



## Town of Windham

Office of the Town Manager  
8 School Road  
Windham, ME 04062

Barry A. Tibbetts, Town Manager  
batibbetts@windhammaine.us

207.892.1907 voice  
207.892.1910 fax

# Questions and Answers for Windham's Private and Special Legislation 1723 for Town Plowed Private Roads.

## 1. Why did the Town request Private and Special legislation 1723 for Windham only?

This legislation was requested by the Town to correct access rights by town vehicles, address private way road improvements, liability protection, and ownership responsibility. The Town of Windham has had a longstanding policy of plowing a large number of private roads to ensure emergency access and passage to our residents on these roads; however, a 1989 Opinion of the Justices of the Maine Supreme Court determined that it is unconstitutional for a municipality to expend public resources on private property. The objective of L.D. 1723 is to give us time to correct Windham's variance from this ruling that was issued years ago, so that we can continue this service with the proper legal allowances. The classification of this legislation as "private and special" means that it only applies to Windham and no other town. Other municipalities have discontinued this practice, Windham has the highest known number of town plowed private roads being serviced in the State.

## 2. What is the Problem?

The Town needs a mechanism (ordinance) to address the access of these town plowed private road by municipal vehicles during winter months, the responsibility of landowners to perform annual/summer maintenance during the year, storm water management drainage issues, the insurability of municipal vehicles on Town plowed private roads and the lack of local road associations to address private way road needs. Current law does not provide a mechanism for addressing any of the above issues or unforeseen future challenges. In 1989 the Maine Supreme Court issued an "Opinion of the Justices" stating

that it would be unconstitutional for a town to use town funds for the private purpose of maintaining a private way road. Many towns throughout the state of Maine stopped when that occurred. Windham developed an agreement, and that practice was not effective.

As you read through this Q & A, for simplicity sake I will be referring to Private Roads or Private Ways as town plowed private roads, as identified on the list (101 roads).

### **3. Why did this practice start, and the History of Windham plowing private ways?**

In the mid 70's to 80's Private Roads located around many lakes/ponds in Windham were not accessible during the winter. This prohibited emergency vehicles and passage to existing properties safely. The Town entered into easement agreements with property owners at that time to allow the Town to plow the roads during the winter. Initially those signed agreements were up to date, but over the last 20 to 30 +/- years they have not been kept up to date. They expired many years ago. These winter maintenance public easement agreements were not recorded in Cumberland County Registry. So, many of the original properties have new owners, and new home and/or lot owners have been added but are not aware that a public easement was given to allow the plowing service, nor are they aware of the responsibilities of private landowners for continued winter maintenance services from the Town.

Most of the affected roads are within the watershed of a waterbody. An additional issue of surface water runoff and phosphorus (other items) has been one of the challenges the Town has been trying to address over recent years. We will be addressing these waterbodies/watersheds at this time based on these Town plowed private roads. In short, from what has been researched the Town started this practice many years ago to ensure emergency vehicle and passage to the existing properties.

### **4. What is the Best Solution?**

The Town sought this Private and Special legislation to allow the Town a means by ordinance to properly address the issues identified. This ordinance will identify the 101 roads that are currently being plowed by the Town and provide a mechanism by which the Town may continue its longstanding practice of providing plowing services to these roads, while leaving all other maintenance as the responsibility of landowners benefitted by the roads. This listing is definitive (see attached Private Road listing and map), (no future Private Roads to be added)). Attempting to enter into new agreements with potentially over 1,723 direct landowners and connector roads off the main private way of approx. 400 is not practical. The ordinance approach simplifies the solution and eliminates the need for special agreements, etc.

**5. If I live on a private road which is not plowed by the Town does this affect my property?**

No

**6. If I live on a private way road which is plowed by the Town does this affect my property?**

Yes

**7. If my private way road has a road association, do I need to do anything?**

Generally, No, the Town will work with the Road Association for the continued service. The Road association needs to be a formal structure, non-verbal. Over 50% of the Private Roads the Town plows for winter maintenance have road associations. The letter you received indicates you are on a private way road.

**8. If my private way road does not have a road association, do I need to do anything?**

Yes, if your road does not have a road association you or someone on your road will need to take the lead to set up the road association. You should review the Town's website for information; and begin with the step-by-step process for you or your designated representative for completing a Road association, notifying the Town and to complete the appropriate tasks. The Town will honor the commitment to continue plowing for calendar year 2022 and 2023, if the road association is not in place by July 1, of 2023. The Town will serve notice of discontinuation on the plowing services as of September 1, 2023 for calendar year 2024. New Road Associations must be completed in 2 years.

**9. What does a road association provide and/or do?**

The Road Associations allows residents to have one voice in communication with the Town and vice versa. Provides a centralized decision making forum, open lines of communication among property owners/abutters on the road, legitimize the collection of members' dues, set up an impartial means for managing association monies, and establishes a legal authority. This is the most effective and simplest way for this continued service to work. The Road Associations will need to provide annual notice to the Town of their designated contact information and will need to register the Road Associations (bylaws) at the Cumberland County Registry of deeds once and when any additional changes to the by-laws are made, change of directors does not constitute registry action simply provide a copy of the Directors to the Town each year. Individual properties are

not required by the town to have a separate filing in the registry concerning the road association.

**10. What is the responsibility of the residents in these road associations?**

The responsibility of the residents/abutters is defined in the by-laws. The primary responsibility of property owners on the identified Town plowed private roads will be to maintain the roads to a basic minimum standard which will be established in a new private way road standards ordinance. This ordinance will only apply to the identified Town plowed private roads. The Road Commissioner (Public Works Director and a designated Councilor) will drive each road every third year and make recommendations. All roads will be driven within this timeline and then roads will be assessed on a three-year rotational basis. Identified improvements must be completed per the prescribed details within an adequate and noted timeframe.

**11. We have decided to form a road association and are thinking of a non-profit approach.**

The Town will allow your group to choose the type of road association. But from my knowledge of options which require the least amount of maintenance for the organization along with the best “bag” of tools allowed to operate, you should consider the standard statutory association. Obtaining a legal opinion on your best options for a road association would be our recommendation. The Town will work with any type of road association or HOA.

**12. What are the necessary steps to get organized since we do not have a road association?**

The following step by step process is recommended.

- A) The Town will send a letter to all property owners or abutters to the identified private ways alerting them to this issue and what steps should be taken to correct it.
- B) Review all the information on the Town Website concerning this topic
- C) Contact your neighbors and identify a contact person or person(s) to be the team leader

The Town is willing to answer questions, the quickest and easiest way is by having point of contacts for each non-road association group. The Town has over 50 roads that need to have an association, so having a point of contact is very important.

- D) The Lead person(s) will need to notify the residents of a road association formation meeting. Information regarding all abutters who use the private road, based on our records, are available on the Town's website for your usage. Simply decide to form a road association or not.

If yes, The Town (designated staff person) will educate the point of contact on how to form the association. Each Private Way Road that desires to form an association to continue receiving the plowing services will be provided a 3-ring binder on the various forms for a statutory road association. This will be provided to the lead person. If you want a town representative at a meeting, please call for availability.

- E) Once your group has decided to go in either direction; have an association or not, then take the necessary steps to complete the decision. If not, simply summarize the meeting and forward that decision to the Town Manager's Office. If yes, we want to continue having the plowing service with conditions. Then use provided booklet to set up the road associations and get organized.
- F) Once you have decided to continue the service, you will need to post the "Notice of Statutory Road Association", vote to establish the road association, vote on the by-laws, vote on the directors, notify the Town and we will meet with the President (of the road association) or designees to review the road, provide a plan of improvements over three years, establish contact information, and complete other foreseen needs over time to continue receiving the snow plowing from the Town. Register the road association with the State.

**13. There is a lot of information to understand will the town provide legal advice or guidance to move through this process swiftly?**

The Town cannot provide legal assistance to the property owners/abutters of the non-road association town plowed private roads to form the association. What the Town has arranged are two levels of guidance. We can provide a checklist and forms for a person or group to get the Road Association organized and recorded. We have limited staff and do have some volunteers to assist in this process. Another alternative solution we have made arrangements with our Town Attorney to provide assistance for forming this road association and to take a road group through the process. This cost will be paid by the property owners/abutters of that road association and not the Town. Any attorney can provide this service. Again, we do have volunteers willing to help. Either way is acceptable, the self-help approach may seem complex but is quite simple.

**14. Who pays for this new road association and ongoing cost of annual road maintenance?**

The residents abutting the road will pay for costs associated with the Road Association and the annual road maintenance.

**15. Do each of the identified town plowed private roads or areas have to form a Road Association or HOA?**

Yes, this must be completed within 2 years by the property owners/abutters using this road. If your road has an HOA or road association, you simply need to have the president contact the Town Manager’s office. HOA’s are rare and are generally associated with newer subdivisions/condos. If you do not have a road association your property owners/abutters to the private way have a choice between forming a non-profit road association or forming a statutory road association under 23MRS 3101-3104. From my contacts the latter is probably the easier to setup and function and provides some valuable protections and enforcement powers. If you choose not to form the road association and comply with the new Town Ordinance the Town will discontinue plowing the road.

**16. What if we (property owners /abutters) as a road group cannot find a point of contact (within our group) to organize the step-by-step process to set up the road association and subsequent obligations, or desire not to be involved.**

The Maine legislature has provided the Town an avenue/path to formalize the continuation of the plowing services. The Town must have a point of contact (i.e., Road Association) to have a continued communication going forward. Once that time frame has expired (2yrs from date of legislature enactment) the plowing services will be discontinued unless the objectives are met in LD 1723.

**17. What are the private way road tallies, associations or not?**

The following tables describe the scope of the plowing issue, with reference to related water bodies.

Agreements (plowing/road associations maintenance)		Private way road Associations	
16 roads	No	No Association or Information Outdated	48
81 roads (whole and partial)	Yes	Association Registered & In Good Standing	53

A	B	C	D	E
General Area	Miles of Town plowed private roads	# Signed Releases @ Origination	Current Homes & Owners/Abutters 2020	Number of Roads
Sebago Lake	10.22	486	575	30
Highland Lake	5.68	162	331	19
Forest Lake	3.23	48	167	9
Little Sebago Lake	15.78	562	694	43
<b>TOTAL</b>	<b>34.91</b>	<b>1258</b>	<b>1767</b>	<b>101</b>

**18. We live on a private way road not on the listing provided by the Town's website, and we want to have our road added to this list?**

This cannot be done. LD 1723 allows only those roads identified to be included in this process since the Town has serviced them for more than 20 years or by prior agreement. The objective for the Town is to not add any new or existing Private Roads to this listing.

**19. What if a road or area no longer wants to have the Town plow the road and does not want to comply with the basic road maintenance?**

The Road Association or property owners of the road areas can simply notify the Town to discontinue winter snow removal services in a letter signed by 51% of property owners or the Road Association president. The road (area) will then be taken off the winter maintenance listing permanently. The road cannot be placed back on the winter maintenance list.

**20. Is there a listing of addresses on each private way road and a map?**

Yes, on our web page is a link to our most current data on the property owners/abutters, this will change if any owner sells, or splits a lot and an overall map.

**21. What is the cost of road improvements that may be necessary?**

This is difficult to project based on many factors. That cost will vary based on profile of the road, ditching, limb maintenance, length or road, number of users, etc. The Town Road Commissioner will recommend improvements over three years to the Association, on a continuous basis. The improvements are the minimum standard for safe passage,

we do not plan to have these Town Plowed Private roads brought to the regular Town road standards since this simply would not work for this smaller roads.

**22. When will the draft ordinance for these Town Plowed Private Roads be available?**

Please see the link on this web page for a draft of the new ordinance. Council will be discussing this ordinance going forward.

**23. Is my Private Road or Private Way defined in the Town Ordinances?**

Yes, the private accesses (Private Ways) we are discussing were created prior October 22, 2009, around the lakes. The other two definitions in our ordinance on being constructed after 2009.

Definitions from our ordinance:

Private Road, Major. A street constructed on or after October 22, 2009, that complies in width and construction with the specifications for private roads in Section 911.M.5, "Traffic Conditions and Streets," and serves more than ten (10) lots.

Private Road, Minor. A street constructed on or after October 22, 2009, that complies in width and construction with the specifications for private roads in Section 911.M.5, "Traffic Conditions and Streets," and serves ten (10) or fewer lots.

Private Way. A street that was constructed prior to October 22, 2009, that does not meet the specifications for private roads in Section 911.M.5 "Traffic Conditions and Streets," and that has not been accepted by the Town of Windham. Private ways do not include access ways typically referred to as tote roads or woods roads.

**24. What is the State definition of a Private Road vs. Way and how does that affect this issue of public access for plow equipment? The long answer is described below this was actually provided by one of our residents who owns a camp in Windham.**

"LD 1723, the "Private and Special Law" that was passed this last session, applies ONLY to the Town of Windham. It basically buys Windham residents a year to get all their "private ways publicly plowed" to be legal. It requires people on those roads to scramble to get road associations in place so they can use 23 MRS 3105-A to get snow removal. Section 3105-A allows the residents of a town to vote to allow the Selectmen to use town equipment on "private ways" when it's in the best interest of the town for fire and police protection.

The catch is that the term "private ways" doesn't refer to private ROADS, but to a class of roads deemed "public easements" under 23 MRS 3021. Here is where the terminology can be extremely confusing.

A "town way" is a road that has been legally laid out and accepted, built to town standard, and is kept in repair at public expense and is open to public use.

A "private road" generally is either entirely on private land or is laid out as part of a subdivision. It generally is NOT kept in repair at public expense and is not open to general public use.

A "public easement" is defined in 23 MRS section 3021 as providing public access to land or water not otherwise connected to a public way. Section 3022 specifies that it's for access by foot or motor vehicle. But these sections do not require any public maintenance of public easements.

The old term "private way" (as opposed to "private road") historically referred to roads that were laid out by a town or county in response to a request from a private individual for a road to access his land. In Maine's early days, it was accepted practice for the public to take private land to create these roads to provide access to developed land. The person who requested the layout was responsible for the cost of taking the land and building the road. But over time, it was slowly recognized that it was unconstitutional to take private land for private access to another's land. In an attempt to resolve conflicting needs, the Courts and the Legislature moved towards recognizing some *public* benefit in these roads, and eventually declared that "private ways" could only be laid out where there was a legitimate public need for the road. In other words, these became public roads even though they were built and maintained at private expense.

In an attempt to avoid confusion as to the public nature of "private ways," section 3021 replaced the old term "private ways" with the term "public easements." Today, either the old term "private way" or the new term "public easement" may be used to refer to a road that is open to public use but supported with private funds. Private ROADS, on the other hand, are privately owned and maintained, and are not open to general public use. So the confusion remains!

To compound the confusion, we now have 23 MRS 3101-3106, which are known as the "Private Ways Statutes." The term is a leftover from the old private ways, but sections 3101-3104 now apply to Private ROADS. Of particular interest is section 3105-A, which allows towns to vote to allow municipal officers to use town equipment on "private ways" when it's in the best interest of the public for fire and police protection. Under the 3021 definition of "private way," this therefore applies to "public easements," NOT to "private roads." As I stated above, in 1989 the Maine Supreme Court issued an "Opinion of the Justices" stating that it would be unconstitutional for a town to use town funds for the

private purpose of maintaining a private road. Therefore section 3105-A cannot be used to allow a town to plow private roads.

But there is a loophole! If a private road is dedicated and accepted as a "public easement," recognizing that the public can use the road, it then becomes eligible for winter maintenance under 23 MRS 3105-A.

Windham's private and special law requires that if those on private roads wish to have public snow removal continue, they must meet certain criteria for approval. (They are NOT required to pave their roads or to "move them to an approved subdivision.") One of those criteria is that they must form a road association to assure that summer maintenance is provided. This is to keep town plow equipment from being damaged by bad roads. Residents have a choice between forming a non-profit road association or forming a statutory road association under 23 MRS 3101-3104. Personally, I would recommend a statutory road association, as it is both simpler to administer and provides some valuable protections and enforcement powers.

The language of section 3101 - 3104 can be confusing. Given the statutory title "Private Ways Statutes," a person unfamiliar with the law might think that Statutory Road Associations are only available to "private ways," which, according to 23 MRS 3021, are "public easements," and that "private roads" which do not have public easements can only form a non-profit road association. Actually 23 MRS 3101 can be used to form a statutory road association on EITHER a "private way" or a "private road. (See paragraph 2 of section 3101.) However, section 3105-A only permits use of town equipment on "private ways," that is, "public easements."

So to recap, in order to enable the town to use its equipment on these roads in Windham, the legislature is asking that they form road associations and then grant the roads to the town as public easements. This would both assure the town that there is an association in place that will keep the road in a condition where the Town can plow it without damaging town equipment, and it will make it legal for the town to plow it under section 3105-A. The tradeoff is that the public is then given free use of the road, although if the road is a dead end, this may not be much of an issue. Without public rights of passage, use of public equipment on a private road has been deemed unconstitutional by the Opinion of the Justices cited above.

**25. How does LD 192 "An Act to Define the Responsibilities of Residential Property Owners for the Maintenance of and Repair of Private Roads" affect the Windham.**

This legislation was introduced separately from Windham's LD 1723 and applies to any Town. It is basically a way for the group of property owners/abutters (four or less) on any road to complete maintenance on a private road or way and assess those cost equally to

all. For purposes of Windham this legislation does work on a number of private roads but does not resolve all our challenges concerning liability and ownership.

**26. Is there a check off list or summary description of items the Town will be reviewing for basic maintenance?**

Yes, there will be a check off list that the Town will use in the rotation review of each road. The Public Works Director, Town Engineer and one Councilor will be the review team. Maintenance includes, but is not limited to, snowplowing, snow removal, sanding and ice control: grading, "crown" of road and adding gravel and surface material; installing, cleaning and replacing culverts, creating and maintaining ditches, drains, catch basins and other storm water management infrastructure including runoff; creating and maintaining sight distances on curves, intersections, straightaways; and cutting brush, trees and vegetation; moving obstacles to safe plowing standards, all in the right of ways as defined by each private way. The objective is to have a safe passable roadway addressing basic road maintenance issues for winter plowing and seasonal travel.

**27. Summary –**

We (the Council and Manager) understand that it is not common for a municipality to be involved in plowing private roads to the extent that Windham has for decades. We desire to address this issue with a balanced solution. Our objective is to bring the Town of Windham into alignment with the Opinion of the Justices of the Maine Supreme Court without ceasing to provide a service which provides safe access to these identified properties and helps protect our many endangered watersheds. After considerable research and discussion, the Town does not see any other possible solution. Not addressing this situation places the community at risk on several levels.