



MEMORANDUM

TO: Standish Town Council

FROM: Sally J. Daggett, Esq.

RE: Overview of Statutory Abandonment Law & Procedures

DATE: April 5, 2017

I am writing to provide a brief overview of the law governing statutory abandonment and suggested procedures in connection with the April 11, 2017 public hearing scheduled on David and Nancy Gavenda's January 30, 2017 request that the Town Council determine that the section of Cram Road running from Dow Road to the northerly end of Lot 43 as shown on Tax Map 6 (hereinafter "the Cram Road section") and the entire length of Cabbage Yard Road have been abandoned under Maine law. A copy of Tax Map 6 is attached hereto. The purpose of the public hearing is for the Town Council to take evidence on the following questions with respect to both the Cram Road section and the Cabbage Yard Road: (1) Was this road ever a town way¹?; (2) If so, has there been 30 years of the road not being kept passable at the Town's expense?; (3) If so with regard to both (1) and (2), what is the end date of the public maintenance?

¹ There are two types of public roads: town ways and public easements. First, a "town way" is defined by state statute. 23 M.R.S. § 3021(3). Most town ways are created by some action of the Town, such as dedication and acceptance, purchase and acceptance, eminent domain or prescriptive use. The Town must keep town ways "in repair so as to be safe and convenient for travelers with motor vehicles." 23 M.R.S. § 3651. This includes summer and winter maintenance.

Second, a public easement is defined in 23 M.R.S. § 3021(2) as "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 July 29, 1976. (To make life confusing, public easements were called "private ways" under state statute until 1976.) The general public has a right of unobstructed access by motor vehicle or foot over a public easement (23 M.R.S. § 3022; 17-A M.R.S. § 505), but the Town is not obligated to maintain or repair a public easement. So the big difference between a town way and a public easement is the Town's maintenance obligation.

I. SUGGESTED PROCEDURES.

The Town Council sits as a quasi-judicial body on this matter, taking evidence and then making a determination based on that evidence. *See* 23 M.R.S. § 3028(4) (copy attached). After the agenda item is introduced, the Chair opens the public hearing. The Town Council should decide if it wants to waive the 5 minute time limit on speakers set forth in Council Rule 8.6. Evidence at the public hearing may come from various sources. There may be documentary evidence presented from Town records related to the establishment of each road as a town way, money raised and appropriated for the repair and maintenance of the roads in question, expenditures for a particular road, municipal road inventories, local road assistance reimbursements, and road repair and maintenance logs. There may be oral testimony from prior road commissioners, public works employees and people who use or live along the roads in question. Councilors may ask questions of the various speakers during the public hearing.

At a certain point, the Chair will ask the Council if it is ready to close the public hearing and deliberate. Note that there may be information that the Town Council would like to consider that is not available at the public hearing, and so the Town Council may decide to continue the public hearing to a later date. Once the public hearing is closed, the public does not have the right to speak on the matter. The Town Council should discuss and deliberate on the following questions with respect to both the Cram Road section and the Cabbage Yard Road:

- (1) Was the road ever a town way?
- (2) If so, has there been 30 years of the road not being kept passable at the Town's expense?
- (3) If so with regard to (2) and (3), what is the end date of the public maintenance?

The deliberations can take place at the same meeting as the public hearing or at a later meeting.

A recent change in law, effective July 29, 2016, requires the Town Council to record any written determination of abandonment at the Cumberland County Registry of Deeds. *See* 23 M.R.S. § 3028(5). I can assist with the drafting of the written determination. I recommend that the Town Council not formally vote on its determination until we have had a chance to draft a proposed written determination developed as a result of the evidence adduced at the public hearing and the Town Council has had a chance to review and comment on the same.

II. THE APPLICABLE STATUTE AND CASE LAW.

The Town may be relieved of the obligation to maintain a town way by operation of law pursuant to 23 M.R.S. § 3028. Under § 3028, a town way that has not been kept passable for motor vehicles at public expense for a period of 30 or more consecutive years is presumed abandoned.² 23 M.R.S. § 3028(1) (1st sentence); *Earwood v. Town of York*, 1999 ME 3, ¶ 9, 772 A.2d 865, 868 (municipality bears the initial burden of establishing the presumption of abandonment). If the Town Council determines that a road is presumed abandoned, the Town has no further obligation to repair the way. The fact that an old road is passable by motor vehicle for a period of 30 or more years is not the test. Under § 3028, the test is whether the road has not been kept passable, year-round, for use by motor vehicles at public expense for a period of 30 or more years. *See* 23 M.R.S. § 3028(1) (1st sentence).

Once the presumption of abandonment is established by the Town, there is only one way to rebut that presumption: “A presumption of abandonment may be rebutted by evidence that manifests a *clear intent* by the *municipality* or county and the public to consider or use the way as if it were a public way.” 23 M.R.S. § 3028(1) (2nd sentence) (emphasis added). Isolated acts of maintenance do not rebut the presumption of abandonment, unless again “other evidence exists that shows a *clear intent* by the *municipality* or county to consider or use the way as if it were a public way.” 23 M.R.S. § 3028(1) (last sentence) (emphasis added).

Once the preemption of abandonment arises, the burden of proving the road is a town way is on the person seeking to have the way repaired or maintained. Any person affected by the presumption of abandonment may seek declaratory relief in Superior Court. 23 M.R.S. § 3028(1); 14 M.R.S. § 5951 *et seq.*

² This statutory rule differs from the common law rule, which recognizes that roads may be abandoned by “long periods” of non-use by the public – as opposed to non-maintenance at public expense. Only a court can make a final determination on abandonment by public non-user. There is no established time period necessary for common law abandonment; it varies depending on how the road was created. In *Shadan v. Town of Skowhegan*, 1997 ME 187, ¶ 5, 700 A.2d 245, 247, the Law Court affirmed the trial court’s finding that 20 years of public nonuse of a road is sufficient to give rise to common law abandonment of a road. The general public likely does not acquire a public easement upon common law abandonment. *See Martin v. Burnham*, 631 A.2d 1239, 1240 (Me. 1993).

Use by abutting property owners does not count as use by the “general public.” *Stickney v. City of Saco*, 2001 ME 69, ¶ 18, 770 A.2d 592, 601; *Longley v. Knapp*, 1998 ME 142, ¶ 14, 713 A.2d 939, 944; *Shadan v. Town of Skowhegan*, 1997 ME 187 at ¶ 7, 700 A.2d at 248 (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; use of the road by abutting landowners to access their own land is insufficient to establish use by the public generally).

Several opinions of the Maine Supreme Court (“Law Court”) provide guidance on what facts are sufficient to support a judicial determination of abandonment and what facts fall short in that regard. Cases in which a determination of abandonment has been found at the trial court level and upheld on appeal are:

- ▶ In *Whalen v. Town of Livermore*, 588 A.2d 319, 320 (Me. 1991), *cert. denied*, 502 U.S. 959 (1991), the town provided no maintenance of the road after 1945 with the exception of minor road repair work and occasional assistance in clearing the road after major snow storms. The trial court found such work to be “isolated acts of maintenance” and declared the road to be abandoned, and the Law Court affirmed the trial court’s determination.
- ▶ In *Lamb v. Town of New Sharon*, 606 A.2d 1042, 1045 (Me. 1992), although the road had been used over the years by loggers, sportsmen and sightseers, no repairs had been made to the road for a period of 30 years at public expense and there was no evidence of intent on the part of the municipality or the public to use the road as a public way; the trial court’s determination of abandonment under § 3028 was affirmed by the Law Court.

Cases in which the facts fell short with regard to a judicial determination of abandonment are:

- ▶ In *Earwood v. Town of York*, 1999 ME 3 at ¶ 9, 772 A.2d at 868, the town graded the road one or two times per year during the applicable 30 year time period and on one occasion hauled gravel to repair a washout. The trial court found that the town’s minor level of maintenance supported a finding of abandonment; however, the Law Court reversed that determination, holding that the trial court’s own finding of annual road grading constituted the requisite “public maintenance.”
- ▶ In *Lamb v. Euclid Ambler Associates*, 563 A.2d 365, 367 (Me. 1989), the town graded the road on an annual basis and plowed it irregularly during the winter months in the 1960’s, and the road was minimally passable for the 30 year period at issue. The trial court found that the road had not been abandoned and the Law Court affirmed that determination.
- ▶ In *Town of South Berwick v. White*, 412 A.2d 1225, 1226 n.2 (Me. 1980), the town had at various times in the 30 year period expended funds for bridge reconstruction, grading, brush cutting and other

repairs and automobiles were frequently driven over the road by members of the public at all times and seasons such that there was no abandonment. (However, this case led to the 1979 amendment of the statute that added the last sentence to § 3028(1) regarding “isolated acts of maintenance.” See P.L. 1979, ch. 629 (effective July 3, 1980). This statutory amendment post-dated the underlying facts of the *Town of South Berwick* case and so was not discussed in the Law Court’s decision.)

I will be present at the April 11, 2017 public hearing to advise the Town Council further on this matter. Thank you.



PROPERTY MAPS
TOWN OF STANDISH, MAINE

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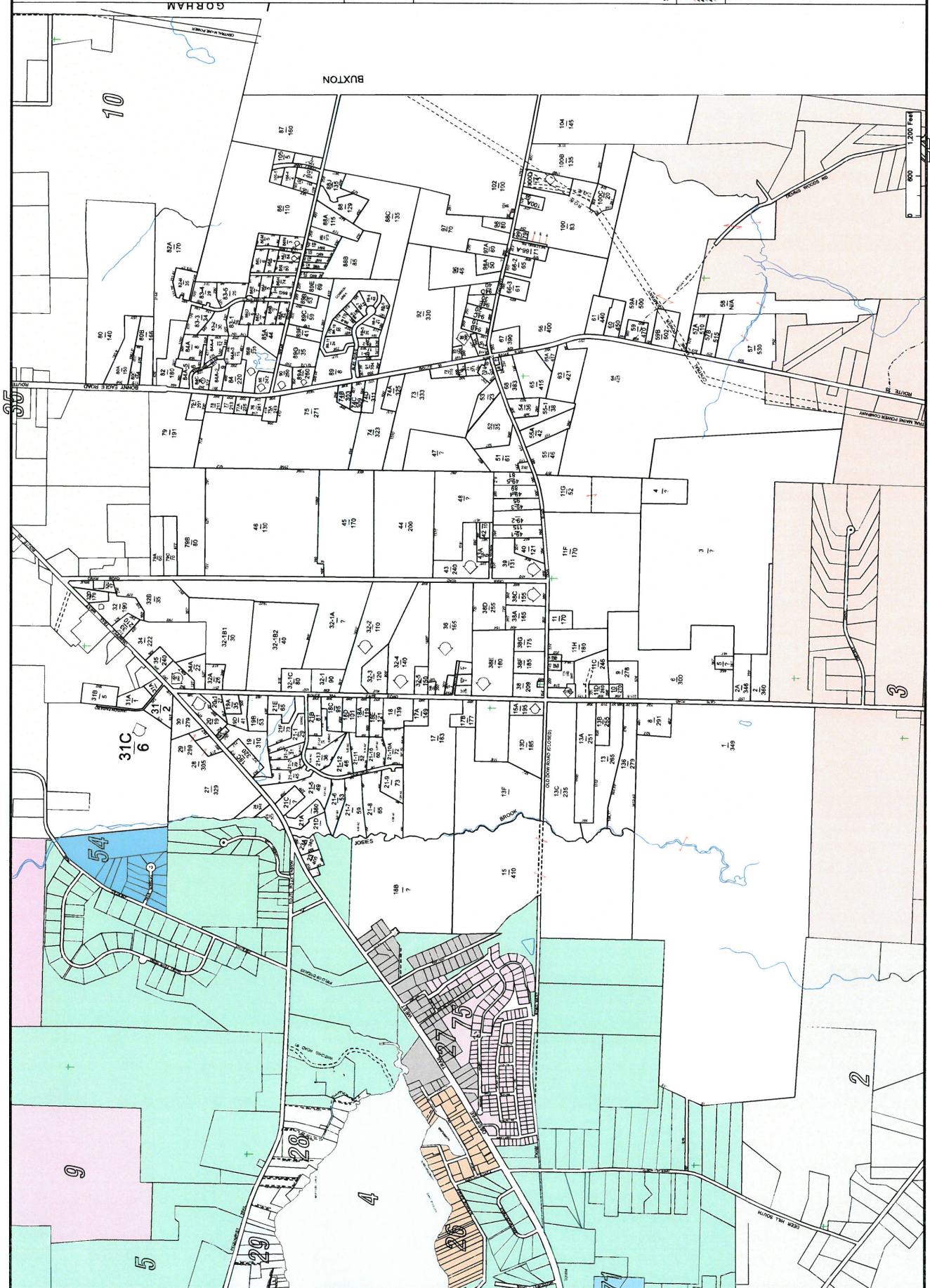
These maps are intended to be
used for the purpose of Property
Tax Assessments and should not
be used for conveyances.
Revised to April 1st

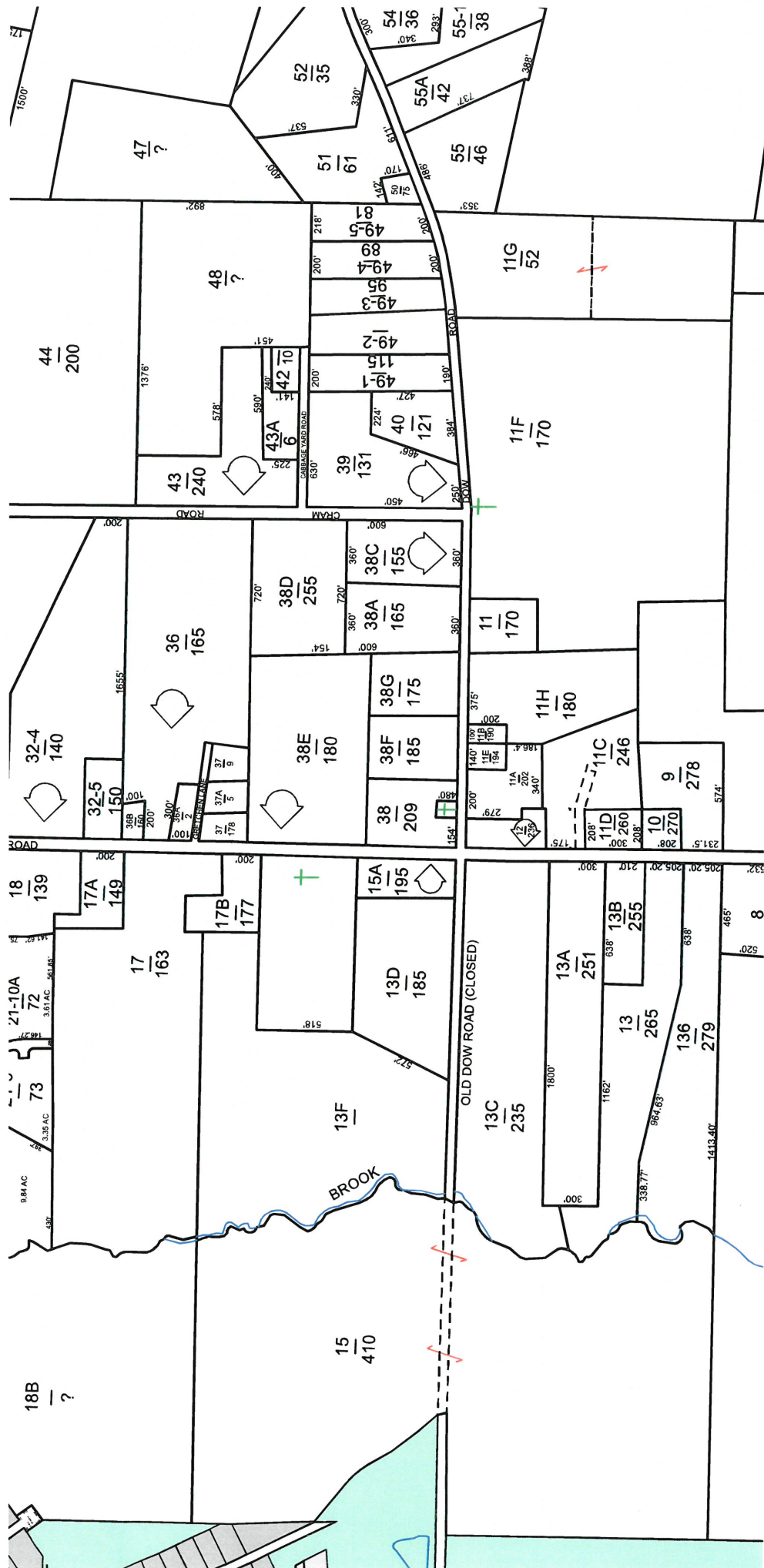
Scale - 1 inch = 600'



2015

MAP: 6





Maine Revised Statutes
Title 23: TRANSPORTATION

Chapter 304: ACQUISITION OF PROPERTY FOR HIGHWAY PURPOSES

§3028. ABANDONMENT OF PUBLIC WAYS; DETERMINATION OF STATUS OF ANY TOWN WAY OR PUBLIC EASEMENT

1. Presumption of abandonment. It is prima facie evidence that 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 30 or more consecutive years has been discontinued by abandonment. A presumption of abandonment may be rebutted by evidence that manifests a clear intent by the municipality or county and the public to consider or use the way as if it were a public way. A proceeding to discontinue a town or county way may not prevent or estop a municipality from asserting a presumption of abandonment. A municipality or its officials are not liable for nonperformance of a legal duty with respect to such ways if there has been a good faith reliance on a presumption of abandonment. Any person affected by a presumption of abandonment, including the State or a municipality, may seek declaratory relief to finally resolve the status of such ways. A way that has been abandoned under this section is relegated to the same status as it would have had after a discontinuance pursuant to section 3026, except that this status is at all times subject to an affirmative vote of the legislative body of the municipality within which the way lies making that way an easement for recreational use. A presumption of abandonment is not rebutted by evidence that shows isolated acts of maintenance, unless other evidence exists that shows a clear intent by the municipality or county to consider or use the way as if it were a public way.

[1991, c. 195, (NEW) .]

2. Status of town way or public easement. The determination of the municipal officers regarding the status of a town way or public easement is binding on all persons until a final determination of that status has been made by a court, unless otherwise ordered by a court during the pendency of litigation to determine the status.

[1991, c. 195, (NEW) .]

3. Removal of obstructions. If the municipal officers have determined under subsection 2 that the way is a town way or public easement and a court has not ordered otherwise, the municipality or an abutter on the way, acting with the written permission of the municipal officers, may remove any gates, bars or other obstructions in the way.

[1991, c. 195, (NEW) .]

4. Quasi-judicial act. The determination of the municipal officers regarding the status of a town way or public easement pursuant to subsection 2 is a quasi-judicial act under Title 14, section 8104-B, subsection 2.

[2009, c. 59, §1 (NEW) .]

5. Filing. If after the effective date of this subsection the municipal officers, either on their own or after being presented with evidence of abandonment, determine that a town way has been discontinued by abandonment pursuant to subsection 1, the municipal clerk shall file a record of this determination with the registry of deeds. The absence of a filing of a determination of discontinuation by abandonment may not be construed as evidence against the status of abandonment. The registry of deeds shall record a document

regarding an abandoned town way under the name of the town way, the name of the municipality and the names of the abutting property owners. The municipal clerk shall provide a copy of the document regarding an abandoned town way to the Department of Transportation, Bureau of Maintenance and Operations.

[2015, c. 464, §7 (NEW) .]

SECTION HISTORY

1975, c. 711, §8 (NEW). 1977, c. 479, §4 (AMD). 1979, c. 127, §154 (AMD). 1979, c. 629, (AMD). 1989, c. 395, (AMD). 1991, c. 195, (RPR). 2009, c. 59, §1 (AMD). 2015, c. 464, §7 (AMD).

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