Members of the State and Local Government Committee,

My name is David Manter, and I have existed in Fayette for 52 years.
My comments focus on the confusing terms "private way" and "public easement" which this bill seeks to remedy. These terms need to be eliminated from this day forward. But they need to stay on record for the sake of history and to avoid ex post facto changes in the law. Here's why.

A year before I bought my property, the Maine Supreme Court declared that it's UNCONSTITUTIONAL to have a public road with no public maintenance without justly compensating abutting landowners for the inevitable destruction of access.

What we need is an affordable method for towns to keep all of their public roads passable for the purpose for which they are needed. Not every road needs to be capable of supporting a high volume of traffic and loads up to 80,000 to 100,000 lbs.

Instead of "private ways," "public easements," or "limited user highways," which force individuals to maintain public roads at private expense and against their will, we need to allow towns options. Currently it's all or nothing. There need to be in-betweens, i.e. roads that are kept to lesser standards and that are to have limits as to use - weight, types of vehicles, etc.

If a town can't afford to provide sufficient maintenance of its public roads to serve its taxpayers, then the town should disband. How can you have some public roads that are maintained by the public for some of the town's citizens, and other public roads that are not? How can you have some public roads that are maintained at individual expense in addition to their property taxes while everyone else can use them for free? Yet this is what is happening to thousands of Maine's citizens across the state.

I bought my property in1971, a year after the Maine Supreme Court's decision in Jordan v Canton which declared public roads without public maintenance (under *whatever* statute) to be unconstitutional. That decision should have prevented my 52 years of suffering from this confusion. Therefore I ask this Committee to do something about it:

1) Recognize that "private ways" and "public easements" are unconstitutional and instruct the ADRC to do likewise. If you don't have the guts to do that yourself, ask the Justices of the Maine Supreme Court what they meant in their decision in Jordan v Canton.

2) Look into Fayette v Manter, where the Court said, "when a town discontinues a road and retains a 'public easement,' the public has an unfettered right of access over that road but the town has no maintenance responsibility."

3) Give towns affordable options on their public roads for providing citizens with serviceable access to their property.

I'll submit further information in writing.

In Jordan v Canton, the Court said that:

"Without maintenance or repair, it is only a question of time before a public road will become impassable or unsafe for travel. ... 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."

The Court further stated:
"...cases involving loss of access depend on the *practical and factual consequences of governmental action rather than the legal status of the highway.*" (Italics added.)
So if a "public easement" or a "private way" has the same practical and factual consequence as a "limited user highway," what should the Court conclude? In Jordan, the Court's final paragraph states:
"We conclude that Sec. 2068, unaccompanied by any statutory method of providing compensation to those whose property rights may be destroyed and "taken" thereunder, fails to meet constitutional requirements."

In Fayette v Manter, the Court said that a "public easement" gives the public an "unfettered right of access," but that the public bears no responsibility for maintenance. In other words, a public easement is a public road with no public maintenance, which according to Jordan will inevitably be destroyed, and there is no compensation for the resulting taking of property access. It seems to be generally believed that the Fayette case settled the matter of the constitutionality of abandonment. But the last paragraph of the Fayette decision says, "Our analysis of the legal issues posed by this case makes it unnecessary to discuss or decide the merits of the Manters' statutory or constitutional arguments."

To look at it from another angle, in Brown v Warchalowski, the court said:
"The location of this private way over the appellant's land which the Referee as a fact found not required by common convenience and necessity was not a taking of private property for a public use under circumstances of public exigencies, and as such was in violation of 23 M.R.S.A. § 3006 and of Article I, Section 21, of the Constitution of Maine.
"Private property can be taken only for public uses, and then only in case of public exigency."

Yet public easements have been retained under 23 MRS 3026 and 3028 for years when a road is discontinued or abandoned. How can it be said that there is a public need for a road so as to justify declaring the road to be a public easement, if the premise for abandonment or discontinuance of the road is that the public no longer needs it? Or, to put it another way, if the public no longer needs the road, why is the public allowed to abuse the road when a private landowner has been forced to rebuild it at his own expense in order to have property access?

In Lamb v New Sharon, the Court said:
"Therefore, for thirty years to have elapsed without the Town keeping the road passable for motor vehicles, the public must have failed to enforce its rights in the road.
"The common law has long recognized in the doctrine of abandonment that rights in public ways may be lost through neglect."

Based on the premise that the public has *lost* its rights in an abandoned road, the Court concluded,
"Lamb next argues that section 3028 is unconstitutional under the Maine and the United States Constitutions because it allows a taking of private property without just compensation and violates his right to due process and equal protection. Because we find that the statute does not work a "taking" within the meaning of either constitution nor deny him due process and equal protection of the laws, we reject his contentions."

What the Court failed to consider was that the public *does not* lose its rights in the way if a public easement is retained. Public use continues in an "unfettered" manner, (Fayette v Manter,) which in the absence of public maintenance inevitably destroys the road (Jordan v Canton.)

We didn't have 80,000 to 100,000 lb log trucks or ATV's and side by sides when maintenance ceased on many of these roads. Yet now these same roads are expected to withstand that sort of use. Currently, towns are required to keep all of their roads to the same standard. If they cannot afford to do that on little used roads, their only other option is to cease maintenance completely. We need to offer towns other options, namely to keep little used roads to a lesser standard. "Minimum maintenance roads" would allow them to keep some roads just passable for the use for which they are needed, and to prevent uses for which they are not suited.