Maine Abandoned and Discontinued Roads Commission January 11, 2023

Meeting Minutes

In Attendance: Corp. Kris Maccabe, Brian Bronson, John Monk, Catherine Nadeau, Karla Black, Roberta Manter, Jim Katsiaficas, Vivian Mikhail, Peter Coughlan, Ryan Pelletier, Rebecca Graham

Absent: Steve Young

The meeting was called to order by Chair Jim Katsiaficas at approximately 10:08 am, followed by a roll call of the members present.

The Commission unanimously accepted the minutes of the December 14, 2022, meeting, based on a unanimous roll call vote.

Jim opened the meeting, turning it to Vivian for an update on the Commission's online presence from her efforts. She explained the YouTube channel is still a work in progress. not easily found given the name the character limits forced, and that she will work on revising and optimizing it. Vivian submitted the current meeting to the MPBN Community Calendar, but it did not appear there. We will try that again for the 1/25 meeting and will also investigate getting onto the legislative calendar. Jim advised that he and Vivian had been in touch with OIT for the State of Maine, and they are running down last possibilities to afford the Commission a website. Jim has relayed to them that we will appeal to the legislature if OIT does not approve the Commission's request. Vivian shared that we are still without a paralegal to staff the Commission but do have one candidate getting back to her after another round of candidates and interviews since the last meeting. Rebecca noted it's important to address all those needs (website, calendar/notifications, paralegal) in our report to the legislature, and there was agreement amongst Commission members.

Rebecca pointed out that some municipalities provided input to the Commission via her after the public hearing, which Vivian pulled and circulated to the Commission in hard copy. Rebecca took over taking the minutes during that time.

Mark Robinson was present by Zoom, and he reiterated his written testimony.

Jim K- General use liability conflicts with recreational use- Presumes the road is used for general conveyance from one place to another and did not envision recreational use.

Brian -Why Wouldn't landowner protections extend to the road for public use? I thought that law apply?

Jim K- Tort claims protect the municipality but in this case it would be for the injury or harm from use that is general. Do you (ATVs) have the right to be on an easement has still been somewhat debated­ Public right of way - is public easement but under the new easement definition for post Abandonment­ use is restricted to pedestrian, motor vehicle and explicitly excludes ATVs.

Rebecca- Going forward- Future easement resulting from abandonment- not historic easement use is now explicit.

Brian -We would want the landowner liability in place where the town is not allowed to insure land under the easement -Trail systems and recreational use doesn't apply on town roads only the public private easement. Required to maintain a town way.

Jim- If town takes the lead it won't protect the abutter because tort claims act only applies to towns. The public right to retain access to land along those roads was automatic in 1965 unless otherwise stated.

Roberta - there is more general traffic thatn ATV traffic, so over time it does more damage. There are times when one ATV at the wrong time and used the wrong way can cause considerable damage.

Brian - Who is responsible if a trail is designated and ATV trail but Truck drives down it?

Ryan - I live on one of these roads and we wanted it private so established a road association because we maintain the easement. Provided the town?/county? a public easement for winter maintenance and now the town has formally accepted the road.

Brian - Under the new easement restrictions placed on abandonment there are deep questions if we can use these easements at all even if you are a landowner because of the way the statute reads. If ATVs are not permitted on the public easement due to this new restriction it impacts road owners ability to operate as well as the recreational trails.

Jim - Review Public Way in the ATV statute and they may operate to the side and except over private land (without permission) or sidewalk.

Brian - Town of Mercer opened up all roads in Mercer to ATV use.

*(Note there are requirements for signage as well as municipal officer designation)*

Road status discussion started with who obligates, who is going to pay, and what to do with the unknown maintenance status. - Vivian Returned.

Roberta mentioned a matter in Livermore as another example of a road being closed to winter maintenance when someone lives there. Brian said there have been similar cases involving snowmobiling, and we need to address liability and protect landowners in winter maintenance situations.

Jim directed the Commission members back to its statutory focus and responsibilities. Cathy raised caution to be careful about putting responsibility on landowners because if there is a loss of access due to that resulting burden, it could jeopardize what we have here in Maine. Jim echoed that perhaps the goal is to make sure a landowner does not get sued if they responsibly maintain and plow, but something happens when the public uses the road. If the landowner does not act in a way that was reasonable and prudent, then there may be liability. That is what the law generally requires, and we could perhaps explicitly extend it to situations the Commission has heard about. Kris noted that it might actually encourage access, as fear of liability and lawsuits often seems to motivate landowner action/inaction. Cathy expressed concern over how to prove certain things happen on someone's land. Jim explained the law applies and courts are decisionmakers as in any case where there is a dispute. The courts hear testimony and decide. Rebecca said situations can give rise to two sorts of causes of action

when there is damage to a public easement- civil when there is negligent behavior, or criminal when there is intentionality involved.

The Commission invited Mark Robinson to speak again via Zoom, and he raised the concern of unsuspecting purchasers of property along one of these roads. He asked if the Commission could add to real estate forms to clarify this information. Jim explained that there already is a real estate disclosure form, but the status of a road is often marked as "unknown". Jim still agreed that it is an important point about making purchasers more informed. Mr. Robinson commented that such knowledge might have changed the Manters' decision-making years ago. Roberta responded by saying the problem was that a private way is not a private road, and they did not know it was a public easement. Jim raised the question of who is responsible for getting the information and checking the appropriate box.

Cathy said if a logging truck creates damage, that's one thing, but what about a situation when an ATV goes in and makes a mess- who is responsible when the private citizen is not even identifiable? Roberta said that in fact is exactly what happens, and unless there are before and after photos as well as photos of the vehicle causing the damage, there is nothing to be done about it. Jim said video cameras are an option- to an extent, of course. Rebecca pointed out that this happens all the time on public roads, and you need proof and to go through the process. Cathy expressed concern that camera evidence doesn't stick, but Brian said it does sometimes.

Roberta raised the possibility of signs warning of criminal penalties to dissuade damaging behaviors. Brian said signs are a great idea in theory, but that doesn't answer how to manage neighbors fighting over the use of a road. Jim said that four or more abutting landowners could join and form a road association- but of course, that requires agreement. Roberta said there can be a road association on a public easement, but if dues are required to pay to maintain the public easement, that doesn't always work because people don't want to pay, and it is unconstitutional to compel private individuals to maintain a public road at private expense Ryan said eventually there could result a public easement for maintenance purposes.

The discussion turned to public easement retention on discontinued roads. Some related problems are that people with houses there need to be able to access their property. Loggers may need access. ATVs may want to recreate. Issues about the scope of permitted use come up. Brian said it is unclear as to when ATV usage is permitted or excluded, with the beginning of the access route in Mars Hill being an example.

Ryan asked why, if there is a maintained public easement, does the cost fall to the property owner? Brian said that issue will get worse with ruts in the recent more intense thaw/freeze cycles. Rebecca said municipal officers designate trails, but there is no public process around designating ATV trails. Brian said he has seen boards make those decisions, possibly sometimes after a public hearing. Rebecc;:i said MMA often advises not to open the process to the public.

Roberta said if there is nothing mentioned about a public easement, there automatically is one. Ryan said the town then should have to pay. Pete said nothing should be automatic; rather, leave it up to the abutters to make a proposal, have a public hearing, then a town vote, with the possible designation of public funding. Pete pointed out the priorities he outlined for the Commission's consideration. Rebecca said that's essentially the process now, and a legislative body needs to appropriate money.

Jim pointed out that automatic retention in the law since 1965 is important because no one wants to land lock a parcel. If you take away a public's right to access, you really might "not be able to get there

from here". The problem remains that the status of the law doesn't allow for maintenance while it's allowing for use. There remains the need for some automatic way to get to e.g., a house. Rebecca said public easement is sometimes the only way to get to a parcel if there are adverse neighbors.

Roberta raised *Jordan v. Canton,* reiterating the issue of a town only compensating once for damage to a road. How can there be compensation for recurring damage? The actual consequence of a public easement is damage over and over, i.e., repeat destruction. It is necessary for the town to keep it passable- grade it, fill potholes with gravel, etc.

Kris said logging permits should require that road/property is left as it was found. Ryan said that on roads closed to winter maintenance, towns can require loggers to get bonds, licenses, etc., to protect from damage, and wondered if this approach could be extended. It was unclear to the members what logging permits currently require.

Brian pointed out that often it can be a situation of multiple vehicles passing for multiple reasons, and unknowable who caused the damage. He gave the example of cutting on Duck Lake, where there were many parties involved and tricky to halt because there was a contract dispute. Rebecca reiterated that there are now continual thaw zones, making maintenance access complicated. Roberta agreed, saying that the question of "what is a frozen road?" is subject to quick changes, and conditions that are not enough to support a logging truck. Brian said that the statutes need to line up and terminology needs to be made consistent, and Rebecca reminded of the need to be aware of unintended consequences.

Roberta then suggested that maybe it's not necessarily a public easement that should be retained, but some access, and maybe better to let landowners decide. She gave an example in Newburg, when private easements in common are established, then discontinued, resulting in the public not having access but the owners do have access. Kris, Brian and Jim raised concern that privatizing means no chance of, for example, trail usage.

Pete said every road has the potential of discontinuance in the future, in different situations- sometimes being landlocked is a possibility, sometimes not. Why not let the abutters/owners decide what to do?

Kris said the problem is that 95% of Maine is privately owned, and it would be hard to recreate without access. He gave the example of Winthrop's limitations on moorings that has been in the news recently. Jim noted that coastal towns have mooring plans, but that that is not usually the case with inland waters.

Brian posed an example of six people on a road, with those six people as the only access holders. How many have to decide to give access? There could be hold outs who gate it *off,* then the matter has to go to court for resolution. Jim agreed that private agreements are preferred, but it's not known how it actually works out.

Roberta brought up a law requiring one year for landowners to come to an agreement. Maybe this should be modified so it's not all or nothing so there is still the possibility of it working out. Perhaps it should be changed to allowing one year to work it out, then if in about five years it seems that a public easement is not ideal, there can be a return to private status. The law says it is for discontinuance of town ways and public easements, but then it really only specifies the process for discontinuance of town ways.

Jim brought up again that it is already difficult for realtors to know road status. If the process changes, and it becomes even harder to discern, the likelihood of defaulting to checking "Unknown" on disclosures will be even higher. Roberta pointed out that 23 MRS 3024 has required filing a notice of discontinuance with the registry of deeds since 1959, but few towns did so, perhaps in part due to the ambiguous language. How can the discontinuance be effective against everyone but the one person who didn't get notified? Again, it is difficult to know how to find, follow and apply the laws.

The Commission took a break from approximately 3:02-3:12 pm. Upon reconvening, Jim focused the discussion on areas of agreement around which to craft the Commission's report to the legislature. It was unanimous that (1) the body supports preventing landlocking (i.e., there needs to be some access, but not necessarily a public easement) and (2) the issue is then the nature of the access (public easement? limited access road?).

It came up that abandonment is what happens when a municipality does not do what it is supposed to do with regard to maintenance for long enough that it is no longer expected to maintain a road. Then the road is effectively treated as discontinued. Roberta said the abandonment statute needs work because the "no use" component is not clear. Kris emphasized that if there is no public use, many of these roads would not even be roads/passable at all.

Jim restated the presumption as: if a town has not spent money to maintain a road for 30 years, then the road is abandoned. Roberta pointed out that it's not clear which definition of public easement to use in the differing statutes. The discontinuance statute is not specific as to which one to use. Jim agreed that there is confusing interplay around public easement versus public roads. Roberta said legislators Hepler and Vitelli are working on a bill that addresses "private way'' language, striking it and replacing it with "private road" or "public easement" as appropriate.

Jim noted that it is fact-specific and expensive to legally dispute and determine the legal status of a road. He raised mediation as another way to address it short of pre-litigation. The Commission came to a rough consensus for some sort of streamlined Alternative Dispute Resolution process around these issues. Roberta reminded of the possibility of tapping into existing programs and resources, including agricultural mediation through Cooperative Extension, and Family and Community Mediation, as possibly a good starting point. A funding request will be necessary if this is an option to pursue. Jim brought up the existing business docket, but of course we don't know if the superior court is interested in having a roads docket.

Jim focused the conversation of the Commission's top priorities, eliciting conversation about what issues we bump up against most often. Roberta emphasized loss of access. Jim raised liability, such as someone trying to do the right thing but still held liable. Ryan agreed, giving the example of a truck following GPS in contravention of signage. Kris reiterated that addressing liability issues might alleviate access issues. Roberta said her focus is landowner access, not recreational access. Recreational access is important, however, as Commission members talked about revenue to the state (e.g., $606M from snowmobiling in 2019, and $746M attributed to ATVs).

Kris asked Roberta to explain her access points more. Roberta said the concern is when you create access, others use and destroy it. Kris said that goes back to leaving land as you found it. Roberta said there can be actual access cut-off, which Kris said is often a private road issue. Brian said the same thing is happening on other roads and there is landlocking.

Jim gave an example of buying a property, and the deed it specifies "town way", which really means nothing. The realtor then has to make a disclosure. Road inventories then came up, which MMA has recommended for years. The questions then become: Whose obligation is it to do that? Who pays? What about the remaining "unknowns"? Roberta suggested starting with what we do know about what roads, then go through existing resources and information to sort out others, agreeing that some will still be hard to determine.

Rebecca said an inventory alone does not tell the status. There still are due process rights for those who live there, and the legislature backed *off* recently due to the price tag attached to doing this work.

Brian brought up that the DOT site already offers the easy information. Pete said that information is 95% correct, with very few tweaks necessary. Roberta emphasized that realtors need to know this tool. Pete agreed that realtor training should be a next step. Roberta said that if a situation falls into a "we don't know" or similar category, buyers should get some information about what that means. Jim suggested that buyers could get MMA's roads manual. Jim said a road status inventory could be good for questionable roads, but who knows who would undertake that, where the information would live, etc.

With time running short, Jim said that he and Vivian will work on a draft report for the Commission's review, highlighting the priorities the Commission has identified, and requests to the legislature to continue this work.

The meeting adjourned at approximately 4:02 pm.