

OFFICE OF POLICY AND LEGAL ANALYSIS
Bill Analysis

To: Joint Standing Committee on Judiciary

From: Peggy Reinsch, Legislative Analyst

LD 192 An Act To Define the Responsibilities of Residential Property Owners for the Maintenance and Repair of Private Roads

Public Hearing Date: February 18, 2021

SUMMARY

This bill addresses the responsibility for the repair and maintenance of private roads that benefit residential properties. It is limited in application to residential properties only. Unless there is an agreement, deed restriction, covenant or declaration or road association that specifies the cost to be paid by each owner of a benefited property, the cost is shared equally by the benefited properties. Each residential property is subject to cost sharing, not each residential property owner; each residential property is assessed one share of the collective costs of repairs and maintenance regardless of whether there are multiple owners of record for that property. An owner who fails to comply may be forced to comply through an action brought by other owners on the private road.

The bill uses the definition of "repairs and maintenance" provided in the law that applies to road associations.

The provisions do not apply to a private road constructed or used primarily for commercial or forest management purposes or to a property owner who issues a ground lease to a 3rd party who maintains a residence on the subject property. "Ground lease" is defined for the purposes of this law as an arrangement under which a property owner leases only land to the lessee and the lessee retains the rights to use the land and any improvements the lessee makes for the term of the lease.

TESTIMONY

Proponents

- Senator Bailey, sponsor (written testimony)
- Aaron Bolster, Maine Association of REALTORS (written testimony)
- Andy Cashman, Maine Association of REALTORS (written testimony)
- Laura Hiestand, Mortgage Loan Officer (written testimony)
- Laurie Michaud, Maine Association of Mortgage Professionals (written testimony)
- Margaret Cardoza (written testimony)
- Roberta Manter, Maine Alliance of Road Associations (MARA) and Maine ROADWays (Residents and Owners on Abandoned & Discontinued Ways) (written testimony)
- Kathy Keneborus, Maine Bankers Association (written testimony only)
 - This is a resubmission of a bill from last year, LD 1598
 - Maine Association of REALTORS, Maine ROADWays, the Maine Alliance of Road Associations, the Maine Bankers Association, Maine Woodlot Owners, Maine Forest Products Council and others collaborated and reached an agreement that worked well for everyone

- The bill seeks to solve a problem in the real estate and mortgage industries whereby transactions are being terminated or delayed because people cannot get lending due to federal secondary market requirements
- LD 192 seeks to remedy this issue by creating a statutory default for how road maintenance costs are to be shared among property owners when no agreement is in place
- Nothing in this bill would in any way change the current practice of property owners getting together and reaching their own agreement of any kind
- This bill says simply in the absence of such an agreement, then the cost of road maintenance will be shared equally, so lending can occur
- This bill applies only to residential properties
- This bill is about making sure that there is something in place so real estate can change hands and people are able to select the mortgage product they feel is best for them without being disqualified because our statutes don't include the language the lender requires
- Few issues have generated more feedback from Maine REALTOR members that residential real estate transactions on private roads
- We have heard numerous instances recently where the federal government backed loans required road maintenance agreements and
 - Sellers were unable to move quickly enough with their neighbors to draft and execute a road maintenance agreement before closing
 - Sellers required buyers to establish the road maintenance agreement which involved added time and costs to the real estate transaction and often resulted in the collapse of the transaction
 - Sellers chose to sell to a competing buyer with financing or cash that did not require a road maintenance agreement; or
 - Buyers used a different financing product that was more expensive than the federal government backed loans
- Example: consumer was moving forward with a VA loan for his primary home purchase in Phippsburg; a road maintenance agreement was required for VA financing, and out of the three owners on the road, one was not willing to sign any agreement – the transaction could not move forward and the veteran could not purchase the home because he did not qualify for other mortgage financing products
- The development of LD 192 has been a cooperative effort that addresses the concerns of varied industry interests and promotes consumer choice in financing
- Unless there is an agreement, deed restriction, covenant or declaration or road association that specifies the cost to be paid by each owner of a benefited property, the cost is shared equally by the benefited properties. Each residential property is subject to cost sharing, not each residential property owner; each residential property is assessed one share of the collective costs of repairs and maintenance regardless of whether there are multiple owners of record for that property.
- An owner who fails to comply may be forced to comply through an action brought by other owners on the private road.
- The bill uses the definition of "repairs and maintenance" provided in the law that applies to road associations.
- If passed, this legislation would address a real problem around secondary mortgage financing requirements - for purchases and refinancing of residential properties - which limits consumer choice and causes delays or terminations of real estate transactions.
- Increasingly, to qualify for the secondary mortgage market, lenders are requiring that a legal road maintenance obligation be in place for residential properties serviced by a private road.
- We support the notion that residential property owners form a road association to address their maintenance needs, but this is not always feasible. This bill will provide a backstop.

- Importantly, this bill is written to apply to residential property only - not to woodland owners or large timber or commercial owners. The obligation for cost sharing under sub-§1 is imposed on “residential property owner[s]” who share “...a common benefit from a private road...”
- We want to make sure that buyers have full choice for their mortgage lending product. The lack of an agreement on road maintenance should not impact that consumer choice – it should not be the reason for a delay or termination of their real estate transaction.
- Specifically, the problem has arisen around Federal National Mortgage Association (“Fannie Mae”) guidelines which require an agreement or indemnification by the lender. In the absence of these, Fannie Mae will not accept loans for properties accessed by private roads.
- However, this problem is rectified if there is a statutory mechanism in place that takes over in the absence of some other form of agreement.
- For this reason, several other states, including Connecticut, have passed legislation similar to the bill before you.
- Affected property owners who desire a different approach on road maintenance are free to put another mechanism in place at which point the provisions of this bill would no longer apply.
- It is not uncommon for issues to arise when creating a road association as a condition to close. These issues include:
 - Not all users of the road could be reached and agree to terms in time for closing;
 - Some road owners might balk at having to be rushed to sign an agreement just so someone on the road can close a loan;
 - Not all title companies have attorneys on staff who can prepare a road maintenance agreement and borrowers often do not know this when using bank-approved title companies or referrals;
 - It may not be readily apparent at the time of going under contract that there should be a road maintenance agreement; that may turn up in the title search.
- This bill intentionally does not address use of private roads – by four-wheelers or otherwise
- If the property is located on a community-owned or privately-owned and maintained street, an adequate, legally enforceable agreement or covenant for maintenance of the street is required.
- The agreement or covenant should include the following provisions and be recorded in the land records of the appropriate jurisdiction:
 - responsibility for payment of repairs, including each party’s representative share;
 - default remedies in the event a party to the agreement or covenant fails to comply with his or her obligations; and
 - the effective term of the agreement or covenant, which in most cases should be perpetual and binding on any future owners.
- The major need for the passage of LD 192 is to solve the frustrating and costly problem of Maine consumers being denied mortgage financing when their property is accessed by a private road.
- Currently, Federal National Mortgage Association (Fannie Mae) will not purchase a loan unless there is an enforceable road maintenance agreement defining property owners’ shared maintenance responsibility on record in the County Recorder’s office or a lenders indemnity to Fannie Mae against all losses incurred by Fannie Mae as a result of the physical condition of the street access.
- There are numerous private roads in Maine without road maintenance agreements of record. This requirement can, therefore, significantly limit financing options for consumers.

- This bill will finally provide a definition that separates a private road from a private way. A "Private way" means a public easement in which the public has full rights to travel on it whereas a private road is not for the use of the public. This is an easement held by a municipality for purposes of public access to land. This is an important difference for owners and municipalities.
- With this bill, if passed, will finally provide a town a distinct meaning for designating a road as a private way or a private road and to the residents residing on either type of road.
- Also, currently, a few homeowners on a "private road" do NOT help repair their roads. I am very aware of how a few owners have no regard to the wellbeing of their neighbors and purposely refuse to contribute towards maintaining a road to their neighbors' home. This creates a great burden on those who do need the road repaired. This results in a great distress to those who are vulnerable and worry that emergency vehicles may not reach them in time.
- By passing this bill, it will finally resolve that each owner is responsible to repair and maintain their private roads.
- LD 192 is the culmination of several months of cooperative effort between the Maine Association of Realtors, the lending institutions, the logging industry, MARA, and Maine ROADWays to refine the language of the bill so that all of those diverse interests could agree on it. We are hoping it will go forward as now written, without any further modification.
- The purpose of this bill is to assure lenders that when there is a residential property on a shared private road, there is some mechanism in place to provide that the access will remain passable.
- The Road Association statutes, 23 MRSA 3101-3106, are one option that can be applied when there are at least four benefitted properties. These statutes have been working well in those situations, and those who depend on them do not want any changes that might conflict with or detract from those statutes.
- This bill has been set apart from the existing road association statutes and carefully crafted so as not to conflict with them, but to be applicable both in cases where a statutory road association is an option, and also in cases where there are not enough properties to qualify for a statutory road association.
- LD 192 allows a lot of flexibility, so long as the purpose of keeping the road passable is achieved.
- The most contentious situations I see are often where there are only two or three residents, and for various reasons, standard solutions just don't work. The flexibility of this bill will give them the chance to find what works for them.
- The "default" position of each landowner contributing an equal share kicks in only if the abutters cannot reach some agreement on their own, and should provide some incentive for working things out.
- There is an exemption that applies only to camps on logging company lands. The logging company owns the land and the road that serves it, and their interest is in the production and harvesting of wood products, not residential development. But they may lease land to those who want a camp for hunting etc. The lessee who builds a camp on it owns the building but not the land. In such cases, the owner if the land will not be compelled to keep their logging roads in repair for residential use.
- LD 192 would address a real problem that consumers so often encounter when attempting to obtain financing for a home located on a private road

Opponents

- None

Neither for nor against

- D. Gordon Mott (written testimony only)
 - I recognize that a need frequently arises for owners who enjoy the benefits of private roads to come to an agreement to share the costs of road maintenance when they don't have one.
 - 1. Would the term "residential property" refer only to parcels where principal residences are located (including vacant lots where such residences are intended)? Or would it also include parcels where there are secondary camps? Is a definition of "residential property" needed?
 - 2. Should it be necessary in order to apply the provisions in LD 192 that the owners who benefit own rights-of-way on the road? There are many private roads where land parcels benefit from roads maintained by others without owning a right-of-way. Here and in other regions in Maine there are many camp lots originally constructed for access by watercraft that are now accessed by private roads. Some of these lots have been converted to become principal residences.
 - 3. Could requiring shared costs on a private road where landowners are being given passage by permission and there is no deeded right-of-way possibly lead to a record from which support for acquisition of a right-of-way by customary use may be gained? If it is intended for LD 192 to apply where there are no deeded rights-of-way by the benefited parties, would it be desirable to include language that prevents acquisition of any right-of-way by customary use when repair and maintenance costs are being imposed?
 - 4. Complex situations often exist on private roads. For example, there is a local private road that extends for 1.4 miles over which 36 seasonal camp lots have deeded rights-of-way, 34 seasonal camp lots do not have deeded rights-of-way but are benefited by the road, a landowner association has a deeded right-of-way for passage to its separate roads, both the Passamaquoddy Tribe and the Penobscot Nation have deeded rights-of-way for all purposes of a way to their Trust lands – and there are 3 principal year-round occupied residences. Despite failed efforts to organize a local road association in accord with Title 14 Section 3101, road repair and maintenance only takes place when some landowners need to use the road for commercial purposes. It would be unfair to place the burden for repair and maintenance on the three residential owners here.
 - While in fact it might be useful to write LD 192 in such a way that all users are compelled to share repairs and maintenance in complex situations like this, at the same time there are private property rights that need to be carefully respected when roads are being used by permission and not by right. Would there be a way to define more tightly the situations where this proposal would apply when there is complexity?

INFORMATION REQUESTED

- Will enacting this law, that establishes a default, undo agreements because people will think the equal share default is better than the agreement they have?

BACKGROUND

Current law provides for the formal establishment of road associations under Title 23, chapter 305, subchapter 2 (§§3101-3106). The subchapter applies when four or more parcels of land are benefitted by a private road, private way or bridge as an easement or by fee ownership. The road association can be established if the owners of at least three or more parcels (three different people) agree.

Road maintenance agreements can also be established by the consent of the owners, but this will not meet the federal mortgage requirements.

Road maintenance agreements can be entered into in writing as agreements among the parties. These agreements may satisfy the federal mortgage requirements.

Some deeds and covenants establish road maintenance requirements – these would meet the federal mortgage requirements.

FISCAL IMPACT:

Not determined as of February 22, 2021