



Agenda Item No. 11.

Staff Report

Date: October 8, 2020

To: Mayor McMillan and Council Members

From: Richard Simonitch, Public Works Director/Town Engineer
Joe Chinn, Town Manager

Subject: Town Council and Staff Discussion of Town's Options to Fund Private Roadways with Public Funding

Recommendation:

Council and staff discuss the Town's options regarding use of public funds to repair, maintain and/or rehabilitate privately owned roads within the Town.

Background and discussion:

The Town received a request, signed by 32 residents, to "review its policy toward private roads." Specifically, the request asks the Town to consider appropriating a pro-rata portion the Town's Road Impact Fees to private roads when the money is collected from properties along private roads. The signers ask the Town to consider a formula that can be agreed upon for disbursement of Road Impact Fees to these privately owned roads. The request and signatures is attached to this Staff Report.

There are a number of privately-owned and publicly accessible streets located within the Town that have neither been accepted into the Town's road system, nor maintained by the Town. There are a number of reasons why these roads may have never been accepted or maintained by the Town. Generally, these privately owned and maintained roads are not through-streets and/or may not meet the City's current standards regarding: 40' right-of-way width, drainage, pavement width, lane striping, signage, and structural integrity.

In February, 1916, the Town voted to fund an extensive Town wide pavement improvement program through a Municipal Improvement Bond sale. Resolution No. 97 ostensibly created most of the publicly maintained roadways in Ross existing today; "Determining that the Public Interest and Public Necessity of the Town of Ross Demand the Acquisition, Construction, and Completion of a Certain Municipal Improvement...". In subsequent years, several other roadways were formally accepted into the Town maintenance system by Resolution of the Town Council/Board of Trustees, the most recent being in 1957 (Resolution No. 620) when West Road, East Road, and a portion of Hill Road were accepted by the Town because the abutting owners "...improved said streets and roadways in accordance with the specification of the Town Engineer...". The Town currently funds the maintenance of 11 centerline miles of roadway. There are approximately 3 miles of private roadway that was at one time or the other offered for

dedication to the Town for public roadway purposes, and another 3.3 miles of what is generally considered little more than private, common driveways. The private roads are not through streets connecting Town public roads to each other but are instead typically cul-de-sacs being used mainly by residents of the private roads and their guests. Attached is a map showing the Town public and private roads.

The Town practice has been to not provide any public funding for private road repair, maintenance, and rehabilitation to private roads for the reasons stated below whether from Road Impact Fees, gas tax revenues, or the Town General Fund. Staff therefore requests and recommends that the Town Council consider the implications and parameters of a policy regarding maintenance, repair and rehabilitation of private roads.

Funding of Public and Private Roads.

Currently, the Town utilizes certain dedicated sources for maintenance, repair and rehabilitation of public roads. These include State gas tax funds, State Road Maintenance and Rehabilitation Account (RMRA) funds, Traffic Congestion Relief (TCR) funds, and Transportation Authority of Marin (TAM) funds. The Town also uses Road Impact Fees for capital improvements to and rehabilitation of public roads.

The road impact fee is a development impact fee and cannot be used for repair and maintenance of existing private roads. Government Code (GC) section 65913.8 provides that impact fees cannot be used for operation and maintenance of capital facilities. In addition, Government Code sections define the use of impact fees to be for "public facilities" – "Public facilities includes public improvements, public services, and community amenities". Thus, if the Town did provide road impact fees for a private road it would be deemed to be a public facility and the Town would be responsible for the costs of repairing and maintaining the roadway in the future with an allowable funding source. The Town's road impact fee is assessed for development along and adjacent to both public and private roadways because traffic created by the development invariably travels along Town maintained roadways to any development and/or construction site in Town.

The Town utilizes several other revenue sources to repair and rehabilitate Town roadways including State gas tax, State RMRA, TCR, and TAM funds. Under California law all the funds are to be used to maintain public roadways. For example, the California Streets and Highway Code (SHC) states that all moneys in the Highway Users Tax Account (also known as "gas taxes") is to be appropriated for the research, planning, construction, improvement, maintenance, and operation of public streets and highways and their related public facilities for nonmotorized traffic along with for public mass transit. Thus, if the Town did provide gas taxes to maintain a private road it would be deemed a public roadway and the Town would be responsible for the costs of repairing and maintaining the roadway in the future.

The California SHC Section 1806(b) provides that no public or private street or road shall become a city street or road until the governing body, by resolution, has caused the street or road to be accepted into the city street system. SHC Section 1805 generally requires all city streets to have a right of way be a minimum of 40' wide. The Town receives money from various Federal, State and local funding sources each year to maintain all of the roadways that have been accepted into the Town's road maintenance system. That being said, the Town need not formally accept a road into its road system for that road to be considered a public road. Instead, once the Town begins maintaining and/or rehabilitating a privately owned, publicly accessible road, the Town may impliedly accept that road into its road system. Even if the Town does not formally accept a road, the road may indeed be considered a "public" road once the road is subject to "public control."

The Town can legally utilize General Fund revenues to maintain private roads. Related to public road maintenance, the General Fund pays for road striping and curb painting, street light electric costs, traffic signal maintenance, and street sweeping. The General Fund is comprised of non-restricted revenues such as property taxes, sales tax, other taxes, fees and service charges, licenses, and rental and interest revenues. These revenues are used to fund General Fund departments such as the police, fire, planning and building, public works, recreation, and general government. To assist in funding these General Fund departments, the Town residents passed a public safety tax to fund a portion of police and fire department costs. The use of the General Fund for private road maintenance has a number of risks involved with it described in the section below as well as reducing funding availability for other General Fund services that serve the entire public not just owners along private roadways.

Risk Factors in Maintaining, Repairing and Rehabilitating Private Roads

If the Town were to utilize other (non-Road Impact Fee) sources of public funds to repair and maintain these private roads, the Town would significantly increase its potential risk of costs and liabilities. These risks are described below:

1. The Town would increase its potential risk of assuming liabilities for dangerous conditions of the privately owned roads. A city may be liable for injuries from its streets if a plaintiff can show that the city "controlled" the property in question. Gov. Code § 830(c). For liability to be imposed, the city must be in a position to protect against or warn of the hazard, whether or not it owns the property. The critical inquiry is whether the city had the power to prevent, remedy, or guard against a dangerous condition.

If the Town elects to repair and/or maintain the private roads, an injured party may allege that the Town is in a position to prevent, remedy and/or guard against dangerous conditions including conditions related to normal wear and tear, and deterioration of road quality. The increase for liability would also stem from the Town being in a position to prevent and remedy conditions related to road signage, alignment and obstructions; all of which could contribute to dangerous conditions if not managed appropriately.

The risk and liability cost is greater for private roads than public roads because none of the private roads were constructed to Town standards and a large share of them have not been regularly maintained. As such, there is a greater likelihood of road failures and accidents due to road conditions on these roads compared to Town public roads.

2. If the Town were to agree to contribute funds to and/or otherwise assist with the repair and maintenance of private roads, that contribution would likely trigger State law requirements regarding the payment of prevailing wage (and potentially competitive public contracting requirements). Following such State law requirements could make what would otherwise be a straightforward private road maintenance project into a City public works project that would take longer and cost more than a project undertaken by private property owners.

3. It is also important to understand whether the public has a clear right to use the private roads in a manner that would justify the expenditure of public funds for maintenance and repairs. Such public use rights could arise because the road was dedicated to public use in a subdivision map or because the public acquired use rights by other means (e.g., through implied dedication). The question of public use rights would be a highly fact-specific legal issue. Legal disputes could arise if the owners of a given private road do not all agree regarding whether public access is or should be allowed access to the private road. Staff would recommend against the City becoming involved in such disputes, which are essentially between private property owners.

4. The Town need not formally accept a road into its road system for that road to be considered a public road. Instead, once the Town begins maintaining and/or rehabilitating a privately owned, publicly accessible road, the Town may impliedly accept that road into its road system. Even if the Town does not formally accept a road, the road may indeed be considered a “public” road once the road is subject to “public control.” For this reason, if the Town opts to maintain and/or rehabilitate the roads in question, the Town would likely be committing to ongoing maintenance and rehabilitation of that road, which ongoing maintenance and rehabilitation greatly increases the Town’s exposure to liability.

5. If the Town agrees to maintain and/or rehabilitate one privately owned, publicly accessible road, it may establish a precedent suggesting that all privately owned, publicly accessible roads in the Town are subject to maintenance and/or rehabilitation by the Town. This precedent would be costly because, as explained above, there are approximately 6.3 miles of privately owned publicly accessible roads in the Town, and, after an initial capital outlay to improve the streets to Town standards, there is ongoing maintenance of these roads and additional liability costs associated with the roads.

6. **Insufficient Funding.** The Town is financially stable because it has made financially responsible decisions in the provision of services. The Town has been currently maintaining 11 public road miles at a cost of \$800,000 to \$1,100,000 per year. The addition of any of the 6.3 privately maintained road miles into the public road maintenance system would reduce funding for other roadways in Town or reduce the ability to fund other services provided by Town.

Alternative Options

There may be less costly and less risky alternatives to repairing the privately owned roads than choosing to have the Town repair and maintain these roads. In order to alleviate the impact of larger construction projects on privately owned roads, the Town could require as a condition of final approval for development entitlements, that applicants repair any damage to public or private property including the roadway, curb and gutter, drainage facilities, fire hydrants, or any other property damaged or impacted as a result of construction activities.

Conclusion

Staff recommends against utilizing any public funding source to maintain private roadways for the reasons stated above. Opting into repair and maintenance of private roadways would be ongoing, costly, and subject the Town to significant increases in liability and ultimately diminish other public service levels that the Town can provide to residents.

Fiscal, resource and timeline impacts:

Staff time to prepare the report.

Alternative actions

Item is open for discussion.

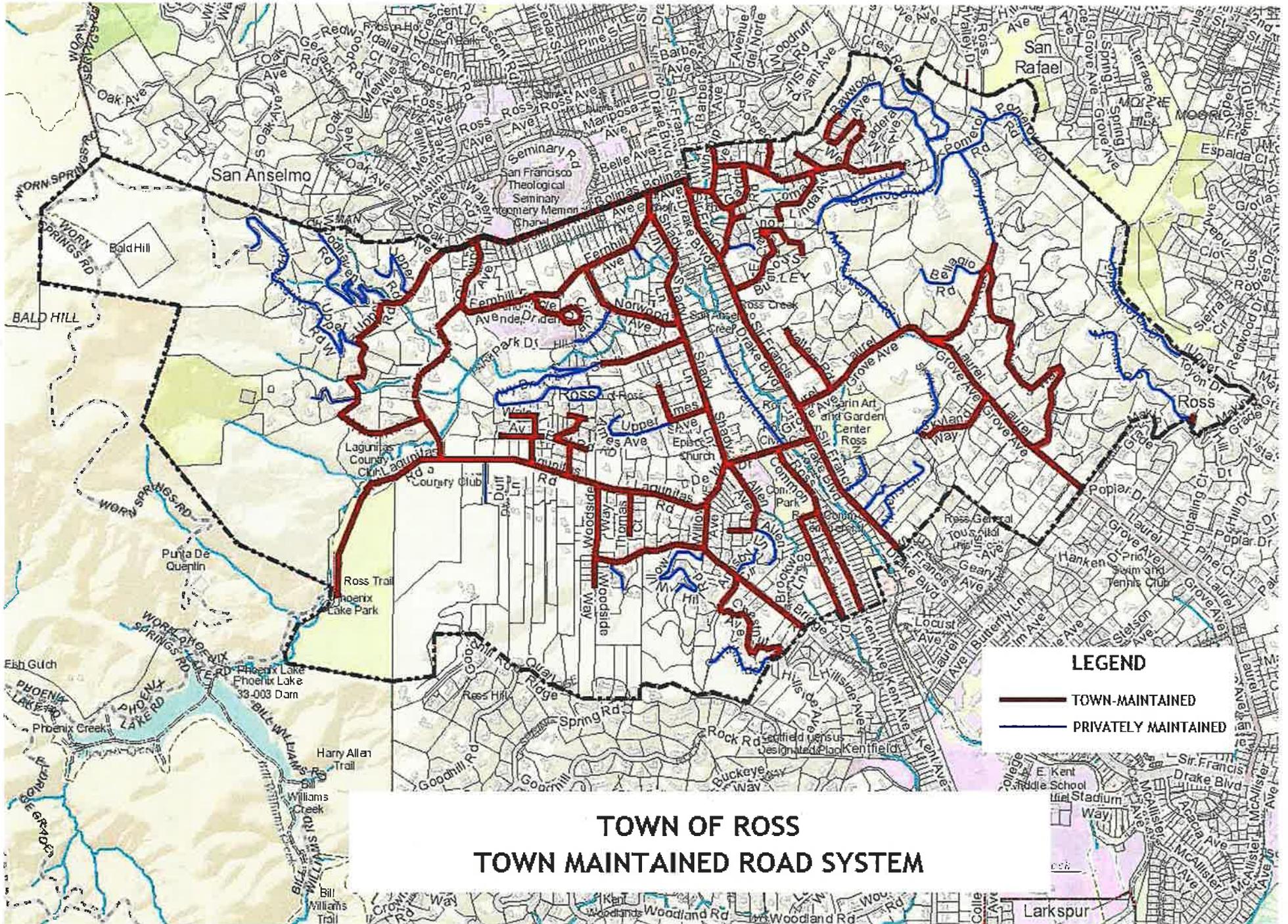
Environmental review (if applicable)

N/A

Attachments

1. Map of public and private roads
2. Resident petition request

ATTACHMENT 1



TOWN OF ROSS TOWN MAINTAINED ROAD SYSTEM

LEGEND

- TOWN-MAINTAINED
- PRIVATELY MAINTAINED



ATTACHMENT 2

August 29, 2018

SEP 2 2020

Memo to Ross Town Council - presented verbally and with handouts at Council Meeting

This is a request for the Ross Town Council to review its policy toward private roads. Specifically, with respect to the permits issued by the Town for construction on these 'private roads' and the collection and distribution by Town of "Road Impact Fees" for work done by homeowners on these 'private roads'.

Currently these fees are ONLY distributed back to 'public' roads for repairs and maintenance. We are seeking an equitable distribution between public and private roads for all projects where money is collected from, and construction is conducted by, a homeowner on or adjacent to a Private road.

We the undersigned (private road) residents and taxpayers of Ross -

Name	Address (Street)	Phone	Email	Signature
1. HOWARD SCHOMER	11 CREST RD.	510 459 0235	hschomer@gmail.com	
2. KIMBERLY ROCHAT	11 CREST RD	415-215-5717	krochat@sbcglobal.net	
3. LULY VARGAS	18 Crest Rd	415 613-7165	lvargas111@yahoo.com	
4. PHILIP DAVID G CREST		415-711-7171	robertawaltz@yahoo.com	
5. Rebecca Nessel	14 Upper Ames	415-595-6982	rnesselegmail.com	
6. Ari Nessel	14 Upper Ames	216-849-0576	arihessel@gmail.com	
7. Andrea Elkort	100 IVY DRIVE	415-254-5039	amielkort@gmail.com	
8. Daniel ELKORT	100 Ivy Drive	415 298-2971		
9. Gian-Michele a Narca	58 Ivy Drive	415 693-2148	gnanurca@wooly.com	
10. Hadee Thai	58 Ivy Drive	415-250-2673	hadee.thai@yahoo.com	
11. WARD CAIN	102 IVY DR.	415-454-6544	WARD.CAIN@4AHOV.COM	
12. MELINDA CHING	"	"	melindaching@yahoo.com	
13. Jason Deutch	57 Ivy Dr.	415-944-0801	Jr.jason@me.com	
14. Charlotte Sweeney	70 Ivy Dr.	415-305-0213	charlottesweeney@gmail.com	
15. DOUG SWEENEY	70 Ivy Drive	415-305-0555	dougsweeney@gmail.com	

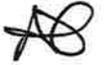
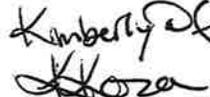
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We the undersigned (private road) residents and taxpayers of Ross –

Name	Address (Street)	Phone	Email	Signature
16. EDWARD LEE	46 IVY DRIVE	415 693 5333	LEEE69774@GMAIL.COM	
17. KAREN LEE	46 IVY DR	415-497-5591	KAYLEEV275@GMAIL.COM	Karen Glee
18. Betty Jean Cruse	65 IVY DR.			Betty Jean Cruse
19. Jerry Cruse	65 IVY DRIVE	415-456-4149		
20. Watilda Thompson	26 Walnut	415-847-7090	wthomp139@aol.com	Watilda Thompson
21. ALISON PICKART	70 BAYWOOD AVE	912-925-8935	ALISONPICKART@YAHOO	
22. PAUL FOLEY (LECOR LLC)	2 CREST RD.	ROSS	Paul@lecorbuilders.biz	
23. ZACH ADELMAN	1 CREST RD.	415-388-8130	zach@navitasorganics.com	
24. Tim Baughman	35 Crest Rd	415-459-7108	tubaughman@comcast.net	
25. KIMBERLY KOZA	55 BAYWOOD AVE	650-207-5999	Kimberly@ketofoodrep.com	
26. STEPHEN KOZA	55 BAYWOOD AVE	512-470-1001		
27. DAMMITH RUPERSINGAM	32 CREST ROAD	SAN ANSELMO CA (510) 776-2014		

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We the undersigned (private road) residents and taxpayers of Ross –

	Name	Address (Street)	Phone	Email	Signature
	Pat Wilson	65 Crest Rd	715 7822	pat.wilson@gmail.com	[Signature]
28.	David Rotman	65 Crest	715-775-284	dardup@msulspria.com	[Signature]
29.	Margelme Burke	60 Crest	415-250-8175	m.burke@comcast.net	[Signature]
30.	Gina Nellesen	33 Woodhaven	650-703-9097	gina.nellesen@gmail.com	[Signature]
31.	David Nellesen	33 Woodhaven	715-782-8095	dnellesen@gmail.com	[Signature]
32.	Marilyn H. McGuree	11 Woodhaven	415 454 3475	MFMCG@comcast.net	[Signature]

Key facts to consider:

- The Town of Ross is the primary if not sole authority to approve construction, issue permits for projects on all roads in town and oversee compliance by homeowners, whether the road in question is considered 'public' or 'private'. (occasionally houses have permits from both Ross and San Anselmo)
- The Town has allowed and continues to allow for numerous heavy vehicles to repeatedly access these private roads for purposes of these projects. See recent examples on Crest Rd and Baywood as per numerous reports from residents.
- The Town does not consult with the Private Road Homeowners, or their Associations, who are responsible for the private road's maintenance and repairs as it pertains to the impact on our roads from these issued permits and the subsequent work, in terms of cost, repair and maintenance as well as potential liability.
- **The Town collects a Road Impact Fee of 1% of the project valuation plus \$3/cubic yard for import/export for demolition activity, earthwork, and site work and retains 100% of these fees. As stated by Town Representative Richard Simonitch on this subject in an email dated Nov 17, 2017:**

Again, these road impact fees are collected to extend the life of the roadways that are being maintained using voter-approved tax payer monies (i.e. public roadways only)

We disagree. The majority of damage and 'impact' occurs closest to the construction project itself, i.e., **on the private road**, and only secondarily on the town's public roads.

- It therefore follows by logic, ethics and fairness between the Town and its homeowners/ taxpayers (these private road residents pay the same full taxes to the Town), -- and perhaps by law as well-- that it is proper and reasonable for a significant, appropriate pro-rata portion of these collected Road Impact Fees to remit back to the private road owners. This will assist in their ongoing cost to repair and maintain these roads and to minimize liability for all.

It is our contention that a simple and reasonable formula can and should be agreed upon by the Town Council and the homeowners/taxpayers, and apportioned for all current future approved projects.

As it currently stands, the Town is aiding in negatively impacting property values on the private roads, as well as contributing to the potential liabilities, by permitting the road damage without any compensation to the road owners. Thus creating a direct causal relationship between the Town's actions/inactions and the resultant road deterioration.

We therefore request the Town Council address and rectify this matter as quickly as possible. Thank you.