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October 1, 2021

Senator Joseph Baldacci, Senate Chair
Representative Ann Higgins Matlack, House Chair
Committee on State and Local Government
100 State House Station
Augusta Maine
04333-0100

Re: L.D. 1723, *An Act Regarding Winter Maintenance on Private Roads in the Town of Windham*

Dear Senator Baldacci and Representative Matlack:

I am writing in response to your letter of June 14, 2021, requesting an opinion regarding the constitutionality of the original version of L.D. 1723, *An Act Regarding Winter Maintenance on Private Roads in the Town of Windham*, and the constitutionality of using public funds to provide winter maintenance on private ways.

As initially drafted, L.D. 1723 authorized the Town of Windham (the "Town") to "use public equipment to perform winter maintenance on a designated private way, regardless of the existence of a public easement over the designated private way." L.D. 1723, § 2 (130th Legis. 2021). The Town council could designate a private way for winter maintenance if:

A. The council has evidence that the Town of Windham has performed winter maintenance on the private way for at least 20 years prior to the effective date of this Act; and

B. The road commissioner has determined that the private way cannot meet standards developed or required by generally applicable local ordinances for dedication and acceptance of the private way as a town way pursuant to the Maine Revised Statutes, Title 23, section 3025.

Id. § 3(1).

L.D. 1723 was subsequently amended to, among other things, include a provision repealing the law on June 30, 2022, and authorizing the Town to submit to the Joint Standing Committee on State and Local Government (the “Committee”) a report with the following information:

- A. A detailed description of the progress made by the council and the town manager to conform the use of public funds to provide winter maintenance on private ways with applicable constitutional and statutory laws;
- B. An assessment by the Town of Windham fire-rescue chief regarding the use of fire rescue vehicles on private ways in the town for fire and safety protection;
- C. An assessment by the Town of Windham police chief regarding the use of police vehicles on private ways in the town for public health and safety; and
- D. An assessment of whether winter maintenance by the Town of Windham of its designated private ways has an environmental impact on the surrounding water bodies.

Comm. Amend. A; House Amendment A. The Committee may then report out a bill based on the report to the Second Regular Session of the 130th Legislature. *Id.* As amended, L.D. 1723 was enacted on an emergency basis and signed into law by the Governor on June 17, 2021. P. & S.L. 2021, ch. 10.

In anticipation that the Town will submit a report and seek ongoing authorization to provide winter maintenance on private ways, you ask about the extent to which the “Public Purpose Clause” of Maine’s Constitution limits public funds from being used in such a manner.¹

The Public Purpose Clause

Article IV of Maine’s Constitution provides that the Legislature has the “full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States.” Me. Const. art. IV, pt. 3, § 1. The requirement that laws be enacted for the “defense and benefit of the people” has been interpreted by Maine courts to “require that taxation and spending at either the state or local level be for a public purpose to be constitutionally valid.” *Delogu v. State*, 1998 ME 246, ¶ 10, 720 A.2d 1153. In considering whether an expenditure of public funds serves a valid public purpose under what has come to be known as the Public Purpose Clause, courts ask whether the planned use “threatens a detriment to the public which outweighs the benefit that could have been anticipated.” *Common Cause v. State*, 455 A.2d 1, 25 (Me. 1983) (citation omitted). If a valid

¹ Because you have not asked whether L.D. 1723 as enacted comports with the Public Purpose Clause, I do not address that here.

public purpose is identified, there need only be a rational basis for the Legislature's determination that the expenditure of public funds advances that purpose. *Id.*

In a 1989 advisory opinion, the Maine Supreme Judicial Court addressed questions involving a bill permitting municipalities to use tax revenues to maintain private roads. *Opinion of the Justices*, 560 A.2d 552, 555 (Me. 1989). The bill at issue explicitly stated that it was promulgated "in furtherance of a public purpose in that it protects the health and safety of the members of the public who reside along the privately owned road by ensuring adequate access and egress for police, fire and other emergency vehicles..." *Id.* at 553.

The Justices advised that "[t]he maintenance at taxpayer expense of privately owned roads ... would be an unconstitutional appropriation of public funds for the benefit of the private property owners." *Id.* at 555. They further noted that while the bill at issue attempted to limit maintenance work to private roads that did not discourage public use, "[t]he public's access to 'privately owned roads'" was "both uncertain and potentially transitory." *Id.* The bill provided only "questionable implicit consent" that the public would be able to travel on the maintained private roads, and this consent might "disappear at the whim of owners" who were under no obligation to allow continuing public use of their privately owned roads. *Id.* The Justices concluded that as "[a]ny indirect public benefits derived from the proposed public expenditures upon private roads from which the public is or may be barred are outweighed by the public detriment," the proposed bill did not comply with the Public Purpose Clause. *Id.*

Because L.D. 1723 authorizes municipal maintenance on roads that are privately owned, and thus roads over which the public has no right of travel, it appears to violate the principle announced in *Opinion of the Justices*, 560 A.2d at 555.² Moreover, the general principle that private road maintenance lacks a public purpose has been acknowledged by the Law Court in a different context. See *Tisdale v. Rawson*, 2003 ME 68, ¶ 21, 822 A.2d 1136. Accordingly, there is substantial risk that L.D. 1723, as originally drafted, may be subject to a challenge on the basis that it does not comply with the Public Purpose Clause of Maine's Constitution. With this in mind, I turn to the specific questions in the Request.

1. Public purpose circumstances

The Request first asks what circumstances may permit the use of public funds for winter maintenance on private ways. Although this question will ultimately turn on the specific facts of individual cases, the *Opinion of the Justices*, 560 A.2d 552, provides some guidance on when a

² Advisory opinions merely "represent the advice of the individual Justices" and do not provide binding legal precedent. See *Opinion of the Justices*, 2017 ME 100, ¶ 9, 162 A.3d 188. However, they provide valuable "guidance and legal analysis that is 'required' by the other Branches for their use in decision-making and action." *Id.*; see also *Opinion of the Justices*, 2004 ME 54, ¶ 36, 850 A.2d 1145.

public purpose may be found. The Justices' focus on the "uncertain and potentially transitory" nature of the public's right to travel on private roads, *id.* at 555, implies that maintenance of private roads conditioned on a clear and irrevocable right of public travel might meet the public purpose test. A public easement, which generally grants rights of access to the public, *see Town of Fayette v. Manter*, 528 A.2d 887, 887 n.1 (Me. 1987), may be sufficient to justify the use of public funds for maintenance. *See* 23 M.R.S. §§ 3101(1)(A), 3105-A. Other forms of legally binding agreements may also suffice, if they contain a right of public travel that is neither transitory and uncertain, nor subject to revocation at the whim of private landowners.

2. Access for emergency vehicles

You also ask whether providing access for emergency vehicles would meet the public purpose standard. The proposed bill at issue in *Opinion of the Justices*, 560 A.2d 552, explicitly included maintaining access for emergency vehicles as a purpose for providing municipal maintenance of private roads but was nevertheless found to violate the Public Purpose Clause. *Id.* at 553, 555. Thus, inclusion of such a purpose in the context of L.D. 1723 would be unlikely to alter the result reached in that opinion.

3. Access for school transportation

You further ask whether the "ability to pick up and drop off children at or near their home" would meet the public purpose standard. I understand this question to ask whether providing winter maintenance on private roads to ensure access for municipal school buses would be a sufficient public purpose under Maine's Constitution. Inclusion of such a purpose in a future bill would be unlikely to sufficiently distinguish it from the bill at issue in *Opinion of the Justices*, 560 A.2d 552, which the Justices advised was unconstitutional. While school transportation was not a stated purpose of that bill, the rationale of that opinion suggests the result would likely be the same even if such a purpose were included. As noted above, a key factor that can be gleaned from *Opinion of the Justices*, 560 A.2d 552, in determining whether the public purpose standard would be met is whether the public holds a legal right to use the private road in question. As with emergency vehicle access, however, the act of maintaining private roads for the purpose of facilitating school bus transportation would likely be found to provide a taxpayer funded service generally benefitting private property owners as opposed to the public at large.

4. Environmental benefit to water bodies

You also ask whether potential environmental benefits to water bodies located near private roads might constitute a public purpose. It is conceivable that potential environmental benefits might be sufficient to allow a municipality to provide some level of road construction activities or maintenance along private ways. *See e.g.* 23 M.R.S. § 3106(1). However, any such determination

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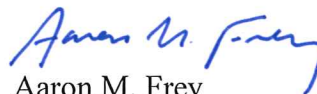
would depend on the specific factual circumstances, and it is not possible to provide definitive guidance to this question absent additional information. I note, though, that as originally drafted, L.D. 1723 authorizes only winter maintenance, defined as “snow removal and surface treatment, including sanding and salting,” on private ways. It is unclear how such maintenance is rationally related to providing environmental benefits to waterbodies. This analysis would be better informed by any information the Town provides in its report to the Committee regarding the environmental impacts of its winter maintenance on private ways.

5. Additional concerns

Finally, you ask if this Office has additional legal concerns with L.D. 1723 as originally drafted. Other than what is discussed above, there are no other readily apparent legal concerns.

I hope this is helpful. If you have further questions, please let me know.

Respectfully,



Aaron M. Frey
Attorney General

cc: Members of the Joint Standing Committee on State and Local Government