

**Testimony of Tom K. Pollard, PhD
Courts, Corrections and Justice Committee
Panel on Homeowners Association Act
December 1, 2015**

My testimony today deals with only one part of those items potentially covered by the HOA, but a very important challenge, and that is the difficulty in maintaining private roads in New Mexico in the absence of a formal and enforceable road maintenance agreement, whereby everyone served by a private road agrees to pay his/her fair share of the cost of road maintenance and repairs.

Part of what brings me here is that for the last 20+ years I've been living on, and coordinating the maintenance of, Coyote Crossing, a private road, off of County Road 60 (Nine Mile Road) southeast of the city of Santa Fe. Coyote Crossing is approximately one mile long and serves 40 lots.

Coyote Crossing is a private road as a result of the failure of the Sunlit Hills III subdivision, in which the road is located, to be properly recorded with Santa Fe County, leaving Sunlit Hills III as a non-conforming subdivision with no covenants and no county maintenance of roads, just an easement through each property served by the road.

There is no formal road maintenance agreement in place for Coyote Crossing. Each year a determination is made by an informal group as to what the road needs and what the residents can afford, and a spreadsheet is prepared which shows each lot owner's share based on the distance of their lot(s) from County Road 60, which is paved. And there is the age-old problem that there are a number of chronic non-contributors that are certainly able to pay their share. The result is that the road is not kept up as well as it should be, and the financial burden falls on about three quarters of the residents. It is my understanding that the establishment of an stand-alone road maintenance agreement in New Mexico would require 100% of the affected properties to sign on, which the chronic non-payers will not do.

The need to have a formal road maintenance agreement in place has intensified recently with the promulgation by the Federal National Mortgage Association (FNMA) of a rule governing their purchase of originated mortgages, which requires that a legally enforceable road maintenance agreement with certain provisions for adequate road

upkeep, payment by all beneficiaries for their representative share, and default provisions for nonpayment by a beneficiary of his/her obligation must be in place before FNMA will purchase from a lender the mortgage for a property on a private road, except in the case where the bank will agree to reimburse FNMA for any losses or expenses as a result of the physical condition of the street or in order to establish and/or retain access thereto (See ATTACHMENT 1). Few, if any, local banks would assume this liability.

However, the FNMA rule allows for an exception to the requirement for such a formal road maintenance agreement in a state that has a statute that provides for the maintenance of private roads by those lot owners benefitting from the road. From the FNMA rule:

“Note: If the property is located within a state that has statutory provisions that define the responsibilities of property owners for the maintenance and repair of a private street, no separate agreement or covenant is required.”

At least two states, Connecticut and Maine, have passed such statutes, attached as attachments 2 & 3, respectively.

The HOA may also qualify as such a state law. The HOA provides for maintenance of common areas, and provides for liens against the non-payers. The only common areas in the case of Coyote Crossing are road easements that pass through each owner's lot. The HOA, however, is very cumbersome and onerous for a situation in which the only matter being dealt with is once-a-year road maintenance.

Further, the road agreement for Coyote Crossing would apply to only a small portion of the non-conforming subdivision, Sunlit Hills III: only those contiguous lots along Coyote Crossing and its feeder/side roads. It is unclear whether the HOA could apply to just a portion of a subdivision.

It appears that either the HOA should be amended to have a separate section dealing solely with road maintenance agreements, or that New Mexico put in place a private road maintenance statute similar to those of Maine and Connecticut.

ATTACHMENT 1

An excerpt from the FNMA Rule B4-1.3-04:

“Community-Owned or Privately Maintained Streets

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.

Note: If the property is located within a state that has statutory provisions that define the responsibilities of property owners for the maintenance and repair of a private street, no separate agreement or covenant is required.

If the property is not located in a state that imposes statutory requirements for maintenance, and either there is no agreement or covenant for maintenance of the street, or an agreement or covenant exists but does not meet the requirements listed above, the lender may still deliver the loan. However, should Fannie Mae experience any losses or expenses as a result of the physical condition of the street or in order to establish and/or retain access thereto, the lender is responsible for the reimbursement of losses or expenses.”

Connecticut

House Bill No. 5219

Public Act No. 14-67

**AN ACT CONCERNING MAINTENANCE OF PRIVATE EASEMENTS
AND RIGHTS-OF-WAY.**

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (*Effective October 1, 2014*) (a) As used in this section: (1) "Residential real property" has the same meaning as provided in section 20-325c of the general statutes, but does not include property owned by the state or any political subdivision thereof; (2) "benefited property" or "property that benefits" includes residential real property burdened by an easement or right-of-way, the owner of which residential real property uses such easement or right-of-way; and (3) "easement" or "right-of-way" means a private appurtenant easement or right-of-way.

(b) The owner of any residential real property that benefits from an easement or right-of-way, the purpose of which is to provide access to such residential real property, shall be responsible for the cost of maintaining such easement or right-of-way in good repair and the cost of repairing or restoring any damaged portion of such easement or right-of-way. Such maintenance shall include, but not be limited to, the removal of snow from such easement or right-of-way.

(c) If more than one residential real property benefits from such easement or right-of-way, the cost of maintaining and repairing or restoring such easement or right-of-way shall be shared by each owner of a benefited property, pursuant to the terms of any enforceable written agreement entered into for such purpose. In the absence of such agreement, the cost of maintaining and repairing or restoring such easement or right-of-way shall be shared by each owner of a benefited property in proportion to the benefit received by each such property.

(d) Notwithstanding the provisions of subsections (b) and (c) of this section, any owner of a benefited property who directly or indirectly damages any portion of the easement or right-of-way shall be solely responsible for repairing or restoring the portion damaged by such owner.

(e) If any owner of a benefited property refuses to repair or restore a damaged portion of an easement or right-of-way in accordance with subsection (d) of this section, or fails, after a demand in writing, to pay such owner's proportion of the cost of maintaining or repairing or restoring such easement or right-of-way in accordance with subsection (c) of this section, an action for specific performance or contribution may be brought in the Superior Court against such owner by other owners of benefited properties, either jointly or severally.

(f) In the event of any conflict between the provisions of this section and an agreement described in subsection (c) of this section, the terms of the agreement shall control.

Approved May 28, 2014

Maine Revised Statutes

Title 23: TRANSPORTATION

Part 3: LOCAL HIGHWAY LAW

Chapter 305: CONSTRUCTION, MAINTENANCE AND REPAIR

Subchapter 2: PRIVATE WAYS

§3101. Call of meetings; maintenance; repairs

1. Definitions. As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

A. "Private way" means a public easement as defined in section 3021, subsection 2. [2007, c. 625, §1 (NEW) .]

B. "Repairs and maintenance" does not include paving, except in locations where limited paving is demonstrated to be a cost-effective approach for fixing an erosion problem or to repair and maintain pavement existing as of July 1, 2007. "Maintenance" includes, but is not limited to, snowplowing, snow removal, sanding and ice control; grading and adding gravel and surface material; installing, cleaning and replacing culverts; creating and maintaining ditches, drains and other storm water management infrastructure; creating and maintaining sight distances on curves and at intersections; and cutting brush, trees and vegetation in the right-of-way. [2013, c. 198, §1 (AMD) .]
[2013, c. 198, §1 (AMD) .]

2. Call of meeting. When 4 or more parcels of land are benefited by a private road, private way or bridge as an easement or by fee ownership of the private road, private way or bridge, the owners of any 3 or more of the parcels, as long as at least 3 of the parcels are owned by different persons, may make written application to a notary public to call a meeting. The notary may issue a warrant or similar written notice setting forth the time, place and purpose of the meeting. Copies of the warrant or similar written notice must be mailed by means of the United States Postal Service to the owners of all the parcels benefited by the private road, private way or bridge at the addresses set forth in the municipal tax records at least 30 days before the date of the meeting. The notice must inform the owners of the planned meeting's agenda and specify all items to be voted on, including, but not limited to, all proposed budget items or amendments that will determine the amount of money to be paid by each owner pursuant to subsection 5. Subsequent meetings may be called in the same manner or by a commissioner or board appointed at a previous meeting pursuant to subsection 5.
[2013, c. 198, §2 (AMD) .]

3. E-mail. E-mail may be used as an alternative to United States mail for sending notices and other materials under this section with the agreement of the receiving party as long as the communication includes the current address and telephone number of the sender for purposes of verification.
[2007, c. 625, §1 (NEW) .]

4. Voting. Each parcel of land benefited by a private road, private way or bridge represents one vote under this section; except that, if the bylaws of the association

authorize more than one vote, then each parcel may represent no more than 2 votes under this subsection. The call to a meeting may state that an owner may elect in writing to appoint another owner to vote in the owner's stead. Owners voting by absentee ballot must be polled on all voting items that were not included in the agenda and the final tally must be reported to the owners.

[2013, c. 198, §3 (AMD) .]

4-A. Road associations. A road association under this subchapter through its commissioner or board may address present and future repair and maintenance of a private road, private way or bridge as authorized by the owners at meetings called and conducted pursuant to this section until the association is dissolved by a majority vote of its members.

[2013, c. 198, §4 (AMD) .]

5. Commissioner or board; assessment for repair, maintenance and other costs. The owners of parcels of land benefited by a private road, private way or bridge at a meeting called pursuant to subsection 2 may choose a commissioner or board, to be sworn. By a majority vote of the owners present and voting in person or by written proxy or absentee ballot, the owners may determine what repairs and maintenance are necessary and the materials to be furnished or amount of money to be paid by each owner for repairs and maintenance and may determine the amount of money to be paid by each owner for other costs, including, but not limited to, the cost of liability insurance for the officers, directors and owners and costs of administration. The determination of each owner's share of the total cost must be fair and equitable and based upon a formula provided for in the road association's bylaws or adopted by the owners at a meeting called and conducted pursuant to this section. The commissioner or board shall report the outcome of all votes to all the owners by United States mail within 30 days. Special assessments for emergency repairs and maintenance may be made at a duly held meeting called for that purpose. Emergency repairs and maintenance are those actions necessary to maintain or restore the functionality of the private road, private way or bridge.

[2013, c. 198, §5 (AMD) .]

5-A. Easements. A road association under this subchapter may negotiate an easement for the installation of a ditch, drain, culvert or other storm water management infrastructure to benefit the private road, private way or bridge. The easement must specify when a ditch, drain, culvert or other storm water management infrastructure must be maintained and include reasonable performance standards to guide the timing and extent of its upkeep and repair. The easement must also be recorded at the registry of deeds in the county in which the property subject to the easement is located. A ditch, drain, culvert or other storm water management infrastructure subject to an easement under this subsection must be under the control of and maintained by the road association.

[2013, c. 198, §6 (AMD) .]

6. Commercial or forest management purposes. This section does not apply to a private road, private way or bridge constructed or primarily used for commercial or forest management purposes.

[2007, c. 625, §1 (NEW) .]

7. Immunity from suit. A commissioner, board or owner of a parcel of land who undertakes activities of a road association under this subchapter is immune from civil liability in all actions by owners or lessees of other lots for the following activities:

A. The determination of repairs and maintenance to be undertaken; [2009, c. 238, §1 (NEW) .]

B. The determination of materials to be furnished or amount of money to be paid by each owner for repairs and maintenance; [2009, c. 238, §1 (NEW) .]

C. The collection of the money from each owner; and [2009, c. 238, §1 (NEW) .]

D. The awarding of a contract authorized under section 3103. [2009, c. 238, §1 (NEW) .]

[2009, c. 238, §1 (NEW) .]

8. Environmental violations. Notwithstanding subsection 7, a commissioner, board or owner of a parcel of land is not immune from an enforcement action for a violation of law under the jurisdiction of the Department of Environmental Protection or a municipality.

[2009, c. 238, §2 (NEW) .]

9. Insurance. A road association under this subchapter may purchase liability insurance to defend and indemnify the road association's officers, directors and owner members for any and all claims of liability or violation of law concerning the private road, private way or bridge and may include the costs of such insurance in the determination of each owner's share of the total cost under subsection 5.

[2013, c. 198, §7 (NEW) .]

SECTION HISTORY

1995, c. 227, §1 (AMD). 1997, c. 682, §1 (AMD). 1999, c. 552, §1 (AMD). 2007, c. 162, §1 (AMD). 2007, c. 625, §1 (RPR). 2009, c. 238, §§1, 2 (AMD). 2009, c. 239, §§1-3 (AMD). 2013, c. 198, §§1-7 (AMD) .