



**A**ccording to the Federal Highway Administration, Pennsylvania has over 250,000 miles of publicly maintained roadways — more than any other eastern state, including New York. But Pennsylvania also has many private roads, and Pennsylvania attorneys have been dealing with issues relating to private roadways since the beginning of the commonwealth. The state is crisscrossed with old logging roads, abandoned rail lines, old coal roads and settlor trails that used to traverse the wilderness that have, over the last several hundred years, become

shared driveways or private roads providing access to private property. There are also uncounted thousands of miles of private roadways, including undedicated roads in subdivisions, condominium developments, cooperatives and planned unit developments.

Notwithstanding that private roads are common in Pennsylvania, the financing of a home accessed by a private road can present difficulties, especially for the lender. In today's lending environment, where banks routinely sell their loans on the secondary market, it is important to make sure that the borrower will have continued access to the property and will be able to afford the

expense of his/her contributory share of the maintenance and upkeep. The right of access is generally addressed through recorded subdivision plans that show the private road, which creates the recorded right of access. Maintenance and upkeep are a different matter. Condominium and similar housing developments address the issue through recorded declarations enforced by homeowners' associations. Private farm roads, country lanes and informal subdivisions do not have such mechanisms. It is the instances of unrecorded maintenance arrangements that present issues for lenders in evaluating a borrower for purchase of a property on a private road.



# Untangling Private Roads in Pennsylvania

## Who has the responsibility of repair and how to calculate?

By Anna Marie Sossong



The Private Roads Act (36 P.S., Chap. 7), one of Pennsylvania's older surviving pieces of legislation — originally created in 1836 — provides landowners of landlocked parcels with a mechanism to petition for the creation of an access road to the parcel. The act's rationale is that it is to the benefit of the commonwealth to ensure that all its land is able to be used for the common good — therefore access is required. There have been hundreds of cases since 1836 challenging various aspects of the process outlined in the act for the petition and creation of a private road across another landowner's property. Most of the cases addressed the determination of a board of view as to the

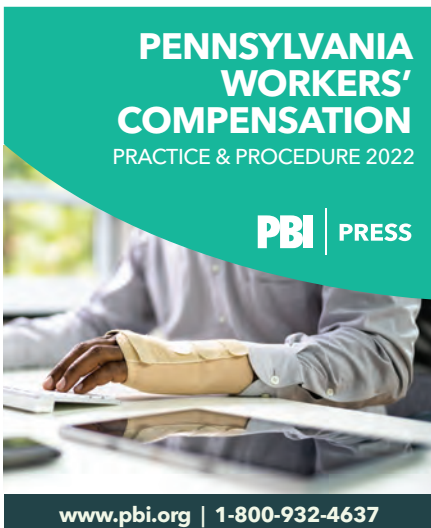
necessity of the proposed private road, its location, its size and its price.

However, once the private road was established, either through the mechanism outlined in the Private Road Act, by a landowner creating a private road as part of a subdivision or through development of a parcel on which the private road already exists, the continuing obligation of maintenance was not always clear. Section 2735 of the act addresses repair of private roads and was amended on Oct. 7, 2021 (effective Dec. 6, 2021) to address some concerns from recent court cases and to attempt to add a bit of certainty as to the determination of maintenance obligations.

This new revised legislation provides lenders with more clarity as to how to evaluate the proposed purchase and financing of a parcel that either contains a private road used by others or where access is dependent on a private road where there is no other maintenance agreement. Generally, lenders require that any loan transaction involving a private road also include a recorded maintenance agreement that clearly outlines the continuing obligations of the landowner and roadway users for all future maintenance expenses. If there is no existing maintenance agreement and the various landowners aren't willing to enter into one, this lender requirement can kill the proposed purchase/sale.



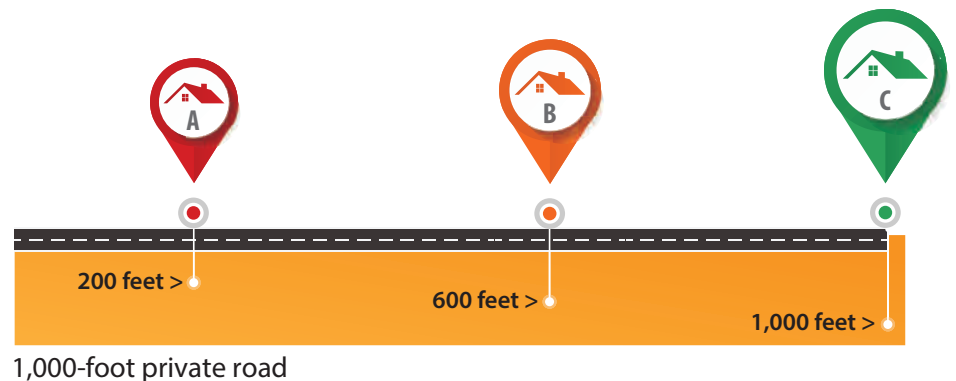
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Section 2735 of the Private Road Act has always provided that the person who requested the private road is responsible for its continuing repair (§2735(a)). Section (b) then continues, “Each property owner that shares a common benefit from a private road shall contribute in proportion to the amount of the private road utilized to the cost of maintaining the private road at the current level of improvement and shall have the right to bring a civil action to enforce the requirement of this section.” This is a slight revision from the former act, which mandated that the obligation for shared maintenance was created whenever “more than one person enjoys a common benefit” without restricting the maintenance to property owners only. Now, only property owners are obligated to participate in maintenance.

While the new language does clearly impose the maintenance obligation on property owners, how to determine the cost sharing is not clear — other than the reference to “proportion to the amount of the private road utilized.” In the past, attempts were made to argue that certain property owners were heavier users of the private road and should, therefore, pay more of the maintenance costs. Under this revised language, the only determination is the proportion of private road used by the various contributing property owners.

The calculation of proportionate share isn't as clear as it may appear. Consider the below:



In this example, the overall length of the private road is 1,000 feet. The distance from the beginning of the private road to the center of the driveway to Parcel A is 200 feet. The distance from the beginning of the private road to the center of the driveway to Parcel B is 600 feet. Parcel C uses the entire private roadway to access the parcel. Each of the parcels that use the private road are a different size and create different amounts and types of traffic.

The most obvious calculation that you might employ as a way to determine proportionality is to calculate what percentage of the private road length each parcel uses, as follows:

Parcel A –  $200' / 1,000'$  private road length = 20%

Parcel B –  $400' / 1,000'$  private road length = 40% (400 feet is the length of the private road after the Parcel A drive)

Parcel C –  $400' / 1,000'$  private road length = 40% (400 feet is the length of the private road after the Parcel B drive)

This, however, doesn't consider each parcel's usage. Remember, Parcels B and C both cross over the 200 feet of private road related to Parcel A, and Parcel C also uses Parcel B's section of private road. This calculation results in a heavier maintenance obligation for Parcels A and





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B and isn't truly a "proportionate share" as required by the statute.

In order to accurately assess maintenance and repair costs, the formula must include all of the various private road distances and must recognize that some property owners' use overlaps with others. To determine overall proportionality, the first step is to determine the total distance and usage to be maintained. Here, Parcel A has a 200-foot drive, B's drive is 600 feet and C has a 1,000-foot drive. Both B and C should expect to pay some portion of the expenses associated with the first 200 feet (A's entire driveway length) and C should also expect to pay some part of the cost of that part of the road the leads to B's driveway. Because of the usage overlap, simply determining the percentage of length, as in the previous example, overstates the obligation of A and B and understates C's maintenance obligation. The calculation must recognize the overlap to fairly allocate the expense.

To do so, determine the total length of all parcels' private road access distances =  $200' + 600' + 1,000' = 1,800'$  (Ignore the fact that the actual private road is only 1,000 feet long). This calculation is to determine proportional cost and recognize the overlap in usage. Using the above private road lengths, the proportional maintenance costs for each parcel are as follows:

Parcel A –  $200'/1,800' = 11.1\%$  of overall maintenance expense

Parcel B –  $600'/1,800' = 33.3\%$  of overall maintenance expense

Parcel C –  $1,000'/1,800' = 55.5\%$  of overall maintenance expense

This method accurately represents the proportionate share of maintenance costs for each user of the private road because it includes within each parcel owner that portion of the private road that is jointly used by others. In other words, it recognizes the overlap.

Section 2735 also provides that all the users of the private road have the independent right to enforce the maintenance obligation via civil action. However, there is no discussion within the Private Road Act as to how to address any change in use of the private road, increase in traffic along the road, commercial vs. residential use or any improvements to the private road that a user may desire (paving, grading, etc.). Based on the language of the act, these issues would only result in a change in maintenance expense, not any change in the proportionality formula — which is only based on length of road and not volume of traffic. So, while the recent revisions are helpful in that the maintenance obligation is clearly allocated to the property owners (regardless of whether or not they use the private road for access), which should give lenders a bit more comfort than the prior language, there are still issues not addressed that have historically proven contentious for users of a private road.

Notwithstanding that this maintenance provision is included in the Private Road Act, which provides a method to judicially

acquire access across property to a landlocked parcel, the provision will apply to all instances of private roadways, regardless of how the roadway was created — except for those that already are covered by a private maintenance agreement, roads within a common interest ownership community or private roads established by a governmental entity. So, the next time that your lender balks at financing a transaction with a private road that does not have a maintenance agreement, refer the lender to 36 P.S. §2735. Or, when your client calls and presents a disagreement with a neighbor about their private access road or driveway, this provision can be invoked to attempt to resolve the neighborhood dispute.

This revision to the Private Roads Act isn't earthshattering, nor does it completely clear up the many issues with private roads in Pennsylvania, but it does help neighbors understand their obligations to the others who join in their use of private roads abutting their properties. ☞



Anna Marie Sossong is underwriting counsel for Conestoga Title Insurance Co., a regional underwriter headquartered in Lancaster. She has extensive experience applying real estate law to both commercial and residential transactions.

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