

**STATE OF MAINE  
131st LEGISLATURE  
FIRST REGULAR SESSION**

**REPORT OF THE ABANDONED AND  
DISCONTINUED ROADS  
COMMISSION**

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## EXECUTIVE SUMMARY

The 12-member Abandoned and Discontinued Roads Commission has met six times to carry out its duties under PL 2021, chapter 743, “An Act to Establish the Maine Abandoned and Discontinued Roads Commission.” Maine local road law, particularly the law of abandoned and discontinued roads, is complex and raises both legal and policy issues, including those that the Legislature directed the Commission to consider. Given that complexity and the four months the Commission has had to examine the issues, the Commission’s recommendations are preliminary and do not contain any proposed legislation, but the Commission does recommend the following:

- Enactment of a statute to limit property owner liability for maintenance of public easements where the municipality does not maintain them;
- Automatic retention of a public easement upon discontinuance or statutory abandonment of a town way, particularly if there otherwise is no remaining access;
- Clarification of terminology related to abandoned or discontinued roads in current law that may be confusing or contradictory, and care to avoid the same in future legislation;
- Encourage greater accessibility to information regarding the status of roads, and possibly establish alternative dispute resolution pathways to more easily and less expensively determine the legal status of roads; and
- Work toward ways by which the existing seller real estate disclosure for roads can be improved and an inventory of the legal status of roads -- town ways, public easements, abandoned and discontinued roads and private roads -- can be incrementally created.

### I. INTRODUCTION

The 130<sup>th</sup> Legislature enacted PL 2021, chapter 743, “An Act to Establish the Maine Abandoned and Discontinued Roads Commission.” That new law directed the formation of the Abandoned and Discontinued Roads Commission (the “Commission”) as a standing body that would consider specific topics, prioritize additional issues and matters of importance to listed parties, and submit a report to the Legislature by February 1, 2023, and annually thereafter.

The Commission has held six meetings since its organization in October 2022, and its work to date is summarized in this Report. This is a complex area of law and policy, and the Commission has just begun its work. Therefore, the Report’s responses to the questions and duties posed by the Legislature through chapter 743 are necessarily broad and preliminary. However, we hope the recommendations of this Report are helpful to the Legislature. As the Commission proceeds with this work, it hopes to offer more concrete suggestions to the Legislature for changes to Maine law to provide greater certainty and protections for landowners, road users, members of the public, the real estate business sector, and State, local and county government officers.

## II. COMMISSION PROCESS

**A. First Meeting, October 7, 2022.** Conducted organizational meeting to introduce members and to become acquainted with the Commission’s duties.

**B. Second Meeting, October 27, 2022.** Discussed methods and locations by which to provide public notice and public access to Commission minutes, reports and other documents and cost of same. Continued discussion of Commission’s duties, including planning and scheduling of future meetings: to obtain background information and public comment; to evaluate public comment; prioritize issues and reach consensus on concerns, issues and potential resolution of same; prepare and adopt report to Legislature.

**C. Third Meeting, November 17, 2022.** Continued discussion of methods and locations by which to provide public notice and public access to Commission minutes, reports and other documents, given cost of same and lack of State funding for Commission; Jim Katsiaticas presented: “Overview of Municipal Roads – Abandonment and Discontinuance” (Appendix C); Roberta Manter, Maine ROADways presented: Results of ROADways’ survey of top issues, and “small tweaks,” to address those issues (Appendix D).

**D. Fourth Meeting, December 14, 2022.** Adopted Remote Participation Policy; Peter Coughlan of MaineDOT’s Local Roads Program presented the “MaineDOT Public Mapviewer Right of Way Research Guide” tool (Appendix E). The Commission opened its public hearing and left the public hearing open for written comment from public and from municipal officials.

**E. Fifth Meeting, January 11, 2023.** Completed receipt of comment from public and from municipal officials; evaluated public comment; prioritized issues, and reached consensus on concerns, issues, and potential resolution of same.

**F. Sixth Meeting, January 25, 2023.** Review and revise draft Report to Legislature and adopt same.

### III. RECOMMENDATIONS

Chapter 743 sets out the following duties for the Commission:

#### **2. Duties.** The commission shall:

##### A. Consider the following:

- (1) Property owner liability, including personal injury, property damage and environmental damage liability resulting from public use of an abandoned or discontinued road;
- (2) Public easement retention over an abandoned or discontinued road, including the scope of permitted and actual public use;
- (3) Statutory terminology related to abandoned or discontinued roads; and
- (4) he statutory process for the abandonment or discontinuation of a road, including barriers to determining the legal status of a road;

##### B. For matters relating to abandoned and discontinued roads other than those described by paragraph A, prioritize matters for consideration by the commission by determining which matters related to abandoned and discontinued roads have a significant negative impact, qualitatively or quantitatively, on:

- (1) Owners of property that abuts an abandoned or discontinued road;
- (2) Owners of property accessible only by traveling over an abandoned or discontinued road;
- (3) Recreational users of an abandoned or discontinued road;
- (4) Members of the public;
- (5) Municipal, county or state governments; and
- (6) The physical integrity of an abandoned or discontinued road and surrounding land;

##### C. Develop recommendations on ways to address matters considered by the commission, including recommendations for statutory changes; and

##### D. Review legislation affecting abandoned or discontinued roads and provide information to joint standing committees of the Legislature upon request.

As to the items in A. above, the Commission considers and recommends as follows.

(1) *Property owner liability.* The Commission heard much in this regard from owners of property located upon a public easement, whether the public easement was created by

discontinuance of a town way or was specifically laid out as a public easement (or private way). A municipality has the right, but not the obligation, to maintain, repair and plow a public easement. 23 M.R.S. § 3105-A. Where the municipality decides not to exercise this right, the property owner may maintain, repair and plow the public easement, on its own or with others, and that property owner is liable for personal injury, property damage and environmental damage liability resulting from the work on the public easement. The Commission therefore recommends creation of a statutory limitation on liability for property owners who maintain, repair and/or plow a public easement where the municipality does not do so. This limitation on liability might resemble the limitation on liability for landowners who make their land available for passive outdoor recreation under 14 M.R.S. § 159-A and should require the work be performed in a reasonable manner.

(2) *Public easement retention over an abandoned or discontinued road, including the scope of permitted and actual public use.* A majority of the Commission’s members generally favor the automatic retention of a public easement upon discontinuance of a town way in order to ensure that the owners of property along that way are not landlocked. There also was some support for ongoing payment to be made to the property owners if a town way is discontinued with retention of a public easement, but the municipality does not exercise its right to maintain, repair and/or plow the way. Some Commission members prefer that the property owners themselves attempt to reach agreement as to whether a road should be privately maintained and consider formation of a private road association, before any public easement is retained after town way discontinuance. (“There should be no automatic anything.”)

(3) *Statutory terminology related to abandoned or discontinued roads.* Commission members point out several instances of confusing terminology related to these roads.

- For example, the term “private way” has a specific meaning as a type of way with rights of public access that has been used in deeds since Maine separated from Massachusetts, but which now is included in the term “public easement” since the Maine Legislature recodified State, county and local highway law in 1976. 23 M.R.S. § 3021(2). However, until a 2007 amendment, the term “private way” also was used to refer to “private roads” in provisions of State law that concern “road associations.” 23 M.R.S. §§ 3101-3104. (In 2007, “private way” in the road association statutes then was defined to have the same definition as in 23 M.R.S. § 3021(2)). The State’s motor vehicle laws define “private way” as follows: “58. Private way. ‘Private way’ means a way privately owned and maintained over which the owner may restrict use or passage and includes a discontinued way even if a public recreation easement has been reserved.” 29-A MRS § 101(58). This definition conflicts with the definitions that give the public a right of access over private ways, or “public easements” as they now are called. As a result, the general public often confuses the terms “private way” and “private road.”
- The term “public easement” itself now seems to have two different definitions – one limited to rights of access by foot or motor vehicle as defined at 29-A M.R.S. § 101(42) (23 M.R.S. § 3022 for public easements formally laid out as such by municipalities after 1976, and since 2015, §23 M.R.S. § 3028-A for public easements after statutory abandonment of a town way), and one without such limitations (23 M.R.S. § 3021(2) for former private ways and 23 M.R.S. § 3026-A for public easements after

discontinuance of a town way). Because the definition of ‘motor vehicle’ at 29-A M.R.S. § 101(42) excludes ATVs and snowmobiles, it means they can be operated along public easements that used to be private ways before 1976 and public easements left after discontinuance, but not public easements laid out as such or left over after statutory abandonment.

- The public and State, county and local officials often mistakenly confuse the terms “discontinuance,” which is a formal process to eliminate public maintenance responsibility for a town way, and “abandonment,” which is the elimination of public maintenance responsibility that happens by the passage of time.

The Commission recommends further work to determine the sources of confusion in Maine’s abandonment and discontinuance law terminology and to find ways to reduce this confusion. The Commission understands that Senator Vitelli is sponsoring LR 88, “An Act Regarding Private Roads,” that may attempt to dispel some of this confusion; the Commission is available to review such legislation and to provide information to the Legislature in this process.

(4) *The statutory process for the abandonment or discontinuation of a road, including barriers to determining the legal status of a road.* Commission members recognize the difficulty people have in determining the status of a road. While the Maine Department of Transportation (MaineDOT) has presented the Commission with information about the Mapviewer tool on its website that displays information collected from municipalities as to whether a given road is publicly maintained, and while it is possible for the public, property owners, and attorneys to search State, county, and municipal records in search of information as to whether a road is a town way, a public easement, a private way, or a private road, some roads elude easy classification and require determination by the courts. Litigation over the status of roads is a fact-specific, time consuming and expensive process.

Several Commission members suggest creating an Alternative Dispute Resolution process for more affordable and timely mediation of road abandonment, road discontinuance, public easement, and private road issues. Commission member Roberta Manter notes that the University of Maine Cooperative Extensions offers a Maine Agricultural Mediation Program that already addresses neighbor disputes or disagreements (involving farm or forest land in production), which may concern public easements. Family and Community Mediation also may provide a model.

Increased compliance with State law could help create greater certainty about the status of municipal roads after their abandonment and discontinuance. Since 1959, Maine law has required an order of discontinuance to be recorded in the appropriate registry of deeds to be effective as against successors in title. 23 M.R.S. § 3024. However, in many cases, recording of these certificates has not occurred, to the detriment of persons purchasing property along the road who are unaware of its legal status. Commission members recommend strengthening this requirement, as was attempted through the 2015 enactment of 23 M.R.S. § 3026-A(5).

Finally, in this regard, the task of determining the status of a municipal road is made more difficult when the terminology, standards, tests, and processes for road abandonment and discontinuance change frequently, and, as seen above, often inconsistently. This determination used to be



relatively straightforward, although still occasionally subject to litigation. If a town way was discontinued before September 3, 1965, there was no automatic retention of a public easement, but the municipality could vote to retain “a private way subject to gates and bars” (since 1976, considered a “public easement”). If a town way was discontinued on or after September 3, 1965, a public easement was automatically retained, but the municipality could vote not to retain a public easement. If the presumption of abandonment of a town way arose because a municipality had not spent money to maintain the way for any 30-consecutive year period, a public easement was automatically retained. Since 2015, the Legislature has made several changes to the procedures and outcomes under these statutes, perhaps in an attempt to make improvements, but these instead appear to have created greater delay and uncertainty, which may lead to more disputes and litigation. Any further changes to the road abandonment and discontinuance statutes should be considered in the larger context of the road, real estate, nuisance, and other statutes in which they appear, with an emphasis on clarity and consistency. Again, the Commission is available to assist and provide information to the Legislature.

As to the items in B. above, the Commission determined based upon the public comments that aside from the considerations in A. above, the parties listed in B. have raised concerns and issues that it prioritizes as follows and makes related recommendations.

*(1) Equal priority*

- *Access.* Property owner access comprises one set of access issues. Owners of property that abuts an abandoned or discontinued road need continued access, since their deeds likely do not include a private easement because the property was once on a town way. Where town ways are discontinued without a public easement, the private property owners may be landlocked, and owners of lots along that private road may block access by property owners located further down the road or may only permit access for a price. Property owners who must pay for their own maintenance of a road, either as a public easement the municipality does not maintain or as a private road, may see their work damaged by other users, such as the general public, ATV and snowmobile operators, and/or owners of forested parcels operating logging truckers and skidders. There is a State law making damage to a public easement by operation of a motor vehicle a Class E crime (*see* 17 M.R.S. § 3853-D. “**Operating a motor vehicle on land of another, 1. Damage or destruction to farmland, forest land or public easement.** A person who, as a result of operating a motor vehicle on farmland, forest land or a public easement in fact, damages or destroys crops, forest products, personal property or roads on that farmland, forest land or public easement, commits a Class E crime.”). Municipalities may bring actions to enjoin persons who damage a public easement. But enforcement of incidents of damage to public easements under § 3853-D or by civil actions is challenging since these roads generally are not patrolled. Also, property owners note that there are no safety regulations, such as speed limits, on private roads, and that if safety regulations are applicable to public easements, they are not enforced.

Commissioner Roberta Manter’s Maine ROADWays group conducted a survey of those owning property on abandoned and discontinued roads, and she reports that the respondents’ primary issue was access-related -- the unconstitutionality (they believe)

of public easements, which they state are public roads with no guaranteed public maintenance and with no ongoing compensation paid to the landowners who must bear the cost of continued maintenance in the face of public use in order to preserve access to their property. Its members urge the Legislature to seek an Opinion of the Justices on the conflict between *Jordan v. Town of Canton*, 265 A.2d 96, 99-100 (Me. 1970) (stating “Without public responsibility for maintenance and repair, it is only a question of time before a public road will become impassable or unsafe for travel,” in requiring compensation for the taking of road rights by State law that allowed reclassification of town ways as “limited user highways”) and *Fayette v. Manter*, 528 A.2d 887, 888 n.1 (Me. 1987) (“The parties also agree that [by definition] when a town discontinues a road and retains a ‘public easement,’ the public has an unfettered right of access over the road but the town has no maintenance responsibility. The parties disagree over whether this definition of a public easement is constitutional.”) Did the Maine Supreme Judicial Court, by ruling in favor of the Town of Fayette and the county's discontinuance of a county way with public easement, despite the Manters’ claims of the unconstitutionality of public easements, implicitly find the retention of a public easement without assumption of a maintenance responsibility is constitutional, or is that issue reserved for another day?

Recreational users also have access issues. ATV and snowmobile operators may operate on private roads with landowner permission and can ride on public roads only for limited distances and purposes. However, it is not clear whether they may operate on public easements generally, and it appears that they cannot operate on public easements created specifically as public easements (23 M.R.S. § 3022) and on public easements created by statutory abandonment (23 M.R.S. § 3028-A). In those cases, the public easement is limited to rights of access by foot and by motor vehicle as defined in the motor vehicle statutes, which specifically excludes ATVs and snowmobiles. Public easements created before July 29, 1976 and by discontinuance at any time do not appear to be limited in this regard. Also, do the apparent prohibition of ATV and snowmobile use on public easements created specifically as public easements or resulting from statutory abandonment preclude owners of property on those roads from accessing their property and perhaps homes by ATVs and snowmobiles?

Finally, property owner access and recreational access needs will have to be balanced, which may be an issue of particular importance to ATV and snowmobile operators.

- *Liability.* As previously mentioned, the Commission members recommend limiting the liability of property owners who reasonably maintain their public easements where the municipality decides not to. Title 14 M.R.S. § 159-A, which limits the liability of landowners who open their land to the public for passive recreation in order to promote public outdoor recreation, may be a model for such legislation.
- *Maintenance and prevention of damage.* Municipalities may bring a civil action to enjoin damage to public easements and property owners along a public easement may do so as well (23 M.R.S. § 3029-A), but there are difficulties in doing so. Proof that a particular person or truck or ATV operator damaged a road is difficult, and there is the

cost of legal action to recover damages and require repair. As noted above, 17 M.R.S. § 3853-D makes motor vehicle-caused damage to a public easement a Class E crime, but enforcement seems lacking and criminal prosecution does not repair the damaged road.

(2) *Road inventory*

For many years, it has been suggested that an inventory of the legal status of roads -- town ways, public easements, abandoned and discontinued roads and private roads -- be prepared. Legislation that would place that burden on municipalities has been defeated as a large unfunded State mandate, and municipalities lack the staff and funding to conduct such an inventory. MaineDOT likewise lacks the staff and funding to conduct such an inventory. A Legislative resolve that municipalities may develop road inventories and send them to MaineDOT expired December 1, 2018 without response. There are practical issues as well -- even a well-funded and staffed attempt to determine the legal status of all roads in a municipality would leave a number of roads whose status would be unknown without a declaratory judgment by State courts. Several Commissioners, though, believe that such an inventory would address the legal status of the majority of roads in each municipality, and that MaineDOT and Maine Municipal Association could perform that inventory incrementally. MaineDOT's Mapviewer tool is an excellent starting point, but it can only provide the information MaineDOT obtains from each municipality -- whether each road is publicly maintained, and not its legal status.

The Commission does recommend the development of a road inventory for each municipality. But whose responsibility is it to develop an inventory of roads in each municipality and their legal status -- the municipality, county, or State? Who should pay to develop that inventory? Recently, the Legislature passed legislation to require the seller of real estate to disclose whether the means of access to the property to be sold is by a public way or by other means in which case road maintenance information must be disclosed, if known. Title 33 M.R.S. § 173(6) provides:

**6. Access to the property.** Information describing the means of accessing the property by:

- A. A public way, as defined in [Title 29-A, section 101, subsection 59](#); and
- B. Any means other than a public way, in which case the seller shall disclose information about who is responsible for maintenance of the means of access, including any responsible road association, if known by the seller.

There is a similar disclosure requirement for nonresidential property at 33 M.R.S. § 193(3).

The Commission recommends that for now, these disclosures could be improved to direct the seller and its real estate broker to at a minimum, consult the MaineDOT Mapviewer tool to help answer the question of whether the property is accessed by a publicly maintained way. When and if municipal road inventories become available, perhaps this statute could then be further amended to require reference to those. Eventually, when better

information about municipal road status is available throughout Maine, the matter might be addressed as a checkoff item on Real Estate Transfer Tax forms, the way Tree Growth taxation classification of real estate is addressed now.

*C. Develop recommendations on ways to address matters considered by the commission, including recommendations for statutory changes.* As this Report and the materials in the Appendices demonstrate, this is a complex area of law and policy, and the Commission has just begun its work. Therefore, the Report's responses to the questions and duties posed by the Legislature through chapter 743 and its recommendations are necessarily broad and preliminary. However, we hope these recommendations are helpful to the Legislature, and as the Commission proceeds with this work, it hopes to offer more concrete suggestions for changes to Maine law to provide greater certainty and protections for landowners, road users, members of the public, the real estate sector, and State, local and county government officers.

*D. Review legislation affecting abandoned or discontinued roads and provide information to joint standing committees of the Legislature upon request.* The Commission is prepared to assist the Legislature in this regard upon request.