as "a lineal measure of sixteen feet and a half, otherwise called a 'perch.'" BLACK'S LAW DICTIONARY (4th ed. 1951).

32. *See, e.g.*, Howard v. Hutchinson, 10 Me. 335, 335 (1833).

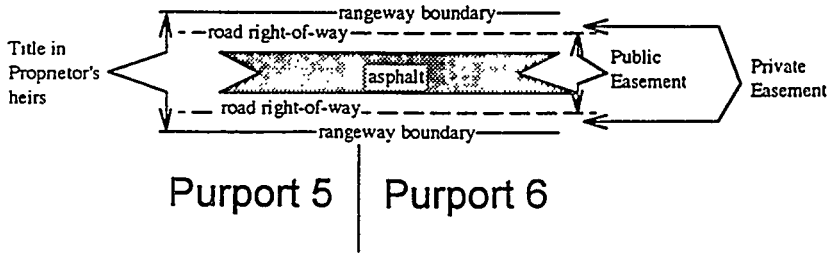
33. The term "range-ways" probably derives from the fact that the strips appear as ways along the "range" of lots laid out by the proprietors.

title, range-roads are treated like other roads and normally are subject to the common law as modified by statute.[34]

While some range-ways presently are used as public and private range-roads, many never have been appropriated for such purposes, and the title of these strips of land remains unclear. The practitioner frequently encounters them when researching title or surveying lots that were laid out on or along rangeways according to the original records.[35] (Often, however, the most recent records fail to show the range-ways.) In many cases, range-ways are owned in fee by the municipality or the heirs of the original proprietors. However, this can be determined only by examining the original conveyance, related documents (for example, an allotment plan), and subsequent conveyances for language evidencing exclusion of the fee or an easement by reservation, dedication, implication, or similar method.

When a public road is established on a range-way, the width of the public road is not necessarily the width of the range-way. If the width of the road, established at the road's creation,[36] is less than the width of the range-way, the following situation would be possible.

FIGURE 2



The figure shows the situation not uncommon in Maine where a range-way is created in fee. The width of the range-way is different from the width of the public easement. Also, both a public easement and private easement burden the range-way.

Locating the range-way is done in the same manner as locating any other property (albeit the range-way may be only a few rods wide and several miles long). The location and width of the easement is then fixed within or on the range-way.

34. *See supra* notes 24-28 and accompanying text.

35. Practitioners have taken an interest in range-ways due in part to their relatively large width and their frequency, especially in the southern part of the state.

36. The record ordinarily states the width. If the width is not stated or the records are lost, the practitioner should refer to title 23, § 2103 (West 1992) (authorizing municipality to use and control for highway purposes one and one-half rods on each side of the center of the traveled portion of a highway survey).

Practitioners must be wary of range-ways. Any lots along or in range-ways require a complete research of all relevant documents back to the original conveyance out of the proprietors. A significant proportion of range-ways are encumbered with private and inchoate or incipient public easements. Failure to research properly the records on or near the range-ways increases the risk of problems being overlooked. In the absence of thorough research, the practitioner must warn his client of the increased risk of imperfect title and of improvements within the confines of the range-way.[37]

B. Title Within the Easement

Many people fail to understand or forget that the easement is not a possessory title—it is an encumbrance on the fee simple title.[38] The easement is similar to a blanket on the ground. The blanket may be used by one or more persons, but the ground beneath the blanket is owned by some other person. In real estate practice, the person who can use the blanket often is identified, but the person owning the ground upon which the blanket lies may be ignored.[39] In the case of a buried gas line easement crossing property there is seldom an omission in identifying the servient owner since the land frequently is cultivated or used by the owner, much as the owner would without the existence of the easement.[40]

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37. If the survey practitioner is unable or unwilling to perform a complete search of the records, the practitioner should agree with the client to exclude the research and otherwise comply with the rules promulgated by the Board of Licensure for Professional Land Surveyors:

> These standards shall apply to every land boundary survey in the State of Maine, except that the Surveyor and the client may agree to exclude any land surveying work from these standards.
>
> Such land surveying work excluded from the requirements of these standards shall not be monumented in the field nor shall it be used as a basis for a description for a conveyance, unless the map or report and description shall clearly set forth the particulars in which the survey departs from these standards.

RULES OF BOARD OF LICENSURE FOR PROFESSIONAL LAND SURVEYORS ch. 6, § 9 (1985).

38. Shepherd Co. v. Shibles, 100 Me. 314, 318, 61 A. 700, 702 (1905) ("An easement is an entirely different thing from the fee. 'The fee in the land is to be regarded as distinct from an easement in the same. The fee may be in one, the easement in another . . . .' " (quoting First Nat'l Bank v. Morrison, 88 Me. 162, 163 (1895))). *See also* Marshall v. Walker, 93 Me. 532, 540, 45 A. 497, 499 (1900).

39. For a good example, look at any subdivision plan and see if it clearly indicates who has title in the streets.

40. In Kuhn v. Farnsworth, 69 Me. 404 (1879), the court stated:

> When we speak of a road or way, there are two distinct rights and interests which naturally present themselves to the mind—the fee in the land itself, and the easement or use (public or private) which may be made of it for the purposes of travel and transportation. The owner of the fee may put the land to any use not inconsistent with the enjoyment of the easement that exists in it.

However, in the case of a public road easement, the status of the "underlying" fee simple title is almost always ignored by surveyors and attorneys since the servient owner can exercise little dominion and control over the road area without interfering with the dominant tenement's rights.[41] Nevertheless, the abutting owner frequently owns to the center of a public road easement or beyond.[42] The owner of the fee can use the area within the road easement in any manner not inconsistent with the public's easement.[43] A practitioner should define the extent and limitations of ownership within an easement in order to provide quality services to a client.

C. *Multiple Uses/Easements*

Easements can be and frequently are co-located (see Figure 3).[44] A utility easement may co-exist with a drainage easement. A private access easement may exist within the public road of a subdivision. There is nothing improper about this situation so long as the servient estate does not interfere with the dominant tenement, the junior use does not interfere with the senior use, and the co-users are reasonable with their use. All users of the easement are responsible for the easement's maintenance.[45]

Id. at 406.

41. *See* Stuart v. Fox, 129 Me. 407, 411, 152 A. 413, 415 (1930) ("[T]he grantor should not be presumed to retain for himself that which is of distinct benefit to his grantee in connection with the proper use and enjoyment of the estate conveyed.").

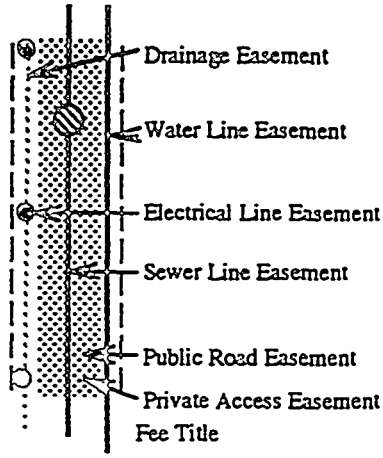
42. Brooks v. Bess, 135 Me. 290, 291, 195 A. 361, 361 (1937) ("It is well-established law that presumptively the adjoining landowner owns the soil to the center of the way. Subject to the easement of passage, he may cultivate the soil and take the herbage growing thereon."); Sutherland v. Jackson, 32 Me. 80, 82 (1850) ("In this State a grant of land bounded on a highway carries the fee to the centre of it, if there be no words to show a contrary intent.").

43. *See* City of Rockland v. Johnson, 267 A.2d 382 (Me. 1970).

44. With respect to utility easements, the municipality can grant a location permit to the utility even though the municipality does not own the fee simple title since utility easements can "piggyback" highway easements by virtue of title 35-A, § 2301-2311 (West 1988 & Supp. 1995-1996).

45. Ring v. Walker, 87 Me. 550, 564, 33 A. 174, 178 (1895) ("It is a rule of law that the one who enjoys the benefit of an easement in the premises of another must be at the expense of maintaining it. Easements impose no obligation, as a general rule, upon those whose lands are thus placed in servitude, to do anything.").

FIGURE 3



Often within a confined area there exist multiple improvements based on one or more co-located easements that are all imposed on the fee simple owner.

The problem that often arises in these situations is not a conflict between the easements; rather, upon the extinguishment of one easement the servient estate assumes that all rights are removed. This situation frequently arises where the town has discontinued a public road in a subdivision and the lot owners are unaware that one or more private easements remain. Also, the discontinuance of a town way[46] usually leaves a public easement for access.[47] The elimination of one easement does not necessarily cause the elimination of all easements.

D. Correlative Rights and Appurtenances

Once it has been determined that an amenity, such as a road, is an easement, and the location of the easement relative to the ownership of fee simple title is fixed, the rights and appurtenances should be determined. Again, the best and most reliable source for the rights and appurtenances is the operative records. If the operative records are missing or the information vague, the rules of construction as modified by statute are applied.

1. Express or Clearly Intended

An easement may be used for the purpose expressed or, when not expressly stated, use may be determined by reference to the actual or obvious intent of the parties at the time the grant is made.[48] Ref-

46. *See supra* note 17.
47. Title 23, § 3026 (West 1992).
48. Saltonstall v. Cumming, 538 A.2d 289, 290 (Me. 1988).

erence may be made to the circumstances surrounding the conveyance to help determine the intent.[49] Furthermore, the courts frequently give great weight to the reasonable use to which the dominant estate may be devoted or which may evolve over time, or what becomes necessary to constitute full enjoyment of the premises.[50]

2. *Implied Rights and Limitations*

As a general rule of interpretation, and in addition to those rights enumerated in the easement grant, the dominant estate may take any action reasonably necessary to realize the full enjoyment of the right.[51] When a grantee receives property he likewise receives such means as are necessary to attain the property.[52] Specifically, all rights necessary for the reasonable enjoyment of the easement impliedly pass with the easement.[53] Therefore, the extent of the use varies with the circumstances surrounding the conveyance barring limiting words to the contrary.[54] Even rights not known at the time of the easement grant frequently are allowed as technology develops, in the absence of words to the contrary.[55] Therefore, "cattle, teams and foot passengers" would not be construed by the terms alone to exclude the use of motor vehicles if the words were written before the technology was available.[56]

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49. *Id.*

50. *See* Lyon v. Lea, 84 Me. 254, 258, 24 A. 844, 845 (1892) ("Easements are of flexible adaptation.... Circumstances must govern the right and expediency of such location.").

51. Peavey v. Calais R.R., 30 Me. 498, 500 (1849) ("[A] grant of a thing includes the means necessary to attain it.").

52. *See* Ring v. Walker, 87 Me. 550, 563, 33 A. 174, 178 (1895); Dority v. Dunning, 78 Me. 381, 389, 6 A. 6, 10 (1886).

53. Gutcheon v. Becton, 585 A.2d 818, 822 (Me. 1991) ("In general, a person who possesses an easement over another's property can exercise his right only in a reasonable manner.").

54. Smart v. Aroostook Lumber Co., 103 Me. 37, 47, 68 A. 527, 531 (1907) ("The circumstances of each case are to be considered in determining the use which individuals may make of the public highways, and the same rule prevails in limiting the extent of the right over waters as over the land.").

55. In Stuart v. Fox, 129 Me. 407, 152 A. 413 (1930), the court stated:

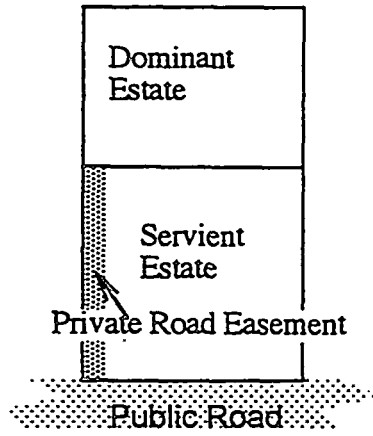
> It is true that the grant of this easement carried with it all the incidents necessary to make the enjoyment of the public right effective, not only with reference to the amount and methods of travel in vogue at the time of the grant, but with respect to such as an advancing civilization might indicate were reasonable and proper.

Id. at 410, 152 A. at 414.

56. The court in Stevens v. Anderson, 393 A.2d 158 (Me. 1978), stated:

> Though motor vehicles were becoming rapidly more common in 1915 as a means of private transportation, they had not yet become so prevalent in rural areas that we can infer their exclusion in this case from the fact that they were not expressly mentioned in the language of the reservation in [the] deed. Similar language was still routinely used by many conveyancers to refer to all modes of private transportation normal at the time.

FIGURE 4



A grant of the private road easement before 1990 would allow utilities to be installed within the easement by reasonable implication. A grant of the same easement after 1990 would deny the legal installation of the utilitites. (*See* ME. REV. STAT. ANN. tit. 33, § 458 (West Supp. 1995-1996)).

Since the rights frequently depend on the relationship of the parties litigating the rights, a brief summary is appropriate at this point. There are ordinarily three situations where conflict arises regarding the extent and use of an easement: (1) conflict between a stranger and the dominant or servient tenement; (2) conflict between dominant tenements; and (3) conflict between the servient and dominant tenements.[57]

Between a stranger and the dominant or servient tenement, there are no rights recognized in the stranger[58] unless founded upon prescription[59] or equity.

Id. at 159.

57. In Hultzen v. Witham, 146 Me. 118, 78 A.2d 342 (1951), the court said:

> It must be remembered that in these cases we are dealing only with the respective rights of co-owners of an easement. Their respective rights as between themselves are relative, not absolute. That which might constitute an invasion or obstruction of an easement by an absolute stranger to the title, that is, by one without scintilla of legal right, in the easement, or in the fee, may well be within the right of a co-owner of the easement to make and maintain. *As against the stranger*, the right of every owner of the easement to repel invasion thereof is absolute. *As between co-owners*, the rights to repair and improve, and the right to object to repairs and improvements, are only relative. Neither co-owner can interfere with the reasonable use of the way by any other for a purpose to which the same is or may be made susceptible.

Id. at 126-27, 78 A.2d at 346.

58. *Id.*

59. See part III.D.2.d. for a discussion of prescriptive easements.

As between various parties with rights in the same easement (or easement location), their respective rights are defined in the first instance according to the express language in their conveyance. Thereafter, there may be a senior versus junior relationship among the dominant estates in the event that there was sequential conveyancing of easements (for example, a grant of an easement to a natural gas company, then later to an electrical company in the same corridor). It stands to reason that a servient owner cannot grant to others that which she has no right to exercise herself. Where there have been simultaneous conveyances of an easement creating equal co-tenants, such as a road in a subdivision plan or an appurtenant easement,[60] the exercise of contemporaneous rights must not infringe on the lawful and reasonable use and enjoyment of the easement by other holders.[61] Furthermore, each dominant estate may act independently of the other—complete agreement among co-tenants is not necessary so long as there is no infringement or unreasonable inconvenience to other co-tenants.[62] In the case of public highways, the use by any person must not be unreasonable in time or place.[63] The use by one person may of necessity dispossess another person of some rights—no two automobiles may occupy the same space at the same time—so long as the use is reasonable.[64] As a general rule, no person can use the public easement for his own benefit without legislative permission.[65] In some cases the legislature, and in lesser matters the courts, have abrogated the rights in

60. *See* Cleaves v. Braman, 103 Me. 154, 68 A. 857 (1907).

61. Hultzen v. Witham, 146 Me. at 127, 78 A.2d at 346. *See also* Poire v. Manchester, 506 A.2d 1160, 1162 (Me. 1986) ("Each easement holder's right may only be asserted to the point where its exercise does not infringe the reasonable use and enjoyment of the beach by other holders of an identical easement.").

62. Rotch v. Livingston, 91 Me. 461, 475, 40 A. 426, 432 (1898).

63. *Cf.* Bearce v. Dudley, 88 Me. 410, 417-18, 34 A. 260, 261 (1896) (holding defendants liable for unreasonably blocking public waterway); McPheters v. Moose River Log Driving Co., 78 Me. 329, 333-34, 5 A. 270, 271-72 (1886) (temporary delays and rests in public waterway must not be unreasonable).

64. *See* Woodman v. Pitman, 79 Me. 456, 458-60, 10 A. 321, 322-23 (1887).

65. The early case of Burr v. Stevens, 90 Me. 500, 38 A. 547 (1897), provides a good example where private use of the public easement will amount to a trespass. In *Burr*, the court stated:

> The parties are owners of adjoining lots of land, both upon the highway. For the purpose of passing between his lot and the highway, the defendant constructed a driveway by making excavations and piling up rocks and refuse across the plaintiff's land, within the limits of the highway as located, but outside of the wrought or traveled portion thereof. . . .
>
> . . . [W]hatever his rights may be in regard to passing over the land of the plaintiff, he clearly had no right to make excavations or pile up rocks on the plaintiff's land, even if this was reasonably necessary in making the driveway used by him safe and convenient.

Id. at 503, 38 A. at 548. *See also* title 35-A §§ 3501-3505 (West 1988 & Supp. 1995-1996) (permitting individuals to use public utility easements for their own benefit).

one or more persons for the good of all in a balance between convenience and inconvenience.[66]

The last conflict scenario, between the servient and dominant tenement, is more likely, as evidenced by the number of historical cases. The dominant estate must confine its use of the easement according to the terms or intent of the easement grant in a reasonable manner.[67] As a general rule, the servient estate may not interfere with or impair the reasonable use of the easement by the dominant party unless expressly allowed by the grant.[68] Nevertheless, this estate may exercise dominion over the easement so long as the reasonable use of the easement is not infringed.[69] The servient estate may use the easement in the same or similar manner as the dominant estate or use the area in a manner not incompatible with the dominant estate's use.[70] Furthermore, although the servient owner may grant the use of the easement to others or extend the rights in the easement to one or more dominant parties,[71] she may not grant rights to use the easement that she herself cannot exercise unless the grant is to a bona-fide purchaser where there was no notice of the former conveyance.[72] In addition, the grant of an easement does not deny the servient owner the right to use her land in such a manner as to diminish the need or desirability of the easement.[73] For example, a person who grants access to a private pond is not thereby compelled to maintain the same water level in the pond.

In the case of public roads, the conflict between the dominant (public) and servient tenements often centers on the municipality's right to increase the width of the traveled portion within the easement. Specifically, conflict arises where the municipality enters the easement to remove trees and occupy the space within the bounds

66. Burr v. Stevens, 90 Me. 500, 38 A. 547.

67. Kaler v. Beaman, 49 Me. 207 (1860).

68. Badger v. Hill, 404 A.2d 222, 227 (Me. 1979) ("The owner of an estate that is servient to an easement may not make a use of the servient land which impairs effective use of the easement *within the bounds of the easement* . . . .").

69. Morgan v. Boyes, 65 Me. 124, 125 (1876) ("Such a right does not carry with it a right to the exclusive possession of the land. The owner may still use it for any purpose which does not materially impair, nor unreasonably interfere with its use as a way.").

70. *See, e.g.*, Ricker v. Barry, 34 Me. 116, 121 (1852) ("The grantor would continue to be the owner of the land subject to the servitude, and he would be also entitled to use the way.").

71. Title deficiencies may occur where the dominant estate rather than the servient estate has attempted to convey or extend the rights in the easement to the owners of other non-appurtenant parcels. *See, e.g.*, Lyon v. Lea, 84 Me. 254, 258, 24 A. 844, 845 (1892) ("[An easement] may be laid out under, over or across another."); Morgan v. Boyes, 65 Me. at 125 ("He may use it as a way himself, or permit others so to use it.").

72. *See* title 33, §§ 201 to 201-B (West 1988 & Supp. 1995-1996).

73. Badger v. Hill, 404 A.2d 222, 227 (Me. 1979).

of the easement—space that was previously used or occupied by the servient estate. The dominant estate generally may use the full and reasonable width of the easement for the purposes stated in the operative document.[74] However, when the municipality begins removing the herbage, trees, and other improvements[75] to expand the width of the traveled way or to make room for ditches or other amenities, the municipality is obligated to pay the landowner for the loss.[76]

"Reasonableness" is often a deciding factor in determining whether a municipality or dominant owner will be permitted to increase the width of the traveled portion within the easement. Depending on the circumstances, the reasonableness of the use is determined by one of the following two tests: (1) overburdening analysis or (2) reasonable in comparison.[77] The overburdening analysis evaluates whether it is reasonable to conclude that a particular use was within the contemplation of the parties to the conveyance and, in that context, whether the contested use made of the servient estate by the dominant estate exceeds the rights granted to the user. The "reasonable in comparison" test determines whether the actual use by one user unreasonably interferes with the reasonable exercise of the other's rights.[78] Regardless of the analysis, the

74. *Cf.* Parsons v. Clark, 76 Me. 476 (1884).

75. From a practical standpoint, wild, natural vegetation with no real market value will not trigger claims for damages against the municipality, but cultivated plants, public shade trees, and trees with commercial value should be paid for if taken by the town. Good practice would require the municipality to put the landowner on notice of pending roadwork allowing the landowner to remove trees for his own use or sale. If the landowner fails to remove the trees, the municipality would cut the trees and leave the cut wood for the landowner. *Cf.* title 30-A, § 3291 (West Supp. 1995-1996) (dealing with cutting and removal of trees and brush).

76. As the Law Court noted:

> "Generally they" (meaning trees by the roadside) "are the property of the adjoining landowner. In the absence of evidence transferring the title out of him, it is to be assumed such trees are his property. In him is vested the right of property and of beneficial enjoyment. The public has no right to the trees or to use them, even if necessarily removed, to construct or maintain the way. For any interference with his possession or right of possession in such trees the adjoining owner has his action."
>
> . . . .
>
> "As to everything except the public right of passage and the incidents thereto, the land was the property of the plaintiffs . . . . They have a right to recover for the defendants' trespass thereon and to be paid the value of the trees he cut and carried away."

Brooks v. Bess, 135 Me. 290, 292, 195 A. 361, 362 (1937) (quoting McCaffery v. Concord Elec., 114 A. 395, 396 (N.H. 1921); Baldwin v. Wallace, 146 A. 90, 90 (N.H. 1929)).

77. *Cf.* Poire v. Manchester, 506 A.2d 1160, 1162-63 (Me. 1986) ("Accordingly, the correlative rights of the parties are determined by applying a reasonableness test. Such a test has been applied in somewhat analogous cases involving the reciprocal rights of riparian owners to stream flowage.").

78. *Id.* at 1163.

practitioner should be mindful that implied rights are not limitless and that certain exceptions exist.

a. Utilities in Private Road Easements

Before January 1, 1990, the dominant estate generally had the right to install utilities in a private access easement.[79] However, on and after January 1, 1990, the dominant estate no longer has this right unless the operative instrument expressly grants those rights.[80] This would not affect easements created before January 2, 1990.

b. Utilities in Public Roads

Under the common law, a public easement could be occupied only by uses that were necessary and reasonably beneficial to the public's health, safety, and welfare.[81] For roads, the public use was generally limited to travel, with any delay or other use deemed a trespass upon the servient estate.[82] Therefore, in the past, occupation of the public road easement generally was limited to travel and possibly water and sewage. Other uses such as telegraph, telephone, cable, gas, and electricity were not considered absolute necessities. In many cases the occupation of the public easement by private utilities was prohibited since the occupation only benefited private corporations offering services to private citizens. In an attempt to clarify who may occupy the public road easement, the Maine Legislature passed several statutes allowing telegraph, telephone, television,[83] common carrier pipeline transmission,[84] water utilities,[85] gas utilities,[86] and electric corporations[87] to make improvements in, along, and under public easements, so long as the easements are used for travel by motor vehicles.[88] The effective date of these statutes was July 1, 1987. Due to an earlier legislative enactment in 1977, public easements in discontinued public roads were deemed to include an easement for public utilities.[89] This enactment, however, was not effective until October 24, 1977; therefore, public roads dis-

79. *See* Chase v. Eastman, 563 A.2d 1099 (Me. 1989); Saltonstall v. Cumming, 538 A.2d 289 (Me. 1988); Ware v. Public Serv. Co. of N.H., 412 A.2d 84 (Me. 1980).

80. Title 33, § 458 (West Supp. 1995-1996).

81. City of Rockland v. Johnson, 267 A.2d 382, 385 (Me. 1970) (" 'No new servitude, not in the nature of public travel, can be imposed upon the land, against the consent of the landowner, without a further condemnation of his land under the right of eminent domain, and the award of adequate compensation therefor.' " (quoting Hartford v. Town of Oilmenton 146 A.2d 851)).

82. Stinson v. Gardiner, 42 Me. 248 (1856).

83. Title 35-A, § 2301 (West 1988 & Supp. 1995-1996).

84. *Id.* § 2302.

85. *Id.* § 2303.

86. *Id.* § 2304.

87. *Id.* § 2305.

88. *Id.* § 2308.

89. P.L. 1977, ch. 301, § 1.

continued between September 3, 1965 (the effective date of legislation providing for the retainment of a public easement in discontinued public roads),[90] and October 24, 1977, are not deemed to contain a utility easement, and permission of the fee owner must be obtained for the installation of utilities. There is also a question whether the 1977 enactment applies to public roads opened prior to the enactment of the statute or roads that may be acquired at any time by prescription.[91] Furthermore, statutory law allows utilities to be installed in discontinued public easements (not private easements) only if they continue in use for travel by motor vehicles.[92] In accordance with Maine statutory law, previously existing utility easements in the public way also may be subject to relocation in connection with development projects.[93]

c. *Obstructions*

Generally, obstructions that prevent or limit the reasonable use of the easement are not permitted. However, the courts have permitted the placement of temporary obstructions when reasonable under the circumstances.[94] Consequently, the courts have allowed blocking an easement to effectuate repairs, temporarily rest, or unload supplies or products so long as the obstruction is temporary and reasonable under the circumstances.[95] In private easements, the courts have often allowed the use of gates and bars across the easement. The slight burden on the dominant estate of opening the gates is balanced against the need of the servient owner to keep cattle from wandering or to protect her property.[96]

d. *Prescriptive Easements*

Prescriptive easements are construed narrowly and may be utilized only in the manner or character of the burden imposed during

90. Title 23, § 3026, *amended by* P.L. 1965, ch. 270, § 1.

91. Arguably the law does apply to previously created roads on the basis that the status of the road is already fixed and cannot be altered retroactively.

92. *Id.*

93. Title 30-A, § 5301 (West Supp. 1995-1996).

94. Smart v. Aroostook Lumber Co., 103 Me. 37, 47, 68 A. 527, 532 (1907) ("Temporary obstructions are unavoidable and are incident to the legitimate purposes of travel and transportation, and if continued within reasonable limits they do not create a nuisance. But if the encroachment upon the public highway is unreasonable in extent or duration, it is unjustifiable.").

95. *See, e.g.*, Davis v. Winslow, 51 Me. 264, 291-96 (1863).

96. Ames v. Shaw, 82 Me. 379, 19 A. 856 (1890):

> [W]hether created by grant or adverse user, [the easement] may properly be subjected to gates and bars not unreasonably established. The way may be gained without being so obstructed at all, but it is nevertheless a way for a particular use; and in the enjoyment of that use, unreasonable obstructions only are prohibited.

Id. at 382, 19 A. at 856.

the prescriptive period.[97] Further limitations may be placed upon prescriptive easements by the court in fashioning equitable relief.[98] However, once the character of the use is established, the amount or quantity of use is flexible and may increase without overburdening the easement.[99] Courts have upheld an increase in the amount of traffic on a prescriptive access easement beyond that specifically authorized during the prescriptive period.[100] As the Court of Special Appeals of Maryland noted in *Mahoney v. Devonshire, Inc.*:[101]

> Even though the common and ordinary use which establishes the prescriptive right also limits and qualifies it, as one court aptly observed, "the use made during the prescriptive period does not fix the scope of the easement *eternally*." One commentator in this field states that "if the above announced rule were applied with absolute strictness, the right acquired would frequently be of no utility whatsoever. A right-of-way, for instance, would, as has been judicially remarked . . . be available for use only by the people and the vehicles which have passed during the prescriptive period."
>
> . . . .
>
> . . . "It appears that one who has a prescriptive easement has the privilege to do such acts as are reasonably necessary to

97. Gutcheon v. Becton, 585 A.2d 818, 822 (Me. 1991) ("Unlike an express easement, whose terms can usually be ascertained from the creating instrument, the permissible uses of an easement acquired by prescription are necessarily defined by the use of the servient land during the prescriptive period."); Pace v. Carter, 390 A.2d 505, 508 (Me. 1978) ("[W]hen an easement is obtained by adverse use alone, its extent must be measured by its use."); Burnham v. Burnham, 132 Me. 113, 115, 167 A. 693, 693 (1933) ("Since prescription presupposes a grant which is lost, the proof of the nature of the grant is to be found in use, and the extent of the right acquired is fixed and determined by the user in which it originated.").

The Court in Ames v. Shaw, 82 Me. 379, 19 A. 856 (1890), said:

> It is true that a way gained by adverse use gives rights commensurate with the adverse use. But, if the use be for agricultural purposes only, then the way becomes a way for that use—a use to be exercised in a reasonable manner; and reasonable use of a way for agricultural purposes . . . . The nature of the easement gained determines its character, and not the particular manner of the use that created the right.

Id. at 382, 19 A. at 856.

98. *See, e.g.*, Martin v. Burnham, 631 A.2d 1239 (Me. 1993).

99. In Gutcheon v. Becton, 585 A.2d 818, the court stated:

> In order to remain useful to the dominant estate it serves, a prescriptive right of way must encompass some flexibility of use, and adapt to natural and foreseeable developments in the use of the surrounding land. When presented with an alleged overburdening of a prescriptive easement, the factfinder must balance the prior use of the right of way established during the prescriptive period against any later changes in the method of use that unreasonably or unforeseeably interfere with the enjoyment of the servient estate by its current owner.

Id. at 822-23.

100. *Id.*

101. Mahoney v. Devonshire Inc., 587 A.2d 1146 (Md. Ct. Spec. App. 1991).

make effective enjoyment of the easement unless the burden on the servient tenement is thereby increased."[102]

e. Exclude the Obvious

On the other hand, it must be presumed that when a deed specifically mentions certain uses, other uses are excluded. Therefore, "cattle, teams and foot passengers" would be construed to exclude the use of motor vehicles if the words were first employed in 1960, since new technologies such as automobiles and electricity were known, reasonable, understood, and widespread at the time.[103] The omission of reasonable and widespread technologies when other uses are specifically mentioned is strong evidence that excluded uses are not included in the terms of the easement.

f. Increased Traffic Not Speed

An increase in the volume of traffic ordinarily is not an overburdening of the easement such that the servient estate may maintain an actionable trespass.[104] However, surfacing that increases the speed of the traffic may be an overburdening because it represents a qualitative rather than quantitative change in use.[105]

g. Subdivision of the Appurtenant Parcel

Many times land is sold in conjunction with an appurtenant easement. At the time of sale, the land may have been used for a farm or field. There was no thought at that time that burgeoning populations would look to that land as a site for future construction of additional residences or multiple commercial enterprises. The courts have held that if the increased or modified use is reasonable, the division of the appurtenant parcel is reasonable even if it increases the use.[106] Each parcel created in the division shares equal right, access, and use of the appurtenant easement.[107]

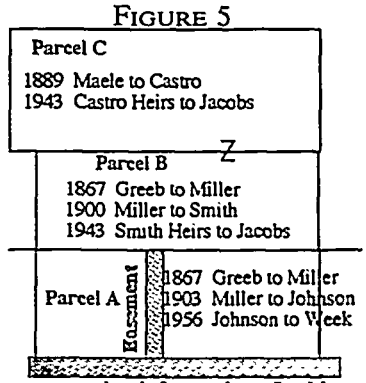
h. Accessing Non-Appurtenant Parcels

Although the Maine Law Court has not specifically addressed this issue, under the common law generally recognized by most states an easement holder may use an appurtenant easement only for the benefit of the appurtenant parcel.[108] The easement holder may not

102. *Id.* at 1149 (quoting Kuras v. Kope, 533 A.2d 1202, 1207-08 (Conn. 1987)).
103. Stevens v. Anderson, 393 A.2d 158, 159 (Me. 1978).
104. Gutcheon v. Becton, 585 A.2d 818 (Me. 1991).
105. Davis v. Bruk, 411 A.2d 660, 666 (Me. 1980).
106. Herrick v. Marshall, 66 Me. 435, 439 (1877).
107. *See, e.g.*, Cleaves v. Braman, 103 Me. 154, 161, 68 A. 857, 860 (1907).
108. The issue was addressed once at the superior court level and decided according to the common law. *See* Adam v. Reiche, CV-89-1413, (Me. Super. Ct. Cum. Cty., Feb. 28, 1995) (Brennan, J.).

use the appurtenant easement indiscriminately to serve non-appurtenant parcels. Unless there is express wording to the contrary, appurtenant easements may not be used to serve property not appurtenant to the easement.[109] Any use of the appurtenant easement to enjoy another parcel, even by the owner of the appurtenant property (dominant estate) attempting to reach another adjacent (but non-appurtenant) parcel, is a trespass on the servient estate.[110] This restriction has led to problems since many landowners incorrectly assume they can use an easement appurtenant to one of their parcels for the benefit of another contiguous parcel they own.

FIGURE 5



Consider the figure and accompanying information. In this case, the common owner of parcels "C" and "B" may not use the easement to reach parcel "C." If there is no other way to access parcel "C," parcel "C" is considered landlocked or must look to the grantor's remaining land for an easement (easement by necessity).

The courts have cited at least two situations in which the use of an appurtenant easement is limited strictly to benefit the appurtenant parcel. In one such situation, the original grantor has not contem-

109. In Kanefsky v. Dratch Constr. Co., 101 A.2d 923 (Pa. 1954) the Pennsylvania Supreme Court said:

> It is elementary law that an easement cannot be extended by the owner of the dominant tenement to other land owned by him adjacent to or beyond the land to which it is appurtenant, for such an extension would constitute an unreasonable increase of the burden of the servient tenement.

Id. at 926 (footnote omitted); Cooper v. Sawyer, 405 P.2d 394, 401 (Haw. 1965) ("The principles of law involved are well settled and do not appear to be disputed. The owner of the dominant tenement . . . may not subject the servient tenement . . . to servitude or use in connection with other premises to which the easement is not appurtenant."). *See also* Kiser v. Warner Robins Air Park Estates, 228 S.E.2d 795, 797 (Ga. 1976); Curtin v. Franchetti, 242 A.2d 725, 727 (Conn. 1968). *But see* National Lead Co. v. Kanawha Block Co., 409 F.2d 1309 (4th Cir. 1969).

110. Wetmore v. Ladies of Loretto, Wheaton, 220 N.E.2d 491, 496 (Ill. App. Ct. 1966); College Inns of Am. v. Cully, 460 P.2d 360 (Or. 1969); Bickler v. Bickler, 403 S.W.2d 354 (Tex. 1966). *But see* National Lead Co. v. Kanawha Block Co., 409 F.2d at 1310 (the landowner was deprived of his access and had to use an easement serving one parcel to reach the other).

plated the unlimited and indiscreet extension of the easement to other parcels.[111] In the second situation, the use, however slight, of an appurtenant easement to benefit other non-appurtenant parcels places an additional burden on the servient estate.[112] Extending the appurtenant easement to non-appurtenant parcels would make it impossible to estimate the future use and burden placed upon the servient estate. Limitation of the use of an easement to the appurtenant property allows the prospective buyer of the servient property to examine the records and with some confidence estimate the burden he will suffer as a result of the easement. To allow an easement to benefit property as yet undefined and dependent on the purchases of the future owner of the dominant estate would impose an unfair burden and risk on the owner of the servient property.[113] Furthermore, absurd consequences could follow depending on subsequent conveyances. By allowing the extension of appurtenant easements to non-appurtenant parcels in common ownership, the court would have to recognize a right in the dominant estate to assign rights in the easement to future owners of the non-appurtenant parcels.[114] Therefore, absent a specific agreement to the contrary, the courts will not extend the benefits of an easement to other parcels.

One possible exception to the common law rule is based on estoppel. The exception arises where the owner of non-appurtenant parcels subsequently purchases the dominant parcel with the appurtenant easement. Under this circumstance, it may be reasonable to assume that the owner of the servient estate has notice that the easement will be extended to the parcels previously purchased. In such a case, the easement would appear in the parcel's chain of title.

IV. CREATION

Private easements may be created in a number of different ways, including grant, reservation, implication, estoppel, and prescription. A private way (also known as a public easement) may be created by town officials.[115] However, courts have held such use unconstitutional if the private way benefits only a private individual.[116] A

111. Buckler v. Davis Sand & Gravel Corp., 158 A.2d 319, 323 (Md. 1960).

112. Plunkett v. Weddington, 318 S.W.2d 885, 888 (Ky. Ct. App. 1958); Nielson v. Sandberg, 141 P.2d 696, 701 (Utah 1943).

113. Buckler v. Davis Sand & Gravel Corp., 158 A.2d at 322-23.

114. The alternative is that the non-appurtenant parcels remain landlocked.

115. Title 23, § 3022 (West 1964 & Supp. 1995-1996). See also Brown v. Warchalowski, 471 A.2d 1026 (Me. 1984), for a discussion of the provisions of the former title 23, §§ 3001-3012.

116. In Brown v. Warchalowski, 471 A.2d 1026, the court noted:

> [When] laying out . . . [a] private way it was necessary that it be found that the establishment of the private way was required by common convenience

public need must be shown. There are three methods by which public easements may be created: (1) prescription; (2) statute; and (3) dedication.[117]

A. Grant

An easement is created by an express grant when a person (grantor or testator) burdens his land with an easement and conveys or devises that easement to some other person (grantee or devisee).[118]

B. Reservation

An easement by reservation is created when the grantor retains an easement over land that she conveys to another party.[119] In many cases, the deed from grantor to grantee is somewhat unclear with respect to the reserved easement, creating problems that arise immediately or at a later date.[120] The following are two of the most common problems associated with reservations:

1. Exception Used

"Reserving" an easement refers to designating an easement to remain in favor of the grantor.[121] However, in a few cases grantors incorrectly will use the term "excepting" to designate an easement that the grantor wishes to retain.[122] An exception is properly used to *retain* fee title whereas a reservation *creates* a right, not existing

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and necessity. We answer that such requirement is necessitated under the Constitution of the State of Maine and under the statutory law existing at the time of the laying-out process.

Id. at 1029.

117. Vachon v. Inhabitants of the Town of Lisbon, 295 A.2d 255, 259 (Me. 1972) ("We conceive the law in Maine to recognize three methods by which public ways may be created; namely, 1) by prescriptive use, 2) by the statutory method of laying out and accepting a way, and 3) by dedication and acceptance.") (footnote omitted). *See also* Avaunt v. Town of Gray, 634 A.2d 1258 (Me. 1993); Town of Manchester v. Augusta Country Club, 477 A.2d 1124 (Me. 1984).

118. *See, e.g.*, O'Connell v. Larkin, 532 A.2d 1039, 1042 (Me. 1987).

119. *Id.*

120. *See, e.g.*, First Nat'l Bank of Skowhegan v. Morrison, 88 Me. 162, 163, 33 A. 784, 785 (1895).

121. S.E. & H.L. Shepherd Co. v. Shibles, 100 Me. 314, 317, 61 A. 700, 701-02 (1905).

122. State v. Wilson, 42 Me. 9 (1856). In the later case of Ring v. Walker, 87 Me. 550, 33 A. 174, the court stated:

> [I]n giving constructions to instruments in writing, the intention of the parties is to be effectuated, and if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another, provided no rule of law is violated. Hence, the distinction between an exception and a reservation is so obscure in many cases, that it has not been observed; but that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be lost.

previously, in the form of an easement.[123] The court in *Engel v. Ayer*[124] attempted to explain the difference.

> A "reservation" is said to vest in the grantor some new right or interest not before existing in him, operating by way of an implied grant .... The operation of an exception on the other hand, is to retain in the grantor some portion of his former estate, and whatever is thus excepted or taken out of the grant remains in him as his former title. An exception is always of a part of the thing granted and of a thing in being.... But the two principles so frequently blend, and the distinction between them is so often found to be uncertain and obscure, that the two expressions have to a great extent been interchangeably employed. A reservation is often construed as an exception in order that the obvious intention of the parties may not be defeated.[125]

2. *Subject To/Together With*

Once the grantor creates an easement in favor of his remaining lands by a reservation, the servient parcel is "subject to" the easement. The deed for the appurtenant parcel should drop the word "reserving" and introduce the easement with the words "together with" to indicate the additional right or title already in existence

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Id. at 560-61, 33 A. at 177 (quoting Winthrop v. Fairbanks, 41 Me. 307, 311-12 (1856)).

123. Brown v. Allen, 43 Me. 590, 599 (1857) ("An exception in a deed must be a portion of the thing granted, or described as granted, and can be nothing else."). Also consider the case Worcester v. Smith, 117 Me. 168, 103 A. 65 (1918), where the court said:

> An "exception" is a part of the thing granted and of a thing in being at the time of the grant. A "reservation" vests in the grantor some new right or interest that did not exist in him before, and operates by way of an implied grant.
>
> ... "The distinction between an 'exception' and a 'reservation' is frequently obscure and uncertain, and has not always been observed, and the two expressions have to a great extent been indiscriminately employed. Moreover, a reservation is often construed as an exception in order that the obvious intention of the parties may be subserved. Whether a particular provision is intended to operate as an exception or reservation is to be determined by the character, rather than by the particular words used."

Id. at 169, 103 A. at 65 (quoting Ring v. Walker, 87 Me. at 559, 33 A. at 176) (citations omitted). *See also*, Shackford & Gooch, Inc. v. B & B Coastal Enterprises, Inc., 479 A.2d 1312, 1314 n.3 (Me. 1984) ("Technically, a 'reservation' is a newly created right, but 'reservation' is frequently used interchangeably with 'exception.' The intention of the parties, not the words in the deed, is controlling.") (citations omitted).

124. 85 Me. 448, 27 A. 352 (1893).

125. *Id.* at 453-54, 27 A. at 354 (citations omitted).

that is being conveyed with that appurtenant parcel. However, the failure to mention the easement does not extinguish it.[126]

C. *Implication*

Implied easements arise from inferences and circumstances surrounding the division and conveyance of land. The Law Court has recognized that certain easements, not specifically described and granted in the instruments of conveyance, may be implied by the circumstances attending the conveyance of the property.[127] Easements by implication are based on a presumed grant,[128] arising from an inferred understanding of the parties and flowing from circumstances present at the time of the conveyance.[129] These circum-

126. The legislature codified the common law by stating, "In a conveyance of real estate all rights, easements, privileges and appurtenances belonging to the granted estate shall be included in the conveyance, unless the contrary shall be stated in the deed." Title 33, § 773 (West 1988).

127. The court held in Hoskins v. Brawn, 76 Me. 68 (1884):

> It is undoubtedly true that an easement on land other than that which is conveyed is not to be created by implication unless the easement is necessary to the beneficial use and enjoyment of that which is conveyed. But the authorities go far to show that easements already created, and in actual use at the time of a conveyance, will often pass, although convenient only, and not absolutely necessary.

Id. at 70.

128. In the early case of Doten v. Bartlett, 107 Me. 351, 78 A. 456 (1910), the court said:

> The basis of a right of way of necessity is the presumption of a grant arising from the circumstances of the case. Necessity does not of itself create a right of way but it is evidence of the grantor's intention to convey one. "Necessity is only a circumstance resorted to for the purpose of showing the intention of the parties and raising an implication of a grant. And the deed of the grantor as much creates the way of necessity as it does the way by grant, the only difference between the two is that the one is granted in express words and the other only by implication." . . . "This species of right of way, in the absence of anything to the contrary contained in the deed, becomes an incident to the grant indicative of the intention of the parties."
>
> The presumption, however, is one of fact and whether or not the grant is to be implied in a given case depends upon the terms of the deed and the facts in that case.

Id. at 354, 78A. at 458 (citations omitted). *See also* Littlefield v. Hubbard, 124 Me. 299, 302, 128 A. 285, 287 (1925) ("[I]t should also be observed that every right of way of necessity is founded on a presumed grant . . . .").

129. In LeMay v. Anderson, 397 A.2d 984 (Me. 1979) the court stated:

> In determining whether the grantor impliedly reserved an easement over the conveyed land, the focus is properly upon the probable intent of the parties. The understanding of the parties to the conveyance giving rise to the implied easement, therefore, is relevant. Also probative of the intent of the parties are the circumstances surrounding the transaction. Certain circumstances that evidence an intent to create an easement have become known as elements of an implied easement. The so-called elements of an implied reservation of an easement are (1) apparent and open use of the quasi-easement, (2) severance of unity of title in the dominant and servient

stances must support the inference that the parties' intent was to create an easement (irrespective of verbal assertions of the true intent).[130] The equitable basis of implied easements lies in the principle that the grant of a thing includes the necessary means to attain, possess, and use it.[131] In some cases, the theory of estoppel will prohibit the grantor from denying an easement.[132] In effect, a person by her acts may imply an easement for the benefit of another (usually the grantee),[133] and by so doing, that person subsequently may be estopped from denying the existence of the easement.

The four circumstances most frequently causing implied easements are: (1) strict necessity existing at the time of the grant; (2) quasi easements existing on the land prior to division and conveyance; (3) amenities shown on a subdivision plan used to convey one or more lots; and (4) the grantor's private road is used as a boundary in a description provided to the grantee.

1. Strict Necessity

If a landowner divides a tract of land in such a way that one of the resulting parcels is completely inaccessible (for example, it does not have access to and from a public highway), the law will imply an easement out of strict necessity for that parcel.[134] An easement by

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portions, and (3) the strict necessity of the servitude to the enjoyment of the dominant estate.

Id. at 987-88 (citations omitted) (footnote omitted). *See also* York v. Golder, 128 Me. 252, 255, 147 A. 41, 42 (1929); Watson v. French, 112 Me. 371, 374-75, 92 A. 290, 291-92 (1914).

130. Frederick v. Consolidated Waste Servs., Inc., 573 A.2d 387, 389 (Me. 1990) ("Because of the strict necessity of having access to the landlocked parcel, an easement over the grantor's remaining land benefiting the landlocked lot is implied as a matter of law irrespective of the true intent of the common grantor."); LeMay v. Anderson, 397 A.2d at 987 (To determine whether an easement has been impliedly created the proper focus is "upon the probable intent of the parties," which may be inferred from the circumstances of the transaction.).

131. Watson v. French, 112 Me. at 374-75, 92 A. at 291; Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 207, 63 A. 915, 919 (1906) ("The good sense of the doctrine on this subject is that under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes to the grantee.") (citation omitted). Twenty years earlier in Dority v. Dunning, 78 Me. 381, 6 A. 6 (1886), the court said, "It is an ancient maxim that when a person grants a thing, he is supposed also tacitly to grant such means of his own as are necessary thereby to attain the thing granted." *Id.* at 389, 6 A. at 10.

132. Sutherland v. Jackson, 32 Me. 80, 83 (1850) ("[T]he grantee acquired a right of way in the street by implication or estoppel.").

133. Frederick v. Consolidated Waste Servs., Inc., 573 A.2d at 389. *See also* LeMay v. Anderson, 397 A.2d at 987-88.

134. In Frederick v. Consolidated Waste Servs., Inc., 573 A.2d 387, the court said:

> We have recognized two kinds of implied easements . . . . The first is an easement created by strict necessity, arising when a grantor conveys a lot of land from a larger parcel, and that conveyed lot is "landlocked" by the

strict necessity arises when: (1) there is a conveyance of a lot out of a larger, divided parcel; (2) the conveyed lot is denied essential access (most often the parcel is "landlocked" in that it cannot be accessed by water or roadway at the time of the conveyance); and (3) relief in the form of an easement may be had on, across, or burdening what is or was the remaining land of the grantor.[135]

As a rule, strict necessity, and not mere convenience, is required.[136] In early cases the court held that an easement by necessity would not be implied where the tract of land conveyed had frontage on navigable waters but otherwise was landlocked.[137] In more recent years the court has looked at the parties' intention in

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grantor's surrounding land and cannot be accessed by a road or highway. Because of the strict necessity of having access to the landlocked parcel, an easement over the grantor's remaining land benefiting the landlocked lot is implied as a matter of law irrespective of the true intent of the common grantor.

Id. at 389. *See also*, Trask v. Patterson, 29 Me. 499, 503 (1849) ("Where one conveys to another a tract of land wholly surrounded by his own land, or inaccessible except through his own land, he has been considered as granting by implication a right of way to and from it."); Flood v. Earle, 145 Me. 24, 27, 71 A.2d 55, 57 (1950) ("It was early decided in Maine that where one conveys to another a tract of land surrounded by the grantor's own land, or inaccessible except through the grantor's own land, he is considered to have granted by implication a right of way to and from it.").

135. Morrell v. Rice, 622 A.2d 1156, 1158 (Me. 1993) ("An easement by necessity, an easement implied in the law, may be created when a 'grantor conveys a lot of land from a larger parcel and that conveyed lot is 'landlocked' by the grantor's surrounding land and cannot be accessed from a road or highway.' "). *See also* O'Connell v. Larkin, 532 A.2d 1039, 1042-43 (Me. 1987).

136. In Stillwell v. Foster, 80 Me. 333, 14 A. 731 (1888), the court noted:

> In this state, the rule is now so well established, that the test to be applied in such cases is, whether the way is one of strict necessity, that it is too late to change it. Nor do we think it desirable, for it seems to be founded not only upon a preponderance of authority but upon sound principle. It has the recommendation of simplicity and certainty, is easily applied, and works no injustice; for, the purchaser knows, or should know, what he is buying before his deed is accepted.

Id. at 344, 14 A. at 732. *See also* Frederick v. Consolidated Waste Servs., Inc., 573 A.2d at 389; Ouellette v. Bolduc, 440 A.2d 1042, 1046 (Me. 1982).

137. In Flood v. Earle, 145 Me. 24, 71 A.2d 55, the court stated:

> No right of way from necessity exists across the remaining land of the grantor, where the land to which such right of way is claimed borders on the sea. It must be necessity and not mere convenience. If free access to the land over a public navigable water exists, a way by necessity cannot be implied.

Id. at 28, 71A.2d at 57 (citation omitted). *See also* Littlefield v. Hubbard, 124 Me. 299, 301, 128 A. 285, 286-87 (1925); Kingsley v. Gouldsborough Land Improvement Co., 86 Me. 279, 281-82, 29 A. 1074, 1075 (1894). In the most recent case of Morrell v. Rice, 622 A.2d 1156 the court stated: "It is true that a showing of access to land across navigable water could in some circumstances defeat a claim of an easement by necessity." However, the court also stated: "We have not reexamined in recent years, in light of the changed conditions of transportation based on the ascendancy of the automobile, the extent to which water access would still preclude an easement by necessity." *Id.* at 1156 n.4.

light of present circumstances. It has held that in certain circumstances an overland easement by necessity would be implied even when property had frontage on the ocean or a lake suitable for navigation.[138]

The Law Court construes strict necessity to mean absolute necessity without recourse to other lawful means.[139] Necessity requires that an actionable trespass would have to occur in order for a landowner to exercise an essential and necessary use. If an alternative means or method (although burdensome) would give the landowner relief, thus rendering actionable trespass unnecessary, requirements of strict necessity are not met. Expense is not typically a consideration unless it is clearly excessive or unreasonable.[140]

The creation of an easement by necessity does not depend on the preexisting use of the land or what the grantor later may claim was her true intent at the time of conveyance.[141] Additionally, the easement by necessity is not limited to the necessary use required at the time of its creation.[142] However, the necessity itself must exist at

138. *See* LeMay v. Anderson, 397 A.2d 984, 987-88 (Me. 1979) (court found implied reservation of easement by conveyance even though the property abutted a lake); Morrell v. Rice, 622 A.2d at 1158-59 (stating that where landlocked or inaccessible land is part of a simultaneous conveyance by a common grantor, an easement by necessity can be implied).

139. Warren v. Blake, 54 Me. 276, 289 (1866); *cf.* Bowers v. Andrews, 557 A.2d 606 (Me. 1989).

140. Flood v. Earle, 145 Me. at 28, 71 A.2d at 57 ("An easement of necessity is sometimes recognized . . . where the expense to be incurred in creating or using another way is excessive.") (citing Littlefield v. Hubbard, 124 Me. 299, 128 A. 285 (1925)). *But see* O'Connell v. Larkin, 532 A.2d 1039, 1042 n.5 (Me. 1987) (stating that expense does not affect the requirement of strict necessity for obtaining an easement by necessity).

141. In Morrell v. Rice, 622 A.2d 1156 (Me. 1993), the court stated:

> The *scope of use* of the easement, however, is not determined solely in reference to the time of its creation. Rather, the better rule is that the scope should be defined with reference to the reasonable enjoyment of the land and all lawful uses to which it may be put.

Id. at 1160. *See also* Bowers v. Andrews, 557 A.2d at 609. ("The creation of an easement by necessity, exemplified by the case of a 'landlocked' lot conveyed out of a larger parcel, does not depend on any preexisting quasi-easement, or even on the intent of the grantor."); Frederick v. Consolidated Waste Servs., Inc., 573 A.2d 387, 389 (Me. 1990) ("Because of the strict necessity of having access to the landlocked parcel, an easement over the grantor's remaining land benefitting the landlocked lot is implied as a matter of law irrespective of the true intent of the common grantor.").

142. In Morrell v. Rice, 622 A.2d 1156 the court wrote:

> The rule is stated that a way of necessity is not limited to those purposes connected with the use of the dominant tenement existing at the time the easement was created, but is available for any and all purposes for which the dominant tenement may be adapted. The enjoyment of such a way is said to be limited only by the necessity for its use in connection with all lawful uses of the land to which it is appurtenant. In other words, a way of necessity is held to be coextensive with the reasonable needs, present and

the time of the conveyance.[143] For example, if a lot was not landlocked at the time of conveyance and only became landlocked by later circumstances through no fault of the grantor or his predecessor, no easement by necessity will exist.[144]

Easements by necessity are not limited to roads. The Law Court has held that easements by necessity may arise for drainage, chimneys, maintenance rights, and other uses.[145]

An easement by necessity never will be recognized over the land of an adjoining owner who is a stranger to the operative conveyance.[146] The easement must burden those lands of the grantor remaining at the time of the conveyance even though a more convenient way could be forced upon the neighbor.[147] To hold otherwise would create numerous problems by allowing acts and

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future, of the dominant estate; it varies with the necessity, insofar as may be consistent with the full reasonable enjoyment of the servient estate.

Id. at 1160 (quoting 25 AM. JUR. 2D *Easements & Licenses* § 83 at 489 (1966)).

143. *See id.* ("Whether an implied easement exists is determined by examining the circumstances existing at the time the landlocked parcel is severed from the parcel with access."); Frederick v. Consolidated Waste Servs., Inc., 573 A.2d at 389 ("At the time of the original conveyance . . . [the] land was bounded by a town road and was neither landlocked nor inaccessible. In the absence of strict necessity for an easement . . . at the time of the severance of unity of title, the law will not imply one.").

144. In Frederick v. Consolidated Waste Servs., Inc., a parcel of land was subdivided with access provided along a town road. Years later the town road was discontinued (without a public easement remaining), and the parcel became landlocked. *Id.* 573 A.2d at 388. The owner of the landlocked parcel argued that they should have an easement by necessity through the grantor's remaining land. *Id.* at 389. The Law Court held that the parcel was not landlocked at the time of its creation and therefore, there was no necessity. *Id.* The parcel, in effect, was left without means of access.

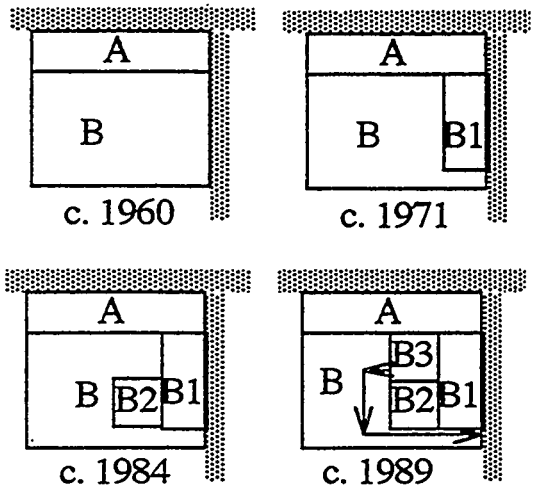
145. *See* York v. Golder, 129 Me. 300, 301, 151 A. 558, 558 (1930) ("The law recognizes that an easement of necessity, in the nature of a drain, may be reserved by implication in the conveyance of a servient estate."). *See also* Watson v. French, 112 Me. 371, 375, 92 A. 290, 292 (1914) (citing cases where easement by necessity existed regarding stairways, drains, and chimneys); Ring v. Walker, 87 Me. 550, 563, 33 A. 174, 178 (1895) ("So where the use of a thing is granted, everything essential to that use is granted also, and there is an implied authority to do all that is necessary to secure the enjoyment of such easement.").

146. Littlefield v. Hubbard, 124 Me. 299, 302, 128 A. 285, 287 (1925) ("[E]very right of way of necessity is founded on a presumed grant, hence none can be presumed over a stranger's land and none can be thus acquired.") (citing Whitehouse v. Cummings, 83 Me. 91, 97, 21 A. 743, 745 (1890). However, having assumed the burden imposed by the omission of her predecessor in title, a successor to the grantor's remaining lands, who is otherwise a stranger to the original conveyance, may be burdened with an easement.

147. *Cf.* Morrell v. Rice, 622 A.2d 1156, 1158 (Me. 1993) ("An easement by necessity also may be created when there are simultaneous conveyances by a common grantor, and one of the conveyed lots is landlocked and inaccessible. In such a case, an easement over the other simultaneously conveyed lot to benefit the inaccessible lot may be implied.") (citing Bowers v. Andrews, 557 A.2d 606, 609 (Me. 1989)); Frederick v. Consolidated Waste Servs., Inc., 573 A.2d at 387.

mistaken omissions between two parties to bind and burden a stranger to the transaction. Where, however, the land conveyed to the grantee borders other lands owned by the grantee, which provide access to the newly conveyed land, the courts will require the grantee to go through the grantee's other land and will refuse to imply an easement of necessity through the grantor's remaining land.[148]

FIGURE 6



The time sequence of figures shows the route the owner of Parcel B3 has to use when relying upon an easement by necessity through the grantor's remaining lands.

When an easement by necessity arises, the owner of the servient estate has the right in the first instance to locate a reasonable way. If the servient owner fails to locate a reasonable way, the dominant owner may locate one.[149] The parties may agree to the location in writing, verbally, or by their conduct[150] and may agree to alter the location at a later time.[151] The Law Court has held that the location

148. *See* Doten v. Bartlett, 107 Me. 351, 355, 78 A. 456, 458-59 (1910).

149. In Rumill v. Robbins, 77 Me. 193, 194 (1885), the Law Court stated: "In such cases [where a right of way exists by virtue of necessity], the owner of the servient estate has the first right to locate the way, and if he refuse [sic] to do so upon request, the owner of the dominant estate may locate the way." (citations omitted).

150. *Id.* ("The parties may agree to a location, and can change any location by mutual agreement. Such arrangement, need not be in writing, but can be inferred from the words or conduct of the parties . . . .").

151. Flood v. Earle, 145 Me. 24, 28, 71 A.2d 55, 57 (1950) ("The location of ways arising from necessity may be changed by the concurrence of the parties. Such location or change need not be in writing nor formally agreed to. It may be inferred from the acts or acquiescence of the parties.").

must be reasonable.[152] In instances where the location of the way changes, its status remains that of an easement by necessity.[153] However, once the necessity terminates, the easement terminates as well.[154]

2. *Quasi Easements*

The term "quasi easement" is derived from the fact that the implied easement begins before an easement legally can exist—it is in a "quasi" state. A quasi easement begins as a use across a parcel under one ownership that continues on one or more divisions after the parcel has been subdivided.[155]

Quasi easements are implied easements that arise when: (1) there is a division of a parcel into two or more parcels (at least two properties formerly unified in title); (2) a use for the benefit of one parcel had occurred prior to separation on what is now the other parcel; (3) the use was open, apparent, and observable to persons familiar with the property; (4) the retention and continuation of the use clearly would benefit the land; (5) the owner of the land (dominant estate) continues to use the easement as if it were a true easement; and (6) the easement is not denied by express language or acts.[156]

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152. Rumill v. Robbins, 77 Me. at 194.

153. *Id.* ("However the way may be located, the right remains one of necessity only.").

154. LeMay v. Anderson, 397 A.2d 984, 989 (Me. 1979) ("The recognized rule in Maine with respect to ways of necessity is that termination of the necessity extinguishes the easement.") (citing Whitehouse v. Cummings, 83 Me. 91, 99, 21 A. 743, 745 (1890); 25 AM. JUR. 2D *Easements* § 106). In Tibbetts v. Penley, 83 Me. 118, 21 A. 838 (1890) the court stated:

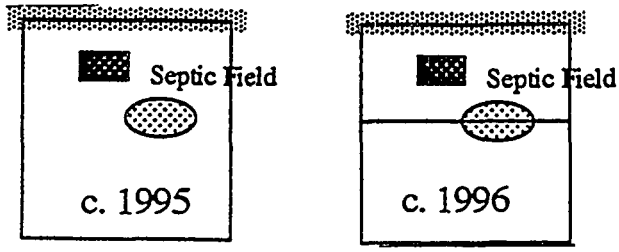
> If the plaintiff's passage-way were one of necessity simply, the location of the street along the western line of the plaintiff's land, would operate a discontinuance of it across the defendant's land, on the well-settled doctrine that the necessity from which the way resulted having ceased, the right of way ceased.

Id. at 123, 21A. at 840.

155. *See* LeMay v. Anderson, 397 A.2d at 988 n.3 ("To distinguish, however, the case in which an existing use is made of the servient portion to benefit the dominant portion from the situation in which there is no existing use at the time of severance of title, the existing use is referred to as a quasi-easement."); Brown v. Dickey, 106 Me. 97, 101, 75 A. 382, 384 (1909) ("An implied grant of an easement in favor of a grantee arises from circumstances where at the time of the conveyance the grantor was the owner of land constituting both the dominant and servient estates.").

156. *See* Sprague Corp. v. Sprague, 855 F. Supp. 423, 431-32 (D. Me. 1994); Frederick v. Consolidated Waste Servs., 573 A.2d 387, 389-90 (Me. 1990); 3 HERBERT T. TIFFANY, TIFFANY REAL PROPERTY § 781 (3d ed. 1939 & Supp. 1991).

FIGURE 7



As the figures show, a division line is created across the existing septic field giving rise to a quasi easement.

Unlike other forms of implied easements, a quasi easement generally is founded upon a previous use.[157] A common example of a quasi easement is when a large house is subdivided with part of the house conveyed as a separate dwelling (for example, a town house). The party wall between the two units is a quasi easement arising from the conveyance.

At one time the court required that an implied easement arising from a quasi easement be based upon strict necessity.[158] At present the court has relaxed that position and no longer requires strict necessity.[159] The court relies primarily on the intent of the parties as evidenced by surrounding circumstances.[160] Necessity of use is a circumstance that may prove the supposed grantor's intent to create

157. *See* LeMay v. Anderson, 397 A.2d at 989.

158. Warren v. Blake, 54 Me. 276 (1866). In wisdom that is particularly appropriate at the present time, when courts are apt to create new law, the court in *Warren* stated:

> If we adopt any other rule than that of strict necessity, we open a door to doubt and uncertainty, to the disturbance and questioning of titles, and to controversies as to matters of fact, outside of the language or boundaries of the deed. If an estate, fully granted without exception or reservation, can be encumbered forever by an easement, or right of use by a third party, by the finding of a jury that such use would be highly convenient, or that it was exercised by a former owner, or was notorious, or any other ground short of strict necessity, the sanctity and security of titles by deeds, exact and precise in their terms, would be seriously shaken and impaired.

Id. at 289. *See also* York v. Golder, 128 Me. 252, 254, 147 A. 41, 42 (1929); Watson v. French, 112 Me. 371, 375, 92 A. 290, 291-92 (1914).

159. *See* 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 411(2) (ed. 1985 & Supp. 1988); Bowers v. Andrews 557 A.2d 606, 609 (Me. 1989).

160. In Bowers v. Andrews, 557 A.2d 606, the court said:

> But the law must also respect the interest of the owner of the allegedly servient estate. An analysis based strictly on "reasonable reliance" is conclusory, begging the question of who would be acting reasonably: the party relying on historical physical conditions or the party relying on record title. "The vital question," as we have consistently recognized, "is, did the parties intend that the right now claimed . . . should be granted?"

Id. at 608.

a quasi easement.[161] Prior use and the physical adaptation of the premises to continue the use are important considerations in determining the existence of a quasi easement.[162]

3. *Subdivision and Sale*

When land has been divided into lots with at least one lot conveyed according to a subdivision plan showing streets and other beneficial amenities, appurtenant rights in these amenities attach to the lots for the use and enjoyment of the lot owners.[163] The roads and other amenities are appurtenant easements provided that: (1) the amenities are shown on a recorded subdivision plan (or one given to the lot owner prior to or at the time of conveyance)[164] and (2) restrictions that would exclude an implied easement are not noted on the face of the subdivision plan nor on any conveyance of land to the lot owner or his predecessors in title.[165]

Accordingly, the lot owner may acquire rights in streets, parks, squares, recreational areas, boat launching sites, and light and air over open areas, provided that these areas are shown on the survey plan that is referenced in the operative deed of conveyance.[166] These amenities are implied with the conveyance of any lot shown on the subdivision plan.[167] They attach to the conveyed property

161. Frederick v. Consolidated Waste Servs., Inc., 573 A.2d 387, 389 (Me. 1990); Bowers v. Andrews, 557 A.2d 606, 608 (Me. 1989).

162. *See* Bowers v. Andrews, 557 A.2d at 608.

163. *See* Bartlett v. City of Bangor, 67 Me. 460 (1878). The court there said:

> When the owner of land within or near to a growing village or city divides it into streets and building lots, and makes a plan of the land thus divided, and then sells one or more of the lots, by reference to the plan, he thereby annexes to each lot sold a right of way in the streets, which neither he nor his successors in title can afterwards interrupt or destroy. . . . Platting alone will have no such effect; but platting and selling will.

Id. at 464-65. *See also* Sprague Corp. v. Sprague, 855 F. Supp. 423, 431-32 (D. Me. 1994).

164. For lot owners to have an implied easement there must have been notice that the roads existed at the time of conveyance. *Cf.* Sutherland v. Jackson, 32 Me. 80 (1850).

165. *See* title 23, § 3031(3) (West 1992 & Supp. 1995-1996).

166. *See* Arnold v. Boulay, 147 Me. 116, 121, 83 A.2d 574, 577 (1951); Brown v. Dickey, 106 Me. 97, 101-02, 75 A. 382, 384 (1909).

167. *See* Sutherland v. Jackson, 32 Me. 80, where the court held:

> [A] street is laid down on the plan adjoining the plaintiff's land, and the conveyance is according to the plan. The fair construction of the deed must be, that the proprietor intended the street for the use of the grantee, and those who might purchase land adjoining it. He exhibited to the purchaser the advantages attendant upon the grant, and not only sold him the land, but the land as it is described upon the plan, where there appears to be a street, in which it would not have been unreasonable for him to have understood, that he was to have an easement. . . . [A] grant of land bounded on a street, the soil of which belonged to the grantor, though it did not

regardless of whether they actually abut the lot in question.[168] Consequently, lot owners within a subdivision generally have an implied right to use the roads and other common areas shown on the subdivision plan as private easements appurtenant to their lots.[169]

If the grantor (developer) depicts property with certain amenities on a plan shown to the grantee (purchaser) or referenced in the deed, the grantor is estopped from asserting that those amenities were not implied in the conveyance to that grantee. It is presumed that the grantee was induced to buy the lot in part because of the amenities displayed on the plan that was shown to him.[170] Under the common law, if a grantor sells a lot by metes and bounds description without the grantee's seeing a plan, the grantee obtains no implied rights in the streets other than those for immediate access to his lots since there could be no inducement that such streets would be available for the grantee's use.[171] In Maine, the attempt at codification of the common law does not address this requirement in such specific language[172]—seeming to imply that actual notice is present from the recording of the plan. If the entire subdivision is completed in phases (phased development) where the overall subdivision plan is not specifically referenced in the deed of conveyance, the purchaser of a lot ordinarily would acquire only implied rights or easements in those aspects of the partial plan (phase) which was

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> convey the fee in the street by the terms of the grant, yet the grantee acquired a right of way in the street by implication or estoppel. . . .
>
> The fee of the street remains in the vendor, but subject to the easement, and the value of his fee is but nominal. The plaintiff must be considered as entitled to a right of way in the street delineated on the plan as adjoining his land.

Id. at 83-84 (citations omitted). *See also* Callahan v. Ganneston Park Dev. Corp., 245 A.2d 274, 278-79 (Me. 1968).

168. *See* Bartlett v. City of Bangor, 67 Me. 460, 467 (1878) ("And where one sells building lots by reference to a plan, the purchasers obtain an interest in *all* the streets marked upon it, and the right to have them converted into public streets as soon as the public authorities can be induced to do so." (emphasis added)).

169. *See* Callahan v. Ganneston Park Dev. Corp., 245 A.2d at 278; Arnold v. Boulay, 147 Me. at 121-22, 83 A.2d at 577.

170. Arnold v. Boulay, 147 Me. at 121-22, 83 A.2d at 577. See also Stillwell v. Foster, 80 Me. 333, 14 A. 731 (1888), where the court held that prior case law asserts the following principle:

> [B]y a reference to the plan that becomes a part of the description and carries the right of way by an express grant, or as when bounded upon a way upon the grantor's land, it is such a representation of the existence of a way material to the value of the land, as to estop the grantor from denying its truth.

Id. at 344, 14A. at 732.

171. Although Maine has not dealt with the issue, some states have held that if the first purchaser buys the lot when the streets have been accepted as public roads, there is no implied private easement. *See, e.g.*, Cohen v. Simpson Real Estate Corp., 123 A.2d 715, 717 (Pa. 1956).

172. *See* title 23, § 3031(2) (West 1988).

referenced in the deed.[173] Of course, the grantor always may deny expressly implied easements in the streets.[174]

Once a lot has been conveyed and easements are implied to a purchaser, the grantor (developer) may not be allowed to make changes in the development that would be detrimental to the interests of the grantee. For example, a developer may not be allowed to turn a cul-de-sac road into a through street or make substantial alterations to road locations or the size of designated parks after he has conveyed one or more lots.[175] Should changes be contemplated, the developer may need to obtain a release from all lot owners affected by the changes, or else repurchase the lots sold in order to eliminate or alter the easements.[176]

Practitioners often encounter difficulties when lot owners have made substantial improvements in vacated paper streets or discontinued town roads. These lot owners fail to realize that the private implied rights of the other lot owners exist independently of the public rights. Consequently, the public's vacation or discontinuance of such streets does not affect the implied rights of the lot owners in the subdivision to use the street though the streets are discontinued (much to the consternation of landowners who made improvements in the former public roads).[177]

4. Boundary in a Description

An implied easement often will arise in favor of the grantee's property over the grantor's private road if the road is specified as bounding the tract conveyed (see Figure 8).[178] The implied easement will arise when: (1) the grantor creates and conveys a lot or parcel; (2) the description of the lot calls for the private road along

173. *See* Young v. Braman, 105 Me. 494, 499, 75 A. 120, 121 (1909). ("The [grantee's] rights . . . are . . . based upon . . . the description in her own deed and so much of that plan as is incorporated into and made a part of her deed.").

174. Bartlett v. City of Bangor, 67 Me. 460, 469 (1878) ("If such is not the intention of the grantor, it is no hardship to require him to say so in his deed.").

175. In Callahan v. Ganneston Park Dev. Corp., 245 A.2d 274 (Me. 1968), the court said:

> We are satisfied that where one sells lots by reference to a plan showing streets and ways upon which the purchaser must rely for access to his property and indeed for the very value of the property purchased, an attempted reservation in the granting instrument which would empower the grantor later to nullify all the proposals for streets and ways shown on his plan contravenes public policy.

Id. at 278.

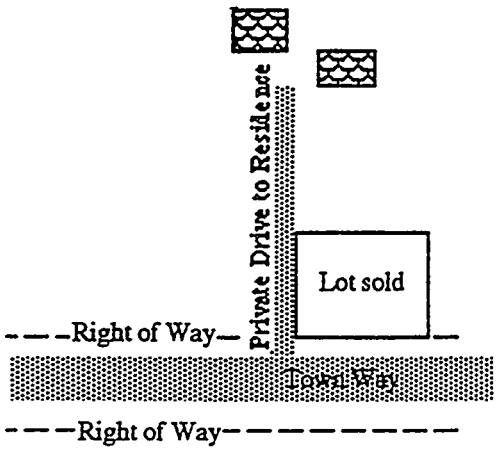
176. Bangor House Proprietary v. Brown, 33 Me. 309, 314 (1851) ("By a repurchase of that title, the former owner would be entitled to close up such way, as he would also by obtaining a release of the right of way.").

177. *See, e.g.*, Bolduc v. Watson, 639 A.2d 629 (Me. 1994).

178. Young v. Braman, 105 Me. 494, 497, 75 A. 120, 121 (1909).

the lot or parcel to be conveyed;[179] (3) the grantor has fee simple title to the road at the time of the conveyance;[180] and (4) the grantor does not expressly deny an easement over the private road.[181] This form of implied easement differs from an implied easement created by a subdivision plan with respect to the manner of creation and the extent of the easement. The implied easement created by a description is limited to the road or other amenity called for as a boundary in the description.[182]

FIGURE 8



In the above figure, a discription for the lot sold that says "thence along the private drive" or similar words, would create an implied access easement for the lot sold in the private drive.

The Law Court has allowed various "boundary calls" to result in an implied easement. Terms such as cedar square, a passageway thirty feet wide, street, avenue, lane, road, place, court, contemplated passageway, and driveway, all have been recognized as creating an implied easement.[183]

179. Although the Law Court has not addressed the issue, it is conceivable that an implied easement may arise if the description calls for other amenities such as a swimming pool to be conveyed.

180. Warchalowski v. Brown, 417 A.2d 425, 428 (Me. 1980).

181. *See* Frederick v. Consolidated Waste Servs., Inc., 573 A.2d 387, 389 (Me. 1990).

182. *Id.* at 390 n.4 ("Such an easement . . . does not extend beyond the road or street abutting the grantor's land . . . .").

183. See Young v. Braman, 105 Me. 494, 498, 75 A. 120, 121 (1909): " 'The question is whether the thing intended as a boundary was in fact a way; if it was, it is immaterial whether it is called a way, or a street, avenue, lane, road, place or court.' " (quoting Franklin Ins. Co. v. Cousens, 127 Mass. 258 (1879)). The court in *Young* explained:

> The following are illustrations of the variety of terms employed, all of which fall within the rule. "Contemplated passageway," "A forty foot

An implied easement does not require necessity where the easement is created by calling for a road as a boundary in a description.[184] In other words, the existence of the easement does not depend on the grantee's need for, or the unavailability of, other access.[185] Therefore, an implied easement will be created even though the parcel has frontage on a public road along some other boundary. Only the omission of any reference to the road in the description or express wording denying the grantee an easement will prevent an implied easement.[186]

5. *Application and Comparison*

When a division of land is made, easements by necessity and quasi easements may benefit either the grantee or the grantor.[187] The right may accrue even though the grant was made with covenants of warranty.[188] However, implied easements that ordinarily would have arisen from a grant and benefited the grantee are favored over those easements that ordinarily would have arisen by reservation.[189]

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way," "A Proprietor's way," "A way twenty feet wide," "To a driveway, thence easterly on said driveway." "The driveway to the Manor Inn" would seem to properly belong in the same class as the foregoing.

Id. (citations omitted).

184. *Id.*

185. *Id.* at 498-99, 75 A. at 121 (" 'The deed is operative by estoppel to create the easement so far as the grantor's title will support it. Such a way is not a way of necessity and the right exists even if there be other ways either public or private leading to the land.' " (quoting N.E. Structural Co. v. Everett Distilling Co., 189 Mass. 145, 152, 75 N.E. 85, 86 (1906))).

186. *See* Doten v. Bartlett, 107 Me. 351, 78 A. 456 (1910). In *Doten* the court said:

> [W]e can conceive of a case where the owner of the front lot would be willing to convey the rear lot provided there should be no right of way over the front lot and the grantee would be willing to take his chances of procuring an outlet over some other adjoining land. Under such circumstances the deed might convey the rear lot and distinctly recite that there was granted no right of way of necessity or otherwise over the front lot. There can be no doubt that in such a deed there would be no implied grant, and the grantee would acquire simply what he had purchased, the lot without the way.

Id. at 354-55, 78 A. at 458.

187. *See* Robinson v. Maine Cent. R.R., 623 A.2d 626, 627 (Me. 1993) ("While, in [Frederick v. Consolidated Waste Servs., 573 A.2d 387 (Me. 1990)], we dealt with an implied easement that burdened the retained land, implied easements may also be found when the burden is on the conveyed land."). *See also* York v. Golder, 129 Me. 300, 301, 151 A. 558, 558 (1930) (holding that an easement over conveyed property, in the nature of a drain, may be created by implication in favor of the grantor of the servient estate).

188. *See* York v. Golder, 129 Me. at 301, 151 A. at 558 (quoting York v. Golder, 128 Me. 252, 254-55, 147 A. 41, 42 (1929)); *see also* Holmes v. Danforth, 83 Me. 139, 142, 21 A. 845, 846 (1891).

189. *See* Bowers v. Andrews, 557 A.2d 606, 609 (Me. 1989) ("[I]mplied grants of easements are favored as compared with implied reservations . . . .").

The implied easement arising by reservation would favor the grantor. The courts are reluctant to burden an innocent grantee by bestowing a benefit upon the grantor, the person who prepared the deed, omitted the easement, and thus created the problem.[190] Consequently, favoring the grantee over the grantor recognizes that equity plays a part in implied easements. Also favored are implied easements between grantees where there are simultaneous conveyances.[191]

The courts ordinarily do not favor easements by necessity and quasi easements,[192] reasoning that it is a simple matter to create easements by the language of the deed. Therefore, the general presumption is that if the deed is silent upon the matter, no easement is conveyed.[193] Historically, the court demonstrated its reluctance to recognize certain implied easements by allowing easements by necessity and quasi easements only in cases of strict necessity. Mere convenience, falling short of absolute necessity, was insufficient.[194]

190. *See* LeMay v. Anderson, 397 A.2d 984, 987 (Me. 1979) ("The traditional rules of construction favoring the grantee against the interests of the grantor when ambiguous language exists in the instrument of transfer necessitate . . . that ambiguities with respect to whether an easement was impliedly reserved be resolved in favor of the grantee.").

191. The court in Morrell v. Rice, 622 A.2d 1156 (Me. 1993), stated:

> "It is . . . important to consider whether [the easement] is claimed against a simultaneous conveyee. Where the claim is thus made, the implication is stronger than where the claim is made against the conveyor himself. It is reasonable to infer that a conveyor who has divided his land among simultaneous conveyees intends that very considerable privileges of use shall exist between them. Commonly, in such cases, the conveyance constitutes a family distribution, and, where this is true, the probability of a desire that existing conveniences shall continue to be operative is greater than the probability that a conveyor would desire them continued as against himself."

Id. at 1158 (quoting RESTATEMENT OF PROPERTY § 476 cmt. f (1944)). The court further explained:

> It is true that when alternative road access across the common grantor's land is available, the law will not imply an easement by necessity across the land of one of the grantees. Moreover, it is the burden of the landowner claiming an easement by necessity to demonstrate that an alternative land route was not available.

Id. at 1159 (citations omitted).

192. Regarding a right of way by necessity, the court held in Kingsley v. Gouldsborough Land Improvement Co., 86 Me. 279, 29 A. 1074 (1894):

> [I]mplied grants of this character are looked upon with jealousy, construed with strictness, and are not favored except in cases of strict necessity, and not from mere convenience. The rule is now so well settled in this State that a reference to the decided cases where this question has been fully considered is all that is necessary.

Id. at 280, 29 A. at 1074.

193. Dolliff v. Boston & Me. R.R., 68 Me. 173, 176-77 (1878).

194. The court in Ouellette v. Bolduc, 440 A.2d 1042 (Me. 1982) stated:

> Easements will not be implied in the construction of deeds, or contracts for the purchase and sale of lands, unless the easement be one of strict neces-

Contrary to easements by necessity and quasi easements, implied easements arising from subdivision-and-sale or boundary-in-a-description do not require necessity,[195] reasonable enjoyment, or existing use at the time of conveyance. These classes of implied easements arise by operation of law unless a contrary intent is clearly expressed at the time of the operative conveyance.

In cases of implied easements by strict necessity and quasi easements, the party claiming an implied easement has the burden of overcoming the general presumption that no easement was intended.[196] The party claiming the implied easement, likewise, must prove that the easement is necessary to the beneficial enjoyment of the property.[197] If the lot can be accessed and made usable at a reasonable expense without the implied easement, no implied easement by strict necessity or quasi easement will be allowed.[198] Furthermore, the servient estate may rebut any showing of an implied easement by producing express language showing an agreement by the parties or their predecessors in title that no implied easement would exist.[199]

With the exception of a quasi easement, implied easements are not always evidenced by actual use prior to the division of the par-

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> sity. Mere convenience, however great, will not suffice. And the test of necessity is whether the party claiming the easement can at reasonable cost on his own estate create a substitute.

Id. at 1046. *See also* Littlefield v. Hubbard, 124 Me. 299, 302, 128 A. 285, 287 (1925) ("[I]t is distinctly stated as the rule of law in this State that a way of necessity must be one of strict necessity and not one of mere convenience.") (citing Whitehouse v. Cummings, 83 Me. 91, 98, 21 A. 743, 745 (1890)); Trask v. Patterson, 29 Me. 499, 503 (1849) ("No implication of a grant of a right of way can arise from proof, that the land granted could not be conveniently occupied without it. Its foundation rests in a necessity for it, not in convenience.").

195. *See supra* note 175.

196. Dolliff v. Boston & Me. R.R., 68 Me. at 173.

197. The tendency against granting implied easements was discussed in Dolliff v. Boston & Me. R.R., 68 Me. 173, where the court held:

> [I]mplied grants are not to be favored. They should not be held to exist except in cases of clear necessity. If it is intended that an easement shall pass as one of the appurtenances of an estate, it is very easy to have this intention expressed in the deed. If the deed is silent upon the subject, it is no more than fair to the grantor to presume that he did not so intend; and to overcome this presumption, to require of the party claiming the easement clear proof that it is necessary to the beneficial enjoyment of the estate conveyed to him.

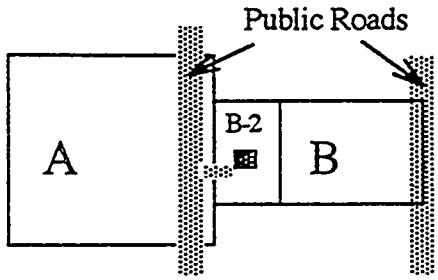
Id. at 176-77.

198. *See* Ouellette v. Bolduc, 440 A.2d 1042, 1046 (Me. 1982); ("[T]he test . . . is whether the party claiming the easement can at reasonable cost on his own estate create a substitute."); Flood v. Earle, 145 Me. 24, 27, 71 A.2d 55, 57 (1950); York v. Golder, 128 Me. 252, 255, 147 A. 41, 42 (1929). *See also* Dolliff v. Boston & Me. R.R., 68 Me. 173 (1878).

199. Doten v. Bartlett, 107 Me. 351, 355-56, 78 A. 456, 459 (1910).

cel.[200] In many cases, the dominant estate will not use implied easements for some time thereafter, if ever. Nevertheless, implied easements will continue to exist (see Figure 9). Such as often occurs with a paper street, the easement will survive regardless of whether the dominant owner attempts to use it.[201] Therefore, with the exception of quasi easements, implied easements do not require the grantor to construct or maintain improvements or actively use the easement.[202] Consider the circumstances depicted by the figure that shows how an easement by necessity may exist long after it was created and still not be evidenced by any use across the grantor's remaining land (the servient property).

FIGURE 9



Parcel B is subdivided without providing an easement for Parcel B-2. The owner of Parcel B-2 trespasses upon Parcel A for a period of 10 years to access the closer public road. Despite the continued trespass, the failure of the owner of Parcel A to protest, and the lack of any physical use on Parcel B, there would likely be an implied easement by necessity across Parcel B.

200. Bowers v. Andrews, 557 A.2d 606, 609 (Me. 1989) ("The creation of an easement by necessity, exemplified by the case of a 'landlocked' lot conveyed out of a larger parcel, does not depend on any preexisting quasi easement, or even on the intent of the grantor."); LeMay v. Anderson, 397 A.2d 984, 988 n.3, 989 (Me. 1979) ("An easement may also be impliedly created without a pre-existing use when access to the property conveyed requires trespass. Such an implied easement is referred to as a way of necessity. . . . A way by necessity, however, is not premised upon a *pre-existing use* or quasi-easement but upon a presumption that the parties intended the owner of the dominant estate to have a way to his property without trespassing.").

201. The legislature, however, has put a time period on paper streets. *See* title 23, § 3031 (West 1992 & Supp. 1995-1996).

202. *See* Bangor House v. Brown, 33 Me. 309 (1851), where the court held:

> He does not by the conveyance of a lot bounded on such a way hold out any intimation to the purchaser, that he is entitled to the use of a highway to be kept in repair, not at his own, but at the public expense, for the common use of all. While he does by an implied covenant assure to him the use of such designated way in the condition in which it may be found, or made at his own expense.

Id. at 314.

D. Estoppel

The doctrine of estoppel applies "because a man's own act stoppeth up his mouth to allege or plead the truth."[203] Estoppel prevents a person from benefiting from her own injurious conduct, negligence, or misdeeds.[204] Certain circumstances must exist for the doctrine of estoppel to apply.[205] First, there must be an inducement by one party (misleading party) through acts, words, or silence amounting to fraud or impermissible negligence made toward another party (reliant party) to take some action or forebear from some act (inducement).[206] Second, the inducement must be reasonable to believe or accept under the circumstances.[207] In other words, the reliant party reasonably must believe the misleading person had both the knowledge and right to make the inducement. Third, the reliant party must rely upon the inducement in a manner

203. Martin v. Maine Cent. R.R., 83 Me. 100, 104, 21 A. 740, 741 (1890).

204. The court in *Martin* said:

> "Equitable estoppel, in the modern sense, arises from the 'conduct' of a party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything." Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law on grounds of public policy. Equitable estoppels are admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.

Id. at 104, 21 A. at 741 (citation omitted).

205. Applying Maine law in the federal case of Sprague Corp. v. Sprague, 855 F. Supp. 423 (D. Me. 1994), the federal court said:

> Other jurisdictions that have recognized the theory of easement by estoppel put forward by Plaintiffs have required a showing (1) of a representation communicated to the promisee; (2) that the representation was believed; and (3) that there was reliance upon such communication. Reliance can be shown by an expenditure on the easement.

Id. at 434 (citing Exxon Corp. v. Schutzmaier, 537 S.W.2d 282 (Tex. Civ. App. 1976)). *See also* Bathport Bldg., Inc. v. Berry, 490 A.2d 663 (Me. 1985); Webber v. Barker Lumber Co., 121 Me. 259, 116 A. 586 (1922), where the court stated:

> The general rule of law in regard to equitable estoppel . . . is that "a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of another. . . . In all the cases where an estoppel has been held to exist, it is believed that it will appear, upon examination, that there was some evidence tending to show that the party estopped had some knowledge of the rights, interests, or intentions of the other party, or of his relations to the thing to which his declarations or acts related, or that he had some intention of misleading the other party into some action that might be prejudicial to him."

Id. at 269-70, 116 A. at 590 (quoting Piper v. Gilmore, 49 Me. 149, 153 (1861) (citation omitted)).

206. Martin v. Maine Cent. R.R., 83 Me. at 104, 21 A. at 741.

207. *Id.*

that is both reasonable and foreseeable by the misleading party. In other words, the reliant party must rely upon the inducement in good faith.[208] Fourth, the inducement must provide some benefit to the reliant party that would be unconscionable or unfair to deny.[209] The intent to deceive is not required.[210] The doctrine also applies to heirs and assignees.[211]

E. Prescription

The doctrine of prescription allows both public and private easements to be created by long-term use.[212] Prescription raises a legal fiction that presumes a lost grant when there has been use beyond a lengthy time period.[213] Prescription is not a favored method of acquiring a right because the burden to show that a right to title has been created rests on the user.[214] The requirements to create an

208. *See, e.g.*, Woods v. Libby, 635 A.2d 960 (Me. 1993); Martin v. Maine Cent. R.R., 83 Me. at 104, 21 A. at 741-42.

209. In its discussion of the interpretation of an instrument, the court in Davis v. Callahan, 78 Me. 313, 5 A. 73 (1886) said:

> No person can avoid his own deed by which an estate has passed, by reason of his own hand and his own seal in executing it. . . . "It is based on the great principle of right that a man shall not be permitted to contradict what he has solemnly affirmed under his hand and seal; nor shall he deny any act done or statement made when he cannot do so without a fraud on his part and injury to others."

Id. at 320, 5 A. at 76-77 (quoting Foster v. Dwinel, 49 Me. 44, 48 (1861) (citing 1 HENRY M. HERMAN, LAW OF ESTOPPEL AND RES JUDICATA § 212 (1886); Sinclair v. Jackson, 8 Cow. 586 (1826))).

210. Martin v. Maine Cent. R.R., 83 Me. at 105, 21 A. at 742 ("[I]t is not necessary that the original conduct creating the estoppel should be characterized by an actual intention to mislead and deceive.").

211. The court in Davis v. Callahan, 78 Me. 313, 5 A. 73, discussed the applicability of estoppel and stated:

> [E]stoppels are not only binding upon parties, but upon privies, privies in blood, as the heir; privies in estate, as the feoffee, lessee, etc.; privies in law, as those upon whom the law casts the estate. They are not binding upon strangers, nor upon those claiming by title paramount to the deed or instrument creating the estoppel.

Id. at 320-21, 5 A. at 77 (citations omitted).

212. Rowell v. Inhabitants of Montville, 4 Me. 270 (1826).

213. In Inhabitants of Pittsfield v. Cianchette, 279 A.2d 527 (Me. 1971), the court held:

> When there has been a continuous and uninterrupted invasion of the rights of another in land for the requisite period, the law presumes the invasion was in accordance with a grant from the owner. The presumption can only arise when the enjoyment of the right has been inconsistent with or contrary to the interests of the owner and is of such a nature that it is difficult or impossible to account for it except on the presumption of a grant from him.

Id. at 529. *See also* Burnham v. Burnham, 132 Me. 113, 115, 167 A. 693 (1933); State v. Wilson, 42 Me. 9, 25-26 (1856). ("Long occupation and enjoyment, unexplained, will raise a presumption of a grant . . . .").

214. Inhabitants of Pittsfield v. Cianchette, 279 A.2d at 529.

easement by prescription are similar to the requirements for obtaining fee title by adverse possession.[215] One major advantage of prescription (until recent legislation affecting adverse possession)[216] was that "adverse use under a claim of right" was presumed for prescription where the other elements had been met.[217] Furthermore, prescription and adverse possession differ in that prescription gives the user an easement without ousting the record owner from possession, while adverse possession removes the record owner from constructive possession.[218] Prescription may be used to create a public or private easement.[219]

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215. Adverse possession gives title to a trespasser where there has been actual, open, notorious, hostile, and continuous possession for the statutory period. *See* Glover v. Graham, 459 A.2d 1080, 1084 n.9 (Me. 1983) ("The requirements for the creation of a prescriptive easement are similar to the elements required in adverse possession."). *But see* Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130 (Me. 1984) ("Acquiescence by the owner to the use is essential, and, in this regard, the acquisition of an easement by prescription differs from the acquisition of title by adverse possession.").

216. A recent legislative enactment changed the presumption regarding intent by stating:

> If a person takes possession of land by mistake as to the location of the true boundary line and possession of the land in dispute is open and notorious, under claim of right, and continuous for the statutory period, the hostile nature of the claim is established and no further evidence of the knowledge or intention of the person in possession is required.

Title 14, § 810-A (West Supp. 1995-1996).

217. Blackmer v. Williams, 437 A.2d 858, 862 (Me. 1981) (" '[W]here there has been unmolested, open and continuous use of a way for twenty years or more, with the knowledge and acquiescence of the owner of the servient estate, the use will be presumed to have been adverse and under a claim of right . . . .' ") (alteration in original) (quoting Jacobs v. Boomer, 267 A. 2d 376, 378 (Me. 1978) (quoting Burnham v. Burnham, 130 Me. 409, 409, 156 A. 823, 823 (1931))).

218. Distinguishing between adverse possession and prescription, the court in Dartnell v. Bidwell, 115 Me. 227, 98 A. 743 (1916) stated:

> The distinction between the creation of an easement by adverse use and the gaining of a title to land by adverse possession is not always borne in mind. . . . "[T]he creation of a prescriptive easement logically differs from the acquisition of a title to real estate by adverse possession. In the former the possession continues in the owner of the servient estate, and the prescriptive right arises out of adverse use. In the latter, the owner is ousted from possession, and the right or title arises out of adverse possession; and nothing short of making entry, or legal action, will break the continuity of possession."

Id. at 230, 98 A. at 745 (quoting Rollins v. Blackden, 112 Me. 459, 465, 92 A. 521, 525 (1914)).

219. Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1128 (Me. 1984) ("The doctrine that the public-at-large is capable of acquiring a non-possessory interest in land has long been accepted in Maine."); Comber v. Inhabitants of Dennistown, 398 A.2d 376 (Me. 1979); MacKenna v. Inhabitants of Searsmont, 349 A.2d 760, 762 (Me. 1976) ("A town way may be created by prescription in the same manner as a public way.").

Prescription requires: (1) continuous use;[220] (2) for at least twenty years (the statute of limitations);[221] (3) under a claim of right adverse to the owner,[222] either with (a) knowledge and acquiescence,[223] or (b) use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed.[224] Acquiescence must be passive rather than active where permission is given.[225] Therefore, where permission has been given or rent has been paid to use the way, there can be no prescription without repu-

220. Continuous use is to use the easement at the pleasure of the person making claim and not, as sometimes supposed, all the time. *Cf.* Gutcheon v. Becton, 585 A.2d 818, 821-22 (Me. 1991); Glover v. Graham, 459 A.2d at 1084-85.

221. The appropriate statute governing prescriptive easements is the following: "No person, class of persons or the public shall acquire a right-of-way or other easement through, in, upon or over the land of another by the adverse use and enjoyment thereof, unless it is continued uninterruptedly for 20 years." Title 14, § 812 (West 1980). *See also,* Gutcheon v. Becton, 585 A.2d 818; Kornbluth v. Kalur, 577 A.2d 1194 (Me. 1990).

222. In Jewett v. Hussey, 70 Me. 433 (1879) the court said:

> [The] question is, whether an easement can be acquired by a possession or enjoyment that has its origin and continuance in parol license or consent. We think it can. So a person may, by gift or sale, dispose of an easement by parol, and the donee or vendee obtain a prescription thereby after the lapse of sufficient time. It must appear that the privilege was not used under a letting, or license, or in any way in subordination to the title of the legal owner. The distinction is, whether I grant you a right over or upon my property to use as your own or as my own—as an enjoyment and privilege belonging to you or as belonging to me. The grantee or donee must accept and enjoy the use of the premises as his own, and because he claims it to be his own, and because the grantor sold or gave it to him to be his own as a perpetual thing. . . . [T]he use of land originating in permission will not prevent it becoming a right by prescription, if continued long enough, if the permission was of a "perpetual or unlimited character."

Id. at 435-56 (quoting Arbuckle v. Ward, 29 Vt. 43, 44 (1856)). *See also* Ashley v. Ashley, 70 Mass. (4 Gray) 197 (1855); Ripley v. Bates, 110 Mass. 161 (1872).

223. Davis v. Mitchell, 628 A.2d 657, 660 (Me. 1993); Maine Coast Heritage Trust v. Brouillard, 606 A.2d 198, 200 (Me. 1992); Blackmer v. Williams, 437 A.2d 858, 861-62 (Me. 1981) ("An essential element to the creation of a prescriptive easement is that the use by the party asserting the prescriptive right must be under a claim of right adverse to the owner, with the owner's knowledge and acquiescence.").

224. *See* Gutcheon v. Becton, 585 A.2d at 818; Kornbluth v. Kalur, 577 A.2d at 1195; Comber v. Inhabitants of Dennistown, 398 A.2d 376, 378 (Me. 1979) ("A prescriptive easement is created only by a continuous use for at least twenty years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible and uninterrupted that knowledge and acquiescence will be presumed.") (quoting Dartnell v. Bidwell, 115 Me. 227, 230, 98 A. 743, 744 (1916)). *See also* Sprague Corp. v. Sprague, 855 F. Supp. 423, 431 (D. Me. 1994); Wood v. Kelley, 30 Me. 47 (1849) (uninterrupted and adverse use for twenty years).

225. In Pace v. Carter, 390 A.2d 505 (Me. 1978) the court noted:

> The owner's acquiescence in an adverse use is essential in Maine to the establishment of a prescriptive easement. "Acquiescence" has been judicially defined as passive assent or submission to the use, as distinguished from the granting of a license or permission given with the intention that

diating the permissive nature of the use.[226] Furthermore, any act that refutes acquiescence will prevent prescription.[227] Deeds, notices, and words of repudiation all have been judged sufficient to dispel acquiescence and to prevent a prescriptive easement.[228] In some cases a family relationship between the owners of the servient and dominant estates has prevented a prescriptive easement. The courts have presumed at the outset that the close family relationship made permission, license, lease, or tenancy more probable than not.[229]

As a rule, the adverse use must be in the same location, without interruption.[230] It must amount to an invasion of the owner's interest, allowing an action for trespass.[231] Therefore, a prescriptive easement cannot arise where the user has a statutory or common

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> the licensee's use may continue only as long as the owner continues to consent to it.

Id. at 507 (citations omitted). *See also* Jacobs v. Boomer, 267 A.2d 376, 378 (Me. 1970) ("Acquiescence, the Court said, means passive assent such as consent by silence and does not encompass acquiescence in the active sense such as when a use is acquiesced in by means of the positive grant of a license or permission."); Dartnell v. Bidwell, 115 Me. 227, 230, 980 A. 743, 745 (1916) ("Acquiescence is used in its ordinary sense. It does not mean license or permission in the active sense. It means passive assent, or submission. It means quiescence. It is consent by silence.").

226. *See* Pace v. Carter, 390 A.2d 505 (Me. 1978); Jacobs v. Boomer, 267 A.2d 376, 380 (Me. 1970) ("Where in its origin a use is shown to be by license or permission of the owner of the servient tenement, such as where rent is paid for its use, the element of adverse user disappears and no prescriptive rights can arise therefrom."). However, the *Pace* court also noted that a parol grant of an easement that is not recognized as valid under the Statute of Frauds may provide a valid foundation for a prescriptive easement:

> A parol grant may manifest an intention on the part of the would-be grantor that the grantee is to enter the property under a claim of right based on the supposed grant, rather than pursuant to the grantor's permission or license. Likewise the grantee's use of the land pursuant to a parol grant may manifest a claim of right hostile to the grantor's full ownership of all rights in the property. For purposes of proving a prescriptive easement, evidence of an unenforceable parol grant of an easement tends to show the landowner's acquiescence in the use that the grantee makes of the land within the terms of the grant.

Id. at 507.

227. Dartnell v. Bidwell, 115 Me. 227, 231, 98 A. 743, 745 (1916).

228. *Id. See also* Noyes v. Levine, 130 Me. 151, 152, 154 A. 78, 79 (1931) (stating that "absence of acquiescence on the part of the latter may be evidenced by verbal protest alone").

229. *See, e.g.*, Weinberg v. Shafler, 414 N.Y.S.2d 61 (N.Y. App. Div. 1979); Burns v. Plachecki, 223 N.W.2d 133 (Minn. 1974); Cope v. Cope, 493 P.2d 336 (Mont. 1971).

230. O'Connor v. Beale, 62 A.2d 870, 873, 143 Me. 387, 392 (1948) ("In order . . . that the enjoyment of an easement in another's land may be conclusive of the right, it must have been . . . uninterrupted; and the *burden of proving* this is on the party claiming the easement.") (quoting 2 GREENLEAF ON EVIDENCE ¶ 539).

231. Kennebunk Water Dist. v. Maine Turnpike Auth., 84 A.2d 433, 437, 147 Me. 149, 155 (1951) (stating that "[a] prescriptive right cannot be acquired against one

law right (for example, the right to cross uncultivated lands to access great ponds)[232] or there is an implied easement (for example, an easement by necessity).

Many public road easements are founded upon long continuous use by the public that presumes a grant.[233] To create a public easement, there must be general use by members of the public.[234] The generality rather than the frequency of the use is the important factor.[235] Maine also imposes an additional requirement that public recreation use in "wild and uncultivated lands" is presumed to be permissive.[236] To rebut the presumed permissive nature, an affirmative act that shows a hostile character is necessary to obtain a prescriptive easement in favor of the public.[237] Therefore a snowmobile trail across woodlands ordinarily would not be susceptible to a prescriptive easement.

Prescription may be defeated by showing that (1) the use started by permission;[238] (2) the use occurred on public property; or (3) proper notice was given in the statutory time period preventing a prescriptive easement.[239] The notice may be made by: (1) posting

whose right is not invaded and who cannot bring an action for the invasion thereof.").

232. *See* title 17, § 3860 (West 1964).

233. Smith v. Dickson, 225 A.2d 631, 635-36 (Me. 1967) ("Evidence to prove a highway often consists in showing that the public have used and enjoyed the road; and the uninterrupted use of it, for a considerable space of time, affords a strong presumption of a grant.") (quoting Beardslee v. French, 7 Conn. 125).

234. Inhabitants of Town of Kennebunkport v. Forrester, 391 A.2d 831, 833 n.2 (Me. 1978) ("There is respected authority for the proposition that in order to create a public easement . . . the adverse use must be general and not limited to a few specific individuals.").

235. *Id.* ("The test of a public use is not the frequency of the use, or the number using the way, but its use by people who are not separable from the public generally.").

236. Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130 (Me. 1984).

237. *Id.* ("Maine stands with the minority, however, with regard to creation of public recreation easements by prescription in wild and uncultivated land, applying the rule that such open and continuous use raises a rebuttable presumption that the use was permissive."). *See also* Inhabitants of Town of Kennebunkport v. Forrester, 391 A.2d 831, 833 (Me. 1978) ("In a consistent line of cases this court has declined to hold that the mere use by the general public of wild and uncultivated land as a route for hauling seaweed, for hunting, or for mere pleasure or recreation, is sufficient to show the adverse user essential to create a prescriptive easement."). *Cf.* Benner v. Sherman, 371 A.2d 420 (Me. 1977) (application of prescriptive easement doctrine to roads).

238. Blackmer v. Williams, 437 A.2d 858, 862 (Me. 1981) ("Permissive use by one individual does not in and of itself prevent any *other* user from establishing an independent or individual claim of right.") (citing Thompson v. Bowes, 115 Me. 6, 9, 97 A. 1, 2 (1916)).

239. *See* title 14, § 812 (West 1964). However, the statute does not appear to prevent a prescriptive easement once all the elements have been met and then, at some later time, the notice is provided.

and recording; (2) simply recording in an unorganized territory;[240] or (3) service of process and/or posting and recording, which is effective against a particular person.[241]

Prescription provides relief and recognition not only for roads or access easements, but for any amenable use meeting the requirements of prescription.[242] However, prescription will not permit the user to obtain the right to sunlight and air which is known as the doctrine of "ancient lights."[243]

As a general rule, tacking of successive periods by different persons is allowed.[244] Tacking provides for continuity of use to meet the statutory period. Tacking adds successive periods of use by different persons when there is evidence of privity of title between the successive users.[245] Privity of title generally is shown by a deed from one user to the next successive user, family nexus that comports with the laws of intestacy, or a devise in a will.

A remedy limited to the servient property[246] provides a means to address the title of a prescriptive easement. An expedited procedure to determine a prescriptive easement in abandoned ways was

240. In unorganized townships the notice expires after ten years so successive recording is necessary. Title 14, § 812-B (West 1964). If one recording is sufficient to break the chain, would a recording every twenty years suffice?

241. Title 14, § 812 (West 1964).

242. Hill v. Lord, 48 Me. 83, 89-90 (1861).

243. *See* O'Neill v. Brown, 609 N.E.2d 835, 839 (Ill. App. Ct. 1993); *see also* Loose-Wiles Biscuit Co. v. Deering Village Corp., 48 A.2d 715, 142 Me. 121 (1946).

> [I]n England a covenant for quiet enjoyment is not construed as reaching property lying outside the demised premises and is interpreted with reference to such premises as they existed when the lease was executed. These decisions have particular force because of the common law principle of English law relative to prescriptive rights in light and air. . . . The New York court . . . expressly declared that the English common law on the point was not applicable under the changed conditions prevailing in this country.

Id. at 128, 48 A.2d at 718 (citations omitted). *See also* Pierre v. Fernald, 26 Me. 436, 442 (1847).

244. In Blackmer v. Williams, 437 A.2d 858 (Me. 1981) the court held:

> To establish an easement by prescription, a party must prove that the elements of prescriptive use have continued for a period of at least twenty years. The general rule of law is that successive periods of use may be added or 'tacked' together in order to satisfy the prescriptive period when privity exists between the users. . . . Maine law recognizes the use of tacking as a method to meet the twenty-year requirement of prescriptive use.

Id. at 860 (citations omitted). *See also* title 14, § 812 (West 1964).

245. Gutcheon v. Becton, 585 A.2d 818, 822 (Me. 1991) ("Continuity of use may result from the 'tacking' of successive periods of use when there is evidence of privity of title between successive users."). *See also* Kornbluth v. Kalur, 577 A.2d 1194 (Me. 1990).

246. *See* title 14, § 6652 (West 1980).

available under former title 14, section 6663 of the Maine Revised Statutes which was created and repealed in short order.[247]

F. Dedication

Dedication is the conveyance to the public through a gift or for a nominal sum, resulting in an appropriation by a public entity for public use.[248] Dedication may be in fee simple or in the form of an easement. For dedication to be effective: (1) the land upon which the use will lie must be owned by the person making the dedication;[249] (2) there must be an offer; and (3) there must be an acceptance.[250] Until the public accepts the offer, the dedication is inchoate or incipient.

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247. The short-lived statute dealt with claims of prescriptive easements over abandoned ways as follows:

> 2. Expedited procedure. An owner of landlocked property claiming a prescriptive easement over an abandoned way under this chapter may initiate a proceeding under this section. Except as otherwise provided in this subsection, if the owner of landlocked property claiming a prescriptive easement initiates a proceeding under this section, the expedited procedures of this section must be completed before a party to the action may bring further action under other applicable provisions of this chapter. The parties to the proceeding initiated under this section may agree to forego completion of the action under this section. Any other claims by the parties regarding access to the landlocked property are not diminished by the operation of this section but actions to enforce those claims are stayed until a proceeding under this section is complete.

P.L. 1993, ch. 677, § 1 (repealed 1995).

248. Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1129 (Me. 1984) ("Dedication is an appropriation of land to some public use, made by the owner . . . ."); Comber v. Inhabitants of Plantation of Dennistown, 398 A.2d 376, 378 (Me. 1979) ("We have previously defined 'dedication' as the 'intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use.' "). In Vachon v. Inhabitants of Town of Lisbon, 295 A.2d 255 (Me. 1972), the court said:

> Dedication is an appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. There must be a clear intent to so dedicate. Mere acquiescence by the owner in occasional and varying use by the public is not sufficient to establish dedication.

Id. at 259. *See also* Baker v. Petrin, 148 Me. 473, 479, 95 A.2d 806, 810 (1953).

249. Op. Me. Atty Gen. 80-113.

250. In Town of Manchester v. Augusta Country Club, 477 A.2d 1124 (Me. 1984), the court stated:

> To prove dedication, two conditions must be shown: that the land in question was "dedicated" by the grantor for a public purpose; that the public "accepted" the dedication by some affirmative act. . . . Acts and circumstances may rebut evidence that may indicate the owner's intention, such as . . . treating the land as his own, . . . maintaining a fence, etc.

Id. at 1129. In addition, the court wrote:

> The "affirmative act" required for acceptance has not been expressly defined, but this Court has intimated " 'that actual enjoyment by the public of the use for such a length of time that the public accommodation and pri-

Generally the offer must be unequivocal and clear.[251] Permissive use is not enough to show an offer.[252] Under Maine statutory law the offer of dedication: (1) must be made in writing, describing the property and location, and voluntarily transferring the right without claim for damage,[253] or (2) may be inferred by showing ways proposed on an approved subdivision plot plan filed in the appropriate registry of deeds.[254] An implied offer arising from a plan of subdivision requires that the developer show streets, roads, or other amenities, and sell at least one lot according to a plan recorded in the registry.[255] One act denying dedication often is sufficient to deny that there is an implied offer.[256] Implied offers can be prevented by express wording on the plan disavowing an intent to dedicate. The developer also can limit the time the offer may be accepted in order to clarify the title in the event the municipality fails to accept the incipient dedication within a reasonable time period. In certain cases where long use with attenuating conditions presupposes an offer of dedication, then both an offer and acceptance will be presumed.[257] This is known as dedication by custom. In the unorganized territory, public notice will suffice to prevent dedication by custom.[258]

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vate rights would be materially affected by a denial or interruption of the enjoyment' " may be sufficient.

Id. (quoting Northport Wesleyan Grove Campmeeting Ass'n. v. Andrews, 104 Me. 342, 347, 71 A. 1027, 1029 (1908)).

251. White v. Bradley, 66 Me. 254, 259 (1876). *See also* Vachon v. Inhabitants of Town of Lisbon, 295 A.2d at 259-60 ("The intention must be unequivocally and satisfactorily shown. Acts and circumstances may rebut evidence that may indicate the owner's intention, such as location, value, local conditions, treating the land as his own, leasing, maintaining a fence, etc.").

252. Wooster v. Fiske, 115 Me. 161, 164, 98 A. 378, 379 (1916) ("Dedication exists only when so intended by the party, and permissible use does not prove it.").

253. For Maine's statutory treatment of dedication and acceptance, see title 23, § 3025 (West 1992).

254. *Id.* §§ 3025, 3031 (dealing with common law and incipient dedication). *See also* Town of Manchester v. Augusta Country Club, 477 A.2d at 1129 ("There must be a clear intent to so dedicate. Mere acquiescence by the owner in occasional and varying use by the public is not sufficient to establish dedication."). *But cf.* Baker v. Petrin, 148 Me. 473, 480, 95 A.2d 806, 810 (1953) ("The defendants say the word 'Common' on the plan is evidence of the intent of the owner in 1882 to dedicate this land to the general public. That is of course true, but it is only evidence.").

255. Bartlett v. City of Bangor, 67 Me. 460, 464-65 (1878).

256. White v. Bradley, 66 Me. 254, 260 (1876) ("Of this *animus dedicandi*, the user [sic] by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention, than many acts of enjoyment.").

257. Cole v. Sprowl, 35 Me. 161, 170 (1852).

258. See title 14, § 812-A (West 1964) for codification of notice to prevent dedication or use by custom in the unorganized territory (Land Use Regulatory Commission Area).

The owner or offeror may not revoke her offer of dedication if one or more lots have been sold from a recorded plan.[259] To revoke the offer, no lot may have been sold and an amended subdivision plan must have been approved and recorded.[260]

Acceptance must be shown by an affirmative vote or affirmative act recognized in the common law.[261] In some cases, reasonable use by the public for a period may be sufficient to show acceptance.[262] A conditional acceptance is not allowed.

G. Covenants

A covenant is a promise respecting the use of land. In some cases, covenants may give rise to easements—specifically negative easements.[263] A covenant is a servitude upon the land that is equivalent to a negative easement.[264] Where the promise results in an advan-

259. *See* title 23, § 3027(2) (West 1992).

260. *Id.*

261. The Law Court has said:

> One obvious way to accept dedicated land, of course, is by an appropriate article in a warrant for a town meeting affirmatively acted on. Without expressly defining the required procedures therefor, our Court has left no doubt that some affirmative act by a municipality in acceptance of a grant for street purposes is required. The act must be, of course, indicative of acceptance; *i.e.*, of agreeing to the terms of the dedication . . . [so] that the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment would be an adequate acceptance of a dedication.

Vachon v. Inhabitants of Town of Lisbon, 295 A.2d 255, 260 (Me. 1972) (citations omitted). *See also* Baker v. Petrin, 148 Me. 473, 479-80, 95 A.2d 806, 810 (1953).

262. Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1128-29 (Me. 1984).

263. It should be noted that not all covenants are easements.

264. In Chapman v. Sheridan-Wyoming Coal Co., Inc., 338 U.S. 621 (1950), the Supreme Court stated:

> [W]hen a right "consists in restraining the owner from doing that with, and upon, his property which, but for the grant or covenant, he might lawfully have done," it is an easement, sometimes called a negative easement, or an amenity. "An equitable restriction," which prevents development of property by building on it, has been said to be "an easement, or servitude in the nature of an easement," a "right in the nature of an easement," and an "interest in a contractual stipulation which is made for their common benefit." Such "equitable restrictions" are real estate, part and parcel of the land to which they are attached and pass by conveyance. A contractual restriction which limits the use one may make of his own lands in favor of another and his lands is "sometimes called a negative easement, which is the right in the owner of the dominant tenement to restrict the owner of the servient tenement in the exercise of general and natural rights of property." It is an interest in lands which can pass only by deed and is in every legal sense an incumbrance.

Id. at 626-27 (citations omitted). *See also,* Meredith v. Washoe County School District, 435 P.2d 750 (Nev. 1968).

tage amounting to a right in one or more adjoining lots, it may be construed fairly to be an appurtenant easement in favor of the other lot(s).[265]

H. Statutes

Various Maine statutes have been enacted to create or recognize a variety of easements. Most of these statutes address roads and access. Many of these statutes are outlined below.

1. Private Way (Public Easement)

Private ways, now commonly referred to as public easements (versus private easement), may be created when: (1) municipal officers make petition on behalf of an occupant of land or owners who have cultivated land;[266] (2) the land is within the municipality;[267] (3) the road will connect with a town way or highway;[268] and (4) there is common convenience and public necessity.[269]

2. Easements Upon Discontinuance

Upon discontinuance of a town way or public road, a public easement remains unless expressly denied.[270] The public easement ordinarily[271] includes a utility easement.[272] Discontinuance of a public road does not involve the elimination of an easement so much as the reduction in the service provided by the public. Prior to September 3, 1965, a public easement did not remain in a town road unless it was specifically called for.[273] The discontinuance of a county road, however, before and after 1965, continued to be controlled by common law, which did not allow a public easement to remain unless specifically called for. After county roads reverted to town ways they fell under the provisions for discontinuance thereof. Title 23,

265. *See* Chapman v. Sheridan-Wyoming Coal Co., Inc., 338 U.S. at 626; Meredith v. Washoe County School District, 435 P.2d at 752.

266. *See* title 23, § 3022 (West 1992 & Supp. 1995-1996) (providing that municipal officers may alter or widen town ways).

267. *Id.*

268. *Id.*

269. The Law Court in Brown v. Warchalowski, 471 A.2d 1026 (Me. 1984) held that "[t]o avoid a constitutional violation, the establishment of any road or way [by the government] . . . must be for a public use and its requirement must be in response to public exigencies." *Id.* at 1029.

270. *See* title 23, § 3026 (West 1992) (providing procedures for the discontinuance of town ways).

271. Between 1965 and 1977, discontinuance left a public easement but not a utility easement. The language in title 23, § 3026 (West 1992) allowing an easement for public utility facilities to remain was added in 1977.

272. *See* title 35-A, § 2308 (West 1988) (providing that upon discontinuance of a public way, an easement for public utility remains unless the discontinuance order specifically provides otherwise).

273. Warchalowski v. Brown, 417 A.2d at 428.

section 3004 of the Maine Revised Statutes was amended to provide: " 'The discontinuance of a town way shall be presumed to relegate the town way to the status of a private way unless the town meeting article shall specifically state otherwise.' "[274] Title 35 of the Maine Revised Statutes was amended by adding section 2347-A, which provides as follows:

> In proceedings for the discontinuance of public ways, such public ways may be discontinued in whole or in part. The discontinuance of a town way shall be presumed to relegate the town way to the status of a private way unless the town meeting article shall specifically state otherwise. Unless an order discontinuing the same shall specifically otherwise provide, a utility may continue to maintain, repair, and replace its installations within the limits of such way for a period not exceeding 3 years from the date of discontinuance.[275]

3. *Burial Grounds*

Title 13, section 1142 of the Maine Revised Statutes codifies what undoubtedly would be an implied easement under the common law—the right to access a cemetery by the spouse, ancestors, and descendants of the deceased.[276] The person who appropriated, recorded, and marked a burying ground can create a right for any spouse, ancestor, or descendant to have access by a direct route from the public road to the burying ground during reasonable walking hours.[277] This right may be exercised provided: (1) the appropriated ground is less than one-quarter acre; (2) a description is recorded by the town clerk or appropriating party; (3) the bounds are marked or fenced; (4) the surrounding land is conveyed by the appropriating person or their heir; and (5) the conveyance causes the burying ground to be otherwise inaccessible.[278]

4. *Condemnation or Conveyance*

Condemnation is the "process by which property of a private owner is taken for public use, without his consent, but on the award and payment of just compensation . . . ."[279] Statutes provide that a public road may be created by condemnation if: (1) municipal officers or person(s) make petition; (2) proper notice is provided; (3)

274. P.L. 1965, ch. 270, § 1 (effective September 3, 1965), *repealed by* P.L. 1975, ch. 711, § 7 (effective July 29, 1976).

275. P.L. 1965, ch. 270, § 2 (effective September 3, 1965), *repealed by* P.L. 1987, ch. 141, § A, 5 (effective July 1, 1987) (subject matter recodified at tit. 35-A, § 2308 (West 1988)).

276. *See* title 13, § 1142 (West Supp. 1995-1996) (providing "an easement for the benefit of [family members] of any person interred in the burying ground").

277. *Id.*

278. *Id.*

279. BLACK'S LAW DICTIONARY 364 (4th ed. 1951).

the proposed road is within the municipality; and (4) the road will connect with a town way or highway.[280] It should be noted that in the past, the failure to create a town way would not have barred the creation of a county way in the same location.[281] There were, however, limitations on the location of town ways.[282] For example, town ways could not be placed across navigable streams and tidal flats without legislative approval since such an act would block the public easement therein.[283] Voluntary purchase and conveyance of the easement is preferred, with condemnation used where agreement is not reached. Even though the municipality in the past took only an easement, compensation was to be provided unless a road already existed in the same location, in which case only nominal payment was made.[284] At the present time, title is taken in fee unless an easement is expressly stated.[285]

5. *Intertidal Lands and Navigable Bodies of Water*

The public has the right to use intertidal lands and navigable bodies of water for fishing, fowling, and navigation.[286] As a general

280. Under both the present statutory provisions, and their predecessors (which were in effect until 1975), the municipality can only accept a town way by following prescribed statutory procedures and recording the same in the Registry of Deeds. Title 23, §§ 3021-3035 (West 1992 & Supp. 1995-1996). *See* title 23, §§ 3001-3003 (West 1965), *repealed by* P.L. 1975, ch. 711, § 7 (effective July 29, 1976). *See also* State v. Beck, 389 A.2d 844, 847 (Me. 1978) (providing three methods for establishing a public way).

281. Waterford v. County Commissioners of Oxford County, 59 Me. 450, 452-53 (1871).

282. In Chase v. Cochran, 102 Me. 431, 67 A. 320 (1907), the court stated:

> "We do not believe there is any authority given by the statute to appropriate the shores or flats of a navigable river to the use of the inhabitants of a town in the form of a way or road. It cannot be wanted for any of the common purposes of a road, and cannot be constructed so as to be used as such without interrupting more or less the public right of passage up and down the river. The whole river included within the high water mark on each side is a public highway. . . .
>
> A public highway cannot be laid out across a navigable stream, except by a license from the legislature. Why? Because it will destroy an existing highway, the river itself, in which all the citizens have an interest. A town, then, cannot lay a way on the shore between high and low water mark, for though it may not entirely, it will essentially impair the public right."

Id. at 435, 67 A. at 321 (quoting Kean v. Stetson, 22 Mass. (5 Pick.) 492, 494-95 (1827)).

283. *See* Blaisdell v. Inhabitants of the Town of York, 110 Me. 500, 501, 87 A. 361, 363 (1913) ("The first step towards the laying out and construction of this way and bridge was . . . [to petition] the Legislature for the passage of a special act authorizing the construction of a highway and bridge . . . . Such an act was necessary . . . .").

284. *See* Boober v. Towne, 127 Me. 332, 334-35, 143 A. 176, 177 (1928) (determining just compensation for landowners).

285. Title 23, § 3023 (West 1992).

286. Title 12, § 573 (West 1994). Note that (1)(B) of this section speaks of the public's right to use intertidal land for recreation. This right, however, has been

rule, the public has an easement in all navigable bodies of water. The easement for the above stated purposes begins in freshwater bodies at the normal high-water mark on one side and extends to the normal high-water mark on the other side.[287] In tidal water, the easement extends from the normal high tide out to sea.[288]

6. *Blanket Utility Easements*

Statutes generally give utility companies blanket easements in all municipal roads with certain caveats.[289] Caveats include complying with certain codes, maintenance, repair, etc.[290]

7. *Conservation Easements*

A conservation easement is an easement in gross for the benefit of the government, nonprofit corporation, or charitable trust that imposes limitations or affirmative obligations for several purposes, including: (1) protecting or retaining natural, scenic, or open space values on real property; (2) assuring that land is available for agricultural, forest, recreational, or open space use; (3) protecting natural resources; or (4) maintaining and enhancing air and water quality of real property.[291] A conservation easement is a favored easement and is valid even though the easement: (1) is not appurtenant; (2) has been assigned to another holder; (3) is not recognized at common law; (4) is a negative burden; (5) requires affirmative obligations upon owner of burdened property; (6) does not benefit, touch, or concern real property; (7) has no privity of estate or of contract; or (8) does not run to successors or assigns.[292]

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found not to exist in instances where private landowners have not been compensated. Bell v. Town of Wells, 557 A.2d 168, 176-78 (Me. 1989). For a detailed explanation of the public right to use intertidal land for recreation, see Brown v. Chadbourne, 31 Me. 9 (1849). *See also* Montgomery v. Reed, 69 Me. 510, 515 (1879) (holding flats are subject to a public easement until they are occupied).

287. *See* Flood v. Earle, 145 Me. 24, 28, 71 A.2d 55, 57 (1950) (stating that the state holds ponds, which exceed 10 acres in size, and the soil beneath them in trust for the public); *but see* Stevens v. King, 76 Me. 197, 198-99 (1884) (stating that, in the absence of a clearly expressed intention to the contrary, lands bound by fresh bodies of water are presumed to extend to the low-water mark); Wood v. Kelley, 30 Me. 47, 55 (1849) (stating there is a presumption that land bounded by a natural pond, after it has been for a long time enlarged by artificial means, has its boundary at the low-water mark).

288. Bell v. Town of Wells, 557 A.2d at 173.

289. *See* title 35-A, §§ 2301-2311 (West 1988 & Supp. 1995-1996) (providing regulations and protections for utility facilities in the public way).

290. *See, e.g.*, title 35-A, § 2305 (West Supp. 1995-1996).

291. Title 33, § 476 (West 1988).

292. *Id.* § 479.

8. Scenic Easements

The public has the right to acquire or accept scenic easements in order to restrict development and preserve aesthetics.[293] The term of such easements must be for a ten-year period or more to be eligible for the benefit of "current use" property taxation.[294]

9. Constructive Easements

As of October 1, 1975, owners of all structures upon submerged and intertidal lands shall be deemed to have been granted a constructive easement for a term of thirty years on the submerged land directly underlying the structure.[295] Beginning on January 1, 1991, and ending on December 31, 1995, Maine undertook a registration program for all structures granted constructive easements.[296] Constructive easements shall be subject to administrative and registration fees.[297]

10. Solar Easements

Solar easements provide a right to direct sunlight by imposing a negative easement on the servient property. A negative easement prevents the owners of the servient estate from performing acts that they ordinarily would have the right to do. This differs from an affirmative easement which allows the owners of the dominant estate the right to enter upon the servient estate. A solar easement is appurtenant to the property meant to benefit from the solar access. The easement is an interest in real property that may be acquired and transferred. A solar easement must comply with certain requirements to take effect.[298] For example, it "must be created in writing."[299] It also must "be recorded and indexed in the same way as other conveyances of real property interests."[300] The instrument creating the easement may include "[a] definite and certain description of the space affected by the easement [and] [a]ny terms or conditions, or both, under which the solar easement is granted or will be terminated."[301] The easement may use or contain a map showing the properties and the area affected by the easement.[302] Contrary to the common law, when there is an inconsistency between the

293. Title 36, § 1111 (West 1990).
294. *Id.* "Current use" property taxation means that the land which is the subject of the scenic easement would be taxed to its owner based on the *actual* value of its current use, rather than its *potential future* value.
295. Title 12, § 558-A(6) (West 1994).
296. *Id.*
297. *Id. See also id.* § 558-A(3) (providing fee amounts).
298. *See* title 33, § 1401 (West 1988).
299. *Id.*
300. *Id.*
301. *Id.* § 1402(1)(A), (B).
302. *Id.* § 1402(2).

written easement and the map, the written easement shall control in the interpretation of solar easement boundaries.[303]

11. Access to Great Ponds

Under the Maine common law and its statutory codification, a person may cross the lands of another person to gain access to a great pond.[304] Certain restrictions apply when exercising use of the easement.[305] For example, the person using the easement must be on foot.[306] Therefore, driving across the easement is not allowed. In addition, the person cannot use the easement to cross improved land.[307] Furthermore, land of a water company or a water district cannot be crossed if the pond is used as a source for public water.[308] The concern that people will be denied access to great ponds is so great that the legislature has enacted penalties for anyone that denies or prevents access.[309]

12. Navigable Water

It has long been recognized in Maine that the public enjoys rights in certain natural waters within and surrounding the state. These waters include all water influenced by the ebb and flow of the tide,[310] great ponds,[311] and navigable rivers.[312] As such, there is a

303. *Id.*

304. Title 17, § 3860 (West 1983).

305. *See id.*

306. *Id.*

307. *Id.* This rule was adopted by ordinance in Massachusetts, " '[F]or great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety [sic] for that end, so they trespass not upon any man's corn or meadow.' " Conant v. Jordan, 107 Me. 227, 230, 77 A. 938, 939 (1910) (quoting COLONIAL ORDINANCE OF 1641-47). Although the Massachusetts ordinance did not apply to Maine, it was "declared to be a part of the common law of th[e] State." *Id.*

308. Title 17, § 3860 (West 1983).

309. *See id.*

310. *See* title 1, §§ 2-3 (West 1989).

311. Conant v. Jordan, 107 Me. at 230, 77 A. at 939.

312. In Woodman v. Pitman, 79 Me. 456, 10 A. 321 (1887), the court stated:

> [T]he test of the floatability of a stream was held to be, whether fit for valuable floatage and useful to important public interests .... [I]n order to make a stream navigable, "there must be some commerce and navigation upon it which is essentially valuable." Navigators must endure inconveniences for the greater general good.... [One justice] said, "But in order to have this character it must be navigable to some purpose useful to trade or agriculture." ... [T]his language is applied to the capacity of the stream rather than to its uses.

Id. at 462-63, 10 A. at 324-25 (quoting Wethersfield v. Humphrey 20 Conn. 217; Rowe v. Granite Bridge Co., 21 Pick. 344, 347) (citations omitted).

public easement extending from the normal high-water line out toward the water.[313]

13. Drainage

Maine recognizes that downstream owners maintain a limited easement in natural water courses.[314] In effect, the upstream owner cannot stop or divert a water course to the injury of a downstream owner.[315] A downstream owner may prevent an unlawful or unreasonable diminution or diversion of the natural flow.[316]

I. Problems Creating or Conveying Easements

Oftentimes the grantor inadvertently creates or conveys an easement in such a manner that the easement is unintentionally limited or denied in what otherwise would appear to be a valid grant.

1. Grants by the Dominant Estate

In some cases, the dominant estate ineffectively attempts to extend the use of an appurtenant easement to other persons or property. For example, an easement cannot be granted by the dominant estate to benefit non-appurtenant parcels. The extension of the easement to other persons or property requires the permission of the servient estate.

2. Rule Against Perpetuities

The Rule Against Perpetuities states that an interest is not valid unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. While Maine has modified the common law Rule Against Perpetuities by adopting a "wait and see" modification, it has not eliminated the rule.[317] The

313. *See* Knud E. Hermansen & Donald R. Richards, *Maine Principles of Ownership Along Water Bodies*, 47 ME. L. REV. 35, 45 (1995).

314. In Card v. Nickerson, 150 Me. 89, 104 A.2d 427 (1954), the court stated:

> There is a public or natural right in and to a water course which belongs to all persons whose lands are benefited by it, and it cannot be stopped up, or diverted, to the injury of other proprietors. To constitute a water course as defined by the law, it must appear that the water in it usually flows in a particular direction by a regular channel having a bed with banks and sides, and usually discharging itself into some other body or stream of water. It must have a well defined and substantial existence but need not flow continuously or never be dry.

Id. at 91, 104 A.2d at 429.

315. Johnson v. Whitten, 384 A.2d 698, 701 (Me. 1978).

316. Mullen v. Penobscot Log-Driving Co., 90 Me. 555, 568, 38 A. 557, 560-61 (1897). This is especially true where the water is required as a necessity such as for drinking. *See, e.g.*, City of Auburn v. Union Water Power Co., 90 Me. 576, 586, 38 A. 561, 565 (1897).

317. *See* title 33, §§ 101-106 (West 1988).

rule applies to easements as well as fee simple title.[318] Simply stated, if the servient estate, the appurtenant property, or the dominant party cannot be identified with certainty at the time the easement is created, the easement is in danger of running afoul of the Rule Against Perpetuities because it has not "vested." People often violate the rule by conveying property and then attempting to reserve the right to create or extend an easement to other, as yet undetermined, property.

3. No Title Interests

In some cases, a third party attempts to grant rights in an easement he does not have. At first impression this action would seem to amount to intentional fraud. This situation, however, is not uncommon in the sequential and often haphazard development of a tract of land.[319] The figures depict that a landowner will often sell off lots from a larger tract over a span of many years. The chance of a problem often is increased by the use of different surveyors or attorneys over the same time span. Where a grantor has sold a lot, creating an appurtenant easement over the grantor's remaining lands for the lot sold, and afterwards sells all or part of the land encompassing the existing appurtenant easement, the grantor is powerless to extend the existing easement to other lots because the grantor has conveyed all of his remaining interest in the easement's "underlying" title (servient estate).

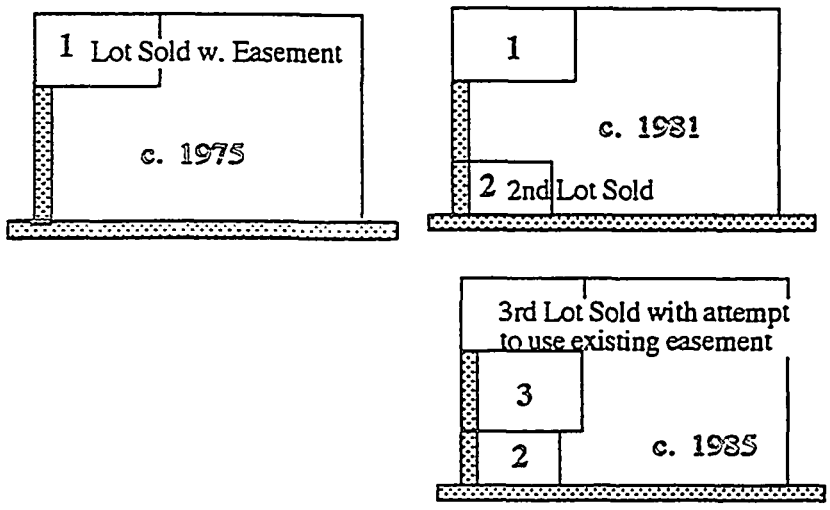
318. *Id.* § 101.

319. In Dorman v. Bates Mfg. Co., 82 Me. 438, 19 A. 915 (1890), the court cited approvingly a Massachusetts case:

> [W]here the owner of land lays out a way through it, with lots on each side, and then conveys one of these lots with a right of way over the whole of it, and then conveys another lot together with the fee of the street in front of it, and then conveys a third lot bounding it on the same street opposite to the two lots before sold, the purchaser of the third lot gets no right of way in that portion of the street, the fee of which had been conveyed to the second purchaser; and for the reason that his grantor was then powerless to place such an additional burden upon it; and the third purchaser could claim no rights under the deed to the first, because to that deed he was a stranger.

Id. at 448-49, 19 A. at 916 (citing Oliver v. Pitman, 98 Mass. 46).

FIGURE 10



The c. 1975 figure shows the out-conveyance of a lot with appurtenant easement. The c. 1981 figure shows a sale of a second lot. The important point to note in regard to the c. 1981 figure is that the grantor has conveyed all her title rights underlying the easement. The c. 1985 figure shows an attempt to extend the easement and increase the burden upon lot 2, the servient estate. The attempt to convey an easement across lot two for the benefit of lot three would not be effective since the grantor has no title rights remaining within the confines of lot 2.

4. Inadequate Description

An easement by reservation should be described using a metes and bounds description, reference to a plat, or some other means that conveys a specific location and width. Failure to adequately describe the easement does not provide actual notice to subsequent owners of the servient estate and will prevent recognition of an easement over their land.[320]

5. Stranger to the Deed

In some cases attempts have been made to reserve an easement in favor of a person not a party to the transaction. These reservations generally are void because the party is a stranger to the deed.[321]

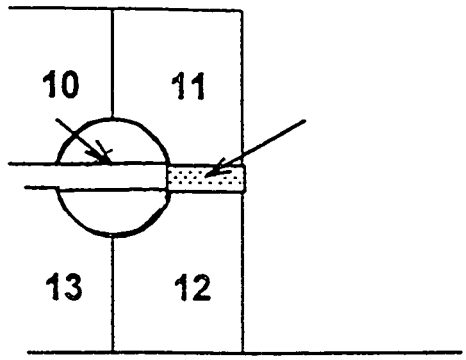
320. Title 33, § 201-A(2) (West 1988).

321. Tripp v. Huff, 606 A.2d 792, 793 (Me. 1992) ("[U]nder our existing case law . . . an easement [to a stranger] convey[s] no property rights . . . . We are unpersuaded that there is any compelling reason to depart from this well settled rule and thus decline to do so.") (citation omitted); *see also* Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130-31 (Me. 1984) ("A mere reservation in favor of one not a party to the deed cannot create any right in interest not previously ex-

There are two situations where this problem frequently arises. The first situation occurs when a person sells his remaining road frontage and attempts to give an easement to neighbors, or to parcels previously sold at the same time, in the same deed. For example, consider the following language: "Provided, however, there shall be reserved for my son and daughter-in-law an easement extending through the parcel herein conveyed to my son's lot to use as they require."

The second situation often encountered concerns easements that extend to the borders of a subdivision with the express or implied purpose of providing access to the adjoining lands. Unless the easement is accepted as a public road, the use of the easement cannot ordinarily be extended into the adjoining lands by implication.

FIGURE 11



A partial plan where the developer has shown access from the development to the adjoining lands. If the access does not become a public road, the depiction of the access is ordinarily ineffective as a private easement for the neighboring property without a deed to the neighbor conveying an easement during the time the developer still has title in the streets and cul-de-sac.

To prevent these problems from arising, the grantor can convey the easement to the appropriate parties prior to the grantor's conveyance of the fee simple title in the servient estate, or the grantor can retain the fee simple title in the road, allowing the grantor to increase the burden on her title at a later time.

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isting."); Dorman v. Bates Mfg. Co., 82 Me. 438, 19 A. 915. In *Dorman* the court stated:

> The whole extent of the doctrine in this class of cases is that, if land be conveyed as bounded on a street, and the grantor at the time of the conveyance owns the land over which the supposed street passes, he and his successors in title will be estopped to deny to the grantee and his successors in title the use of it as a street. But each one claiming the benefit of such an estoppel must rest his claim on his own-title deed, and not on the deed of another, through which he has not derived his title.

Id. at 449, 19 A. at 916.

Courts are reluctant to recognize transactions involving a stranger to the deed for three reasons. First, the stranger to the deed conveyance does not allow for acceptance of the instrument by the would-be dominant estate. While it is rare that a person would not welcome the benefits of an easement, unexpected taxes, potential litigation, environmental concerns, and other potential liability could prevent a face-to-face transfer. A second, more pervasive reason, is that the dominant estate is not afforded the opportunity to bargain and reach agreement with the grantor over such important matters as the location, width, extent of use, allowable use, and so on. It is not surprising that many easements running afoul of the stranger to the deed doctrine are vague and subject to various interpretations. The third reason why the courts are reluctant to recognize the stranger to the deed doctrine is founded upon the fact that the transaction will not appear in the chain of title to the appurtenant parcel and consequently will fail to provide notice to a bona-fide purchaser that the land benefits from an easement. As a result of these deficiencies, transactions involving a stranger to the deed potentially give rise to litigation.[322]

V. Extinguishment

Easements may be extinguished by various methods. The methods may be categorized as follows: release, condition, nonuse, abandonment, merger of title, termination of necessity, foreclosure, destruction, death of a party, and statutory.

A. Release

A release is a grant or conveyance from the dominant owners to the servient owners releasing the dominant owners' rights in the easement.[323] To be effective each of the dominant cotenants must be a party to the release.

B. Condition or Event

Although parties may provide in writing for an easement to extinguish upon a certain condition or event,[324] unfortunately, this procedure rarely is used. Nevertheless, some foresighted scriveners do put in easements one or more conditions for termination. Some conditions that often are written into easements are improper uses of the easement, time period, specific date, nonuse for a specific period, failure to perform a specific act (for example, improve road,

322. Repudiation of the stranger to the deed doctrine has been successful in some jurisdictions based upon the theory of estoppel.

323. *See, e.g.*, Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621 (1950).

324. *See, e.g.*, title 23, § 3031 (West 1992 & Supp. 1995-1996).

close gate, or erect a bridge), obsolescence of specific technology, and so on. The following is an example of a condition clause:

> If this easement is not used within a five-year period, the easement shall be extinguished and all outstanding rights and interest shall revert to the servient estate.

1. Paper Streets[325]

Ordinarily public and private rights in streets terminate upon either the failure to accept the offer of dedication in twenty years, the failure to construct a way for the exercise of private rights within twenty years, or the period stated in the plan.[326] Paper streets that existed prior to September 29, 1987, will be deemed vacated on the later of September 29, 1997, or fifteen years after the recording of the plan.[327]

2. Vacation

A municipality may vacate public and private rights in paper streets within a subdivision.[328] For vacation to be effective, the municipal officers themselves, or upon a petition by persons claiming a property interest in the paper street must provide notice of the proposed vacation to the lot owners.[329] However, revocation of paper streets shown on an approved subdivision plan, in which no lots have been sold, may be done by the municipality.[330] Thereafter, a decision will be made and an order of vacation entered if appropriate.[331]

C. Nonuse

Under the common law, an easement cannot be extinguished by nonuse, regardless of how long the nonuse continues.[332] In fact, the easement may never be used and still may survive.[333]

> "A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in

325. For an explanation of paper streets, *see supra* text section entitled "Rangeways & Range-roads."

326. *Id.*

327. *Id.* § 3032. It is unclear whether the deemed vacation vacates private rights as well as public rights in paper streets.

328. *Id.* § 3027. Under title 23, § 3031 the vacation procedure appears to include private rights.

329. *Id.* § 3027.

330. *Id.* § 3037(2).

331. *Id.*

332. *See, e.g.*, Phillips v. Gregg, 628 A.2d 151 (Me. 1993); Canadian Nat'l Ry. v. Sprague, 609 A.2d. 1175 (Me. 1992); Witt v. McKenna, 600 A.2d 105 (Me. 1991).

333. *See* Adams v. Hodgkins, 109 Me. 361, 367, 84 A. 530, 532 (1912) ("It has been held that a way, created by the necessity for its use, cannot be extinguished so long as the necessity exists.").

> the land, and it is no more necessary that he should make use of it to maintain his title than it is that he should actually occupy or cultivate the land. Hence his title is not affected by non-user, and, unless there is shown against him some adverse possession or loss of title in some of the ways recognized by law, he may rely on the existence of his property with full assurance that, when occasion arises for its use and enjoyment, he will find his rights therein absolute and unimpaired."[334]

There are two exceptions to this common law rule that easements cannot be extinguished by nonuse. One exception, known as common law abandonment, applies to public road easements. Under the common law, a public road easement was considered abandoned when a public way, originally created by use, was not kept passable at the expense of the public for a period of twenty years or more.[335] Common law abandonment also may be presumed within a few years of the municipality's discontinuance of maintenance on the old road as a result of the construction of a new replacement road.[336]

The second exception to the common law rule that easements cannot be extinguished by nonuse applies to private easements which are treated differently than public road easements.[337] With respect to private easements, the exception to the common law oc-

334. *Id.* at 366, 84 A. at 532 (quoting Welsh v. Taylor, 31 N.E. 896, 899 (1892)).

335. Lamb v. Town of New Sharon, 606 A.2d 1042 (Me. 1992).

336. *Id.* The *Lamb* court specifically noted:

> Under the doctrine of abandonment, a presumption of a public intent to abandon a road may be raised by evidence of nonuse for twenty years or more, intentional and voluntary desertion of a road, or acquiescence, even for a few years, in the discontinuance of an old road combined with use of a new road.

Id. at 1046. Similarly, in Piper v. Voorhees, 130 Me. 305, 155 A. 556 (1931), the court said:

> [T]he laying out of a new road near an old road does not necessarily operate a discontinuance of the latter. Still, voluntary and intentional desertion of a highway, the acquirement of a new road in its place, its travel and recognition by the public, may operate as an abandonment of the former. Acquiescence for even a few years, in the discontinuance of an old road, and the adoption of another, has been held sufficient to show the abandonment of the old road in the absence of evidence of a contrary intention.

Id. at 309-10, 155 A. at 559 (citations omitted). *See also* Tibbetts v. Penley, 83 Me. 118, 123, 21 A. 838, 839-40 (1890) ("Undoubtedly, in straightening public ways by alterations authorized by Rev. St., c. 18, such strips of land in an old location as are not covered by the new, would become *ipso facto* discontinued. Such is the natural and desired object sought by the proceeding.").

337. Under the common law abandonment exception, the presumption begins with the concept that a private easement acquired by deed is never lost by nonuse. This is true even in the situation where the owner of the dominant estate prefers to ignore an earlier easement in favor of a new easement in another location. *See* Adams v. Hodgkins, 109 Me. 361, 365, 84 A. 530, 532 (1912) ("[A] right of way, whether acquired by grant or prescription, is not extinguished by the habitual use by its owner of another way, equally convenient, instead of it, unless there is intentional abandonment of the former way.").

curs in two situations. The first is where the dominant owner has agreed with the servient owner to move the location of the way and thereafter does not use the earlier location and does not protest the servient owner's complete dominion over the former location. The surrender of the former easement is presumed to have provided consideration for the agreement in the new location.[338]

The second situation where the exception to the common law will occur involves prescriptive easements. Continued use of property under certain circumstances will create a prescriptive easement in favor of the user. The use with attending conditions, though generally unmarketable, constitutes a form of title in favor of the user. The prescriptive easement is said to be inchoate awaiting perfection through recognition by the dominant tenement's owner who must seek a deed or judgment. Until recognition occurs, the title is supported by continued use that constitutes notice to subsequent purchasers of the servient tenement. The recognition of a prescriptive easement and the requirements of notice are difficult burdens to carry. Consequently, the former user or her heirs and assigns sometimes will stop adverse use. Under the common law, if a former user, now a nonuser, has acquired an inchoate right and afterwards fails to use or perfect the right (constructive possession), the former user will be presumed to have abandoned the right.[339] Abandonment of a prescriptive public way or private easement arises when there has been an unexplained cessation of use (nonuse) for twenty

338. In Tabbutt v. Grant, 94 Me. 371, 47 A. 899 (1900), the court noted:

> [M]ere non-user of a definite right of way for any period does not of itself extinguish the right. . . . Evidence shows an executed agreement for a substitution of the new path for the old one, by which the plaintiff acquired the right to use the new path and in consideration thereof surrendered the right to use the old path. Such an agreement may be made by parol, and, when executed,—when, in pursuance thereof, the owner of the right of way begins to use the new path, and the owner of the servient estate shuts up the old path,—then the former acquires right to use the new path, and effectually releases the right to use the old path. Such an agreement can be shown by conduct as well as by words, but it must appear that there was an agreement. If the conduct of the parties fails to show that, it does not change their rights.

Id. at 372-73, 47 A. at 900.

339. Smith v. Dickson, 225 A.2d 631, 636 (Me. 1967) (quoting Piper v. Voorhees, 130 Me. at 309, 155 A. at 558-59 (1931)) ("While the nonuser of a prescriptive easement, for a period sufficient to create an easement by prescription, is evidence of an intention to abandon the easement, it is open to explanation, and may be controlled by proof that such intention did not exist."); Farrar v. Cooper, 34 Me. 394, 400 (1852) ("A non user of twenty years is regarded as presumptive evidence of an abandonment and extinction of the right. This presumption may be rebutted by proof of facts inconsistent with such a conclusion. The rule is not applicable to rights or incorporeal hereditaments, secured by a deed of conveyance.").

years.[340] Where all evidence of the former use has disappeared so that a purchaser takes title without notice of adverse rights, a recognition of a prescriptive easement would be unjust. It is presumed that the former right has been extinguished in favor of some other adverse right, or, where no such adverse right appears, that the former has been surrendered, or that it never existed.[341]

D. Abandonment

An easement is abandoned when it is relinquished or given up without a delivery of a deed.[342] While in limited cases nonuse may presume abandonment, nonuse alone ordinarily is insufficient to constitute abandonment.[343] In Maine abandonment generally requires affirmative acts.[344]

> It has been stated that the only way in which an easement can be extinguished by the act of the parties interested is by release, actual or presumed; that abandonment will not have that effect unless a release can be presumed from that and the surrounding circumstances; that when an easement is spoken of as having been lost by abandonment, it is intended that the circumstances are such that a release can be presumed.[345]

Extinguishment by abandonment requires intentional acts (or failure to act in some cases) on the part of the owner of the right-of-way that are decisive and conclusive, indicating a clear intent to stop

340. Adams v. Hodgkins, 109 Me. at 364, 84 A. at 531 ("[O]ne acquired by prescription, may be extinguished among other modes, by abandonment, so called, or non-user and adverse possession for twenty years.").

341. Wooster v. Fiske, 115 Me. 161, 164-65, 98 A. 378, 379 (1916).

342. Doherty v. Russell, 116 Me. 269, 272-73, 101 A. 305, 306 (1917) (quoting Middle Creek Ditch Co. v. Henry, 39 P. 1054, 1058 (1895)) ("Abandonment is the relinquishment of a right, the giving up of something to which one is entitled—it must be by the owner—without being pressed by any duty, necessity, or utility to himself, but simply because he desires no longer to possess the thing.") (alterations in original).

343. In explaining abandonment versus nonuse the court in Adams v. Hodgkins, 109 Me. 361, said:

> Abandonment necessarily implies nonuser, but nonuser does not create abandonment no matter how long it continues, and an easement proved by grant or reservation is not lost by nonuser alone. It has been said that an easement acquired by grant cannot be lost by mere nonuser, though it may be by nonuser coupled with an intention of abandonment.

Id. at 365-66, 84 A. at 432 (citations omitted). *See also* Doherty v. Russell, 116 Me. at 273, 101 A. at 301 (nonuse alone is insufficient without intention to abandon.)

344. Phillips v. Gregg, 628 A.2d 151, 152-53 (Me. 1993); Chase v. Eastman, 563 A.2d 1099, 1102 (Me. 1989) ("Although mere nonuse is not enough, an easement created by deed or grant may be extinguished by abandonment."); Adams v. Hodgkins, 109 Me. at 365, 84 A. at 532. ("Abandonment necessarily implies nonuser but nonuser does not create abandonment no matter how long it continues.").

345. Adams v. Hodgkins, 109 Me. at 367, 84 A. at 532.

using the easement for its intended purpose.[346] In the alternative, the act or acts may be carried out by the owner of the servient tenement for the statutory period, adverse to the dominant owner's interest.[347] This alternative, sometimes referred to as reverse prescription, also would require that the servient owner not give to the adverse user valid notice denying extinguishment of the easement[348] and would not apply to wild lands (unimproved lands).[349] Ordinarily, the adverse act would have to be maintained for the statutory period. However, the Law Court has recognized a shorter period when the improvements were permanent or substantial and coupled with conditions suggesting laches or estoppel.[350]

As can be seen, mere nonuse of an easement would not be sufficient to extinguish a private easement by abandonment.[351] Furthermore, the acts must be unequivocal and amount to clear and convincing evidence that the use is being abandoned permanently.[352] The fact that the easement is no longer necessary or is no longer required for its intended purpose is not sufficient cause to show abandonment.[353] It also is irrelevant that the easement has never been exercised, as in the case of paper streets shown on a

346. Canadian Nat'l Ry. v. Sprague, 609 A.2d 1175, 1179 (Me. 1992); Doherty v. Russell, 116 Me. at 273, 101 A. at 306-07 (1917) ("To constitute an abandonment of a right there must be a clear unequivocal and decisive act of the party, showing a determination not to have the benefit intended.") (quoting Banks v. Banks, 77 N.C. 186 (1877) ("There must be not only an intention to abandon but an actual abandonment.") (quoting Stevens v. Town of Norfolk, 42 Conn. 377 (1875))). *See also* Chase v. Eastman, 563 A.2d at 1103 (an easement holder's intention to abandon an easement may be shown from his failure to object to the erection of a permanent structure that prevents the enjoyment of the rights granted by the easement); McLellan v. McFadden, 114 Me. 242, 249-50, 95 A. 1025, 1029 (1915) (intention to abandon may be inferred, but mere lapse of time or nonuse is not sufficient evidence of abandonment).

347. Phillips v. Gregg, 628 A.2d at 151; Witt v. McKenna, 600 A.2d 105 (Me. 1991). *See also* Ballard v. Butler, 30 Me. 94, 99 (1849) ("[A] party to whom a servitude is due may effect its extinguishment by suffering erections of a permanent kind, which would prevent its use . . . .").

348. Title 14, § 813 (West 1980) (dealing with preventing a prescriptive easement by interruption).

349. *Id.* § 814.

350. Bolduc v. Watson, 639 A.2d 629, 630 (Me. 1994) ("The history of nonuse, coupled with the intention to abandon demonstrated by the Bolducs' failure to object to the garage when it was built, are sufficient to establish abandonment."); Fitzpatrick v. Boston and Me. R.R., 84 Me. 33, 24 A. 432 (1891); Ballard v. Butler, 30 Me. at 94.

351. *See* Chase v. Eastman, 563 A.2d 1099, 1102 (Me. 1989).

352. *See* Canadian Nat'l Ry. v. Sprague, 609 A.2d 1175 (Me. 1992); Witt v. McKenna, 600 A.2d 105 (Me. 1991). *See also* Adams v. Hodgkins, 109 Me. 361, 364, 84 A. 530, 531 (1912) ("[T]he denial of the right to an easement or a declaration of relinquishment of it coupled with acts on the part of the declarant in furtherance of and conformity to the denial or declaration are evidence of abandonment and adverse possession.") (citations omitted).

353. Witt v. McKenna, 600 A.2d at 105.

subdivision plan,[354] or has only been exercised in part, such as a cul-de-sac.[355] Where the servient owner erects permanent structures or barriers across the easement, abandonment by the dominant owner will be deemed to exist.[356] Any actions by the servient or dominant owner which prevent the dominant owner from permanently exercising the easement will be sufficient to constitute abandonment.[357]

In the past, the removal of railroad tracks and the cessation of railroad service was enough to constitute abandonment. However, legislation by the U.S. Congress known as "Rails to Trails," has attempted to set up a legal fiction[358] to prevent the abandonment and reversion of railroad corridors and allow the use of the former railroad corridors for public recreation activities.[359] Some federal district courts have declared the law unconstitutional while others have upheld it.[360] It has not been reviewed by the United States Supreme Court. The question of abandonment has no relevance to track corridors owned in fee simple. Maine also has a law that gives the

354. In Bartlett v. City of Bangor, 67 Me. 460 (1878), the court said:

> It is seldom within the contemplation of the parties that all the streets marked upon a plan of a considerable extent of territory, or that the whole of any one of them, if of considerable length, shall be at once opened. And, until such as the growth of the place requires them to be opened, the owner has a right to use the land for any of these temporary purposes. And such a use is not adverse, but according to strict right. It will not, therefore, bar the rights of the grantees, or the public, to have the streets opened, whenever, in the opinion of the public authorities, they are needed.

Id. at 466.

355. *Id.* at 467.

356. Bolduc v. Watson, 639 A.2d 629, 630 (Me. 1994).

357. Speaking about adverse use, the court in Bartlett v. City of Bangor, 67 Me. 460, said:

> An adverse use, such as placing upon the land buildings or other permanent obstructions to all possible travel over it, if acquiesced in for a sufficient length of time, might have that effect. But using the land for pasturage, or the growth of crops, or other purpose, which does not indicate an intention that it shall never be used as a street, will not have that effect. Such a use of the land is not adverse. It is seldom within the contemplation of the parties that all the streets marked upon a plan of a considerable extent of territory, or that the whole of any one of them, if of considerable length, shall be at once opened.

Id. at 466.

358. *See* Burnier v. Department of Envtl. Resources, 611 A.2d 1366, 1368 (Pa. Commw. 1992) ("[T]he National Act specifically provides that interim trail use is not an abandonment of a railroad right-of-way.").

359. National Trails System Act, 16 U.S.C. § 1247(d) (1985). *See also* 49 C.F.R. §§ 1152.29(a), (d) (1994).

360. The courts have upheld the National Trails System Act in Burnier v. Department of Envtl. Resources, 611 A.2d at 1366, Washington Wildlife Preservation, Inc. v. State of Minnesota, 329 N.W.2d 543 (Minn. 1983), *cert. denied*, 463 U.S. 1209 (1983).

Maine Department of Transportation first opportunity to purchase rail lines intended for discontinuance.[361]

E. Merger of Title (Unity of Title)

When the servient and dominant estates combine or come together, the easement will cease.[362] Where the easement had been used adversely, the prescriptive period is suspended.[363] However, the title of the dominant estate and servient estate must be co-extensive, equal in validity, quality, and all other circumstances.[364] For example, a lease on one and title to the other, or a mortgage on one and unencumbered title to the other, will suspend the easement but not extinguish it.[365] In another example, ownership of the dominant estate and a half interest in the servient estate will not result in unity of title. Once the easement has been extinguished, a subsequent separation ordinarily will not revive the easement except by implication.[366]

F. Termination of Necessity

In the case of easements created by necessity, circumstances or conditions that subsequently arise that remove the necessity will ex-

361. Title 23, § 7105 (West 1992).

362. Smith v. Dickson, 225 A.2d 631, 636 (Me. 1967); Dority v. Dunning, 78 Me. 381, 387, 6 A. 6, 9 (1886) ("That an easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right, is a principle of law too general and elementary to be questioned."); Warren v. Blake, 54 Me. 276, 281 (1866) ("When the possession of two closes is united in one person all subordinate rights and easements are extinguished.") (quoting Whalley v. Thompson, 1 B. & P., 373).

363. Glover v. Graham, 459 A.2d 1080, 1085 (Me. 1983) ("Common ownership of the dominant and servient estates would also have interrupted acquisition of the prescriptive easement.") (citations omitted). Some states would have viewed unity of title as an extinguishment of the prescriptive rights and started the time over at the separation.

364. In Dority v. Dunning, 78 Me. 381, 6 A. 6, the court said:

> In order that unity of title to the two estates should operate to extinguish an existing easement, the ownership of the two estates should be coextensive, equal in validity, quality, and all other circumstances of right. If one is held in severalty and the other only as to a fractional part thereof by the same person, there will be no extinguishment of such easement. Thus it was held . . . in which case one estate was held in fee and the other for a term of five hundred years, that unity of possession did not extinguish the easement, but only suspended it during that unity of possession; and upon parting with the premises to different parties, the right revived.

Id. at 387-88, 6 A. at 9-10 (citations omitted).

365. *See, e.g.*, Bonney v. Greenwood, 96 Me. 335, 52 A. 786 (1902).

366. *Cf.* LeMay v. Anderson, 397 A.2d 984, 988 n.3 (Me. 1979) ("Unity of title to the dominant and servient estate, of course, extinguishes an easement."). *See also* Tripp v. Huff, 606 A.2d 792 (Me. 1992); Fitanides v. Holman, 310 A.2d 65 (Me. 1973).

tinguish the easement.[367] However, since necessity is not a condition for quasi easements, subsequent circumstances removing the necessity do not necessarily extinguish other forms of implied easements, such as quasi easements.[368]

G. Foreclosure

In the event an easement is obtained subsequent to a mortgage but prior to foreclosure, the easement will be extinguished for those taking title under the mortgagee. Maine recently has enacted an exception to the common law rule in regard to utilities and their easements when the utilities were not notified or made a party to the foreclosure proceedings.[369] As a result, the mortgagee now is required to provide notice to the utility company before she can convey the mortgaged property free and clear of easements that the mortgagor may have created subsequent to the mortgage.

H. Destruction

An easement may be extinguished by the frustration of its purpose[370] or the destruction of the servient or dominant tenement.[371] When nothing remains upon which the easement can operate, the easement is extinguished.[372] Note, however, that extinguishment by destruction requires complete destruction and not just a setback or difficulty in using the easement.[373]

I. Death of the Party

In the case of easements in gross, the death of the dominant party ordinarily will extinguish the easement.[374] This common law rule

367. The court in Tibbetts v. Penley, 83 Me. 118, 21 A. 838 (1890), said:

> If the plaintiff's passage-way were one of necessity simply, the location of the street along the western line of the plaintiff's land, would operate a discontinuance of it across the defendant's land, on the well-settled doctrine that the necessity from which the way resulted having ceased, the right of way ceased.

Id. at 123, 21 A. at 840. *See also* LeMay v. Anderson, 397 A.2d 984, 989 (Me. 1979) ("The recognized rule in Maine with respect to ways of necessity is that termination of the necessity extinguishes the easement."); Adams v. Hodgkins, 109 Me. 361, 367, 84 A. 530, 532 (1912) ("It has been held that a way, created by the necessity for its use, cannot be extinguished so long as the necessity exists.").

368. LeMay v. Anderson, 397 A.2d at 984.

369. Title 14, § 6321 (West Supp. 1995-1996).

370. *Cf.* Canadian Nat'l Ry. v. Sprague, 609 A.2d 1175 (Me. 1992).

371. Bonney v. Greenwood, 96 Me. 335, 52 A. 786 (1902).

372. *Id.* at 341, 786 A. at 789.

373. *Id.*

374. O'Neill v. Williams, 527 A.2d 322, 323 (Me. 1987) ("An easement in gross is a purely personal right, is not assignable, and terminates upon the death of the individual for whom it was created."). *See also* Reed v. A.C. McLoon & Co., 311 A.2d 548, 551-52 (Me. 1973); Davis v. Briggs, 117 Me. 536, 540, 105 A. 128, 129-30 (1918).

was modified in the last century in regard to corporations such as utilities and railroads where the corporations had merged, combined, or been acquired by another similarly situated entity.[375]

J. Statutes

Extinguishment by statute mostly applies to public road easements. The common forms are the following:

1. Discontinuance

In Maine, discontinuance refers to extinguishing all or some of the public rights by proclamation and procedure. For discontinuance to be effective the following requirements must be met: (1) the road must be an interest held for highway purposes, a town way, or public easement; (2) notice must be given; and (3) an order of discontinuance must be filed specifying: (a) location; (b) names of abutting property owners; and (c) amount of damages.[376] Consider the following example of an order of discontinuance:

> Pursuant to 23 M.R.S.A. § 3026, having given best practicable notice to all abutting property owners and to the Hampden Planning Office, it is hereby ordered by the Hampden Town Council that the public easement commonly referred to as the Cox Road, as depicted on Exhibit A, be and hereby is discontinued for highway purposes. Meaning and intending to discontinue that public easement, formerly known as a private way, established by the passage of Article 8 at a town meeting held on December 2, 1964. It is further ordered that no damages are to be paid to any abutter. A copy of this Order of Discontinuance shall be filed with and maintained by the Town Clerk. Town of Hampden Minutes (Sept. 8, 1992).

Unless otherwise stated in the order, a public easement will be retained.[377] Therefore, the discontinuance of a town way does not

375. *Cf.* Champaign Nat'l Bank v. Ill. Power Co., 465 N.E.2d 1016 (Ill. App. Ct. 1984); Sandy Island Corp. v. Ragsdale, 143 S.E.2d 803 (S.C. 1965).

376. *See* title 23, § 3026 (West 1964). *See also* City of Rockland v. Johnson, 267 A.2d 382 (Me. 1970). Note also that title 30, § 4801 provides for the discontinuance of easements upon the adoption of urban development plans. For a discussion of this procedure, see Lewiston Urban Renewal Auth. v. City of Lewiston, 349 A.2d 763, 766 (Me. 1976).

377. *See* title 23, § 3026. See also Jordan v. Town of Canton, 265 A.2d 96 (Me. 1970), where the court stated:

> The statute is designed to permit a governmental entity to avoid the expense of maintaining and keeping certain designated roads open for travel and free from dangerous defects. Its responsibility for accident caused by such defects in a road so designated is removed. All this is accomplished without technical discontinuance of the public way and without terminating the public easement therein. No provision is made for compensation to abutting owners for the destruction of property rights.

Id. at 98.

automatically terminate all public rights in the easement or allow the former road bed to be ignored or obstructed. An order of discontinuance might not involve the elimination of the easement, but might involve only the reduction in the service provided by the public. The municipality may opt to remove the public easement, allowing a reversion to the status before the public road easement was imposed.

The presumption of a public easement (formerly called a "private way") remaining in *town* roads arises from amendments taking effect on September 3, 1965. Prior to that time there was no presumption of the existence of an easement, and all public rights were discontinued unless expressly stated otherwise.[378] County roads that were discontinued had no such presumption until after July 29, 1976, when they became town roads and were thereafter discontinued.[379]

The discontinuance of public roads where a public easement was not provided often leaves property landlocked. In such situations the law recognizes the deprivation of the landlocked owner's property rights, thus mandating just compensation.[380] In other cases, when a public easement does remain, the property is not landlocked, however, there may be substantial burdens imposed on the landowner.[381]

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378. Warchalowski v. Brown, 417 A.2d 425 (Me. 1980).

379. Craig v. Davis, 649 A.2d 1096 (Me. 1994); Town of Fayette v. Manter, 528 A.2d 887 (Me. 1987). For a statement of the powers of county commissioners with respect to the discontinuance of county roads prior to July 29, 1976, see title 23, § 2051.

380. In Jordan v. Town of Canton, 265 A.2d 96 (Me. 1970), the court noted:

> The right of access to a public way is a property right in the nature of an easement. . . .
>
> . . . .
>
> "Clearly, an owner of land abutting on a street or highway cannot constitutionally be deprived of all access to his premises without compensation, either by the vacation of the street or highway or its physical obstruction in front of his premises, or its obstruction at another place so that the portion of the street in front of his premises cannot be reached."

Id. at 98 (quoting 26 AM. JUR. 2D *Eminent Domain* § 200).

381. In Jordan v. Town of Canton, 265 A.2d 96, the court said:

> The fact that a "limited-user highway" continues to have a legal status as a "public way" over which there continues to be a public easement of travel is meaningless if there is no longer any public responsibility for maintenance and repair. Without maintenance or repair, it is only a question of time before a public road will become impassable or unsafe for travel. The rigors of Maine weather, the action of frost and the erosion from rain and melting snow will speed the process of disintegration. The ability to use the road for vehicular travel and thus the abutter's easement of access to and over the road to the public road system will inevitably be destroyed.

Id. at 99-100.

2. *Abandonment*

Under the common law, abandonment of public roads occurred (1) with the creation of a new road and nonuse of a former road or (2) after nonuse of the public road for a twenty-year period of time.[382] While statutes have expanded the common law, common law abandonment still remains relevant in certain cases.[383] According to statutory language, for abandonment to be effective the road must be a town or county way not kept passable for the use of motor vehicles at the expense of the municipality or county for a period of thirty years or more.[384]

There are several considerations in applying the statute that relates to abandonment of roads. First, section 3028 refers to prima facie evidence. This reference creates a rebuttable presumption, not a *fait accompli.* Second, the statute raises the possibility that a public easement may remain, since the statute provides that a "way that has been abandoned under this section shall be relegated to the same status as it would have had after a discontinuance pursuant to section 3026."[385] This assumes a public easement for town roads discontinued after September 3, 1965.[386] In determining the effective time of abandonment, the Law Court has held that abandonment takes effect at the end of the thirty-year period and not at the beginning.[387] Third, the statute provides that "at all times [a way's status is] subject to an affirmative vote . . . making that way an easement for recreational use."[388] Fourth, this statute does not appear

382. Martin v. Burnham, 631 A.2d 1239 (Me. 1993). *See also* Lamb v. Town of New Sharon, 606 A.2d 1042, 1046 (Me. 1992) ("A presumption of a public intent to abandon a road may be raised by evidence of nonuse for twenty years or more, intentional and voluntary desertion of a road, or acquiescence, even for a few years, in the discontinuance of an old road combined with use of a new road."); City of Rockland v. Johnson, 267 A.2d 382, 385 (Me. 1970) ("When that part [of the highway] was discontinued as a through highway and was relocated, there resulted an abandonment. 'Establishing an alteration in a highway, is in law a discontinuance of the part altered.' ") (quoting Commonwealth v. Inhabitants of Westborough, 3 Mass. 406 (1807)); Smith v. Dickson, 225 A.2d 631, 636 (Me. 1967) (" 'The desertion of a public road for nearly a century, is strong presumptive evidence that the right of way has been extinguished.' ") (quoting Beardslee v. French, 7 Conn. 125, 127 (1828)).

383. Town of South Berwick v. White, 412 A.2d 1225, 1227 (Me. 1980) ("Furthermore, the existence of section 3028's special presumption of abandonment does not impair the availability of common law abandonment through public nonuser, although the referee found that the requisite showing had not been made in the instant case.").

384. *See* title 23, § 3028 (West 1964).

385. Title 23, § 3028(1) (West 1992 & Supp. 1995-1996).

386. *See supra* note 357 and accompanying text.

387. Town of Cornville v. Gervais, 661 A.2d 1127, 1128 (Me. 1995) ("Because abandonment pursuant to the statute does not occur until the end of the thirty-year period, Gervais' argument that abandonment occurred in 1948 when the Town last maintained the road is wrong.").

388. Title 23, § 3028(1) (West 1992 & Supp. 1995-1996).

to apply to state roads or state aid roads. Nor does the statute raise a presumption that a public easement remains after September 3, 1965, in regard to county roads unless they were abandoned after being recognized as town roads under authority of P.L. 1975, ch. 711.[389]

Subsequent additions to this statute make assertions of municipal officers on the status of a town way or public easement "binding on all persons."[390] These assertions may be subject to reversal by the court.[391]

In both discontinuance and abandonment it is important to emphasize that not all public rights may be extinguished. In some cases, discontinuance or abandonment simply may indicate that the character or intensity of public use has changed without an actual denial of the public use, and the public easement remains. Also, if the public road originally was created on a private easement, such as a road shown on a plan of subdivision, the private easement will remain.

3. Statute of Limitation or Conditional Period

In some cases statutes do not extinguish an easement; rather, the statute extinguishes the right to create or claim an easement. Incipient or inchoate dedication (an offer made but not yet accepted) may be nullified or void if an easement (a paper street) is: (1) laid out on a plan; (2) not accepted in a reasonable manner (in the case of a public road) or not constructed or utilized (in the case of a private road); (3) within twenty years from the date of recording of the plan or *shorter* time set on the face of the plan by the developer, municipal reviewing authority, or person recording the plan.[392] Before enactment of title 23, section 3031(1) of the Maine Revised Statutes (effective September 29, 1987), the time period within which a dedicated road could be accepted was limited to a "reasonable" period of time.[393] In some states, a person does not acquire a private right unless the person acquires title to the lot from the developer prior to the acceptance of the road as a public road. The law as applied in Maine seems to imply that the person acquires a private easement regardless of the status of the road at the time of the original conveyance.

389. Craig v. Davis, 649 A.2d 1096, 1097 (Me. 1994).

390. Title 23, § 3028(2) (West 1992 & Supp. 1995-1996).

391. *Id.*

392. *Id.* § 3031.

393. Baker v. Petrin, 148 Me. 473, 480, 95 A.2d 806, 810 (1953) ("If there was an intention to dedicate it must be accepted in a reasonable time."). *See also* Callahan v. Ganneston Park Development Corp., 245 A.2d 274 (Me. 1968); Harris v. City of South Portland, 118 Me. 356, 359, 108 A. 326, 328 (1919)).

4. Vacation By Petition

Whereas public rights arise by the passage of time in title 23, section 3031(1), section 3027 allows for vacation of paper streets at any time. The street must be an unaccepted town way (in other words, the subject of inchoate or incipient dedication) that is proposed and described in a recorded subdivision plan where lots have been sold with reference to the plan. Under these conditions, the municipal officers or any person claiming a property interest in the proposed way can petition to vacate the paper streets in whole or in part.[394] Section 3027 is unclear whether the purpose of its enactment was to remove both the incipient dedication and the private rights or to remove only the incipient dedication. However, section 3031 would appear to indicate that the intent of the statutes is not to affect private rights, even if a municipality could do so.[395] Furthermore, it appears that the mere declaration of acceptance will suffice only for a period limited to fifteen years unless the road is actually constructed or an extension to the ten-year time period is filed.[396]

5. Vacation Upon Condition

The vacation of paper streets may be implied where a proposed, unaccepted way or portion of a proposed, unaccepted way lies in a subdivision recorded prior to the effective date of title 23, section 3032 of the Maine Revised Statutes without having been used or constructed as a highway and without having been accepted either within ten years after the effective date of section 3032 or fifteen years from recording.[397] It does not appear that this statute applies to any roads in subdivisions laid out subsequent to the effective date of section 3032. These roads would fall under sections 3027 and 3027-A. Furthermore, by the wording of this statute, it does not seem to apply to unrecorded plans.

6. Revocation of Dedication

In the case of incipient or inchoate dedication, the offer of dedication can be withdrawn under certain conditions. A dedication of property or interest offered to the municipality may be revoked if: (1) the dedication arises by a recorded subdivision plot plan; (2) no lot has been sold with reference to the plan; and (3) an amended subdivision plan has been approved by the municipal subdivision review authority and recorded in the appropriate registry of deeds.[398]

394. *See* City of Rockland v. Johnson, 267 A.2d 382 (Me. 1970).

395. If title 23, § 3031 does apply to private rights, it is unclear what effect, if any, the statute has on persons purchasing the lot from the developer after vacation has occurred.

396. Title 23, § 3032 (West 1992).

397. *Id.*

398. *Id.* § 3027(2).

7. *Adverse Use*

Title to public roads may be obtained by private individuals against the government by adverse use—in effect, extinguishing the public rights for the portion adversely held.[399] Private improvements within a public easement (or any public area) may be maintained despite the public easement as long as the improvements have existed for more than forty years and the public right or public title has existed for more than forty years.[400] If improvements were located continuously within a proposed, unaccepted way laid out on a subdivision plan recorded in the registry of deeds, where lots have been sold according to the plan, then only twenty years is required.[401] Under the common law, once all the elements of adverse possession have been met the inception of title relates back to the date of first entry, suggesting that the date of entry, not the date when the claim was perfected, establishes the relevant date.

K. Rights and Title Upon Conveyancing or Termination

The rights and title upon a conveyance are always determined in the first instance by referring to the operative document.[402] A conveyance of land abutting a public road is assumed to convey all of the grantor's interest in the portion of the public road which abuts the land.[403] Furthermore, all rights, easements, privileges, and ap-

399. The question arises whether the abutting landowner actually acquires title in fee simple or only the right to continue the use of the land where the fence or building sits. The question is almost always irrelevant since the abutter ordinarily owns the fee simple title in the road, or the practical aspects of the difference are nil.

400. Title 23, § 2952 (West 1992 & Supp. 1995-1996). However, only 20 years of adverse possession is required if the possession occurred prior to 1885 but after 1841. *See* Phinney v. Gardner, 121 Me. 44, 115 A. 523 (1921).

401. Title 23, § 3034(1) (West 1992).

402. In limiting a grant, the court in Bradford v. Cressey, 45 Me. 9 (1858) said:

> It is, however, competent for the grantor to limit his grant as he may choose. He may exclude or include the entire monument, and run his line on either side, or to the centre thereof, at his pleasure, by the use of apt words to indicate his intention so to do. The intention of the party is always to be sought in the interpretation of deeds, as in other written instruments. If the language leaves that intention at all doubtful, the instrument should be examined and construed, when practicable, by the light of the circumstances which surrounded and were connected with the execution of the instrument.

Id. at 13.

403. Title 33, §§ 460, 461, & 469-A(1) (West 1988 & Supp. 1995-1996); Lamb v. Euclid Ambler Assocs., 563 A.2d 365, 367-68 (Me. 1989). *See also* title 33, § 465 (West 1988 & Supp. 1995-1996); Franklin Property Trust v. Foresite, Inc., 438 A.2d 218, 223-24 (Me. 1981); Brooks v. Morrill, 92 Me. 172, 174, 42 A. 357 (1898) (if the land described in a deed is bounded on a highway, or its boundary line runs to a highway, and thence by the highway, the grantee is presumed to take a fee to the center of the highway subject to the public easement, if the grantor owns to the center).

purtenances belonging to the dominant estate shall be included unless the document states otherwise.[404] Prior to 1975 an instrument may have been prepared reserving title and rights in the grantor. The instrument must: (1) include an accurate description of the road or way; (2) include the names of persons claiming title; (3) show a reference to the operative conveyance that a claim is made; and (4) be filed in the county registry where the road is located.[405]

VI. Locating Easements

In many cases easements must be identified at the site and located.[406] In locating real property burdened by easements, a practitioner must perform four major tasks. The practitioner must gather information on the easement, determine the location of the easement, determine the boundaries of the easement, and determine the fee simple title boundaries (if any) along or within the easement. Each of these tasks can present formidable and often seemingly insurmountable obstacles.

A. Easement Information

The first task and often the most difficult task is to gather information from appropriate records.[407] Gathering information is necessary to determine: (1) the quality of title (for example, fee simple, easement, license); (2) the category of the easement (public or private, appurtenant or in-gross); (3) how the easement was created (grant, eminent domain, dedication); 4) the current status of the easement (for example, discontinued, private way); (5) the former,

404. Title 33, § 773 (West 1988). *See also* LeMay v. Anderson, 397 A.2d 984, 989 (Me. 1979); Dority v. Dunning, 78 Me. 381, 386, 6 A. 6, 9 (1886).

405. Title 33, § 463 (West 1988). In Lamb v. Euclid Ambler Assocs., 563 A.2d 365, 367 (Me. 1989) the court stated that title 33, §§ 462-469-A are merely codifications of the common law.

406. Rules of Board of Licensure for Professional Land Surveyors, ch. 6, § 10.A.1 states:

> A Standard Boundary Survey is defined as a sufficient investigation, study, and evaluation of all factors affecting and influencing the location of the boundaries, and including rights of way and easements of record within or immediately surrounding a certain lot, parcel or quantity of real estate. Such study and evaluation will culminate in the location or relocation on the ground of the boundaries and the determination of areas of the certain lot, parcel or quantity of real estate.

Id.

407. *See id.* § 2 ("The Surveyor shall conduct a reasonable search to acquire data, including but not limited to deeds, maps, certificates of title, abstracts of title, and other boundary line information in the vicinity."); Avaunt v. Town of Gray, 634 A.2d 1258, 1260 (Me. 1993) ("The question of whether a town has accepted a road is a matter of law that must be determined from the records of the laying out of the road."). *See also* Chasse v. Town of Lyman, 580 A.2d 1043 (Me. 1990).

present, and proper location for the easement;[408] (6) width of the easement; and (7) the proper use for the easement.

The practitioner should find and use the original record whenever possible. The language used in the deed and description for the first conveyances out of the grantor is critical to fix accurately the necessary information.[409] Later conveyances often alter the language that was first used in the original description of the conveyance. For example, words such as "by," "along," or "with" often are used in the present deed descriptions to describe the parcel boundary along a public road easement.[410] However, the language in many of the original conveyances used words such as along the "easterly limit," "southerly side," or "edge."[411] Later alterations in the description may reduce the limits of the title but cannot ordinarily enlarge the title in contradiction to the intent of the original language.[412] The subsequent owner can convey no better title than he obtained from his grantor. Hence, the language used in the present deeds may be misleading.

Gathering information on easements is often a tedious and time consuming task. The difficulty involved with gathering information often lies in locating the records themselves and the easement information from within the records. The difficulties and ambiguities often arise because many easements, such as public road easements, were created long ago. The operative records are found only in the earliest documents and in places not ordinarily examined by researchers. For example, the existing town roads may predate the existing town, requiring the practitioner to travel to a neighboring town office which was the historical predecessor of the current town. The researcher often arrives at the town office to discover the clerk has no idea where road records are kept or where the ancient town records are located. In many towns, unfortunately, the records, considered old and useless, were thrown away. Where the appropriate records are found, the records often have fallen into disuse and disarray: pages are missing, ink smudged or faded, indices sparse or non-existent, pages brittle to the touch, and maps referred to "for more complete descriptions" lost or misplaced. Should the appro-

408. *See supra* note 386.

409. Northern Utilities, Inc. v. City of South Portland, 536 A.2d 1116, 1117 (Me. 1988) ("The intention of the parties, as expressed in the instrument, governs the interpretation of a deed.").

410. Franklin Property Trust v. Foresite, Inc., 438 A.2d 218, 223 (Me. 1981); City of Rockland v. Johnson, 267 A.2d 382 (Me. 1970).

411. Brooks v. Morrill, 92 Me. 172, 174, 42 A. 357, 357 (1898) ("And ordinarily if a boundary runs to or by the *line* of an object, the exterior limit of the object is intended. 'So in common language, if one speaks of the line or lines of a street, the exterior limits would be understood and intended.' " (quoting Hamlin v. Pairpoint Mfg. Co., 141 Mass. 51 (1886); South v. Slocumb, 9 Gray 36 (1857))).

412. This result reinforces the requirement that the research go back to the original conveyance.

priate records be located, the easement more often than not is difficult to identify. Often the only identification for an easement is something as brief as "a road leading from the bay pike at Brown's Farm to Jorden's Mill." A trip to the courthouse to find county road records can be just as frustrating.

Private easement records, while concentrated in the registry of deeds, are not without difficulties. Often the deeds or plats evidencing their creation were recorded long ago. Their recording entry is often beyond the period encompassed within a title search or search for boundary information. Even though the discovery of the easement is unlikely without in-depth research, the easement's existence and those rights exercised by others remain intact. Conceivably, the necessary research may involve a search through the chain of title from the present time to the time the original proprietors obtained title from the sovereign.[413]

The problem often is compounded by the failure of prior researchers to search titles forward and inadequate citation of the specific easement in later deeds, thereby not providing reasonable notice in the records. Consequently, the specific easement information is not always carried forward and evidenced in the present deeds; rather, parties sometimes must rely only on general notice clauses. An example of the typical language used in a deed to apprise the buyer of the possible existence of easements is: *"together with all right, title, and appurtenances pertaining thereto."*

Despite the apparent lack of notice in the present deeds, appurtenant easements, once created, ordinarily pass with the appurtenant property without mention in the present deeds or the requisite of necessity.[414]

413. State v. Beck, 389 A.2d 844, 847 (Me. 1978) ("If the street has been officially laid out and accepted according to the statutory provision, this could have been established from the official records of the Town.").

414. O'Neill v. Williams, 527 A.2d 322, 324 (Me. 1987) (use of the "technical word 'heirs' " not necessary "to preserve an interest of perpetual duration"); LeMay v. Anderson, 397 A.2d 984, 989 (Me. 1979) ("The right and burden relative to an appurtenant easement respectively pass to grantees of the dominant and servient estates, assuming the grantees of the servient portion have actual, constructive, or implied notice of the servitude."). See also Dority v. Dunning, 78 Me. 381, 6 A. 6 (1886), where the court said:

> But when an easement, although not originally belonging to an estate, has become appurtenant to it, either by express or implied grant, or by prescription which presupposes a grant, a conveyance of that estate will carry with it such easement whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee.

Id. at 384, 6 A. at 7. Also consider title 33, § 773 (West 1988), which states: "In a conveyance of real estate all rights, easements, privileges and appurtenances belonging to the granted estate shall be included in the conveyance, unless the contrary shall be stated in the deed."

In addition to the record information, the practitioner should gather information at the records site to: (1) determine if easements could exist that are not evident from the available records (prescriptive and implied easements); (2) indicate whether the use may have moved outside the easement or unreasonably increased over the years; (3) determine the original location and use; and (4) determine the existing location and use.

The possible existence of an implied easement presents special research needs. To discover an implied easement a researcher must examine the conditions at the site, determine the historical sequence of conveyancing, and analyze the wording in the operative records. To determine if an implied easement does or does not burden the property, a researcher must research the title to the adjoining property. Because of the burdens of time and cost, researchers rarely investigate the adjoining title in a title search. Because all implied easements arise at the time of subdivision, it is important for the researcher to pay particular attention to the conditions at the time of the original subdivision and the deeds and other documents coming from a common grantor.[415] The practitioner should scrutinize both the site conditions and the operative documents.

Researchers often will discover many problems after an analysis of the information. In some cases the practitioner will be unable to solve the problem for lack of reliable information. In other cases the problem falls outside the scope of reasonable practice or agreed services. In still other cases the client is unwilling or unable to provide the time, effort, or funds to solve the problem. Nevertheless the practitioner must provide the client with an accurate appraisal of the situation[416] or warning of potential problems.[417]

B. Easement Position

In a surveyor's attempt to locate easements, the actual position of the easement upon a parcel can be a major problem. Nevertheless, the general position of the easement often is easier to determine

415. O'Connell v. Larkin, 532 A.2d 1039, 1042 (Me. 1987) ("In order for such an implied easement to be created there must be severance of unity of title between the dominant estate (the property benefited by the easement) and the servient estate (the property subject to the easement).").

416. RULES OF BOARD OF LICENSURE FOR PROFESSIONAL LAND SURVEYORS ch. 6, § 10.A.9.l, states: "When applicable, properties, water courses, rights-of-way and easements surrounding, adjoining, penetrating or severing the surveyed site shall be identified and labeled with the name of the owner and record reference." *See also id.* at § 10.A.9.m ("If appropriate, original subdivision, survey or land grant lines should be shown in proper location.").

417. The fact that other practitioners may have failed to report the problem or reported it incorrectly will not relieve the practitioner of liability. *Cf.*, Ivalis v. Curtis, 496 N.W.2d 690 (Wis. 1993) (upholding award of attorney's fees below for negligence on part of attorney in accepting another surveyor's erroneous quarter line location).

than the boundaries of the easement, because in many instances boundaries are dependent on the precise location of the easement's center.

1. Monuments

Generally, one or both parties fix the easement's location at the time of purchase, dedication, or reservation. In these cases the remains of all or part of the valid monument, or evidence of its former position, is the best evidence of the location of the easement.[418] Therefore, in many situations the location of an easement can be shown by the position of monuments cited in the deeds and plans or by a determination of the original position of the monuments.

2. Directions and Distances

In the case where monuments were not used or have been displaced, application of the directions and distances found in the original conveyance document is usually the next best alternative to locate the easement's position.[419]

In some cases a long, continuous use may legally fix the location of the easement in a position different from the plan or descriptive location.[420] This is especially true for road easements, particularly

418. In speaking about the effectiveness of monuments in determining lines the court in Wentworth v. LaPorte, 156 Me. 392, 165 A.2d 55 (1960), provided the following quotations from earlier Maine cases:

> "If the locations of these monuments could be established and they indicated a line varying from the one described by course, the monuments would control, the course must yield." (quoting Whitcomb v. Dutton, 89 Me. 212, 218, 36 A. 67, 69 (1896)).
>
> . . . .
>
> "And from their well known experience and legal knowledge we presume that to the facts as they found them evidenced by ancient marks upon the face of the earth, they applied the well settled principle of law, that where the line described in a deed or charter, and that indicated by monuments established in the original survey and location of the tract or township, do not correspond, the latter, being the best evidence of the true line, must govern, however they may differ." (quoting Inhabitants of Bethel v. Inhabitants of Albany, 65 Me. 200, 202 (1876)).
>
> . . . .
>
> "In construing a deed, the first inquiry is, what was the intention of the parties? This is to be ascertained primarily from the language of the deed. If this description is so clear, unambiguous, and certain, that it may be readily traced upon the face of the earth from the monuments mentioned, it must govern." (quoting Knowles v. Toothaker, 58 Me. 172, 175 (1870)).

Id. at 400-01, 165 A.2d at 59-60.

419. Mayer v. Fuller, 248 A.2d 140, 141 (Me. 1968) ("Boundaries are established in descending order of control by monuments, courses, distances and quantity.").

420. Compare Wentworth v. LaPorte, 156 Me. 392, 165 A.2d 55 (1960), where the court noted:

> [W]hen, from the courses, distances, or quantity of land given in a deed, it is uncertain precisely where a particular line is located upon the face of the

public road easements. Many times roads were not located as decided on paper. There were many reasons for this situation, not the least of which were builders who lacked training. Often the builders were landowners building the road in lieu of paying taxes or to aid their own access. Difficulties with construction before motorized mechanical equipment and high speed travel often were alleviated somewhat by building the road around swamps, boulders, trees, and other obstacles rather than following the surveyor's stakes. In other cases roads were brought closer or moved away from houses and fields for the convenience or privacy of residents. As a result, the roads constructed seldom are recognizable as the roads shown on the paper plan.[421]

In one Maine case, the Law Court deferred to the traveled way over the plan measurements.[422] A court's deference to the traveled way over the plan measurements is known as the "beaten path" rule. The rule prescribes that where the traveled surface, as originally constructed and used for twenty years, is not wholly within the monumented right-of-way, the road's traveled way becomes the monument to its location rather than the measurements stated in the records.[423]

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earth, the contemporaneous acts of the parties in anticipation of a deed to be made in conformity therewith, or in delineating and establishing a line given in a deed, are admissible to show what land was intended to be embraced in the deed. It is the tendency of recent decisions to give increased weight to such acts, both on the ground that they are the direct index of the intention of the parties in such cases, and, on the score of public policy, to quiet titles.

Id. at 399-401, 165 A.2d at 60 (quoting Knowles v. Toothaker, 58 Me. at 175).

421. In Brooks v. Morrill, 92 Me. 172, 42 A. 357 (1898), the court stated:

[I]t appeared that for a distance of seventy-five or eighty rods . . . this road had been built outside of and nearly four rods west of the original location recorded in the town records in 1842 . . . . It appears from the evidence that nearly one-half of the width of this location, within the limits of the eighty rods mentioned, is at one point under a meeting-house, and at another point under a dwelling-house; and that no attempt has ever been made to build the road as located, and that it has never been opened or used for public travel.

Id. at 175, 42 A. at 358.

422. *Id.* at 176, 42 A. at 358.

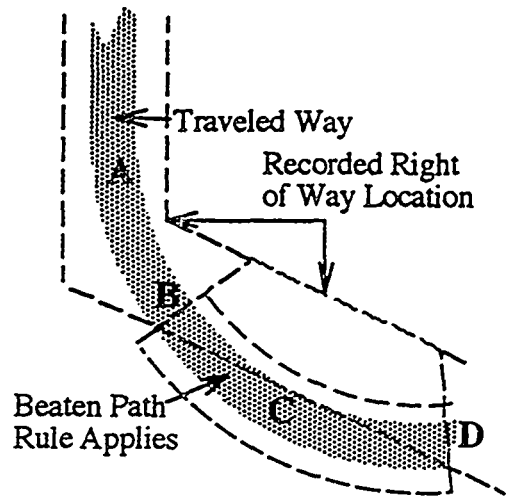
423. In Smith v. Dickson, 225 A.2d 631 (Me. 1967), the court, in considering whether the road was established by use, stated:

"It is the location *de facto* that by the lapse of time ripens into a location *de jure*. To rest such a result on the presumption of regularity is to rest it on a fiction; and to rest it on the presumption of a dedication would be equally so. We think it would be better to avoid these unnecessary fictions, and let the result rest on a positive rule of law, which, like all limitation laws, has the public good and the public convenience for a foundation. The rule of law is this: that after the lapse of 20 years, accompanied by an adverse use, a location *de facto* becomes a location *de jure*. . . . The location *de facto*, if not in all particulars regular, had become by lapse of time and use, and the acquiescence of all parties adversely interested, a location *de jure*."

The "beaten path" rule is sometimes applied to roads in existence for less than twenty years for which there are no valid monuments (either presently existing or displaced) by which to fix the legal position of the right-of-way (public or private). In such situations the physical location of the road is the best evidence of its legal position.

To summarize the beaten path rule, where the beaten path of a public road originally was constructed partially or wholly outside the boundaries established by the municipality and use of the road therefore would constitute a trespass, the location of the beaten path will determine the legal location of the road after twenty years. The beaten path rule implies that the center of the traveled way is the center of the right-of-way. The legal assumption fixes the beaten path as a physical monument whose center is the center of the easement.

FIGURE 12



The figure shows the displacement of the easement boundary caused by the construction of the traveled way outside of the legal easement boundaries coupled with long use.

Many surveyors, whether due to neglect, laziness, or concerns with cost, immediately adopt the beaten path rule to locate the center of an easement. The beaten path rule should be used only when other, better evidence cannot be found or when a field and record search determines that a public road in existence more than twenty years was originally laid outside the record boundaries. The rule does not apply when the beaten path resides within the easement boundaries but does not coincide with the center of the easement.

Id. at 634 (quoting Pillsbury v. Brown, 82 Me. 450, 454, 19 A. 858, 859 (1890)).

3. Use and Occupancy

When an easement exists by virtue of prescription or a vague grant, it may have been created without fixing the location in the field. Consequently, there are neither monuments nor measurements recited in the documents. In these cases, the improvements made on, over, or under the surface will fix the easement's legal location. In particular, the objects will fix the center of the easement. For example, the physical location of a sewer conduit, drainage ditch, utility pole or similar object fixes the center of the easement. Furthermore, it is appropriate to use an object to fix the center of an easement when the directions and distances contained in the grant are so vague, incorrect, or imprecise that the location of the objects necessarily becomes the best evidence of the original intentions of the parties.

When use becomes the means of fixing the easement's location, the use at the time of the original grant or conveyance will control whether or not the present use is in the location of the original use.[424] Furthermore, where the easement boundaries are known, improvements may occur anywhere within the easement's legal limits and do not have to fall within the center of the easement. The improvements do not always reside in or fix the center of the easement. Consequently, the following rules of construction generally apply regarding improvements within an easement: (1) The improvement may occur anywhere within the legal limits of the easement; (2) when the improvement extends beyond the legal limits there may be an encroachment or trespass;[425] (3) when the limits of the easement are not defined or certain (or in the case of the beaten

424. In Tebbetts v. Estes, 52 Me. 566 (1864), the court noted:

> [T]he land is described as bounded at one point "on the road leading to Little River."
>
> It seems that several years before that time the road at this place had been changed, and was not on the line of its location. And it is claimed that the words in the conveyances are to be applied to the road *as located*, and not to the road *as existing*. But there is no such rule of law. The question is one of *intention*. And it is far more reasonable to suppose that the appraisers, in viewing the premises upon which the execution was to be extended, intended the road as they saw it, then existing, rather than any other road, of which it does not appear that they had any knowledge.

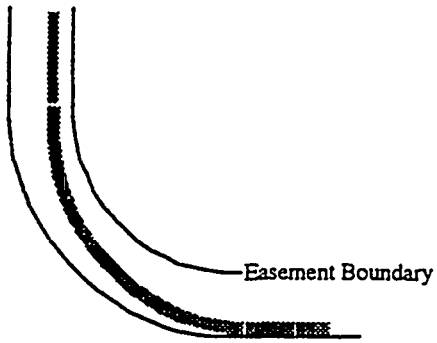
Id. at 568-69.

425. In Benton v. Maine State Highway Comm'n, 161 Me. 541, 215 A.2d 83 (1965), the court stated:

> [I]t must be concluded that owners of property adjacent to that highway must have been aware of the entry upon, use, widening, if any, improvement, if any, relocation, if any, over the years, and even though such entry and use were not brought about by statutory condemnation, such entry and occupation for public use constitutes a taking in a constitutional sense. Seasonable action by the land owner would afford him a remedy in equity by injunction, and in law by a real action to try title, or complaint in trespass to his possession . . . .

path rule, when they have been ignored), the location of the original improvement fixes the center of the easement; (4) although the improvement may shift from time to time, the legal center of the easement nevertheless remains fixed at the location where the improvement was first placed; (5) without credible evidence to the contrary, the presumption is that the improvement's position has not changed over time; and (6) in cases where it is apparent that the improvement has shifted from its original position and strayed outside the legal limits of the easement, the improvement should be noted as a possible encroachment on the adjoining property.

FIGURE 13



The traveled way should not be assumed to be in the center of the easement since the traveled way may be located anywhere within the confines of the easement boundary witout trespass.

4. Servient Estate—First Choice

In the event that neither documented nor physical evidence exists to locate the position of the easement, the courts prefer that the parties arrive at a mutual agreement. Barring a favorable "meeting of the minds," the grantee has the first option to pick a "reasonable" location for the easement.[426]

C. Boundaries of the Easement

The easement boundary sometimes is described and defined by monuments along the boundary. In such cases, the general rule is that monuments control. However, another common way to designate easement limits is to recite dimensions relative to one side of the easement or the center of the easement. In this situation, the

Id. at 545, 215 A.2d at 85 (quoting Benton v. Maine State Highway Comm'n (Me. Super. Ct., Yor. Cty., 1965)) (citations omitted).

426. Brewster v. Churchill, 148 Me. 8, 14, 88 A.2d 585, 588 (1952) ("The principle is undoubted that instruments of conveyance should be construed most strongly against grantors and in favor of grantees.").

width of the easement, coupled with the location of one side or the centerline, is used to determine the boundary. In particular, the boundaries may be found by application of the dimensions given for the width, placing one-half of the width on each side of the easement's center or extending the width dimension laterally on the appropriate side of the easement boundary. All measurements are applied in a radial or perpendicular direction to the centerline or sidelines, as the case may be. Fixing the width of the easement is often the biggest obstacle to determining its boundaries.

1. Grant or Intent

The preferred method of fixing the easement's width is to use the operative records, such as subdivision plans, highway plans, road dockets, and deeds. Using these records, practitioners should examine those documents that depict the width at the time of taking, dedication, purchase, or conveyance to determine the easement's width. In some cases, practitioners must resort to ancient documents, including early town lotting plans, survey records, fence line records, and historical descriptions.

Although the width stated in the records often exceeds the width taken by improvements, the width stated in the records nevertheless controls (see Figure 14).[427] This is true even where the recorded width exceeds a reasonable width.[428] The dominant estate may use part of the width or all of the width for the purposes stated in the easement grant.[429]

427. In Rotch v. Livingston, 91 Me. 461, 40 A.2d 426 (1898), the court held:

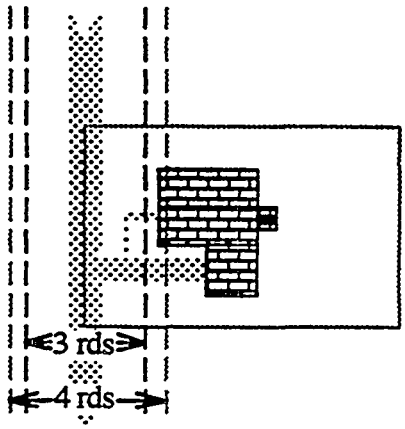
> When a public road or way has been "laid out" of a specified width by the proper authority, the public has the right to use the entire width of the whole location to its outermost limits, though the town or other public agency charged with the duty of making a road within the location need not make a wider road than is safe and convenient for travelers.

Id. at 471, 40 A.2d at 431.

428. *Id.* at 472-73, 40 A.2d at 431.

429. *Id.*

FIGURE 14



In the diagram the easement was assumed to be three rods when it was actually four rods. The failure to identify the correct width of the easement results in the encroachment of improvements within the easement or mandatory building set back line.

Perhaps more troublesome is the common practice of using the statutory width of three rods for public road easements in all circumstances without consultation of the operative records. It is no surprise to practitioners who make a habit of examining the records that many, if not most, public road easements are not three rods. Four rods is a more common width—although two or two and a half rod widths are not uncommon. Consequently many property owners in Maine undoubtedly have constructed improvements within the easement area or zoning set back area (see Figure 14). In other cases, gaps exist between the owner's property and the limit of the public road easement. In these cases there may not be legal access from the land to the public road easement without trespass.

2. *Occupation and Possession Barriers*

Easement records often do not exist, are missing, or do not state with certainty the boundaries or width. If no valid monuments or documented dimensions exist to fix the width or boundary of the easement, the boundary should be determined from long-standing occupation and barriers that clearly indicate the permissible (acquiesced) width.[430] This rule follows the rules of construction applied

430. *See* Benton v. Maine State Highway Comm'n, 161 Me. 541, 548, 215 A.2d 83, 86 (1965) ("It follows that it still remains to be determined where the easterly boundary of the highway as it existed prior to 1958 had been established either by lawful location or user."); Cleaves v. Braman, 103 Me. 154, 68 A. 857 (1907). In Drummond v. Foster, 107 Me. 401, 78 A. 470 (1910), the court noted:

> The deed does not fix or define the width of the way granted. But if the grantee, at the time of the grant, practically located the way of a width of

to contracts, namely that a party's intentions may be evidenced by its prior, contemporaneous, or subsequent actions.[431]

Barriers may include such fixtures as fences, walls, tree rows, and other linear, possessory objects, provided that such objects allow a reasonable use within the intent of the original grant. The rule that barriers may determine easement width is founded on acquiescence or estoppel. For public roads, the rule is codified by statute:

> When buildings or fences have existed more than twenty years fronting upon any way, street, lane or land appropriated to public use, the bounds of which cannot be made certain by records or monuments, such buildings or fences shall be deemed the true bounds thereof. When the bounds can be so made certain, no time less than forty years will justify their continuance thereon, and on indictment and conviction they may be removed.[432]

3. *Adequate and Reasonable Width*

If the grant or record does not recite information on the width and no physical evidence can be found, the width normally will be fixed according to the easement's intended use--a width adequate and reasonable for the intended purpose of the easement. The law will impose a width sufficient to carry out the intentions of the grantor and the intended use of the easement by the dominant tenement

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> eighteen feet, and the grantors then and for a long time subsequent acquiesced in this location, the parties intending to fix the width, this would operate as an assignment of the way, would show what the parties intended by the deed, and would have the same legal effect as if this width had been fixed by the deed.

Id. at 405-06, 78 A. at 474 (quoting George v. Cox, 114 Mass. 382 (1874)).

431. *See* Englishmans Bay Co. v. Jackson, 340 A.2d 198, 200 (Me. 1975) ("[H]e was to ascertain the objectively manifested intention of the parties in light of circumstances in existence recently prior to the execution of the conveyance."); Northern Utilities, Inc. v. South Portland, 536 A.2d 1116, 1117 (Me. 1988) ("We find the easement deed to be ambiguous; in order to ascertain the intent of the parties, we interpret the deed's language in the context of the circumstances under which it was drafted. In so doing, we draw reasonable inferences from the language employed."). See also Saltonstall v. Cumming, 538 A.2d 289 (Me. 1988), where the court stated:

> Our prior cases have established that when, as here, the purposes of an express easement are not specifically provided, they are to be determined by the presumed intent of the parties at the time the grant is made. The parties' presumed intent must be determined "in light of the circumstances surrounding and leading to the execution of the deed."

Id. at 290 (quoting Ware v. Public Serv. Co., 412 A.2d 84 (Me. 1980). See also Loose-Wiles Biscuit Co. v. Deering Village Corp., 142 Me. 121, 48 A.2d 715 (1946), where the court noted, "To give the word . . . the meaning which reflects the intention of the parties to the contract we must go back to the day of its execution and consider the position of those parties with reference to the properties involved. It is in that manner that contracts should be construed." *Id.* at 131, 48 A.2d at 720.

432. Title 23, § 2952 (West 1992).

as stated at the time of conveyance.[433] This principle was well stated in *Drummond v. Foster*[434]:

> It is well settled that when the grant of a right of way is silent as to its width, it will be held to be of a width suitable and convenient for the ordinary uses of free passage to and from the grantee's land. And if the particular object of the grant is stated, the width must be suitable and convenient, with reference to that object. And this is merely construing the grant in accordance with the presumed intentions of the parties.[435]

In certain cases, a reasonable width is defined by statute. For public roads, the legislature has determined that three rods is a reasonable width.[436] The same statute, however, continues to require payment to abutting landowners for damages that occur outside the existing improved portion of the public road but within the three-rod width.[437]

In other cases, statutes or charters may have set a reasonable width by fixing a minimum width, maximum width, or both when land is taken. Early turnpike statutes, for example, sometimes stated a minimum or maximum width that could be taken by condemnation. Similar statutes limit the maximum width for railroads based upon conditions along the route.[438]

Consequently, in the absence of records or reasonable occupation lines to the contrary, railroads are presumed to have taken the maximum easement width allowed. The location of the railroad bounda-

433. *See* Cleaves v. Braman, 103 Me. 154, 160-61, 68 A. 857, 859 (1907) ("If the width of the way is not fixed by the deed nor determined by the parties, it will be held to be a way of convenient width for all the ordinary uses of free passage.").

434. 107 Me. 401, 78 A. 470 (1910).

435. *Id.* at 404, 78 A. at 471 (citations omitted). An example of the principle of adequate and reasonable width is that most ingress and egress easements will be held to be of sufficient width to allow vehicles to enter and exit.

436. Title 23, § 2103 (West 1992). The statute states:

> When a highway survey has not been properly recorded, preserved or the termination and boundaries cannot be ascertained, the board of selectmen or municipal officers of any municipality may use and control for highway purposes 1 1/2 rods on each side of the center of the traveled portion of such way.

Id.

437. *Id.* The statute further states:

> When any real estate is damaged by the use and control for highway purposes of such land outside the existing improved portion and within the limits of 1 1/2 rods on each side of the center of the traveled portion, they shall award damages to the owner as provided in section 3005.

Id.

438. *Id.* § 6001 ("Through woodland and forest the land so taken shall not exceed 6 rods in width unless necessary for excavation, embankment or materials and through all land other than woodland and forest, the land so taken shall not exceed 4 rods in width unless necessary for excavation, embankment or materials.").

ries is accomplished by first determining whether tree growth was present at the time the railroad was constructed. Later wood growth or clearing of woodland around the tracks does not increase or decrease the width first obtained. According to the statute, in areas of woodland the easement width is six rods, except when the outer limits of excavation or embankment exceed this width (in which case the outer edge of excavation or embankment control). In areas that were not woodland, the width is four rods, except when the outer limits of excavation or embankment exceed this width (in which case the outer edge of excavation or embankment control). This statute does not apply necessarily to railroad locations established prior to its effective date.

4. Prescriptive Easements Width

Easements established by prescription are construed strictly. The holder of the easement acquires rights only to the width actually used during the statutory period of adverse use.[439]

5. Official Action

The boundaries of highways and town easements that are not reasonably defined may be defined later by official procedures.[440] In the case of public roads, municipal officers may petition the county commissioners to mark the bounds of roads whose boundaries are doubtful, uncertain, or lost. In response, the county commissioners must: (1) provide notice as though a new way were being laid; (2) hear the parties involved; (3) examine the road; (4) survey and mark the road; and (5) make a return of their doings accompanied by an

439. *See* D. L. & L. Corp. v. Leonard, 435 A.2d 743, 745 (Me. 1981). For an interesting elaboration of the definition of "use" of the width of an easement during the prescriptive period, see Cunningham v. Otero County Electric Coop., Inc., 845 P.2d 833, 836-37 (N.M. 1992). In that case, the New Mexico Court held that electric utility poles located on one property provided adequate notice and allowed the width of a prescriptive easement to extend onto an adjoining property even without an actual physical invasion of the latter.

440. Title 23, § 2101 (West 1992).

accurate plan of the way.[441] Failure to make a proper petition could be fatal to the resulting proceedings.[442]

VII. Parcel Boundaries In or Along Roads

The fee simple title boundaries for parcels often are found in or along easements, especially road easements. In determining the location of property boundaries along easements there are two situations in which a road easement may serve as a boundary. First, the property boundary may have existed before the road easement. In this situation, a property owner should recognize that the fee simple title or any associated property boundary does not change simply by conveying or creating an easement. An alteration in the fee simple title or in any associated property boundary would require the grantor to expressly change the boundary location. As the accompanying figures show, the condemnation or conveyance to the municipality of a four-rod-wide road easement along the side of one parcel prior to 1977 would not alter the original property boundaries.[443] The imposition of an easement on the property serves only to restrict the landowner's enjoyment of her property within the four-rod-wide area encompassing the easement. In the example, one easement boundary coincides with the property boundary while the other side of the easement is a separate easement boundary that should not be confused with or thought of as a new property boundary.

441. Elaborating on the need for municipal officers to comply with the requirements set forth in title 23, section 2101, the court in Benton v. Maine State Highway Comm'n, 161 Me. 541, 215 A.2d 83 (1965), said:

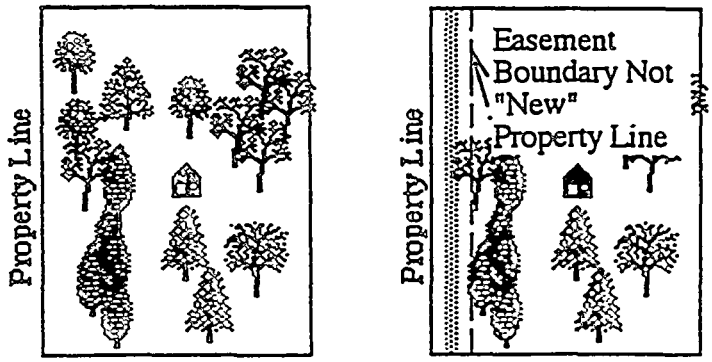
> The municipal officers of the City of Saco were the mayor and aldermen. . . . No authority is suggested permitting a petition in their behalf to be signed by the city clerk, or any persons other than themselves, or a majority of their number . . . .
>
> . . . There is no statement either that the "location" of the boundaries is "lost" or that the true boundaries "can only be established by user, are doubtful, uncertain, or lost." No statutory reason is given to "locate, and define its limits and boundaries."
>
> Jurisdiction must appear in the petition . . . .

Id. at 545, 215 A.2d at 85 (citations omitted).

442. *See, e.g.*, Benton v. Maine State Highway Comm'n, 161 Me. 541, 215 A.2d 83 (1965) (relocation of highway held to be void in subsequent land damage case for failure to state essential jurisdictional facts in petition).

443. A pre-1977 conveyance could have expressly given fee simple title but this would have been a rare event. After this date, the municipality would have acquired fee simple title by condemnation barring words to the contrary. *See* title 23, § 3023 (West 1992).

FIGURES 15 AND 16



The left-side figure shows a parcel and its boundaries prior to the citation of an easement. The right-side figure demonstrates how the placement of the road easement does not affect the parcel boundary.

The second situation in which a road easement may serve as a boundary occurs when an easement is created simultaneously with or prior to the respective property boundaries. A subdivision is a common example of the simultaneous creation of easements and property boundaries. Where a large parcel is astride the road and a section of the parcel on one side is sold off an easement existed prior to the respective property boundary. An example of this situation exists in the following testament: "I give, devise, and bequeath my lands south of the Thomaston Road to my son, Joshua. The rest, residue, and remainder of my real property, to include the homestead house, I give a life estate to my wife, Catherine, the remainder to my daughter, Violet."

When an easement is created simultaneously with or prior to the respective property boundaries, a property owner faces further complication if the actual "beaten path" is not in the center of the easement or does not fall within the easement (see accompanying figure). Where would the property boundary be located if the deed description calls for the "center of the road"? Logically, if the title was created when the road was a paper street and unopened, the title would go to the center of the easement—there could be no other definition of the "road" at the time of the paper location. On the other hand, if, when created, the parcel boundary consisted of a road that was actually opened and existed as a traveled way, the term "road" meant the actual physical path as used. Therefore, where the road has been opened and used prior to the date of the operative description, the Law Court has determined that the physical location of the beaten path is the intended boundary.[444] The physical road as opened will govern over the "paper" center of the

444. See Rounds v. Ham, 111 Me. 256, 88 A. 892 (1913), where the court stated:

easement when determining the location of the parcel boundary calling for the "road."[445]

The question often arises regarding the exact location of the parcel boundaries along road easements. The simple answer is to say the deed controls the location of the conveyance. However, seldom does the deed say "[t]o the center of the road; thence by the center of the road. . . ." or "[t]hence to the edge of the right of way. . . ." Typically a deed contains words such as "by," "along," or "with." In conjunction with the somewhat ambiguous terms, the property measurements often fail to reach the center, but stop at or extend slightly beyond the near side of the easement boundary. Consequently, rules of construction that are dependent upon the facts and situation at the time of the conveyance govern. Over the years, the common law has become replete with cases citing rules of construction and their exceptions. In response to this confusion, the legislature has intervened with statutes attempting to codify the rules, yet these efforts often make the rules more confusing. The Law Court

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> When a road is referred to in a deed as one of the boundaries of the land conveyed, we should ordinarily suppose that something more than a mere location was meant. A road is a way actually used in passing from one place to another. A mere survey or location of a route for a road is not a road.

Id. at 259, 88 A. at 893-94. See also Brooks v. Morrill, 92 Me. 172, 42 A. 357 (1898), where the court held:

> The question is not free from difficulty, but it must be regarded as res judicata in this state. . . . "A road is a way actually used in passing from one place to another. A mere survey or location of a route for a road is not a road. A mere location for a road falls short of a road as much as a house lot falls short of a house. Can the proposition be maintained that an invisible and unwrought location answers such a call better than a visible wrought road over which the public is passing daily? We think not."

Id. at 176, 42 A. at 358 (quoting Sproul v. Foye, 55 Me. 162, 164-65 (1868)).

445. *See* Dees v. Pennington, 561 So. 2d 1065, 1068 (Ala. 1990) ("In the absence of evidence to the contrary, where a street is named in a deed as a boundary line, it must be taken that the parties intended the boundary to be the street as actually opened up and in use."). See also Scott v. Hansen, 422 P.2d 525 (Utah 1966), where the court noted:

> One of [the rules of construction in determining a grantor's intent] is that fixed monuments or markers of a permanent nature which can be definitely identified and located take precedence over calls of courses or distances, or plats, or amounts of acreage. This is so because it is reasonable to assume that the parties are more apt to be familiar with such monuments or markers than with precise measurements, or with recorder's plats; consequently, giving precedence to the call to such a monument or marker results in less possibility of error and a greater likelihood of giving effect to the intent of the parties.
>
> . . . [T]he reference [in this conveyance] was to the county road as it actually existed and was observable by the parties involved, rather than to the theoretical county road shown by the straight line on the county plat.

Id. at 527-28.

in *Franklin Property Trust v. Foresite, Inc.*[446] noted that the legislative intent of the Roads and Ways Act[447] was to codify the common law.[448] In any event the Act may have created more confusion than the legislation actually alleviated.

The following is the common law and statutory law as applied to parcel boundaries within roads.

A. Public Road Easements

Public road easements include town, county, and state highways. In the older records, one class of public road easements was referred to as private ways. The term "private way" was used to define public road easements that the municipality had disavowed any obligation to improve or maintain.[449]

Generally, a landowner whose property abuts a public road easement is deemed to have title to the center of the easement.[450] Because this is a rule of construction and not a rule of law,[451] the

446. 438 A.2d 218 (Me. 1981).

447. Title 33, §§ 463-469-A (West 1988).

448. Franklin Property Trust v. Foresite, Inc., 438 A.2d at 223 (" 'The purpose of th[e] [Roads & Ways] Act is to clarify ownership of the land which underlies the public easement in roads and ways by giving statutory effect to the common law presumption that an abutting owner owned to the centerline of the road.' ") (quoting L.D. 983 (106th Legis. 1973)).

449. The *Franklin* court noted:

> [The words "private way"] commonly mean ways of a special type laid out by the public authority for the use of the public. Such " 'private ways' are private only in name, but are in all other respects public. . . ." The words [also] may well mean or include defined ways for travel, not laid out by public authority or dedicated to public use, that are wholly the subject of private ownership of the land upon which they are laid out by the owner thereof, or by reason of ownership of easements of way over land of another person.

Id. at 221-22 (quoting Opinion of the Justices, 47 N.E.2d 260, 262-63 (Mass. 1943)). The court further noted, "The term private way is used 'not because the easement is the private right of the person benefited but rather to distinguish it from that class of ways the cost of which is met entirely from public funds.' " *Id.* at 222 (quoting Browne v. Connor, 138 Me. 63, 67, 21 A.2d 709, 710 (1941)).

450. *See* Coombs v. West, 115 Me. 489, 491, 99 A. 445, 445 (1916) ("And it is undoubtedly true, that where a grant is bounded upon . . . a highway, . . . such . . . way[s] . . . are to be deemed monuments, located equally upon the land granted and the adjoining land, and in all such cases, the grant extends to the center of such monument." (quoting Bradford v. Cressey, 45 Me. 9, 13 (1858))); Franklin Property Trust v. Foresite, Inc., 438 A.2d 218, 223 (1981) ("Under Maine law, a conveyance to or by the sideline of a public street gives rise to the rebuttable presumption that the grantor intended to convey title to the center of the street unless a contrary intent is indicated.").

451. In Stuart v. Fox, 129 Me. 407, 152 A. 413 (1930), the court said:

> "The rule by which the mention of a way as a boundary in a conveyance of land is presumed to mean the middle of the way, if the way belongs to the grantor, is not an absolute rule of law irrespective of manifest intention, like the rule in Shelley's case, but is merely a principle of interpretation

proper analogy to fix the extent of title and the boundary is the following: (1) The boundary should remain the original parcel boundaries before the road was taken, widened, or altered (see Figure 17);[452] (2) a parcel boundary in a subsequent conveyance may be stopped short of the original parcel boundary when expressly provided by the grantor;[453] (3) the boundary will coincide with the center of the traveled way if the original boundary is unknown and the grantor's intent cannot be determined, provided that the grantor owned to that extent.[454] Therefore if the road is a public road easement title extends by implication to the center of the road or the extent of the grantor's title, whichever is less, barring express words to the contrary.[455] This principle holds even if the measurements stop short of the center.[456] Therefore if a property owner sells land on one side of a public road while retaining the remainder on the other side, ordinarily the boundary of the land sold will be in the center of the public road.[457] Only clear and express words will stop an adjoiner's title from going to the center of the road or to the extent of the grantor's title, whichever is less.

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adopted for the purpose of finding out the true meaning of the words used."

Id. at 413 (quoting Crocker v. Cotting, 44 N.E. 214, 215 (Mass. 1896)).

452. Title 33, § 463 (West 1988).

453. Low v. Tibbetts, 72 Me. 92 (1881). In *Low,* the court noted:

The well settled doctrine in this State is, that a grant of land bounded on a highway, carries the fee in the highway to the centre of it, if the grantor owns to the centre, unless the terms of the conveyance clearly and distinctly exclude it, so as to control the ordinary presumption.

Id. at 94 (citing Oxton v. Groves, 68 Me. 371, 372 (1878)).

454. Franklin Property Trust v. Foresite, Inc., 438 A.2d 218, 223 (Me. 1981) ("Under Maine law, a conveyance to or by the sideline of a public street gives rise to the rebuttable presumption that the grantor intended to convey title to the center of the street unless a contrary intent is indicated."). *See also* title 33, §§ 460, 465 (West 1988 & Supp. 1995-1996). It should be noted that the courts have strictly construed any wording by the grantor that may appear to prevent title going to the center. Wellman v. Dickey, 78 Me. 29, 30, 2 A. 133, 133-34 (1885).

455. Brooks v. Morrill, 92 Me. 172, 174, 42 A. 357, 357 (1898).

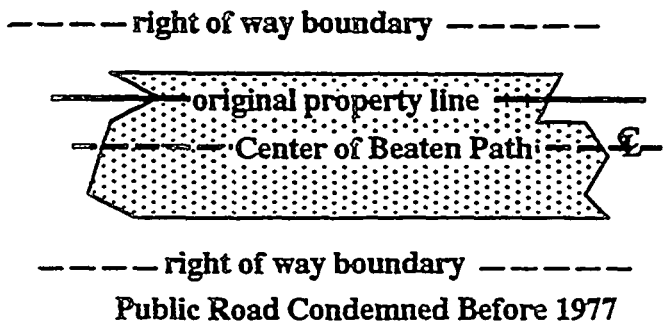
456. Inhabitants of Warren v. Inhabitants of Thomaston, 75 Me. 329, 331 (1883).

457. In Bradford v. Cressey, 45 Me. 9 (1858), the court stated:

[I]t is undoubtedly true, that where a grant is bounded upon a non-navigable fresh water stream, a highway, a ditch or party wall, or the like, such stream, way, ditch or wall, are to be deemed monuments, located equally upon land granted and the adjoining land, and in all such cases, the grant extends to the centre of such monument.

Id. at 13.

FIGURE 17



The original property line remains fixed as the property line in subsequent conveyances despite the fact the property line does not reside in the center of the road or public easement.

The courts often have said that phrases such as "by the road," "along the road," and "with the road" do not stop the title at the edge of the public road easement—the title continues to the center of the public road easement.[458] Ordinarily, "to," "with," "along," and similar words are words of exclusion.[459] Common meaning would not place the boundary in the center.[460] Nevertheless, when used in reference to the boundary of a public road easement, according to the rules of construction, these words would place the parcel title and its boundary in the center of the public road (see Figure 18). Four reasons often are cited for title going to the center of a public road in all cases of doubt. First, little reason or benefit exists for the grantor to retain title to a long narrow strip of land.[461] The strip would tend to benefit the grantee more than the grantor. Second, the rules of construction, often based on equity, provide that where a conveyance is ambiguous, as between the grantor and

458. *See, e.g.*, Hardison v. Jordan, 141 Me. 429, 433, 44 A.2d 892, 894 (1945) ("[W]hen there is nothing as here to indicate a different intention, the point of beginning of a boundary being on a road must be taken as in the center of the way."). *See also* title 33, § 461 (West 1988).

459. Stuart v. Fox, 129 Me. 407, 420, 152 A. 413, 419 (1930) ("[T]his court has held that the words 'to,' 'from' and 'by' are words of exclusion.").

460. Should a parent expect her child to walk down the center of the road after expressly telling the child to walk "along" the road?

461. *Id.* at 415, 152 A. at 417 ("[T]he rule is founded on considerations of expediency to prevent title to small remnants of land being left in remote grantors . . . .").

grantee, the grantee is favored over the grantor.[462] The grantor who prepared the deed presumably could have prevented the ambiguity and therefore should not benefit from the ambiguity. Third, the presumption provides clarity to title within the road easement and prevents stale claims from arising later.[463] Fourth, the grantor should not be presumed to withhold title that has a real and present advantage to the grantee.[464]

462. Brewster v. Churchill, 148 Me. 8, 14, 88 A.2d 585, 588 (1952) ("The principle is undoubted that instruments of conveyance should be construed most strongly against grantors and in favor of grantees.").

463. In Franklin Property Trust v. Foresite, Inc., 438 A.2d 218 (Me. 1981), the court states:

> Since no specific landowner is *particularly* concerned about maintaining the rights and limitations associated with the easement, the possibility is great that the right to the underlying fee in a long established public street or road may not explicitly appear in a recent record of title. In such instances, the potential for conflicting or ancient claims to land arising to hinder the marketability of land is manifest.

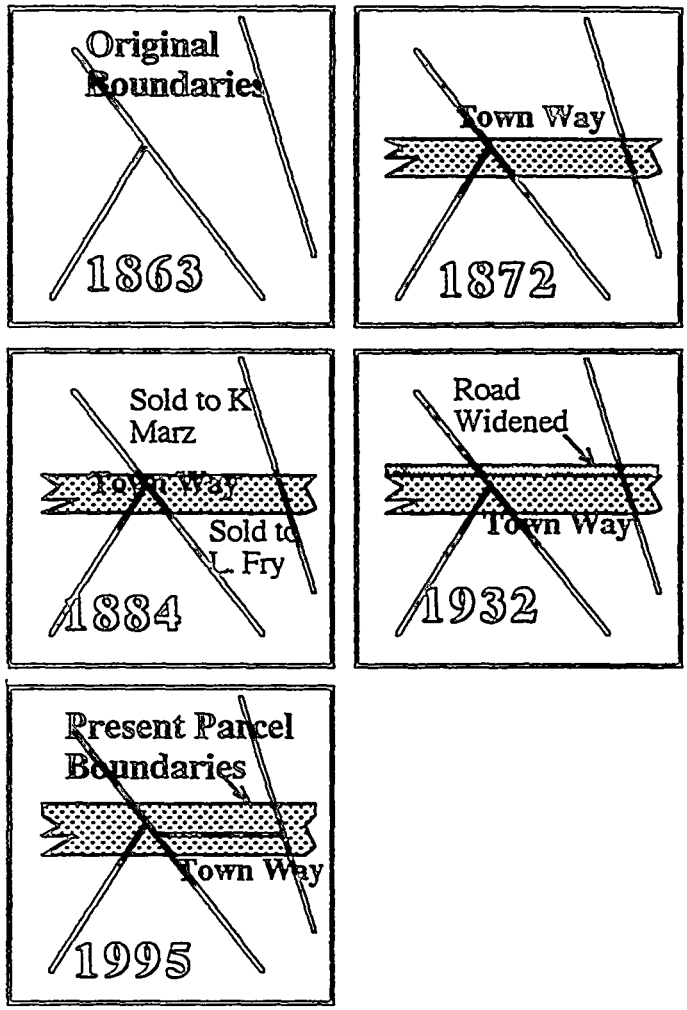
Id. at 225.

464. The Law Court has embraced this rationale. In Stuart v. Fox, 129 Me. 407, 152 A. 413 (1930), the court noted:

> [T]he grantor, if he retains the fee in such a way, may own a long narrow strip of land which may not be of any great value to him . . . . In our opinion it loses sight of the most important consideration of all—that the presumption in the case of bounds on highways and streams is based, not so much on the fact that the grantor does not intend to retain that which is of no apparent benefit to himself, but rather on the assumption that he does not intend to withhold that which has a real and present advantage to his grantee. The views which we have here expressed appear to be sustained by courts of high authority.

Id. at 417-18, 152 A. at 418.

FIGURE 18



The sequence of figures show how historical circumstances leave the boundary unaffected but not centered in the present traveled way.

It is worth repeating that title goes only to the center of a public road easement when: (1) the boundary was not otherwise expressly described at some other location;[465] (2) the grantor has title at least to the center;[466] (3) the land abuts the road; (4) the road is an easement; and (5) the road is a public or proposed public road.[467] How-

465. See title 33, § 467 (West 1988) for a codification of the common law recognizing that all abutting owners' title does not extend to the center.

466. *Cf.* Warchalowski v. Brown, 417 A.2d 425, 428 (Me. 1980).

467. *See* title 33, §§ 461, 465, 469-A (West 1988 & Supp. 1995-1996).

ever, those rights accorded to owners of other lots in a subdivision (implied, appurtenant rights) will not pass to the abutter.

In construing the intent of the grantor and applying the rules of construction, the Law Court has recognized that when the grantor explicitly denotes the boundary as the side of a public road or the edge of the right of way, or uses similar words rather than placing the boundary "along," "by," "with," or "in" the road itself (or similar words), title will not go to the center of the road.[468] This common law interpretation seems to conflict with certain Maine statutes.[469]

Despite the questionable effect of this statutory language on the common law, it is important to recognize that often there is a difference between calling for the *description* to begin, end, or go to the side of the road and for the *boundary* to go along, with, or by the road.[470] The former usually refers to a convenient point to begin or terminate the surveying measurements, while the latter actually controls the location and extent of title.[471] However, when the descrip-

468. *See* Brooks v. Morrill, 92 Me. 172, 174, 42 A. 357, 357 (1898).

469. *See* title 33, §§ 460-61, 465, 469-A (West 1988). Title 33, § 469 (West 1988) adds: "This subchapter shall be liberally construed to effect the legislative purpose of clarifying the title to the land underlying roads and ways by eliminating the possibility of ancient claims."

470. In Low v. Tibbetts, 72 Me. 92 (1881), the court states:

> Is there enough in the language used, to exclude the street from the conveyance? The mere mention in the description of a fixed point on the side of the road as the place of beginning or end of one or more of the lot lines, does not seem to be of itself sufficient.... [N]or will similar language with, reference to monuments standing on or near the bank of a stream, in lines beginning or ending at such stream, prevent the grantee from holding *ad medium filum aquae.*

Id. at 94 (citations omitted). *See also* Coombs v. West, 115 Me. 489, 491-92, 99 A. 445, 445 (1916).

471. In Smith v. Hadad, 314 N.E.2d 435 (Mass. 1974), the court stated:

> "A majority of the court is of opinion, that it is a common method of measurement in the country, where the boundary is a stream or way, to measure from the bank of the stream or the side of the way; and that there is a reasonable presumption that the measurements were made in this way, unless something appears affirmatively in the deed to show that they began at the centre line of the stream or way."

Id. at 437-38 (quoting Dodd v. Witt, 29 N.E. 475, 476 (Mass. 1885)). See also Haight v. Hamor, 83 Me. 453, 22 A. 369 (1891), where the court stated:

> In the case of Dodd v. Witt, after citing several cases in support of the general rule that a boundary on a way includes the soil to the centre of the way, the court add [sic]: "Not one of these cases, however, considers the construction to be given to a deed in which a highway is a point of departure of a measured line.... The rule is well established when the road is the terminus *ad quem*, but there is little authority when it is the terminus *a quo*, and there is no monument at the other end of the line. A majority of the court is of opinion that it is a common method of measurement in the country where the boundary is a stream or way, to measure from the bank of the stream or the side of the way, and that there is a reasonable pre-

tion simply begins with "at the road" or a similar phrase, the measurements are assumed to begin in the center of the road unless a preponderance of evidence indicates otherwise.[472]

B. *Private Easements*

If the road is a private easement, title extends to the edge or margin of the road unless the words in the grant clearly indicate otherwise.[473] Contrary to the rules of construction for a public road easement, words such as "by," "along," and "with" the road define the boundary along the edge or margin of the private easement. As long as the grantor had title to the road, he retains title to the underlying fee, while the grantee obtains an easement in the road.[474]

C. *Paper Streets*

A broad definition of a paper street is a road that has not been improved or opened for public or private use. It exists on paper but has not been created on the face of the earth as to allow any form of reasonable physical use by vehicles. In this Article, paper streets are roads that have been offered for dedication by the landowner or developer but not accepted by the government or used by the public. This condition is known as incipient or inchoate dedication. In

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sumption that the measurements were made in this way unless something appears affirmatively in the deed to show that they began at the centre line of the stream or way."

Id. at 460-61, 22 A. 372 (1891) (quoting Dodd v. Witt, 29 N.E. 475 (Mass. 1885)) (citation omitted).

472. *See, e.g.*, Coombs v. West, 115 Me. 489, 99 A. 445 (1916). The court there noted:

"[I]t is undoubtedly true, that where a grant is bounded upon a non-navigable fresh water stream, a highway, a ditch or a party wall, or the like, such stream, way, ditch or wall are to be deemed monuments located equally upon the land granted and the adjoining land, and in all such cases, the grant extends to the center of such monument. It is, however, competent for the grantor to limit his grant as he may choose."

Id. at 491-92, 99 A. at 445 (quoting Bradford v. Cressey, 45 Me. 2, 13 (1858)). The court also held that " '[w]hen walls, fences, and the like are referred to as monuments, if they are of considerable thickness or width, the boundary line is always in the center of the monument, as has been seen in the case with streams and highways.' " *Id.* at 493, 99 A. at 446 (quoting TIEDMAN, REAL PROPERTY § 838).

473. *See* Winslow v. Reed, 89 Me. 67, 70, 35 A. 1017, 1017 (1896) ("[W]hen land is bounded on a private way, it extends only to the side line of the way."). *See also* Bangor House Proprietary v. Brown, 33 Me. 309, 314 (1851).

474. In Franklin Property Trust v. Foresite, Inc., 438 A.2d 218 (Me. 1981), the court stated:

Under Maine law, a conveyance to or by the sideline of a public street gives rise to the rebuttable presumption that the grantor intended to convey title to the center of the street unless a contrary intent is indicated. This presumption, however, does not apply when the land is bounded by a private way not dedicated to public use.

Id. at 223 (citations omitted).

most cases there is a private easement in the paper streets but no public easement until acceptance. Maine, like many states, has chosen to handle paper streets in the same manner as operational public streets—the title is presumed to run to the center line of the street.[475]

D. Former Public Streets

The discontinuation of public roads and the vacation of paper streets are two common occurrences that affect parcel boundaries within roads. In some of these cases a private easement may remain effective after the discontinuation or vacation. In the event of an ambiguous description, the question arises whether the title to the property should go to the center or the edge of the road. The simple solution is for the owner at the time of sale or conveyance (subsequent to the discontinuance of the public road easement or vacation of the incipient dedication), to rewrite the ambiguous descriptions clearly to include title to the center of the former public road. However, this foresight is seldom present and the grantor is more likely to use the same vague description that she received from her predecessor. The result is confusion as to ownership from the edge to the center of the former public road or paper street. The Maine Law Court has held that a discontinued public road is to be treated the same as a public road—title is presumed to run to the center.[476]

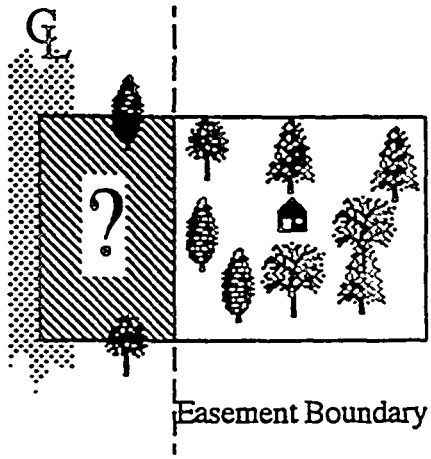
475. The legislature in a series of statutes codified the common law in regard to title underlying accepted and unaccepted roads. *See, e.g.*, title 33, §§ 461, 469-A (West 1988). *But cf.* Bangor House v. Brown, 33 Me. 309 (1851), where the court said:

> As the law has been established in this State, when land conveyed is bounded on a highway, it extends to the centre of the highway; where it is bounded on a street or way existing only by designation on a plan, or as marked upon the earth, it does not extend to the centre of such way.
>
> . . . .
>
> There is no indication in such cases of an intention on the part of the grantor to dispose of any more of his estate than is included by the description, with a right of way for its convenient use.

Id. at 314.

476. In speaking about the statute the court in Belfast Water Dist. v. Larrabee, 570 A.2d 828 (Me. 1990), wrote: "We hold that the same rule should apply to discontinued public ways because, as with conveyances of land bounded by public ways, absent a contrary intent, the grantor should not be presumed to retain an interest that is a distinct benefit to the grantee." *Id.* at 829-30 (Me. 1990).

FIGURE 19



The area between the easement boundary and center often is not clearly explained or defined in the title documents.

E. Railroads

Contrary to title in a public road easement, the title underlying a railroad easement is presumed to remain with or transfer to the railroad, depending on the circumstances.[477] The rights of the grantor whose land abuts the railroad do not extend to the center of the railroad easement. When doubt exists as to the title of the underlying fee, the grantee's boundary is deemed to be at the edge of the

477. In Stuart v. Fox, 129 Me. 407, 152 A. 413 (1930), the court noted:

> When we consider the real origin of the highway rule, that it had its foundation in the early customs of the people which gave to the abutting property owner, having title to the fee in the highway, certain rights in the highway of real advantage to him in the daily use of his adjoining land, we can see very little analogy between his situation and that of the owner of land bordering on a railroad right of way. The land owner beside the railroad has no use whatsoever of the railroad way. In fact he is absolutely excluded from it. The use of it by the railroad is altogether inconsistent with the idea that it could in any way be of advantage to his adjoining land. It is quite true that a railroad way is often referred to as a public highway. This designation has reference to the fact that it is open to the public for travel under the restrictions imposed by law; but it has never been considered that, for this reason, it has the other incidents of a public highway.... "It follows that the easement in lands taken for the purpose of a railroad is obviously vastly different from that in lands appropriated to the various kinds of other public ways." The court then indicates clearly what these differences are, one of which is that the railroad must have the exclusive occupation and control of its property without any interference by the adjoining land owner.

Id. at 417, 152 A. at 417-18 (quoting Hayden v. Skillings, 78 Me. 413, 416, 6 A. 830, 831 (1886)).

railroad right-of-way, consistent with the rules governing private road easements.[478] The Law Court has reasoned that while a grantee may derive some value and use from a public road easement fronting on his property, no comparable benefit accrues to the property owner adjacent to a railroad right-of-way.[479]

VIII. Unresolved Issues

Unfortunately, there are many questions that have not been addressed by the Law Court or legislature. In some cases, the attempt by the legislature to codify the common law has resulted in further confusion of the law.[480] The following are samples of unanswered questions regarding roads and easements in Maine.

A. Vacation, Abandonment, Discontinuance, etc.

Statutes addressing vacation, abandonment, discontinuance, and other mechanisms that extinguish public rights in roads appear to have been written with the assumption that roads are public easements where title reverts to the abutting owner. However, roads developed more recently are owned by state or local governments in fee simple. The termination of public title in these streets and transfer to abutting property owners would appear to require a deed or other recognized form of conveyance appropriate to fee simple title.

B. Lines of Occupation versus Three-Rod Width

Practitioners frequently face difficulties in ascertaining determining which statute to apply in determining the width of an otherwise undefined public road easement. On the one hand the practitioner has statutory authority for fixing the width as the actual dimension between lines of occupation.[481] However, another statute allows practitioners to fix the width of undefined public roads at three rods.[482] Often the two statutes appear to conflict. It would seem logical that where lines of occupancy exist, the lines of occupancy should fix the road width rather than an arbitrary three-rod width. The width of public road easements generally is determined by either: (1) estoppel; (2) acquiescence; or (3) the theory that the lines of occupation are the best evidence of the width marked at the time of the original grant.

478. *Id.*

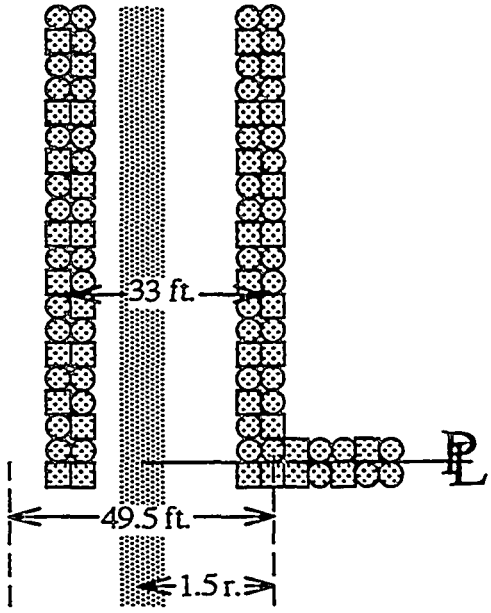
479. *Id.*

480. *See, e.g.*, title 23, § 3026 (West 1992), which states "all remaining interests of the municipality shall pass to the abutting property owners to the center of the way." This is somewhat inconsistent if the abutting owner owns some portion more than half-way but less than the whole when the road is discontinued.

481. Title 23, § 2952 (West 1992 & Supp. 1995-1996).

482. *Id.* § 2103.

FIGURE 20

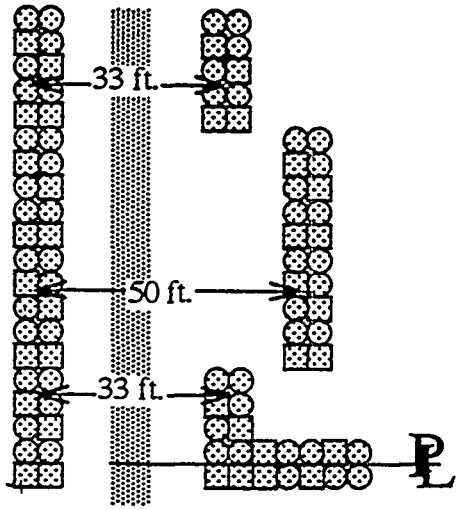


The results of using the improvements or a presumed width are often in conflict.

Practitioners face additional problems when no lines of occupancy exist along a particular part of an easement, even though clearly defined lines of occupation exist along the same road easement at a different location. The question facing a practitioner is whether the remote lines of occupation should be used to define the width for the entire road. Under the theory that occupation lines are the best evidence of the width intended by the original parties, remote occupation would be relevant. Under this theory a practitioner must drive along the entire length of the road to look for lines of occupation and use the dimension between these remote lines of occupation to fix the width for the entire public road easement.

To complicate matters further, in some cases the dimensions between lines of occupation vary along the length of the road easement, both on and off the part of the road in question (see Figure 21). Several questions arise in this situation. Should the practitioner use the maximum, minimum, or average width? In using either the maximum, minimum, or average width, should practitioners confine their measurements to the part of the easement on the tract in question or survey all occupation lines along the entire easement length to determine a width?

FIGURE 21



The statute and case law are silent in the situation where the width between improvements varies.

C. *New Road on Original Road*

Other problems arise when a new public road is developed over an existing road and the dimensions differ. Which dimensions control when there is no formal action to condemn extra land or discontinue part of the old road?

D. *Center or Far Side*

As previously explained,[483] the common law holds that by implication title goes to the center of a public road easement (see Figure 22). However, Maine statutory law states the following:

> A conveyance of land which abuts a town or private way, county road, highway or proposed, unaccepted way laid out on a subdivision plan recorded in the registry of deeds shall be deemed to convey all of the grantor's interest in the portion of the road or way which abuts the land . . . .[484]

(See Figures 22 and 23.)

The wording of the statute implies that the first lot sold in a subdivision would gain all the grantor's title in the road easement. Rather than stopping at the center, the first lot sold would gain fee-simple title to the entire width of the road in front of the lot (see

483. *See supra* part VI, dealing with parcel boundaries in or along road easements.

484. Title 33, § 460 (West 1988).

Figures). This often leaves the status of the title in subdivision roads uncertain and open to varying interpretations.

FIGURES 22 AND 23

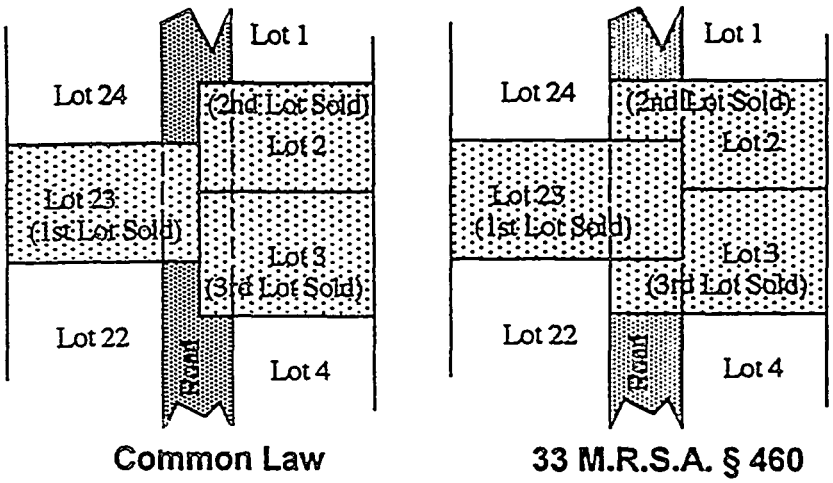


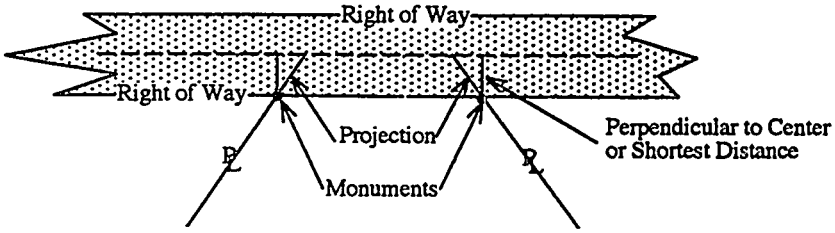
Figure 22 shows the common law which generally presumes that the title goes to the center of public roads. The wording of the statute appears to modify the common law as show in Figure 23 and favors the earlier conveyances by conveying all the title in the road.

E. Sidelines

Since title extends to the center of public road easements, the question often arises as to how non-perpendicular parcel boundaries extend between the side of the easement to the center of the easement. In particular, do the boundaries continue to extend in the same direction or are they perpendicular to the center line of the road?[485] The choice is usually between projecting the boundary line along its original course or striking a line perpendicular to the center (shortest distance) as illustrated by the following figure.

485. Of course, the deed or other operative document will control if that document specifically provides for projecting the sideline into the road easement according to a particular method.

FIGURE 24



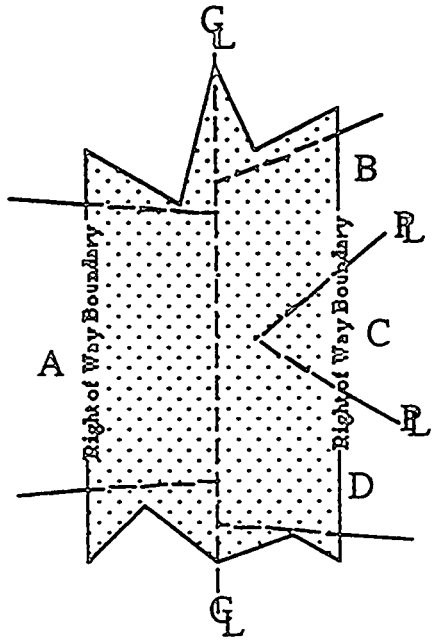
The above figure illustrates the difference between the two methods of fixing the side boundaries within the public road easement.

Often, practitioners automatically and uncritically choose to project the property line along its original course into the right-of-way because of the straight-forward simplicity of that approach (in other words, continue the sideline boundary on a straight path to the center of the road).[486] Deeper reflection may lead to rejection of this method in many cases, however, because it may produce inequitable or absurd results.[487] Where a boundary comes to the road at an angle oblique to the right-of-way boundary, the abutting parcel's boundaries could converge short of the road's center, and thus the abutting parcel owner's title would not extend to the center of the right-of-way. In addition, the resulting road frontage could be reduced or enlarged to such an extent as to enrich unjustly one neighbor while denying another almost all benefit of the area within the easement.

486. "Extending the boundary" and similar terms often have been used loosely in describing title extending to the limits of ownership. *See, e.g.*, Cottle v. Young, 59 Me. 105, 110 (1871). However, when addressing the question directly, the courts recognize that more equitable methods are to be employed when the grantor's intent is not clear. *See* Proctor v. Hinkley, 462 A.2d 465 (Me. 1983), and in particular, *id.* at 473 n.7.

487. Treat v. Chapman, 35 Me. 34 (1852).

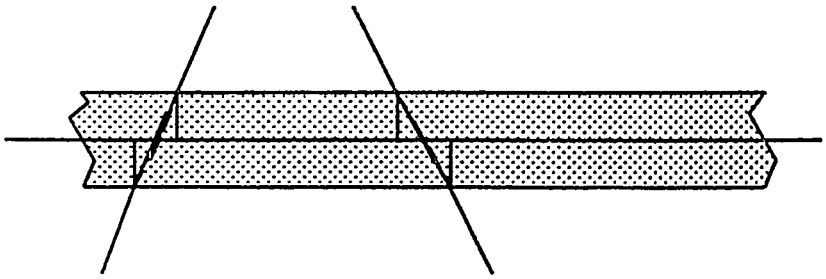
FIGURE 25



In this example, extending the Lot C's boundaries causes them to intersect prior to reaching the center of the road. This fails to provide equitable distribution and leaves the common boundary between the adjoining lost of B and D uncertain.

The perpendicular method, also known as the right-angle and shortest distance methods, fixes the boundary at the shortest distance between the edge of the easement and the center of the road. The line fixed at the shortest distance always will be perpendicular or radial to the center line of the road. This method always will provide for an equitable apportionment of rights within the road easement. The apportionment will bear direct relation to the frontage along the right-of-way. Furthermore, the method is applied easily at the site by determining the shortest distance from the terminus of the marked boundary to the center line of the road.

FIGURE 26



In the above figure, a road crossed existing lot lines. Thereafter portions of the original lot on each side of the road were sold with the road called for as a boundary. To establish the boundaries within the road at right angles to the center where existing original lot line existed would cause gaps and overlaps.

Many courts select the perpendicular method for fixing property lines into the public easement along streams and highways.[488] There are two reasons for this choice. First, the courts opt for an equitable distribution of the area within the road easement.[489] Second, courts prefer a method that can be applied in most situations rather than a method that would require the court to revisit the question under varying circumstances. Of course, this method would not apply where the original lot lines were fixed and crossed the road at a diagonal. The perpendicular method would apply only where the grantor or her predecessor in title did not expressly indicate how the lot lines should be projected into the road (see Figure 26).

While the Law Court does not appear to have addressed the issue directly,[490] it has adopted the perpendicular method for non-tidal bodies of water[491] and has on several occasions noted that rivers and

488. *See* Carlino v. Barton, 349 N.Y.S.2d 535, 541-42 (1973). This method has been widely used in establishing boundaries between states and countries. *See, e.g.*, Sang-Myon Rhee, *Sea Boundary Delimitation Between States Before World War II*, 76 AM. J. INT'L L. 555 (1982).

489. Some courts will project the boundary line along its original course when that line is approximately perpendicular to the road right-of-way—in effect giving nearly the same results as the perpendicular method. *See, e.g.*, Langley v. Meredith, 376 S.E.2d 519, 523-24 (Va. 1989) (discussing riparian rights).

490. In Bradley v. Wilson, 58 Me. 357 (1870), the court stated:

> If one of the lines is described as ending at a point on one side of a street opposite a point on the other side, we think there can be no doubt that a straight line between the two points must cross the street at a right angle. And such a description is too plain and too free from doubt to be controlled or affected by parol evidence.

Id. at 360.

491. Shawmut Mfg. Co. v. Town of Benton, 123 Me. 121, 124, 122 A. 49, 50 (1923) ("By implication of law, in the absence of negativing words, the side lines of a riparian proprietor, whose estate is bounded by an innavigable river, are extended from

streams are highways of commerce.[492] The Law Court has stated that the rules of construction applied to streams are applicable to roads, and the reverse also has been asserted.[493] Consequently, logic and case law support the presumption that the boundaries extending between the center of the road and edge of the right-of-way within public road easements should be fixed at the shortest distance, perpendicular to the center.

F. Marginal Street Doctrine

Under the marginal street doctrine the grant of land along a street where the grantor had title to the far side, but no farther, conveys all the title in the street to the grantee. The presumption is that the grantor would not intend to keep a small strip between the center and far side of the road.[494] Maine does not appear to have addressed this particular question under the common law. However, certain statutes[495] would appear to support such an interpretation. While the situation is not uncommon, litigation involving this question is rare.

G. Government Subdivider

In some states the common law holds that a subdivision made by the government does not convey title in the roads to the abutting landowner; the government keeps the fee simple title underlying the

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the termini on the margin, at right angles from the stream, to include one half of the bed of the river.").

492. Smart v. Aroostook Lumber Co., 103 Me. 37, 46, 68 A. 527, 531 (1907); Warren v. Thomaston, 75 Me. 329, 332 (1883).

493. Warren v. Thomaston, 75 Me. at 332-33 ("Whether the highway be by land or water, the same rule of construction must apply."); Stuart v. Fox, 129 Me. 407, 411, 152 A. 413, 415 (1930) ("An almost perfect analogy with the rule as to highways is that governing the boundaries of land on non-navigable streams."). *See, e.g.*, Brown v. Heard, 85 Me. 294, 297-98, 27 A. 182, 183 (1893).

494. Everett v. Bosch, 241 Cal. App. 2d 648, 655 n.3 (1966) ("The 'marginal street' doctrine has been thus stated: 'The grant of land adjoining a street or highway which has been wholly made from, and upon the margin of, the grantor's land is deemed to comprehend the fee in the whole of the street.' ") (citation omitted). See Wolff v. Veterans of Foreign Wars, Post 4715, 74 A.2d 253 (N.J. 1950), where the court stated:

> [T]he presumption is that the intention was to invest the grantee with all property rights in the full width of the highway. "Where the highway has been, as in the present case, wholly made from and upon the margin of the grantor's land, his subsequent grant of the adjoining land should be deemed to comprehend the fee in the whole road-bed, upon the same principle that exists for giving the fee to the center in the other cases. The grantor should be presumed to have intended by his conveyance the full investiture of the grantee with all appurtenant property rights in the highway."

Id. at 257 (quoting Haberman v. Baker, 128 N.Y. 253, 259, 28 N.E. 370, 371 (1891)).

495. *See, e.g.*, title 33, §§ 460, 467 (West 1988).

roads. Ordinarily, the grantee stands to benefit most from having the title underlying a road easement conveyed to him. Where the government is the grantor, however, there remains an overriding interest for the government to retain title. Title retained by the government would allow the installation of utilities, ditches, drainage with accompanying tree removal, snow storage, and construction to go unimpeded and without requiring compensation to landowners. While this question does not appear to have been addressed directly by the Law Court, that court has addressed a similar issue with respect to range-ways.[496] Furthermore, the negative analogy used by the Law Court to justify title in railroad corridors as compared to road easements would support the proposition that title remained with the government where the government subdivided the property.[497]

IX. Conclusion—Counseling the Client

A real estate attorney must have a thorough understanding of easements to ensure a successful practice dealing with real estate conveyance. Often the practitioner is in a position to counsel her client on creating new easements, for example, when creating a subdivision plan. After discussing most of the problems with easements, the practitioner must follow certain rules.

The practitioner should review carefully the proposed easement to make sure the easement is located properly and described adequately in terms of dimensions. The practitioner should make sure the allowable use is stated clearly. If utilities are to be installed in the access easement, they must be expressly allowed. It is advisable to define clearly conditions for termination of the easement so that the easement will not be a burden after its purpose or use has ceased. To avoid conflict, the easement should be monumented in the field and described clearly in the records. For certain easements, other statutory requirements also must be met.[498] To avoid the conditions that often arise by implication, the practitioner should ensure that the title underlying the easement is obvious. Consequently, he should exercise extra care to avoid merely calling or showing a parcel along or by the road without expressly stating limitations, to avoid unintended implied easements (see Figure 27). The servient and dominant estates should be described clearly in the supporting documents and rights made to vest immediately or within the parameters set by the Rule Against Perpetuities. The practitioner should avoid extending the use of easements to others not a party to the transaction, except to the public where dedication

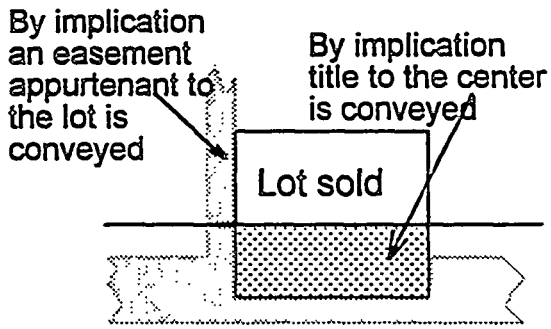
496. *See, e.g.*, Howard v. Hutchinson, 10 Me. 335 (1833).

497. *See* Stuart v. Fox, 129 Me. at 417, 152 A. at 417.

498. *See, e.g.*, title 33, §§ 1401-1402 (West 1988), which govern solar easements.

is intended. In this situation the title and conditions accompanying the acceptance should be made clear.

FIGURE 27



The practitioner should be wary of uninteded consequences and expressly state the extent of title.

In examining a parcel already benefiting from an easement, burdened by an easement, or calling for an easement as a boundary, the practitioner should investigate certain documents and conditions. If possible, she should examine the documents creating the easement to ensure that it was created properly. The location, dimension, and allowable use should be determined and compared with the then-existing situation at the site. The practitioner should be wary of several situations: (1) improvements intended to be within the easement that are outside the easement boundaries (for example, asphalt roads); (2) improvements meant to be outside the easement that are encroaching on the easement (for example, buildings); (3) overburdening of the easement (for example, for a contiguous parcel that was not benefitted originally by the easement); (4) improper use of the easement (for example, utilities located in private easements created after 1990 when such easements do not allow expressly for utilities); and (5) circumstances attending the extinguishment of the easement (for example, obstruction of the easement by the servient owner).

In some cases, the practitioner should examine carefully the site conditions and the sequence of conditions accompanying the original conveyancing to determine if there are implied, prescriptive, or common law easements. In other cases, the practitioner must examine carefully the latest documents dealing with former easements to determine if these easements were extinguished improperly or only partially extinguished. Possible easements or problems should be disclosed to the client.

If at all possible, practitioners should identify and describe parcel boundaries within easements. Where the location of the title

boundary cannot readily be determined, the client nevertheless should be notified of this situation. Therefore the practitioner should place the following or similar wording on retracement plans or other documents depicting or describing land bounded by one or more roads where the title boundary cannot be established without litigation:

> The owner of land adjoining roads may have ownership rights extending into the road. This document does not intend to limit, deny, or locate these rights. The boundaries as shown are the boundaries described in the deed and not necessarily the extent of title that passes by implication or operation of law.

For deed descriptions the following or similar language may be appropriate: *Together with any right, title, or interest in the road that the grantor herein may have.*

Similar notes would be appropriate for parcels bounded by water or burdened with common law easements.