

**FORMING AND RUNNING ROAD ASSOCIATIONS UNDER MAINE STATUTE:
A LEADERSHIP MANUAL**

COMPILED BY

THE MAINE ALLIANCE FOR ROAD ASSOCIATIONS

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The Maine Alliance for Road Associations (www.maineroads.org) is an online community that is comprised of and is designed to serve those who are active in Maine road associations. This manual has been compiled from sources that include government officials, qualified attorneys, and informed citizens. MARA is grateful to Attorney Howard Lake of Hufnagel and Lake, Winthrop for his editing and advice. MARA cannot be held liable for specific actions taken on the basis of information contained herein but suggests seeking advice you may need relative to your situation from a qualified attorney.

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CHAPTER ONE

MAINE ROAD ASSOCIATIONS -- HISTORY

- **Informal road associations** in Maine date from times when people simply got together to “fix the road.” They addressed the problems whenever they could, pitched in with labor and materials, and kept things going. Associations still exist in that form and have for many generations. These associations work as long as the people who are in them get along. If they don't, things break down and the road shows it. Frequently, one person might emerge who takes on the whole burden of the road. Situations like that tend to persist. However, they are unfair.
- **Road associations become more formal organizations** in order to solve or prevent the problems discussed above. People get together and decide where to meet when, what needs to be done, how to do it, and how to share the expenses. These ways of operating become customs or long-standing ways of doing things that survive so long as they operate well. Sometimes there is contention, non-nonetheless. Sometimes there are non-payers.
- **Covenanted road associations** usually exist in situations where a single owner/developer of a piece of land has attached covenants to the deeds of subdivided parcels requiring membership in a road association. Additionally, it may have been possible for all abutters to sign such covenants after a piece of property has been subdivided. The obligation to pay for road costs then “runs with the land” and can be enforced in court. Problems may emerge when the original covenants are either forgotten or disputed and become difficult to enforce without contention.
- **Road associations seek to form under the Maine nonprofit statute** for a number of reasons. They may need to form a Corporation that can hold something of value such as ownership of the road or other common elements such as open space and storm water management facilities.
- **The Maine legislature passed the Erosion and Sedimentation Control Law** effective in 1997. Beginning with the late 1990s, it had become apparent that water quality degradation stemming from erosion sites on poorly maintained roads was a serious threat to Maine's lakes and hence its economy and quality of life. The law requires landowners to take and maintain “adequate and timely measures” to “prevent unreasonable erosion and sedimentation.”
- **The Erosion and Sedimentation Control timetable** is this:
 - o After July 1, 2005 it began to apply to a property that is located in the watershed of a body of water “most at risk.”
 - o After July 1, 2010 it will apply to property that is subject to erosion of soil or sediment into any protected natural resource.
 - o Thus, the Department of Environmental Protection now has **wider authority to require owners of property that is subject to on-going erosion**, including wash-outs in storm events or spring run-off, to take responsibility to repair and maintain the property.

Chronically eroding sites, including camp roads, will become subject to the erosion control requirements.

- **Using the Maine Private Ways Statute** to form an association has gained in importance now that the potential burden on members is greater. Statutory road associations are able to collect from non-payers. The non payers, not the association, must pay the legal expenses of collection, including reasonable attorney's fees.
- **The concern of the DEP is to make the statute more "user friendly."** Indeed, the DEP had proposed this preamble to its suggested changes in road law: "The purpose of the(se) measure(s) is to facilitate the formation of road associations for private roads and to assist said associations in the assessment of fees to properly maintain and repair roads. The intent is to provide a road association **"template"** to make it easier for landowners to form an association to maintain the road and do what needs to be done to protect water quality."
- **A template that also respects the diversity among associations is the goal.** The DEP understands the wide variety of conditions under which road associations operate across the state. Some associations are large; some are small. Some have many seasonal residents; some have few. Procedures for assessing contributions have evolved in response to the conditions on that particular road and vary widely. The template must leave associations free to deal with their unique situations, but it must ensure that democratic procedures take place.

CHAPTER TWO

THE MAINE ALLIANCE FOR ROAD ASSOCIATIONS

- **The Maine Alliance for Road Associations (MARA)** is a volunteer-run organization formed in 2005. Its website www.maineroads.org is an information clearinghouse that includes links to various materials and also has a social networking site where road association members can exchange information. On it will be posted the most recent version of this leadership manual. It will also inform members of upcoming legislation affecting road associations by email.
- Its core values are **providing access, protecting the environment and preserving community**. Providing access and protecting the environment are the basic values of any good road association. Preserving community can be difficult, since assessments are enforceable legally. MARA's underlying philosophy is that with the ability to use the power of law to collect assessments comes the responsibility to implement democratic processes. Oftentimes road associations do rely on the energy and commitment of a few. However, they must be careful to conduct themselves in ways that ensure **the majority of members casting informed votes determines policy**. Likewise, its concern has been to preserve flexibility while forming under the statute to deal with widely varying road situations. Ideally, associations will be able to do their job of providing access and protecting the environment without disrupting harmonious community life.

CHAPTER THREE

FORMING UNDER THE MAINE PRIVATE WAYS STATUTE

- **Many types of association can form under the statute.** If there is a pre-existing road association, it can also constitute itself under the statute and still retain its original form, whether simple, organized, nonprofit, etc. If a covenanted Association has existed, if the covenants are for any reason unenforceable, it may be necessary to form under the statute to collect in court. Public easements may form road associations.
- **It takes three or more owners to form an association.** The law reads: Call of meeting. When 4 or more parcels of land are benefited by a private road, private way or bridge as an easement or by fee ownership of the private road, private way or bridge, the owners of any 3 or more of the parcels, as long as at least 3 of the parcels are owned by different persons, may make written application to a notary public to call a meeting.
- **Tax parcel owners, not deeded parcel owners, are required.** “Parcel” in the above refers to tax parcel as assessed by the town for taxes. Tax records lag behind recorded deeds at the Registry of Deeds. Deeded parcels are updated when the property changes hands. There can be problems surrounding finding the responsible member of a family-owned parcel. This must be dealt with.
- **There must be three owners, not one or two owners of three parcels.** If one owner has more than one tax parcel and, more likely, more than one deeded parcel, that person must, to form a road association under the statute, join with the owners of at least two other parcels. Owning a parcel conveys membership, but one vote per parcel obtains.
- **Assessments are made per parcel.** Typically, the owner of multiple parcels pays multiple assessments where the parcels are developed and the road is used. Most associations do not assess undeveloped parcels even if owned by a member who also owns one that is developed. If an undeveloped parcel is not assessed, sometimes its ownership does not confer a vote, by custom.
- **Potential board members must be identified. Some may have liability concerns.** **What liability does road association board membership bring?** Does an individual forming or helping form a road association put his or her personal assets at risk or is there limited liability? Prior to 2009, unlike non-profits, associations formed under the statute did not have the civil liability protection of a corporation, namely that individuals such as directors and officers acting for the corporation were not personally liable if their actions were undertaken in good faith at the behest of the Board. This could be a stumbling block to the recruitment of people to serve on the Board.
- **A 2009 bill grants limited immunity in some circumstances to board members.** The 124th Legislature passed a bill granting officers and directors limited immunity from liability by owners or lessees of other lots for activities carried out in performance of

their duties, such as determining repairs and maintenance to be undertaken, materials furnished, collection of money, and awarding of contracts.

- **Road associations should take other measures to reduce personal liability.**

Associations formed under the statute should be able satisfactorily to reduce the risk of being sued if they are especially careful to hire **contractors** who carry their own liability insurance so that the association will not be liable for damages caused by defects in work done on the road. **Volunteers** working on the road are not immune and should be careful to confine their actions to routine maintenance work unlikely to lead to personal injury if not properly performed (grading, ditching and filling potholes.)

- **There is no immunity for violation of environmental laws.** Associations are not immune from enforcement actions for violations of environmental laws under the jurisdiction of the DEP or a municipality.

- **Statutory road associations may also incorporate as nonprofits.** It is perfectly legal for an association to do both. Incorporation as a nonprofit is at minimal cost to start and maintain. It gives liability protection that is cheaper than insurance.

- **Associations should obtain liability insurance.**

- **There are circumstances in which it is not legal to form under the statute.** They are: 1) if there are not enough owners of parcels on the road, or 2) if the road is constructed or primarily used for commercial or forest management purposes. The statute reads: ***6. Commercial or forest management purposes. This section does not apply to a private road, private way or bridge constructed or primarily used for commercial or forest management purposes.***

CHAPTER FOUR

PLANNING FOR THE FIRST MEETING

- The three or four owners who wish to form an association should make **written application to a notary public to call a meeting**. The notary's function is to identify formally that the people who call the meeting are indeed the people they represent themselves as being.
- **The notary** then issues a warrant or similar written notice setting forth the time, place and purpose of the meeting. (See sample notice.)
- **The procedure the statute requires** is this: *Copies of the warrant or similar written notice must be mailed by means of the United States Postal Service to the owners of all the parcels benefited by the private road, private way or bridge at the addresses set forth in the municipal tax records at least 30 days before the date of the meeting.*
- **You must find and communicate with all members.** The sentence "If mailing copies of the warrant or similar written notice to all such owners is not possible, the notary shall post a notice in a public place" was eliminated from the statute by the 124th Legislature (2008-2009) as antiquated. This puts the burden on the association to find and communicate with all potential members.
- **The notice must contain certain elements.** It must inform the owners of the planned meeting's agenda and specify all items to be voted on. Subsequent meetings may be called in the same manner or by a commissioner.
- **There are issues that should be addressed before the meeting.** They are, for example, bylaws, hardship exclusion, proxies and absentees, and communication. If you have already been operating as an association these may have been addressed. If not, it is important to flesh them out and present a plan at the meeting, as they can take a long time to discuss.
- **Bylaws** It is a good idea to have set of bylaws ready to be adopted. There are sample bylaws in the YCSWD and DEP manuals. They deal with issues such as what members are needed for a board and how dues are assessed. They should be adapted as needed.
- **Hardship exclusion** Existing associations often have ways of dealing with situations in which one or more users are simply unable, rather than unwilling, to pay. Members may formalize this policy in the bylaws or all increase their assessments to compensate.
- **There is a ceiling on how much you can assess members.** The statute reads that in general, assessments can only be a certain percent of assessed valuation: *The commissioner's or board's apportioning of the cost of repairs to the road undertaken pursuant to the provisions of section 3101 may not exceed 1% of an individual owner's property valuation in any calendar year.*
- **How you will deal with proxies and absentees is another important issue.** The call to a meeting may state that an owner may elect to appoint another owner to vote in the owner's stead. This voting is called "proxy voting." Absentee ballots may be provided. Both measures are for the purpose of enabling members who may not be able

to attend a meeting to vote and are advisable. Proxy and absentee forms should be sent with the notice of the meeting.

- **Communication** One of the more important functions the Board will carry out is identifying who and how the responsibility to communicate with the membership will be performed.

- **How do you get the names and addresses of whom you should contact?** The best way is by using local property records. Again, the statute reads that ***Notice of the meeting should be sent to the owners of all the parcels benefited by the private road, private way or bridge at the addresses set forth in the municipal tax records at least 30 days before the date of the meeting.***

- **What if someone is not usually in residence at the location?** It's important to find the address where they actually live and send a duplicate there. Someone, a neighbor or relative, usually knows this, if the person cannot be asked directly. If you are aware that the tax address is inaccurate, or that the owner is not now at that address, then send a copy of the notice to both.

- **What evidence of communication should you keep?** It's important to keep records of mailings. Mailing with a "return receipt requested" is one method. Drawbacks are that it is an added expense and some users of the road may be reluctant to accept certified return receipt requested mail.

- **A proposed board of directors** should be presented at the first meeting. You will need to have decided on a proposed board of directors, the offices on it and who may be willing to hold those offices. If there are competing factions this may prove difficult but must be resolved. A slate is usually voted in at the first meeting.

- **There should be a policy on special assessments made at emergency meetings.** Associations must be able to deal with damage to a road that occurs at times other than the usual meeting. All members must be communicated with and their votes called for. The statute reads: ***Special assessments for emergency repairs and maintenance may be made at a duly held meeting called for that purpose. Emergency repairs and maintenance are those actions necessary to maintain or restore the functionality of the private road, private way or bridge.***

- **The bylaws may state that such a meeting may be called with less than thirty days' notice** if needed in order to deal most effectively with the emergency and restore the road to functioning. Longer-term measures may be proposed at the annual meeting.

- **A meeting may not be necessary if the bylaws so state.** Some associations grant the board the authority to deal with the emergency without calling a meeting. They can also provide for the setting aside of certain funds to be expended in emergency.

- **What voting items should be in the call to the meeting?** The statute reads: ***The notice must inform the owners of the planned meeting's agenda and specify all items to be voted on.*** There should be no big surprises. A proposed set of bylaws, slate of officers, and assessment should all be voting items.

- **How do you obtain a final vote on items voted on at the meeting that were not on the agenda?** Some associations are willing to originate voting items and follow up with absentees. Should such a voting item be originated during the meeting, if the tally

was such that the absentees could change the vote, it will be necessary to poll the absentees before the vote is considered final. If they are not large enough in numbers to influence the outcome, they do not need to be polled. Some associations require that only agenda items may be voted on.

CHAPTER FIVE

THE FIRST MEETING

- **Two major things are important to know about how to conduct the first meeting.** First, who votes? The statute reads: *Each parcel of land benefited by a private road, private way or bridge represents one vote under this section; except that, if the bylaws of the association authorize more than one vote, then each parcel may represent no more than 2 votes under this subsection.* Secondly, what officers are needed and what do they do? This is something that each road association must determine for itself. The number and function of officers depends greatly on the size of the membership and the needs of the road.
- **Board members must be nominated, voted on, and “duly sworn.”** The statute reads, *The owners of parcels of land benefited by a private road, private way or bridge at a meeting called pursuant to subsection 2 may choose a commissioner or board, to be sworn.*
- **The meeting must be fair and the agenda should be well thought out** and include all major items discussed above. It may be useful to have on hand a copy of Robert’s Rules of Order, though they are not always necessary or required. Conducting the meeting in a fair way and, perhaps of equal importance, actually having it be perceived as such, is the primary goal. Allowing all to participate is important to a democratic process.
- **Two votes per owner** were legislated in at an association’s discretion, presumably to deal with parcels owned between a husband and a wife. Since parcels owned by more than two persons would have a maximum of two votes, the bylaws should have a process for resolution of disputes among owners. Family ownership may require such treatment.
- **Liability** What is the liability officers take on with the office by law? The statute reads, **The commissioner or board shall collect the money as town taxes are collected and is liable for neglect of duty as town collectors are for similar neglects.** This means that criminal actions such as theft are prosecutable.
- **Is liability insurance needed** for other liabilities? Yes, it is recommended. Matters such as cost, availability, deductibles, and limitations should be discussed with an agent. MARA and COLA are developing guidance on this.
- **How many votes in favor are needed to determine the assessments?** The statute reads: *By a majority vote, the owners may determine what repairs and maintenance are necessary and the materials to be furnished or amount of money to be paid by each owner for repairs and maintenance.*
- **What is the standard for an assessment?** The determination of each owner’s share of the total cost must be fair and equitable. MARA’s view is that courts generally look to see that people “similarly situated” are “similarly assessed.” If you are a part-time resident you must be assessed as all other part-time residents are assessed. If the association chooses to further define “part time” and you are there for one month, someone else there for one month must be assessed equally.

- **What items may the association raise money for?** The statute reads: **23 §3103. Contracts For Repair; Assessments** *The owners, at a meeting held under section 3101, may by a majority vote authorize a contract to be made for making repairs to and maintaining the private road, private way or bridge by the year or for a lesser time and may raise money for that purpose pursuant to section 3101, subsection 5.*
- **What about getting easements when needed?** The 124th Legislature amended the Private Ways statute to give road associations guidance as to how to negotiate easements for the installation of a ditch, drain, culvert or other storm water management infrastructure.
- **What are special inclusions and exclusions to items for which the association may raise money?** Statute covers paving: *"Repairs and maintenance" does not include paving, except in locations where limited paving is demonstrated to be a cost-effective approach for fixing an erosion problem or to repair and maintain pavement existing as of July 1, 2007.* It also covers snowplowing. *"Maintenance" includes, but is not limited to, snowplowing.*
- **What communication with membership is required subsequent to meeting?** Statute reads: *The commissioner or board shall report the outcome of all votes to all the owners by United States mail within 30 days.*
- **What happens as regards absentees if an item not on the agenda was voted on at the meeting?** Owners voting by absentee ballot must be polled on all voting items that were not included in the agenda and the final tally must be reported to the owners.
- **What should be in the minutes?** The minutes of the meeting generally include who attended, reports, what happened, the date and location of the future meeting, and a statement of assessment to each member, although that is sometimes sent separately. In the last session legislators struck explicit language requiring proxies and absentee ballots but left in language regarding how to use them. We can conclude that they are not required but recommended. It can be important to show in court that all voters have had the opportunity to vote, especially given the often geographically dispersed membership.
- **What about people who do not attend or respond to mailings?** People who have not responded to the mailings, despite contact, and who have not sent in absentee ballots or appointed proxies must abide by the majority vote of the membership and assessed according to its determination and assessments are collectable provided the statutory requirements have been followed.

CHAPTER SIX

SUBSEQUENT MEETINGS

- **Is it necessary to re-form under the statute every year?** No, but in the past it has been thought to be and some literature still recommends that it be. The 124th Legislature amended the Private Ways statute to read, ***A road association through its commissioner or board may address present and future repair and maintenance of a private road, private way or bridge until the association is dissolved by a majority vote of its members.*** This means that it is not necessary to send out a notarized call to the meeting. However, the call to the meeting must still include an agenda listing voting items.
- **How long may the association continue to operate under the statute?** It may continue so long as a majority is in favor.
- **How can an association terminate under the statute and adopt another form of organization?** If for whatever reason a majority of members is in favor, it may vote to terminate using the statute and may do so and adopt another form of organization.
- **Who calls the next meeting?** The next annual meeting should be called with due notice by the commissioner or board elected at the founding meeting or elected at a subsequent meeting.

CHAPTER SEVEN

COMMUNICATING WITH MEMBERS

- **What is the intent of the legislature re communication?** The intent of the legislature has been towards modernizing the statute so it can be possible to communicate and act efficiently and quickly. Email can be a big help. If some members can't use that method, phone can fill in but it's still important to create a "paper trail" of evidence showing the communication has taken place.
- **Is email allowed?** Yes. The statute reads: **E-mail may be used as an alternative to United States mail for sending notices and other materials under this section with the agreement of the receiving party as long as the communication includes the current address and telephone number of the sender for purposes of verification.**
- **What steps can members take to ease the burden on the board?** It may be helpful if association members view it as their responsibility to inform the association of any change in parcel ownership and how they are to be contacted. Specifically, they should notify the association of any upcoming changes in ownership and changes in preferred address, fax and/or email address, or phone number by which they may be reached. If kept abreast of changes in ownership, this can relieve the board of the need to consult the town tax list annually.
- **What about email proof of required communications?** When using email, some associations require that a return email be sent verifying receipt of the communication. This can be helpful in establishing a "paper trail." Adequate notification is presumably something the courts are interested in, along with documentation on the steps to form required by the statute. More notice is better than less notice and proper record keeping is vital.

CHAPTER EIGHT

NON-PAYERS

- **What action can be brought into play in the case of non-payers?** The statute reads: *The commissioner or board chosen under section 3101, with respect to the private road, private way or bridge, has the powers of a road commissioner. If any owner, on requirement of the commissioner or board, neglects to furnish that owner's proportion of labor, materials or money, the same may be furnished by the other owners and recovered of the owner neglecting to pay in a civil action, together with costs of suit and reasonable attorney's fees.*
- **What civil action?** The more typical course is bringing a small claims court action. Once a judgment is obtained, then a writ of execution may be readied at the Registrar of Deeds to be a lien on the property. Notice of the recorded lien must be given in accordance with statute.
- **What may be collected?** Assessment plus cost of suit and reasonable attorney's fees may be collected.
- **What documentation will a court require?** The statute reads: *Money recovered under sections 3102 and 3103 is for the use of the owners. In any process for its recovery, a description of the owners in general terms as owners of parcels of land benefited by the private road, private way or bridge, clearly describing the private road, private way or bridge, is sufficient.* Yes. The statute reads, Such process is not abated by the death of any owner or by the transfer of any owner's interest.
- Collection process -- to be added

CHAPTER NINE

PUBLIC OPTIONS

- **Does the public take an interest in the maintenance and repair of private roads, and is the public willing to help with the expenses?** The law in Maine makes it clear that the environmental impact of private roads is primarily the responsibility of the abutting landowners. Individuals purchasing property benefited by a private road take on a responsibility to maintain it when they purchase the property. In other words, the responsibility not to harm the surrounding environment is inherent in ownership of the land.
- **This does not mean owners have to carry this responsibility out alone and independently.** Road repair and maintenance benefits all abutting owners and through an association, that responsibility can be shared.
- Likewise, since the public good is served when roads are kept in such a state as not to harm public waters, **the public takes an interest and indeed may support individuals or associations in carrying out their responsibilities.** The state can at its discretion take an interest in protecting that public good. There are other instances where the state takes an interest in the well being of entities that are the responsibility of private citizens: the education and well being of children; the survival of certain types of businesses; the rules governing the conduct of private individuals. This is because the state perceives a public good is at hand. It does this with water quality and the negative effect of erosion from roads into Maine waters.
- **The state's interest is qualified by the fact that private roads are private and not public.** Landowners retain the right to limit access to private roads. The public may and sometimes does travel them; certainly emergency and service vehicles do. Nonetheless, they generally are not the well-travelled thoroughfares that public roads are.
- **Towns may in some cases accept a formerly private road as a public road.** This happens for reasons that vary from town to town, but is definitely an option.
- **Can towns help in other ways?** The current statute reads: 23 §3105. USE OF TOWN EQUIPMENT *The inhabitants of any town or village corporation at a legal town or village corporation meeting may authorize the selectmen of the town or assessors of the village corporation to use its highway equipment on private ways within such town or village corporation, whenever such selectmen or assessors deem it advisable in the best interests of the town or village corporation for fire and police protection.* Note the operative word "may."
- **Maine law provides for public access to "great ponds."** The 124th Legislature addressed the issue of using public funds or town equipment to repair a road maintained by an association to protect a Great Pond, defined in Maine statute as "any inland body of water which in a natural state has a surface area in excess of 10 acres (40,000 m²) and any inland body of water artificially formed or increased which has a surface area in excess of 30 acres (120,000 m²) except where the artificially formed or

increased inland body of water is completely surrounded by land held by a single owner."

- **The law now holds that municipalities may authorize the expenditure of public funds to prevent storm water runoff pollution from reaching a great pond** and may authorize the use of town equipment to repair a road to protect or restore a great pond or for fire and police protection. See subsections 3105 and 3106 for pertinent definitions and requirements regarding such authorizations. Again, note the operative word "may." Municipalities ***do not have to do this.***

- **How does a road association get town help?** If you seek such aid from your town, address the selectmen or the Town Council and possibly propose a warrant to be voted on at town meeting. If the political will to protect local water bodies from water quality degradation exists, you may be able to get town help.

CHAPTER TEN

OTHER SOURCES OF INFORMATION

- The DEP has formulated standards that you can use to evaluate gravel roads as to their impact on road water quality.
- The DEP has an online up-to-date Camp Road Manual with sample bylaws, covenants, and other important documents.