

# *A Guide to Forming Road Associations*



**October 2009**

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Copies of this document can be obtained from your local Soil and Water Conservation District or the Maine Department of Environmental Protection, or online at [www.maine.gov/dep/blwq/docwatershed/roadassociation.htm](http://www.maine.gov/dep/blwq/docwatershed/roadassociation.htm) (please see last page for contact information).



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# - INTRODUCTION -

This manual is intended to assist private road residents who would like to have a successful road maintenance program by forming a road association. Forming a road association can provide a way for road users to formally manage their roads in an organized and cost-effective manner. While the focus of the manual is on camp roads in lake and pond watersheds, most sections should be useful for all private roads.

## I. Benefits of Forming a Road Association

### 1) Improve road safety and drivability.

The primary benefit is that having a maintenance program ensures the road is maintained so that the road will be free of potholes, ruts, and other problems that make the road dangerous and difficult to travel on.

### 2) Reduce maintenance costs over time.

Another major benefit is as Yankee thrift advises: an ounce of prevention is worth a pound of cure. In the long run, having and using a preventative road maintenance program really is less expensive than paying to fix a road once it has developed significant problems - and this process can be undertaken with much less effort when fellow road users join together.

\$1 spent in routine maintenance will save \$15 in capital repairs.

-Camp Road Maintenance Manual

### 3) Provide liability protection for association members.

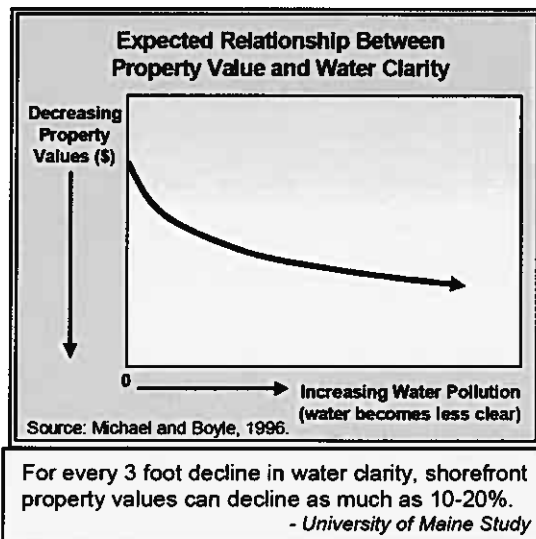
Without a formal road association, whoever makes road maintenance decisions could be liable if anyone gets injured using the road. A formal road association provides limited immunity from civil liability for the association decision makers and an association can purchase liability insurance for the protection of the road commissioner, board of directors, and members.

### 4) Sustain the clarity and quality of your lake's water.

An effective camp road maintenance program will also help protect your lake or pond from the negative impacts of soil erosion from your road. Many camp roads were either not properly constructed, or not properly maintained, or both. Because of this, rain and melting snow runoff erode the road. Soil erosion is actually the single largest pollutant source (by volume) to Maine lakes, and much of this is from camp roads. See the next page for more discussion of this connection.

### 5) Protect the value of your lakefront property investment.

Another consideration is the potential decrease of property values as a result of declining lake water quality. Due to soil erosion's impact on lake water quality, poor maintenance of your road could actually result in lowered value of your



property. This is a strong financial incentive to join together with fellow road users to protect your individual and collective investments. Having a road association can also help to protect property values and marketability since many banks and the secondary mortgage market may deny construction and mortgage loans for properties on private roads that do not have road associations.

**6) Establishing a road association can also:**

- help open the lines of communication among community members
- provide a framework for centralized decision-making
- improve planning for and implementation of road maintenance
- legitimize the collection of road dues
- set up an impartial and efficient means for managing money
- establish legal authority
- allow possible use of town funds and equipment for road repair

### **The Impact of Camp Road Erosion on Lakes**

#### *How Do Camp Roads Impact Water Quality?*

Camp roads frequently change natural stormwater drainage patterns. These changes can increase the potential for soil erosion by:

- reducing the ability of water to soak into the ground by stripping away the protective vegetative cover
- creating highly erodible pathways of exposed soils
- collecting drainage on the road and in ditches, increasing the overall flow, speed and volume of the runoff

#### *How Does This Affect the Lake?*

The nutrients attached to camp road sediment particles can be bad news for lakes. Phosphorus, a nutrient that is common on land, is a primary food for all plants, including algae. In natural conditions, the scarcity of phosphorus in a lake limits algal growth. However, when a lake receives extra phosphorus in the form of camp road sediment particles, algal growth increases dramatically. Sometimes this growth causes choking algal blooms, but more often it results in small, negative changes in water quality that, over time, damage the health and aesthetics of the lake.

When you see the water turn brown, sediment has been eroded into the lake. This suspended sediment can:

- irritate the gills of fish, making them prone to disease
- smother fish spawning and feeding grounds
- gradually fill in near shore, resulting in the loss of desirable shoreline (due to encroaching weeds, for instance)
- cause algal blooms, resulting from the attached phosphorus
- reduce levels of dissolved oxygen, resulting in fewer cold-water fish (i.e., salmon and trout)
- diminish recreational and aesthetic values of the lake



*Improperly constructed and/or maintained shore-side roads can result in sedimentation to lakes and ponds.*

## **II. Types of Road Associations**

Road associations can be loosely formed or highly organized. Generally, the more organized the association, the easier it is to maintain the road and share the cost. Following are the basic types of organizations that are available for formation of a road association for an existing private road in Maine.

### **3 Types of Road Associations:**

- \* Informal or Ad hoc
- \* Statutory
- \* Nonprofit Corporation

### **Informal/Ad hoc Road Associations**

#### **Informal Organization by Consent**

Many private roads are maintained by a few individuals who take the initiative to oversee the maintenance and attempt to collect the costs from all the people that use the road. Most frequently, this is the result of a simple consensual arrangement when there are a few individuals that take the initiative and most, if not all, of the users voluntarily reimburse the maintenance expenses. These Ad hoc arrangements work in many circumstances, but have a number of legal and liability problems. To begin with, the individuals who make the maintenance decisions can be held liable for injuries suffered by road users. Because of the informality of the arrangement, it may be very difficult to get insurance coverage and a property owner's insurance policy probably does not provide liability coverage for the entire length of the road. (For more information about liability, see Online Appendix K.)

There is also no legal mechanism for collecting maintenance costs from all of the other users if such costs aren't voluntarily paid. In addition, banks and secondary mortgage markets are reluctant to provide construction loans and mortgages for property on a private road with such an informal arrangement. This could mean that anyone wishing to sell his or her lakeside property may find that potential buyers are denied financing until a formal road association has been created.

#### **Informal Organization by Signed Agreement**

Another type of voluntary road association which is a little bit less informal is created by a written agreement similar to the Sample Road Maintenance Agreement that is in Online Appendix G. Entering into such an agreement, however, is purely voluntary and can be cancelled at anytime. It does not have durability, and there is no way to require that all users of the road sign such an agreement. In addition, every time a property has new owners, a new agreement would be necessary. It may be possible to have liability insurance coverage for the officers and members. Collection of assessments can only be against those people who have an agreement in effect, and its enforcement would be based upon legal contract theory. Basically, this agreement is a contract for services.

## Formal Road Associations

### Statutory Road Association

Maine, for many years, has had what is commonly referred to as the "Camp Road" law. It is now informally called the "Private Ways" statute. The statute should be reviewed periodically to see if it has been revised.

#### ***What are some of the requirements of the Private Ways law?***

This law provides that when a private road is used by owners of four or more parcels of land, three of the owners can make written application to a notary public to call a meeting of all of the owners on the road. The meeting of owners is conducted just like a Town Meeting and includes voting on a budget, election of officers and any other decisions concerning the road. It is different from a Town Meeting in that absentee and proxy votes are possible as provided for in the statute. The law provides for the election of a commissioner or board of directors who will administer the road association for 12 months. The association does not have to re-form each year and continues to be in existence until dissolved by a majority vote of its members. For more details about the required actions to start up a statutory road association, refer to the Organizational Meeting section (page 15) in this guide and to the Maine Alliance for Road Associations Leadership Manual ([www.maineroads.org](http://www.maineroads.org)).

#### ***What are some of the benefits of this type of road association?***

The advantages are that it is a legal entity created by statute; the courts recognize its legitimacy, and it has the power to collect and enforce its assessments. It can buy liability insurance for its officers and members and it has been successfully used for many years on various lakes throughout Maine. Creating such an association also can be accomplished in as little as two month's time and is relatively inexpensive to set up. It does not need any agreement signed by any of the owners. It does not need to be incorporated; it doesn't pay taxes, and it doesn't have to have any property interest conveyed to it in the form of road ownership or easement. It may also negotiate easements for the installation of a ditch, drain, culvert or other storm water management infrastructure.

If the road is in a lake watershed with threatened water quality and is contributing to the degradation of the lake's water quality, a municipality may use public funds to repair or maintain the road for the purpose of protecting or restoring the lake water quality. In order to qualify for municipal assistance, the road must have either a statutory or nonprofit corporation road association and meet other qualifications noted in the Private Ways statute.

#### ***What about liability for this type of road association?***

Unlike nonprofit corporations, statutory road associations do not have the civil liability protection of a corporation. As a result, the association should buy liability insurance to protect its officers and members against liability lawsuits. The settlement of some court cases has included the cost of insurance as "maintenance cost." A recent amendment

#### **Private Ways Law**

Title 23, MRSA §3101 to §3106. This statute was revised in 1997 and amended in 1999, 2005, 2007 & 2009. The statute is available at [www.mainelegislature.org/legis/statutes/23/title\\_23ch305sec0.html](http://www.mainelegislature.org/legis/statutes/23/title_23ch305sec0.html). This publication is based on amendments that became effective on September 12, 2009.

to the Private Ways Statute does provide officers and directors of a statutory road association with limited immunity from civil prosecution by owners or lessees of other lots for activities carried out in performance of their duties, such as determining repairs and maintenance to be undertaken, materials furnished, collection of money, and awarding of contracts. Associations formed under the statute should be careful to hire contractors who carry their own liability insurance so that the association will not be held liable for damages caused by defects in work done on the road. Volunteers working on the road are not immune from lawsuits resulting from personal injury or property damage due to road work performed. Also, statutory road associations are not immune from enforcement actions for violations of environmental laws under the jurisdiction of the DEP or a municipality. (See Online Appendix K for more information about liability.)

### Nonprofit Corporation Road Association

This is the most formal legal organization for private road maintenance. The corporation is created through the Maine Secretary of State's office, per the Maine Nonprofit Corporation Act. It requires the adoption of by-laws, the voluntary burdening of all of the lots using the road and usually the deeding to the new corporation road ownership or an easement for the road from all of the abutting owners and users of the road. This type of association is often setup with the creation of new residential subdivisions with deed restrictions and covenants.

<p><b>Nonprofit Corporation Act</b> Title 13-B. Available at: <a href="http://www.mainelegislature.org/legis/statutes/13-B/title13-Bch0sec0.html">www.mainelegislature.org/legis/statutes/13-B/title13-Bch0sec0.html</a></p>
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#### ***Is this the same as a 501(C)(3) nonprofit corporation?***

No. This nonprofit corporation is legally also known as a "mutual benefit" nonprofit corporation, since it benefits only the owners of property using the road. It is not a charitable corporation. It is not eligible for tax exemption and cannot get charitable postage status.

#### ***What are some of its distinctive characteristics?***

There are two distinctive characteristics of the nonprofit corporation road association. The first is that it has indefinite duration as a corporation which is a separate and distinct legal entity from all of its members. The second distinctive characteristic is that it generally has some type of ownership interest in the road by the abutting landowners deeding the road ownership to the corporation while retaining a right to pass over it or by conveying an easement across the owner's land for the road.

#### ***What type of road would this be good for?***

This is a viable alternative for short private roads, when there are a limited number of owners on the road, or if a new residential subdivision is being created. For longer roads with multiple owners, it is still a good alternative, but the process for setting up such a corporation becomes more complicated. When there are multiple owners, there may need to be a Board of Directors created as well as the corporate officers, instead of simply having it managed by all of the members. In Rome, Maine, a nonprofit corporation was created in 2004 for over 30 different lots on a road almost five miles long. It took two years and significant effort to achieve total participation and it had the leverage of a relocated road which owners could not use if they didn't join the corporation. In the long run though, such an effort may be worthwhile.



***What are some of the benefits of this type of road association?***

Because there is a conveying of property interest to a corporation with unlimited duration, the authority to assess maintenance fees runs with the land and goes on forever regardless of who owns the land and whether or not it has been conveyed to new owners. This type of corporation is eligible to buy insurance for its officers, members and directors.

If the road is in a lake watershed with threatened water quality and is contributing to the degradation of the lake's water quality, a municipality may use public funds to repair or maintain the road for the purpose of protecting or restoring the lake water quality. In order to qualify for municipal assistance, the association must be either a statutory or nonprofit corporation association and meet other qualifications noted in the Private Ways statute.

***What about liability for this type of road association?***

Nonprofit corporation road associations have the liability protections of a corporation. This means that individuals such as directors and officers acting for the corporation are not personally liable if their actions were undertaken in good faith at the behest of the Board. However, these individuals are not granted charitable limited immunity from prosecution for things they may have done in carrying out their responsibilities. Because of this, the association should buy liability insurance to protect its officers and members if they are sued by someone who may be injured using the road. Associations should be careful to hire contractors who carry their own liability insurance so that the association will not be liable for damages caused by defects in work done on the road. Volunteers working on the road are not immune from lawsuits resulting from personal injury or property damage due to road work performed. Also, nonprofit corporation road associations are not immune from enforcement actions for violations of environmental laws under the jurisdiction of the DEP or a municipality. (For more information about liability, see Online Appendix K.)

***What are some of the negatives of this type of road association?***

In addition to its complexity, one shortcoming of this type of organization is the fact that it is voluntary. There is no way to legally force all of the owners on an existing private road to burden their land to a nonprofit corporation which takes over the ownership and control of their road. If an owner does not sign on, then the assessment of maintenance fees against that owner may be unenforceable.



<b>Characteristics of the 3 Types of Road Associations</b>			
<b>Characteristic</b>	<b>Informal or Ad hoc Road Association</b>	<b>Statutory Road Association</b>	<b>Nonprofit Corporation Road Association</b>
Legal Framework	None, or legal contract theory	Private Way Law: Title 23 §3101-3106	Maine Nonprofit Corporation Act: Title 13-B
Formation time, complexity, and cost	Short, simple, inexpensive	Approx. 2 months, relatively simple, inexpensive	Long, complex, moderately expensive
Landowner participation	Voluntary	Not voluntary	Voluntary until agreement is signed
Needs agreement signed by all owners	No	No	Yes
Power to collect from all owners whether sign on or not	No	Yes	No
Assessment fee holds when property changes hands	No	Yes	Yes
Association duration	Can be cancelled at any time	Until dissolved by a majority vote	Indefinite
Liability coverage	Individuals liable; difficult to buy insurance	Individuals have civil liability immunity for association decisions; association able to buy insurance for officers and members	Individuals can be indemnified by corporation; association able to buy insurance for officers and members
Association has ownership interest in road	No	No	Yes
Need to file tax forms/pay taxes	No	Not usually	Yes
How banks regard	Mixed	Positively	Positively
Municipality may use public funds to assist maintenance	No	If work contributes to the protection or restoration of a great pond	If work contributes to the protection or restoration of a great pond
Must have annual meeting to adopt annual budget and hold election	No	Yes	Yes Check by-laws
Operates with by-laws	No	Optional	Yes