

Road Maintenance and Repair

This Chapter discusses municipal road maintenance and repair obligations. Several topics are covered, including summer and winter maintenance, state and state-aid roads, brush cutting, and bidding and contracting practices. Related topics are discussed in Chapter 6 and Chapter 9.

Legal Obligation to Maintain and Repair Roads

A municipality's obligation to maintain and repair a road varies depending on the type of road: town way, public easement, or privately owned road. These are addressed separately below.

Town Ways. Maine law requires that town ways be kept open and in repair so as to be “safe and convenient” for travelers with motor vehicles.¹ If a municipality fails to meet this repair obligation, three or more responsible persons may petition the county commissioners to order the municipality to repair the town way.² If, after notice and hearing, the county orders the municipality to repair the way and yet the municipality fails to do so, the county commissioners may have the work performed by their agent and then may send the bill for repairs to the municipality.³

Additionally, if a town way is “blocked or encumbered” with snow, it must be opened and made passable within a reasonable time.⁴ This obligation to remove snow from town ways also requires the removal of snow and ice from sidewalks; however, the municipality is immune from liability for accidents caused by ice and snow on streets and sidewalks⁵ and is liable only for injury caused by a defect in the sidewalk.⁶ The process for closing roads to winter maintenance in order to avoid having to keep some or all of certain ways clear of snow is discussed later in this Chapter.

No Private Maintenance of Town Ways. Municipal officials are often asked whether private citizens can repair and maintain public ways at their own expense, and what rights and liabilities this involves. There is no statute on point, but the case law is clear that private individuals have no right to repair or reconstruct town ways; this may only be done by the municipality or a person acting with authority of the municipality.⁷ This result is logical, since the municipality is responsible for defects in the town way, and so the municipality should be able to control the repair of a town way and the resultant liability.

Public Easements. The voters of a town or village corporation *may* authorize the selectmen or assessors to use municipal equipment to maintain and repair private ways (public easements) within the town or village corporation.⁸ The voters can determine the level of maintenance the town will provide, as there is no requirement that public easements be kept “safe and passable” on a year-round basis. The voters can designate that some public easements (or portions thereof) be maintained at public expense, while

others are not. In short, municipalities have broad discretion in deciding how to care for public easements.

In contrast with town ways, private individuals may repair or reconstruct public easements. It would seem that private individuals should be able to do so in order to permit them to use the easement, especially since the municipality is not obligated to maintain public easements and is not liable for any maintenance it does provide or for any defect in a public easement. Further, these same private individuals often have private easement rights in the same way, and at common law, an easement holder has the right (and generally, the duty) to maintain the easement.⁹ The Maine Superior Court determined that upon discontinuance of a public way, the individuals abutting the way have “very broad rights, including the right to maintain the way with respect to width and character that was sufficient to them so long as their exercise has some reasonable basis and was within the scope of the prior public use.”¹⁰

However, in the event that private repairs are performed improperly and cause injury, the person who made the repairs to a public easement (or contracted for them) may be personally liable. In addition, there are other related questions that as yet are unanswered, such as: (1) Whether it is possible to “overburden” or “surcharge” a public easement (in other words, to increase its use beyond that for which it originally was intended) as could occur if a landowner were to create a major subdivision on a lot abutting the public easement; (2) Whether a person could widen the traveled portion of the public easement right-of-way; or (3) Whether a person could improve a public easement both for purposes of personal use and to accommodate additional traffic.¹¹ The position of MMA Legal Services staff is that a municipality should not prevent private parties from maintaining a public easement but should not act to authorize or condone private maintenance either, and that a municipality may act to prevent a private party from damaging a public easement when it becomes aware of potential damage (as could happen if logging trucks were to use a public easement during mud season).

Privately Owned Roads. The Maine Supreme Court has stated that because of constitutional limitations, public funds or equipment may not be used to maintain or plow privately owned roads.¹² 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.

Maine law, however, permits repairs to private roads for the limited purposes of protecting or restoring a great pond. The law allows municipal repair of a private road if (1) the road is within the watershed of a great pond, (2) the great pond is identified by the Department

of Environmental Protection (DEP) as at risk, threatened or impaired, (3) the DEP or the municipality has determined that the road is contributing to degradation of the great pond's water quality, (4) the repair complies with the DEP's best management practices, and (5) the road is maintained by an organized private road association.¹³ A "great pond" is an inland water body with a surface area greater than 10 acres in its natural state or, if artificially formed or increased, with a surface area greater than 30 acres.¹⁴ Since great ponds are public property and their protection is deemed to be a public trust,¹⁵ the use of public funds to repair a private road to prevent pollution of a great pond presumably satisfies the Maine Constitution's "public purpose" clause. (The public purpose clause requires that public funds be expended for public purposes.¹⁶)

Note that this law authorizes only road repairs, not maintenance or snow removal. Routine maintenance, including plowing, is the responsibility of a road association or of private road owners (see above). (See "Plowing Private Roads & Driveways Revisited," *Maine Townsman*, "Legal Notes," November 2003.)

The Maine Supreme Court opinion has raised many questions, particularly in municipalities that traditionally have maintained privately owned roads. Some of the commonly asked questions are addressed below:

- **People on private roads pay taxes, too; doesn't that entitle them to have their roads plowed?** No. A municipality is not legally required to provide identical services to all roads, just as some parts of town may have public sewer and water, while others do not. Property without those services, however, should not be assessed as though it had them. In other words, the lack of public maintenance of the road may become a consideration in calculating the "just value" of the property for tax purposes. (In some cases, the increased privacy or exclusivity resulting from lack of public maintenance actually may enhance the value of the property.)
- **What can landowners on private roads do to get road maintenance?** The landowners have three general options.

First, they can arrange for private plowing and maintenance. They can do this by informal agreement, or by creating a formal road association for that purpose. State law authorizes members of road associations to call a meeting of abutters to select a "commissioner," who may determine what repairs are to be done and may order the private way repaired. This commissioner may assess the cost of repairs, and the association may raise funds by assessing the abutting owners and may collect assessments in the same manner in which town taxes are collected.¹⁷

Second, the landowners can request that the municipal legislative body accept the road as a public easement, which could then be maintained at public expense. This option will depend on three events: first, all of the abutters on the private road must agree to grant the public easement; second, the legislative body must vote to accept

the way as a public easement; third, the legislative body must vote to authorize maintenance of the public easement, since it is not required by law.

A third option, though unlikely, is to ask the legislative body to accept the road as a town way, perhaps after the road is improved to municipal standards at the expense of the abutters. If so accepted, the municipality assumes the legal obligation to maintain the road in a safe and passable condition.

- **What about access for emergency vehicles, buses, and other municipal vehicles?** The Supreme Judicial Court has not addressed this point. MMA Legal Services staff is of the opinion that it is probably permissible to send the plow down a privately-owned road ahead of a fire truck, police car or ambulance, since opening the road is necessary to provide the emergency service and the provision of that service represents an isolated occurrence for the purpose of saving life or limb, and does not constitute, therefore, a regular practice. But because the Supreme Judicial Court has ruled that public money cannot be used for the benefit of private roads, we recommend that persons living on private roads keep them open, as there is no guarantee that town vehicles can get through in an emergency. It is important to remember that a municipality is not liable for the failure to provide emergency services.¹⁸

Nor should a municipality plow privately owned roads to allow access for school buses, garbage trucks, or other non-emergency municipal vehicles. People living on a private road are responsible themselves for keeping it open for those vehicles, or else to bring their children, trash, etc., out to the public road for pick-up.¹⁹

- **Is it legal to maintain privately owned roads if the road owners pay the municipality for road maintenance services?** MMA Legal Services recommends against this practice. Generally speaking, Maine court cases have determined municipalities should not compete against the private sector unless the service provided to private individuals is one of public necessity, convenience and welfare and the subject matter is of such a nature that the difficulty which individuals encounter in providing for themselves constitutes an exigency, e.g., fuel, water, electricity, food and other necessities. In the cases where courts condoned municipalities competing in the private business sector, an ordinance or law justifying the activity was in place. In those cases, the reason for the ordinance or law was the necessity of specific, basic services for the general welfare of the community and either the lack of those services or their inconsistent provision.²⁰
- **What legal problems may the municipality encounter if it continues to maintain privately owned roads without a contract?** The municipality exposes itself to broader liability when it maintains privately owned roads. Such liability includes:

Possible Loss of Tort Claims Act Protections. There are no cases on point, but it is arguable that the Maine Tort Claims Act will not protect either the municipality or the municipal employee while performing what is essentially a private service. For example, if a plow driver negligently injures a pedestrian on a private road, to the extent that the municipality is not immune from liability, the \$400,000 cap on municipal liability in the Tort Claims Act may not apply.²¹ Also, the municipality's insurance may not cover occurrences on privately owned property on the basis that such work is not a public activity. Moreover, because work on a private road is outside the scope of government activity, the grant of specific immunities and the \$10,000 limit of liability for a municipal employee may not apply to any personal injury or property damage that might occur. *In other words, both the municipality and its road employees could be liable without limitation and without insurance coverage (for defense costs and for damages) for any personal injury or property damage caused by them in the plowing of a private road.*

Anti-trust Liability. Another potential problem is violation of federal anti-trust laws. Since the municipality usually gets its bituminous mix, gravel, salt, sand, gasoline and other supplies at a good price (bulk amounts and no taxes), it can perform road plowing and maintenance for less than a private contractor charges. A private contractor who maintains private roads for a living could argue that municipal maintenance of private roads is an anti-competitive practice. The municipality has an inherently unfair advantage because of its position as a governmental entity. The U.S. Supreme Court held in *Community Communications, Inc. v. City of Boulder*, 102 S. Ct. 835 (1982) that a municipality is not exempt from anti-trust liability unless it can show that there is a precise and affirmatively expressed state grant of power to engage in anti-competitive actions. We are aware of no road-related anti-trust cases involving a Maine community, but the potential exists.

Closing Roads

Sometimes the best way to maintain or repair a road is to close it or limit its use. Three laws address this subject.

The winter closing process contains four steps: (1) list roads for closing; (2) public hearing; (3) order; (4) vote.
--

Closing Roads to Winter Maintenance.²² The legislative body of the municipality may designate that certain roads (or portions) be closed to winter maintenance. Under this law, maintenance of a road can be discontinued for a specific number of months from

November to April, inclusive. The winter closing process requires four steps. The law specifies that some of these steps be taken between May 1 and October 1. To be safe, we recommend that the entire process be done in that time period.

- First, the municipal officers themselves, or upon petition of at least seven voters, draw up a list of roads proposed to be closed. The issue is whether it is “unnecessary” to maintain a road in view of its population, use and travel in winter.
- Second, the municipal officers schedule a public hearing to discuss the list of proposed winter closings. They must place written notice of this hearing in some conspicuous public place at least seven days before the hearing.
- Third, after the public hearing the municipal officers file with the clerk an order specifying the road (or portion thereof) to be closed to winter maintenance. This order also must specify the months of non-maintenance and the number of years the closing order will be in effect. A winter closing can run from one to ten years; if the order fails to specify, it is for one year only.
- Fourth, the legislative body must vote to approve each order, or vote to provide that each order made by the municipal officers is a final determination. In a town meeting town, this step will require a town meeting vote.

Sample orders and articles pertaining to this process are included in Appendix G.

A winter closing order can be altered, but only *after* one year from the date the legislative body has approved it. Alteration of an order can be proposed by the municipal officers or upon petition of seven voters. The steps in the alteration process are the same as those in the initial approval process. Any order by the municipal officers to annul, alter or modify a road closure shall not become final until the legislative body approves the order or makes all such orders by the municipal officers a final determination.

A winter closing order or alteration order may be appealed to the county commissioners within thirty days of this final determination by the legislative body. The appeal must be brought by petition of seven voters to the county commissioners. The county commissioners will conduct a *de novo* hearing on the appeal of the order, and so the municipality should be prepared to prove that the road closing or alteration meets the statutory standard.

There is some confusion about who can use roads that have been closed to winter maintenance. It is not uncommon for private citizens to volunteer to plow a closed road at their own expense, in order to use the road for logging or some other purpose, but we recommend that the municipality not authorize or condone plowing such roads for easier access. The reason for this advice is that a plowed road may appear open and safe to passersby, when in fact it is poorly plowed and hazardous to travel. The municipality would likely be sued in the event of an injury, and even if not liable it would incur legal fees in defending itself. The safe approach is to disallow closed roads to be privately plowed.²³

Snowmobiles and all terrain vehicles (ATVs) are a different matter. In both cases, snowmobiles and ATVs may operate on any public way which has been closed for winter maintenance.²⁴ Maine law is silent about whether other vehicles may use snowbound roads that have been closed for winter.

Temporary Closings and Weight Restrictions.²⁵ Many roads are vulnerable to damage during certain times of the year. Maine law allows municipalities to close a road to all traffic during these seasons, or to impose restrictions upon the gross weight, speed, operation and equipment of vehicles, as determined by the municipal officers.

Closing roads requires adoption of an ordinance or regulations; posting signs is insufficient.

Also, although this section no longer specifically authorizes only a temporary closure, that was its original intent, and so MMA Legal Services staff is of the opinion that this law only authorizes a

temporary closing. (If year-round regulation of a road is necessary to protect the public health, safety and welfare, the municipal officers may adopt a traffic ordinance under 30-A M.R.S.A. § 3009.) However, this temporary closing may be at any time of the year—it is no longer limited to springtime or “mud season.” The law allows posting of bridges as well as of roads.

A temporary closing/weight restriction may be accomplished by regulations or an ordinance adopted by the municipal officers. MMA’s Road Weight Limits/Seasonal Road Closings Information Packet contains sample forms, a sample ordinance and other information on this topic. When restricting the weight limit for vehicles on a road or bridge, we recommend that the *registered weight* of the vehicle be used as the guideline. This will avoid the need for scales or other devices to measure the vehicle’s actual weight.

Some weight-limit regulations provide that a permit can be obtained to use an otherwise off-limits road. The permit should require the vehicle owner to post a bond or other security to repair any damage to the road, as authorized by state law.²⁶ For example, a logging operation could be allowed to use a dirt road in the spring if the logger agrees to pay for any road or drainage damage resulting from his operation. To protect the town, we recommend that a bond or other surety be required to cover the full cost of all potential damage, not just surface damage.

Typically, road weight regulations contain exceptions for emergency vehicles, fuel deliveries and utility trucks. State law now specifically exempts vehicles delivering home heating fuel from having to obtain a local permit so long as they operate in accordance with a permit issued by MaineDOT.²⁷ It also specifically exempts “a person operating a vehicle that is transporting well-drilling equipment for the purpose of drilling a replacement water well or for improving an existing water well on property where that well is no longer supplying sufficient water for residents or agricultural purposes” from county or municipal permit requirements if the operation is during a period of drought

emergency as declared by the Governor.²⁸ Also, some regulations allow vehicle passage when the road is “*solidly frozen*.” This term should be clearly defined if used; see the sample ordinance in Appendix H.

Violation of a posting or permit under the temporary closings and weight restrictions law is a traffic infraction punishable by a *mandatory minimum fine* of \$250.

Any ordinances adopted by the municipal officers pursuant to the traffic and parking regulation authority provided them under law²⁹ should contain a penalty clause, and it should state that all penalties accrue to the municipality; otherwise, the State will keep any fines recovered.

The law allowing restrictions on weight does not specifically mention permanent or year-round restrictions on the use of a road, but such restrictions are allowed by an ordinance adopted by the selectmen using the authority given to them under State law to enact traffic ordinances.³⁰

Closings for Emergency or Special Events.³¹ A police officer may close or restrict the use of a road as necessary for public safety during emergencies, accidents or special events. The law does not define “special events”; that determination apparently is left to the discretion of the police officer.

A municipality may want to close a road for non-emergency special events, such as parades, festivals, block parties and the like. The municipal officers have this authority by ordinance (they must adopt an ordinance for this purpose under their traffic and parking regulation powers; see Chapter 6).

A municipality cannot permit persons to stop traffic on a public way to solicit contributions from, or to sell merchandise to, motorists. However, State law does allow fundraising by charitable non-profit organizations incorporated in or recognized by the State that have received municipal and local law enforcement authorization.³²

Towns without quick access to police officers often ask whether in an emergency, the municipal officers can close a road under the same authority that allows police officers to close or restrict traffic for non-emergency special events. No, they cannot. However, State law provides elsewhere that municipal officers have the authority to respond to an emergency through the road commissioner or on their own, if the road commissioner fails to take steps to eliminate safety hazards within twenty-four hours.³³

Contracting Out for Road Maintenance and Repairs; Bid Process

Municipalities without their own highway equipment usually contract with a private contractor or another town for road maintenance and repairs. A one-year road maintenance contract is not required to be in writing, but we strongly recommend a

written contract, as oral contracts are difficult to enforce if there is a dispute because there is no record of the terms. Contracts which will not be performed within one year *must* be in writing under Maine’s Statute of Frauds.³⁴ A road maintenance contract need not be filled with unintelligible legal language. A simple “plain English” contract will protect the municipality and make it easier for the contractor to understand his rights and obligations. A sample plowing contract (which can be modified for summer maintenance) is found in Appendix I, along with *Townsmen* Legal Notes from October 1986 and March 2000, and the Legal Information Packet on bidding.

Contracts for one year or less do not need specific voter approval. For example, if the voters in Meddybemps raise and appropriate \$25,000 for winter and summer road maintenance for 2009, but the town has no equipment of its own, the selectmen have the *implied* approval of the voters to contract out for the work, as long as not more than \$25,000 is spent.

However, it is the opinion of MMA Legal Services staff that to enter a multi-year contract, the municipal officers need the express approval of the legislative body. (The reason for obtaining voter approval is because the legislative body must authorize money to fund any future contractual obligation.) For example, if Contractor Johnson will do road maintenance at a good price, but insists on a three-year commitment from the town, the selectmen must obtain voter approval. The voters need not approve a particular contract, but the municipal officers need, at a minimum, the authority to bind the town beyond the immediate budget year. A sample warrant article authorizing the selectmen to enter a multi-year contract is contained in Appendix I.³⁵

The Bid Process. A commonly asked question is whether road maintenance contracts

Maine law contains no general requirement that municipal road maintenance work be put out to public bid.

must be put out to public bid. Not under State law. Bidding is required in some communities by charter, ordinance or warrant article.

Bidding is required if State funds are being used for *certain public improvements*.³⁶ The term “public improvements” generally includes construction, major alterations and repairs, but does not apply to road maintenance. Although a municipality may, by charter, ordinance or article, require a bid process, in the absence of a local requirement, it is up to the municipal officers or road commissioner to decide who will do the work.³⁷ Competitive bidding can save money, however, so the municipal officers may want to go this route even if it is not required. Appendix I contains some sample forms, and outlines some simple rules to avoid problems commonly associated with bidding. Also see Chapter 7 of MMA’s Municipal Officers Manual (“The Bid Process”).

Surety Bond Requirement. State law requires that any contract exceeding \$125,000 for the construction, alteration or repair of any public work, including highways, be accompanied by a bond from the contractor to the municipality.³⁸ This law actually

requires two bonds: a performance bond to ensure that the work will be done, and a payment bond to guarantee that subcontractors and vendors of materials will be paid.³⁹ The same State law also provides that in lieu of performance bonds, at the discretion of the contracting authority, a letter of credit may be accepted.

- **Registered Professional Engineer.** When proposed public works, including a road improvement, are expected to cost in excess of \$100,000, State law requires that a municipality procure the services of a registered professional engineer to prepare the drawings.⁴⁰

Culverts and Driveways

There is often confusion about who is responsible for installing and maintaining culverts which underlie driveways along town ways. Maine law squarely addresses this matter.⁴¹

Culverts. Responsibility for culverts is as follows:

- **Inside town ways and within the right-of-way of state and state-aid highways inside the compact area.** State law provides that placement of culverts on town ways and on portions of state and state-aid highways in the “compact area” of an “urban compact” municipality requires a municipal permit. An “urban compact area” is defined in State law as a municipality having a population of more than 7,500 inhabitants, or a municipality having at least 2,499 but fewer than 7,500 inhabitants that has not opted out of the Urban Compact Initiative. The abutter provides the initial culvert (which must be satisfactory to the municipality) at the abutter’s own expense, and thereafter the culvert is the municipality’s responsibility. Traditionally, municipalities have required the abutter to pay for the first culvert, and thereafter it becomes a public obligation.⁴² However, the municipality should pay for the first culvert and for subsequent replacements if the culvert is solely for the benefit of the road, and does not provide access to an abutter’s property.⁴³ Appendix J contains a sample easement allowing for the placement of a culvert on private property, as is sometimes necessary to best maintain a public road.
- **Culverts within the right-of-way of state and state-aid highways outside the compact area.** MaineDOT is responsible for administering the placement of culverts within the right-of-way of state and state-aid highways that lie outside the compact area of an urban compact municipality. Culverts may be placed in such areas only with a permit from MaineDOT; the abutter provides the initial culvert (which must be satisfactory to MaineDOT) at the abutter’s own expense, and thereafter the culvert is MaineDOT’s responsibility.

Driveways. The same division of responsibility applies to driveways.⁴⁴ No person may construct or maintain a driveway, entrance or approach within the right-of-way of a state or state-aid highway that is outside the compact area of an urban compact municipality

without first obtaining a written permit from MaineDOT, or if within the right-of-way of a state or state-aid highway that is within the compact area of an urban compact municipality, without first obtaining a written permit from the municipal officers. Municipalities are authorized to adopt rules and regulations for the location of driveways, and MaineDOT is required to adopt rules, including a limitation on the number, spacing, design and location of driveways.

Ditches and Drains

Improper drainage is the leading cause of road deterioration. Ditches and drains are therefore critical aspects of road maintenance. A municipality's rights and obligations in this regard depend to a great degree on how the ditch or drainage course was established. This is discussed below.

Common Law Right to Control Water. Maine's law governing control of water has changed as a result of a legislative enactment. The law applies the "reasonable use rule." The reasonable use rule is an express repudiation of the "common enemy rule," which was the governing law in Maine. The reasonable use rule establishes as a nuisance the unreasonable use of a person's land that results in the altering of the flow of surface water that unreasonably injures another's land or that unreasonably interferes with the reasonable use of another's land.⁴⁵

Ditches and Drains Laid Out by Statute. Maine law authorizes the municipal officers to construct ditches, drains and culverts when necessary for the public convenience or to properly care for the road. These ditches, drains and culverts may be located along the road or over adjoining private property,⁴⁶ provided that no such ditch, drain or culvert may pass within twenty feet of a dwelling without the owner's consent. Note that ditches and drains may not be constructed over or through any private lands unless an easement is acquired or land is taken by exercise of eminent domain (see Chapter 2, eminent domain).⁴⁷ A drainage easement may have been acquired when the road was established, in which case it would not be necessary to pay damages to abutters a second time or through prescriptive use.⁴⁸ Town ways which were formerly State roads may include drainage easements that were acquired by the State either through eminent domain or by existing for more than 20 years.⁴⁹

- **Municipal duty to maintain drains, ditches and culverts.** The municipality has a legal duty to maintain and keep in repair the drains, culverts and ditches it has established, regardless of whether these are located on public or private property (presumably, in the latter case, the municipality has an easement to allow the installation and repair of drains, ditches and culverts on private property), and is liable to the owners or occupants of property damaged by the failure to do so. However, the municipality is not liable for failure to construct a sufficiently large ditch, drain or culvert, nor is it liable for damage caused by defective or eroding drainage ways which were not constructed or established by the municipality.⁵⁰

- **State Culvert Replacement and Stream Crossing Rules.** For new culvert installations, the Maine Department of Environmental Protection (DEP) may require a permit. Sections 4 and 10 of the DEP Rule Chapter 305, “Natural Resources Protection Act (NRPA) Permit-By-Rule,” contain a number of permitting criteria that vary depending on whether the municipality is replacing or repairing an existing culvert, or installing a new culvert across a river, stream or brook. (For activities adjacent to, but not within, protected natural resources or within a coastal sand dune system, see sections 2 and 16, respectively, for the heightened standards which apply to these areas).

Note that each of these sections requires the activities to otherwise be in compliance with local shoreland zoning ordinances as well as the terms of Maine’s Site Location of Development Law (38 M.R.S.A. sections 481-490), Stormwater Management Law (38 M.R.S.A. § section 420-D), Natural Resources Protection Act (38 M.R.S.A. sections 480-A to 480-Z), and Maine Hazardous Waste, Septage and Solid Waste Management Act (38 M.R.S.A. section 1301). Municipal officials should also be aware that in some instances the U.S. Army Corps of Engineers requires permitting.

- **Liability for interference with municipal ditches, drains and culverts.** Under Maine law, persons interfering with the municipality’s ditches, drains and culverts are subject to a fine of not more than \$500, imprisonment of not more than three months or both.⁵¹ Also, no person shall cultivate plants, operate farm machinery or deposit fill within the municipal ditches, drains and culverts.⁵² A willful violation of this prohibition results in a fine of \$50 and costs (\$100 and costs for each subsequent offense), plus double the amount of actual damages suffered by the municipality.

A related State law covers public drainage systems and how they affect municipal roads.⁵³ Municipalities have under State law a duty to maintain and repair public drains they have constructed. Anyone who negligently or willfully obstructs or damages a public drain or any street or culvert to a public drain may be liable for the possibility of paying double damages.⁵⁴

Sample drainage easements are included in Appendix J.

Brush and Tree Removal

The municipality’s obligation⁵⁵ to keep town ways “safe and convenient” includes the duty to remove roadside brush, trees and grass that could pose a road safety problem. Uncontrolled brush can limit sight distances and in some cases may intrude onto the travel way itself.

State law authorizes the removal of shrubbery and bushes growing within the limits of the town way,⁵⁶ but specifically excludes from this authority the removal of shrubbery and

trees planted for profit (such as an apple orchard) or ornamental and “public shade trees.”⁵⁷ Therefore, these should not be cut unless they pose a safety threat to the traveling public or pedestrians, or hamper the municipality’s ability to repair and maintain the road. Public shade trees are defined and protected by the provisions of State law.⁵⁸

The law governing municipal affairs authorizes the municipality to initially remove roadside brush and requires abutting landowners who have “cultivated or mowing fields” to thereafter remove brush from the adjoining roadside by October 1st of each year; removal of brush from all other roadside land is the responsibility of the municipality.⁵⁹ If the abutter fails to timely cut roadside brush, the municipality may do so and may impose a lien on the land for the actual expense of this work. This law is a throwback to the days when road repairs and maintenance were done by abutters. We recommend against using this lien method, however, as it raises constitutional issues of due process and equal protection.

One common question is, who is entitled to keep usable wood (such as hardwood) resulting from brush cutting within the road right-of-way? Generally, this wood belongs to the abutting landowner, since abutters own to the centerline of most roads in Maine. However, if the municipality owns the fee simple to the road, then any wood or other usable items belong to the municipality (the question of ownership is discussed further in Chapter 1). We recommend that usable wood be left behind for the landowner, unless that person has agreed to let the municipality take it.

Another source of questions is the removal of trees in the right of way. The municipality may at its expense remove healthy or dead trees located within the right of way if they pose a safety hazard to the traveling public or impede the municipality’s ability to maintain the road. If a tree is located in the right of way but is not (in the determination of the municipal officers or road commissioner) a safety hazard, then the municipality is under no duty to remove it, even if the abutter requests removal. If the reason for removing the tree is to protect an abutter’s house or property, rather than the traveling public, then the abutter should pay the costs of removal. Trees located outside the road right of way should not be removed by the municipality without the landowner’s permission. The municipality may cut any limbs in the air or roots on the ground that intrude into the right of way, even if the trunk of the tree is outside the right of way.

Spraying

The Maine Department of Transportation often sprays herbicides to control brush along State roads. A municipality can enter into a “no spray” agreement with MaineDOT for land within its borders, and individual landowners can do so as well⁶⁰ (7 M.R.S.A. § 625). In both cases, the municipality and the landowner are responsible for removing roadside brush in areas that would otherwise have been sprayed. Under its home rule powers, a municipality also may adopt an ordinance governing the use of pesticides within its borders, and even prohibiting the spraying of pesticides.⁶¹

Municipalities may spray along their own roads, but the “no spray” arrangement should be offered to abutting landowners. Sample “no spray” agreements are included in Appendix K; those samples pertain to state roads but can be modified for local roads.

Public Works in Resource Protection Areas

The Natural Resources Protection Act (NRPA)⁶² requires that a permit be obtained from the DEP before undertaking activities in resource protection areas. The NRPA⁶³ allows certain public works to proceed under a “permit-by-rule” process that is faster and involves less paperwork than the usual full-blown permit procedure. The activities allowed under permit-by-rule include “emergency repair and normal maintenance and repair of existing public works which affect any natural resource.”⁶⁴ Also allowed is the repair or replacement of road culverts, as long as the replacement is not more than 25% longer than the existing culvert and is no longer than 75 feet.⁶⁵ The permit-by-rule process requires the municipality to submit to the DEP a notification form outlining the work to be done. Contact the DEP Bureau of Land & Water Quality, 17 State House Station, Augusta, ME 04333, or call (207) 287-3901 or 800-452-1942, for the most recent version of the performance standards imposed under the permit-by-rule process.

Salt/Sand Storage Facilities

Maine law requires that salt/sand piles be managed so that they do not contaminate ground and surface waters of the State. For some salt/sand piles, containment in a structure is required, while low priority sites may require only the use of “best management practices” to prevent groundwater and surface water contamination. Both DEP and MaineDOT play a role in the administration of this law.

Pursuant to statute, DEP developed a priority list in 1986 stating when public and private salt/sand piles are to be contained.⁶⁶ The timetable for compliance is set out in 38 M.R.S.A. § 451-A; This deadline does not apply to Priority 4 and 5 sites. Priority 4 and 5 sites are not required to follow best management practices to protect ground water provided that a municipal or county site was classified as Priority 4 or Priority 5 as of April 1, 2000 and was registered pursuant to section 413 prior to October 15, 1997. Such Priority 4 or 5 sites have been determined by statute not to be in violation of any groundwater classification or reclassification for discharges to the groundwater from those facilities. However, Priority 4 and 5 sites may need to comply with other State and federal laws regarding surface water impacts and effects on wetlands. Also note: if a town moves its priority 4 or 5 pile from the exempt, registered location, it becomes a new pile no longer exempt and subject to DEP rules. Priority 4 and 5 municipal sites are entitled to reimbursement of construction costs for facilities constructed before November 1, 1999 if plans and financial information were submitted to MaineDOT before that date. The timetable addresses several steps of the process: preliminary plans, financing arrangements, final plan, MaineDOT review, and actual construction. For further information generally or concerning siting or location changes, contact DEP,

Bureau of Land & Water Quality, 17 State House Station, Augusta, ME 04333, or call (207) 791-8110. Information can also be found on the MaineDOT web page: <http://state.me.us/mdot/community-programs/sand-salt-program.php>; information is also available on the DEP website: <http://www.maine.gov/dep/blwq/docstand/sandsalt/index.htm>

Even if a town is not required to construct a facility for groundwater protection, call MaineDOT at 624-3270 for technical assistance. Pursuant to State law, MaineDOT reviews and approves plans for county and municipal storage facilities, in accordance with MaineDOT guidelines.⁶⁷ MaineDOT administers a program for reimbursement of the State share of salt/sand storage facility construction costs.⁶⁸ For more information, contact MaineDOT's Community Services Division, 16 State House Station, Augusta, ME 04333, or at (207) 624-3270.

Maintenance of State and State-aid Roads

Terminology. Pursuant to law, the Department of Transportation classifies roads as state highways, state-aid highways, or town ways and may reclassify roads within these categories. In addition to its own town ways, a municipality may in some circumstances be responsible for state or state-aid highways or portions of the same.⁶⁹

A municipality's obligations for state and state-aid highways depend on whether the state road runs through the compact area of an "Urban Compact Municipality." A "compact section" (also known as a "built-up section") is defined as a section of highway where the structures are nearer than two hundred feet apart for a distance of one quarter of a mile.⁷⁰ "Compact areas" are defined in the Maine Revised Statutes (23 M.R.S.A. § 754(2)(A)) and are determined by the MaineDOT; they include intermittent compact sections separated by short intervals that are not compact. An "Urban Compact Municipality" is defined in State law (23 M.R.S.A. § 754(2)(B)) to mean those municipalities with a population of more than 7,500, and those municipalities whose population is at least 2,500 but not more than 7,500 where: (1) the ratio of persons whose place of employment is in a given municipality to employed people residing in that same municipality is 1.0 or greater, and (2) the municipality has not chosen to opt out of the urban compact initiative.

Maintenance Obligations. Briefly stated, municipal maintenance obligations for state and state-aid highways are as follows:

- In general, a municipality that is an urban compact municipality must maintain in good repair, at its own expense, all state and state-aid highways within the compact areas of the municipality. If within fourteen days of receipt of notice from MaineDOT of neglect to maintain said highways, the municipality does not repair the way, MaineDOT may make the repairs and withhold the cost of repairs from the municipality's payments due under the Urban-Rural Initiative Program.⁷¹

A municipality with a population less than 7,500 which is eligible to be an urban compact municipality and which had no compact area summer maintenance responsibilities as of January 1, 1999 may opt not to become urban compact municipality. Such option must be exercised within one year after July 1, 1999 or within six months of notification by MaineDOT that it is eligible to be an urban compact municipality.⁷² However,

1. If that municipality opts out of summer maintenance responsibilities and had compact area state highway winter maintenance responsibilities on January 1, 1999, it shall continue to be responsible for winter maintenance of compact areas of state highways (23 M.R.S.A. § 754(2)(C)(2)); and
2. If the municipality opts out of summer maintenance responsibilities and did not have compact area state highway winter maintenance responsibilities on January 1, 1999, then it may choose to perform winter maintenance on compact areas of state highways (23 M.R.S.A. § 754(2)(C)(2)).

A municipality also may be responsible for the maintenance of a *discontinued state or state-aid highway* pursuant to State law if the municipality was originally liable for the road. This is not always easy to determine, but a starting-point is the records pertaining to the State's control of the road.⁷³

Urban-Rural Road Initiative Program and Funding for Maintenance. Under the Urban-Rural Road Initiative Program, which actually consists of the Rural Road Initiative and the Urban Road Initiative, municipalities receive regularly scheduled payments from MaineDOT for the improvement of public roads.⁷⁴

Rural Road Initiative funds are distributed at the rate of \$600 per year per lane mile for all rural state-aid minor collector roads and all local roads located outside urban compact areas, except that the rate is \$300 per year per lane mile for seasonal town ways.⁷⁵ Funds may be used only for capital improvements. "Capital improvement" means "any work on a road or bridge that has a life expectancy of ten years or restores the load-carrying capacity."⁷⁶ For municipalities in which there are no rural State aid minor collector roads, funds may also be used for winter highway maintenance, acquisition of highway maintenance equipment or the construction of highway maintenance buildings if the municipal legislative body affirmatively votes that its town ways and local bridges are in sufficiently good condition. Sufficiently good condition means that significant repair or improvement is not needed for at least ten years.⁷⁷ Urban Road Initiative funds are distributed at the rate of \$2,500 per year per lane mile for summer maintenance performed by municipalities on state and state-aid highways in compact areas. For each lane mile beyond the second lane on a highway with more than two lanes, municipalities also are reimbursed at the rate of \$1,250 per lane mile for summer maintenance in compact areas. In addition, Urban Road Initiative funds are distributed at the rate of \$1,700 per year per lane mile for winter maintenance performed by municipalities on

state highways in compact areas regardless of the number of lanes.⁷⁸ These funds may be used only for maintenance and improvement of public roads.

The legislative body must appropriate the funds received pursuant to this law just as all other funds for road purposes are appropriated. (Note: an annual article to accept various categories of state funding is *not* sufficient to authorize *expenditure* of road initiative funds.) The State will make quarterly payments under this program before September 1st, December 1st, March 1st and June 1st of each year.⁷⁹

Snow Fences. State law allows the municipal officers to erect snow fences on private property adjacent to town ways and state and state-aid highways under their control.⁸⁰ The owner of the adjacent property is entitled to compensation for this use of the land. The law also describes the hearing and appeal process.

MaineDOT Road “Turnbacks.” Where a municipality’s population increases to the point that the requisite threshold is reached and the municipality is not eligible to opt out of summer maintenance, responsibility for the section(s) of the state or state-aid highway is turned back to the municipality under State law.⁸¹ The section(s) of state or state-aid highway transferred to a municipality must be in “good repair” at the time of the transfer, meaning that the condition is such as to reasonably avoid non-routine maintenance activities for a minimum of ten years.⁸²

Railroad Crossings⁸³

Municipal officers are authorized, or MaineDOT may order the municipal officers, to remove obstructions, brush, weeds and trees for a distance of up to three hundred feet either side of the crossing; one-half of this expense may be recovered from the State.⁸⁴ However, the municipal officers must give ten days’ written notice by mail to the last known address of the abutting property owners and post the notice in a conspicuous place in the municipality prior to entering onto private property to clear the obstructions. A person may claim damages for their work within two years of the municipality’s action, and MaineDOT will hold a hearing and assess damages to be paid by the municipality, one-half of which the State will reimburse.⁸⁵

Sometimes accidents occur at railroad crossings. The liability for an accident occurring at a crossing may initially rest with the municipality because the crossing is part of a town road maintained by a town. However, if the railroad was negligent in maintaining the crossing, a municipality may recover its losses from the railroad company.⁸⁶

Bridges

Municipalities are responsible for all low-use bridges on town ways and all redundant bridges on town ways. MaineDOT is otherwise responsible for all bridges on state-aid

highways and town ways.⁸⁷ The terms “low-use” and “redundant” are defined within State law.⁸⁸

A chart describing State and municipal responsibilities for bridges is found in Appendix W. Additional information can be obtained from MaineDOT at (207) 624-3417 or 3000.

¹ 23 M.R.S.A. § 3651.

² 23 M.R.S.A. § 3652.

³ 23 M.R.S.A. § 3654.

⁴ 23 M.R.S.A. § 3201; See also *Alexander v. Mitchell*, 2007 ME 108; *Ouelette v. Miller*, 183 A.341, 134 Me. 162 (1936), and *Rogers v. Newport*, 62 Me. 101 (1873).

⁵ 23 M.R.S.A. § § 1005-A and 3658.

⁶ See *Ouelette v. Miller*.

⁷ See *Lamb v. Euclid Ambler Associates*, 563 A.2d 365 (Me. 1989; *Hunt v. Rich*, 38 Me. 195 (1854); and *Harris v. Larrabee*, 109 Me. 373 (1912).

⁸ 23 M.R.S.A. § 3105. At the time of publication of this manual, MMA Legal Services understands that the Maine Department of Environmental Protection intends to submit legislation that would repeal 23 M.R.S.A. § 3105 and re-enact it as a new law (23 M.R.S.A. § 3105-A) that omits any reference to “private roads,” but otherwise restores the provisions of 23 M.R.S.A. § 3105 to allow the use of municipal equipment to maintain and repair private ways (public easements). This proposed change eliminates the problem created by the 124th Maine Legislature, 1st Regular Session, when it amended 23 M.R.S.A. § 3105, authorizing the use of municipal equipment on private roads, in violation of the *Opinion of the Justices*, 560 A.2d 552 (Me. 1989). MMA Legal Services further understands that the proposed legislation will be submitted before the 124th Maine Legislature, 2nd Regular Session.

⁹ See Creteau, *Principles of Real Estate Law* (1977) at 145; and *Dana v. Smith*, 114 Me. 262, 95 A.1034 (1915).

¹⁰ *Wade v. Wenal*, No. CV-96-056 (Me. Super. Ct., Wal. Cty. Jan. 13, 1999)). Indeed, in *Browne v. Connor*, 138 Me. 63, 21 A.2d 709 (1941), the Law Court upheld the constitutionality of the public easement statute (now found at 23 M.R.S.A. § 3022) and implicitly allowed private citizens to improve a public easement (then called a “private way”) at their own expense.

¹¹ *Wade v. Wenal* indicates that surcharge of a public easement may be possible.

¹² See *Opinion of the Justices*, 560 A.2d 552 (Me. 1989).

¹³ 23 M.R.S.A. § 3106.

¹⁴ See 38 M.R.S.A. § 480-B(5).

¹⁵ See 38 M.R.S.A. § 1841.

¹⁶ See *Common Cause v. State*, 455 A.2d 1 (Me. 1983).

¹⁷ 23 M.R.S.A. § § 3101-3103. (These statutes invite confusion because although they appear in the “private ways” provisions they clearly mean “private roads.”).

¹⁸ See 14 M.R.S.A. § 8104-B.

¹⁹ See *Collins v. Westmanland School Committee*, No. CV-90-268 (Me. Super. Ct., Aro. Cty. July 12, 1991).

²⁰ *Morrison v. City of Portland*, 286 A.2d 334; *Ace Ambulance Service, Inc., v. City of Augusta*, 337A.2d 661; and *Laughlin v. City of Portland*, 111 Me. 486.

²¹ 14 M.R.S.A. § 8105.

²² 23 M.R.S.A. § 2953.

²³ This advice is consistent with the reasoning in *Lamb v. Euclid Ambler Associates*, 563 A.2d 365 (Me. 1989).

²⁴ 12 M.R.S.A. § 13106-A(5)(C) states that snowmobiles may operate on any public way which has been closed in accordance with 23 M.R.S.A. § 2953. All terrain vehicles (ATVs) have this same right under 12 M.R.S.A. § 13157-A(6)(C).

-
- ²⁵ 29-A M.R.S.A. § 2395.
- ²⁶ 29-A M.R.S.A. § 2388(2).
- ²⁷ See 29-A M.R.S.A. § 2395(4).
- ²⁸ See 29-A M.R.S.A. § 2395(4-A).
- ²⁹ 30-A M.R.S.A. § 3009.
- ³⁰ 29-A M.R.S.A. § 2395 and 30-A M.R.S.A. § 3009.
- ³¹ 29-A M.R.S.A. § 2078.
- ³² 29-A M.R.S.A. § 2109.
- ³³ 23 M.R.S.A. § 2701.
- ³⁴ 33 M.R.S.A. § 51.
- ³⁵ In the case of *Boudreau v. Town of Princeton*, 611 A.2d 78 (Me. 1992), the Law Court upheld the validity of a multi-year plowing contract which was entered without clear authority from the voters, but what is important to note is that the legislative body gave the selectmen authority to select a contractor. Our advice is that the safe and prudent course is to obtain voter authority for all multi-year contracts.
- ³⁶ 5 M.R.S.A. § 1743-A.
- ³⁷ 23 M.R.S.A. § 2701.
- ³⁸ 14 M.R.S.A. § 871.
- ³⁹ Many municipal officials criticize this law as driving up the cost of roadwork. That is, local officials want the option of foregoing a bond (which will undoubtedly be added to the contract price) when dealing with a reputable, solid and dependable contractor. Under home rule, a town can authorize the municipal officers or road commissioner to require a performance bond if they see fit, so there is some question about the real need for this law. In any event, the law is on the books, and it does help a municipality avoid the placement of mechanics' liens on municipal property for failure of a contractor to pay its subcontractors and materialmen.
- ⁴⁰ 32 M.R.S.A. § 1254.
- ⁴¹ A 1999 amendment to 23 M.R.S.A. § 705 (P.L. 1999, c. 473, Pt. C, effective July 1, 1999) should eliminate any confusion.
- ⁴² This practice was upheld in a small claims case where the town sued the abutter to recover the cost of the initial culvert (see *Town of Chesterville v. Erickson*, No. FAR-89-SC-66 (Me. Dist Ct., Fra. Cty. 1989)).
- ⁴³ See 23 M.R.S.A. § 3251.
- ⁴⁴ See 23 M.R.S.A. § 704.
- ⁴⁵ See 17 M.R.S.A. § 2808. This law enacts the "reasonable use rule" and rejects the common enemy rule most recently reaffirmed by the case of *Johnson v. Whitten*, 384 A.2d 698 (Me. 1978). Maine now follows New Hampshire, as explained in the case of *Micucci v. White Mountain Trust Company*, 321 A.2d 573 (NH 1974). As of the date of this writing and in the wake of the statutory change, Maine's courts have not yet applied the reasonable use rule. Previously, Maine applied the "common enemy rule," as explained in *Maddocks v. Giles*, 1999 ME 63 and *Johnson v. Whitten*, 384 A.2d 698 (Me. 1978).
- ⁴⁶ 23 M.R.S.A. § 3251.
- ⁴⁷ 23 M.R.S.A. § 3251.
- ⁴⁸ See Articles: Maine Roads and Easements, 48 Me. L. Rev. 197 (1996); and *Nevers v. State, et al*, No. CV-83-223 (Me. Super. Ct., Yor. Cty. 1986) and *Boober v. Towne*, 127 Me. 332 (1928).
- ⁴⁹ See 23 M.R.S.A. § 651.
- ⁵⁰ See *Whalen v. Town of Livermore*, 588 A.2d 319 (Me. 1991), *cert. den.* 112 S. Ct. 422, 502 U.S. 959, 116 L. Ed.2d 442; and *Austin v. Inhabitants of St. Albans*, 144 Me. 111 (1949).
- ⁵¹ 23 M.R.S.A. § 3251.
- ⁵² 23 M.R.S.A. § 3252.
- ⁵³ 30-A M.R.S.A. § § 3401-3409.
- ⁵⁴ 30-A M.R.S.A. § 3407.
- ⁵⁵ 23 M.R.S.A. § 3651.

-
- ⁵⁶ 23 M.R.S.A. § 2702.
- ⁵⁷ 23 M.R.S.A. § 2702 and 30-A M.R.S.A. § 3291.
- ⁵⁸ 30-A M.R.S.A. § § 3281-3284.
- ⁵⁹ 30-A M.R.S.A. § 3291.
- ⁶⁰ 7 M.R.S.A. § 625.
- ⁶¹ See *Central Maine Power Co. v Town of Lebanon*, 571 A.2d 1189 (Me. 1990).
- ⁶² 38 M.R.S.A. § § 480-A, *et seq.*
- ⁶³ *id.*, Section 480-Q.
- ⁶⁴ *id.*, Section 480-Q(9).
- ⁶⁵ *id.*, Section 480-Q(2-A).
- ⁶⁶ 38 M.R.S.A. § § 411 and 413(2-D).
- ⁶⁷ 23 M.R.S.A. § § 1851 and 1852.
- ⁶⁸ 23 M.R.S.A. § 1851.
- ⁶⁹ The Legislature made significant changes in the laws governing municipal responsibility and payment for maintenance of state and state-aid highways (see P.L. 1999, c. 473, effective July 1, 1999). These laws distinguish between “summer maintenance” and “winter maintenance.” “Summer maintenance” refers to general physical upkeep, including brush cutting, ditching and capital improvements. “Winter maintenance” refers to plowing, sanding and the erection of snow fences.
- ⁷⁰ See 23 M.R.S.A. § 2.
- ⁷¹ 23 M.R.S.A. § 754(1).
- ⁷² 23 M.R.S.A. § 754(2)(C)(1).
- ⁷³ 23 M.R.S.A. § 651.
- ⁷⁴ The Legislature has repealed the former Local Road Assistance Program and has enacted the Urban-Rural Road Initiative Program (see PL 1999, c. 473, effective July 1, 1999).
- ⁷⁵ 23 M.R.S.A. § 1803-B(1)(A).
- ⁷⁶ 23 M.R.S.A. § 1803-B(1)(A)(2).
- ⁷⁷ 23 M.R.S.A. § 1803-B(1)(A)(2).
- ⁷⁸ 23 M.R.S.A. § 1803-B(B)(1).
- ⁷⁹ 23 M.R.S.A. § 1803-B(3).
- ⁸⁰ 23 M.R.S.A. § 1005-A.
- ⁸¹ 23 M.R.S.A. § 754(3).
- ⁸² As a result of 1997 and 1999 amendments to 23 M.R.S.A. § 754.
- ⁸³ The laws pertaining to railroad crossings are found at 23 M.R.S.A. § § 7201-7234.
- ⁸⁴ 23 M.R.S.A. § § 7223 and 7224.
- ⁸⁵ 23 M.R.S.A. § 7225.
- ⁸⁶ Title 23 M.R.S.A. § § 3701-3707.
- ⁸⁷ 23 M.R.S.A. § 565.
- ⁸⁸ 23 M.R.S.A. § 562.