

Private Roads and Road Associations

A privately owned road, commonly called a “private road,” is a road over which neither the municipality nor the general public has the right to pass by vehicle or on foot. Anyone using or repairing a privately-owned road without the owner’s permission is subject to an action by the owner for trespass (see 14 M.R.S.A. § § 7551-A and 7552; and *Hatch v. Donnell*, 74 Me. 163 (1882)).

In general, a municipality has no legal right to spend public funds to repair, maintain or plow privately owned roads (Opinion of the Justices, 560 A.2d 552 (Me. 1989)). In emergency cases, such as a house fire in the winter, it is legal to send a snowplow down a privately owned road so that the fire truck can get in, but the owner is responsible for ensuring that the road is sufficiently maintained to allow the plow to get through. In 2009, the Legislature modified this law to allow municipal equipment to be used on private roads that were negatively impacting the water quality of a nearby “great pond” as listed by DEP.

In 1989, the Maine Supreme Court ruled that public funds or equipment may not be used to maintain or plow privately owned roads (see Opinion of the Justices, 560 A. 2d 552 (Me. 1989)). This is true even if the public is not prevented by signs or gates from using the road. The Court’s reasoning was that the “implied consent of access” is transitory at best, and one or more of the road’s owners could at any time restrict access.

For example, the municipality might make substantial repairs to a private camp road open to the public, only to find that the very next day the road was closed to public access. Therefore, the Court held that the proposed use of public funds to maintain a private road would represent an unconstitutional expenditure of public funds for a private purpose, thereby violating the “public purpose” doctrine of the Maine Constitution.

Forming a Road Association

Managing maintenance on private or camp roads that serve multiple users can be difficult. Questions about ownership, liability, and maintenance costs can become very complicated and cause hard feelings between neighbors. Forming a road association can be an effective means of avoiding or addressing these problems. By establishing a road association you can:

1. centralize decision making;
2. open lines of communication among members;
3. legitimize the collection of members dues;
4. set up an impartial means for managing money;
5. establish legal authority (if necessary); and
6. potentially avoid personal liability.

Road associations can be loosely formed or highly organized. Generally, the more organized the association, the easier it is to maintain the road and share the cost. A good option for road associations is to incorporate as a non-profit corporation with the State of Maine and to develop a set of rules by which you will do business (by-laws). The primary purpose for incorporating is to protect individuals from personal liability. If an accident occurs (gross negligence aside), instead of an individual being held liable, the incorporated association would be liable.

One of the best places to visit for detailed information is here:

- <http://www.maine.gov/dep/land/watershed/roadassociation.htm> (Offsite)

Incorporating as a Non-Profit

Following are some steps to follow to form a non-profit corporation:

- Discuss incorporating ahead of time with all the landowners that benefit from the road. This gives people an opportunity to ask questions, express concerns, and it gives you the opportunity to discuss the benefits.
- Notify landowners at least 30 days ahead of time - preferably in writing - of the meeting to discuss and vote for incorporation.
- Hold the meeting. Be sure to have a clear agenda and stick to it. Set aside plenty of time for discussion, and take accurate minutes.
- Vote. A majority vote is necessary to pass a motion to form your non-profit corporation.
- If a majority of the landowners vote for incorporation, visit the Secretary of State's website here:
 - <http://www.maine.gov/sos/cec/corp/nonprofit.html> (Offsite)

Complete the form entitled "Non-Profit Corporation, State of Maine, Articles of Incorporation." This form can be obtained from the Maine Secretary of State at 101 State House Station, Augusta, Maine 04333-0101 (Tel: 207-624-7736). There is a small annual filing fee. If your annual gross receipts are normally less than \$5,000, your non-profit organization is exempt from paying income tax under Section 501(c)(3) of the Internal Revenue Code. If your annual receipts are over \$5,000, you can apply to the IRS for exemption designation using form 1023.

By-Laws

Your next step is to adopt by-laws and elect officials. Topics covered by the by-laws should include items such as:

- A purpose statement (describe the location of your private road and that you have formed for the purposes of maintaining the road)
- membership (who is eligible to be a member and vote)
- dues
- election of officers
- duties of directors and officers
- meetings

By-laws should be tailored to each association's needs, so you may want to consider hiring a lawyer experienced in private road agreements to help you set up your by-laws. The State of Maine has a Private Way Law (<http://janus.state.me.us/legis/statutes/23/title23ch305sec0.html> , Subchapter II).

The law allows landowners to underwrite necessary maintenance costs and establishes an enforcement process for collecting dues. To qualify under this law, a private road must:

- provide access to four or more parcels of land;
- benefit three or more different landowners;
- have three or more parcel owners who agree to file; and
- not be a road constructed or primarily used for commercial or forest management purposes.

Essentially, this law allows for the recouping of maintenance costs, but specific procedures must be followed so landowners have the opportunity to vote on proposed maintenance projects. If an owner neglects to pay his or her dues, the money (plus costs and attorneys fees) may be recovered in a civil action.

(Excerpted from "Camp Road Maintenance Manual, A Guide for Landowners"; developed by Kennebec County Soil and Water Conservation District with assistance from the Maine Department of Environmental Protection; June 2000).