An aerial photograph of a dense urban area, likely a city center, with numerous high-rise buildings and a complex street grid. The image is overlaid with a semi-transparent green filter and a large, light-green, abstract geometric shape that frames the text. The overall aesthetic is modern and professional.

NHMA On Demand

Development on Private & Class VI
Roads: How to Handle It



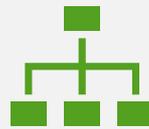
Presenter



Natch Greyes

Municipal Services Counsel

Presentation Agenda



Classification &
Maintenance



Development on
Class VI or Private
Roads

Classification & Maintenance

What's a Public Highway?



- Highway = Road
- Easement for viatic use
- **Public use**
- EST. 1941 RSA 229:1 – Not really a “definition”
- Ownership separate from easement

HAMPSHIRE MUNICIPAL ASSOCIATION

EST. 1941

Municipal Roads

Class	Class VI • RSA 229:5, VII & 231:21-a
Class	Class V • RSA 229:5, VI & 231:3
Class	Class IV • Urban Compact Section Highways - RSA 229:5, IV
Class	Class II • Unimproved Class II - RSA 230:4

The Default Maintenance Rule

RSA 231:59 authorizes municipalities
to spend money on repairing:

Class IV

Class V



No provision to authorize
municipalities to repair Class VI

Emergency Lanes: How Class VI Roads May Be Maintained by the Town



- ▶ RSA 231:59-a – Requires a layout and public hearing by select board on any Class VI or Private Road.
- ▶ Must receive information of a concrete public safety need.
- ▶ Allows the municipality to undertake such “work deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles roads.”



Creating Class VI Roads



Layout pursuant to RSA 231:21



Discontinuance subject to gates and bars pursuant to RSA 231:45, or



Failure of the town to maintain and repair such highway in suitable condition for travel thereon for 5 successive years or more as set forth in RSA 229:5, VII



Regulating Class VI Roads



- ▶ Under the provisions of RSA 41:11, select boards are afforded the same authority as city councils to regulate local roads as provided in RSA 47:17, VII, VIII and XVIII.
- ▶ RSA 47:17 allows regulations pertaining to:
 - ▶ VII: Use of Public Ways
 - ▶ VIII: Traffic Devices and Signals
 - ▶ XVII: Parking

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Limiting Access to Certain Persons



- ▶ Although all Class VI roads are deemed subject to gates and bars, the select board must still regulate such structures to assure public access. RSA 231:21-a, I.
 - ▶ The public, including motor vehicles, cannot be barred from using a Class VI road, except as weight limits, seasonal or otherwise, prohibit. RSA 231:191.
- ▶ Limiting access to a Class VI road requires discontinuance – making it a quasi-private road – or reclassification as a Class A trail under RSA 231-A:2.
 - ▶ Class A trails can be used by owners of land abutting the trail, land served exclusively by such trail for non-developmental use (agriculture/forestry), or access to existing structures.

Discontinuance

Complete Discontinuance

- ▶ Vote by Legislative Body for a complete discontinuance.
- ▶ Should not add any additional words b/c law favors continuance. (See: *Town of Goshen v. Casagrande*).
- ▶ Roads cannot be lost by adverse possession.

Subject to Gates and Bars

- ▶ Still Class VI road
- ▶ Allows installation of a gate or bar.
- ▶ The gate or bar cannot interfere with the public's use of the highway, meaning they cannot be locked.

Effect of Discontinuance

- ▶ Extinguishment of public right of access and travel
- ▶ Does not create a private road
 - ▶ Nothing in statute about how private roads are created or how they are different from, e.g., an easement including a **private right-of-way**.
- ▶ However, discontinuance does not eliminate any private lots from being able to access their properties along the former highway.

Private Roads

- No authority to regulate outside of street names and numbers for E-911 purposes.
- No duty or authority to maintain.
 - So stop plowing private roads!
 - (See *Clapp v. Jaffrey*)
- If you maintain them, you may have accepted them under *Hersh v. Plonski*



RSA 231:81-a: Private Roads & Maintenance



- ▶ **In the absence of an express agreement or requirement governing maintenance of a private road**, when more than one residential owner enjoys a common benefit from a private road, **each residential owner shall contribute equitably to the reasonable cost of maintaining the private road**, and shall have the right to bring a civil action to enforce the requirement of this paragraph.
- ▶ **Any owner of a residential property abutting a private road who directly or indirectly damages any portion of such road shall be solely responsible for repairing or restoring the portion damaged by such owner.**

RSA 231:81-a: Solves Municipal Headaches



- ▶ In the case of all private road disputes, municipal officials can point to RSA 231:81-a.
- ▶ The statute resolves two of the most common complaints about private roads –
 - ▶ Who is in charge of repaving/plowing/or other maintenance?
 - ▶ Who is liable if the road is damaged by one of the persons with rights to the road?
- ▶ Note that it focuses on residential properties...but contains a “savings provision” for other disputes – telling owners to go to court (with one another) – and keeps the municipality out of it.

Liability Protections

- ▶ **RSA 231:50** – Towns shall be relieved of all obligation to maintain, and all liability for damages incurred in the use of, discontinued highways or **highways discontinued as open highways and made subject to gates and bars.** (All Class VI Highways are “subject to gates and bars.”)
- ▶ **RSA 231:93** – Municipalities shall not be deemed to have any duty of care whatsoever with respect to the construction, **maintenance or repair of class I, III, III-a or VI highways...**

Development on Class VI or Private Roads

RSA 674:41 is State Zoning

- ▶ The statute is not dependent upon the adoption/existence of local zoning, nor the adoption of a local building permit process, so it applies in all municipalities.
- ▶ In addition, the statute states that it preempts any less stringent local regulation, and thus the municipality cannot exempt lots from having approved frontage, meaning that grandfathered lots are not exempt from the statute's requirements either. RSA 674:41, III.



What Does RSA 674:41 Do?



RSA 674:41 generally prohibits the issuance of a building permit for a lot unless that lot has frontage on a Class V or better highway.

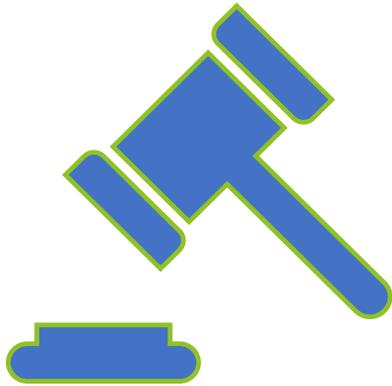
In other words, no building on Class VI highways and private roads unless certain circumstances apply...

(Notes About Class V Highways)



- ▶ “Class V or better” doesn’t just mean built roads. It also means prospective roads and “official” roads, whether or not such road exists.
- ▶ RSA 674:41, I(b) – The street giving access Corresponds in its location and lines with:
 - ▶ A street shown on the official map (RSA 674:10); or
 - ▶ Adopted by Legislative Body – Lays out the Roads
 - ▶ A street on a subdivision plat approved by the planning board; or
 - ▶ i.e. a new development.
 - ▶ A street on a street plat made by and adopted by the planning board; or
 - ▶ i.e. a prospective development.
 - ▶ A street located and accepted by the local legislative body of the municipality, after submission to the planning board, and, in case of the planning board's disapproval, by the favorable vote required in RSA 674:40.
 - ▶ i.e. a municipal road accepted by legislative body vote over the disapproval of the planning board. (This would be a Class V road)

Why Does RSA 674:41 Limit Building?



“The purpose of this limitation on building on class VI highways is to provide against such scattered or premature subdivision as would necessitate the excessive expenditure of public funds.”

Glick v. Town of Ossipee, 130 N.H. 643, 649 (1992).

Municipalities Not Obligated to Allow Construction

- ▶ Municipalities empowered to regulate by means of a zoning ordinance frontage requirements, which exclude access routes unsuited for expeditious travel.
- ▶ Basic purpose of requiring frontage is to ensure that a dwelling may be reached by the fire department, police department, and other agencies charged with the responsibilities of protecting the public peace, safety, and welfare.

But what about “Grandfathering?”

- ▶ "Grandfathered" means a nonconforming use that was lawfully established before the passage of the provision in the zoning ordinance that now does not permit that use in that particular place.
 - ▶ E.g. building on a property with frontage on a Class VI road.
- ▶ The only question is whether the proposed use would expand the nonconformity.
 - ▶ If the nonconformity is expanded, then it is prohibited, unless the proper process is followed to allow the use.
 - ▶ E.g. a new addition or building on the property.
 - ▶ If the nonconformity is not expanded, then it is not prohibited.
 - ▶ E.g. repair/reconstruction within the existing footprint.

RSA 674:41 Applies to Building Permits in General

- ▶ The statutory title implies that the statute *only* applies to subdivisions, but that is untrue.
- ▶ RSA 674:41 is not limited to only those building permits issued through the subdivision process.
- ▶ Challenged in *Vachon v. Town of New Durham Zoning Bd. of Adjustment*, 131 N.H. 623 (1989), and the challenger lost.

Minimal Steps to Allow Development?

Governing body, after review and comment by planning board, votes to authorize building permit.



Municipality clearly disclaims responsibility for maintenance and liability for damages resulting from use of road.



Applicant files with Registry of Deeds a notice of the limits of municipal responsibility and liability prior to issuance of the permit.

Municipalities Need Not Adopt Town- wide Policies

- ▶ No requirement that municipalities adopt town-wide policies.
- ▶ Municipality may examine each request on a case-by-case basis.
- ▶ Even if municipalities adopt policies, they can adopt policies that only allow construction in some areas, but not others.

What to Consider When Considering Whether to Allow Development?



Condition of the road



Width and grade of the road



Drainage infrastructure



Extent of demands on public services



Likelihood of future lay out /
connection to existing road network

ROW Cannot be Only Access to Property

- ▶ “Street giving access” means “a street or way abutting the lot and upon which the lot has frontage.” RSA 674:41, III.
- ▶ Definition was a legislative change in response to the Supreme Court’s decision in Belluscio v. Westmoreland, 139 N.H. 55 (1994), where the Court held that an easement was sufficient access.

What's the Waiver?

- ▶ The landowner must execute and record a release and indemnification agreement prior to issuing the building permit.
 - ▶ Note: Any item recorded at the registry of deeds binds all future owners and puts them on notice of the terms.
- ▶ Necessary to protect the municipality from potential liability that could arise in the event there is an injury at the property due to condition of the road.
- ▶ *Prior* because they won't do it afterward, even if you plead.

**NOTICE, AGREEMENT AND REALEASE OF MUNICIPAL LIABILITY
AND RESPONSIBILITY PER NEW HAMPSHIRE RSA 674:41**

AGREEMENT made this _____ day of _____, _____ between _____ (“Owners”) of _____, and owner of property located at _____ in Groton, NH 03241, and the Town of Groton (“Town”), acting through its Select Board, a New Hampshire municipal corporation of said Groton.

WHEREAS, _____ is the owner of certain real property in Groton as described in deed recorded book# _____, Page# _____ at the Grafton County Registry of Deeds; and

WHEREAS, the portion of _____ upon which the Owner’s real property fronts is a Private or Class VI Road; and

WHEREAS, the Town has authority and discretion, following comment from the Planning Board, to vote to issue a building permit for the consideration of a single family-dwelling on Owner’s property upon term and conditions herein contained and upon filing of this notice pursuant to RSA 674:41;

NOW, THEREFORE, the Town and Owner, for consideration, agree as follows:

Common Terms in a Waiver

Municipality assumes no responsibility for maintenance, including snow plowing, nor liability for any damages resulting from the use of the road

Landowner is responsible for maintaining the road and the access to the subject property and releases and discharges the municipality from any maintenance obligation, and from providing any municipal services, including police, fire and ambulance services.

Landowner agrees to indemnify the municipality from claims, whether brought by the Landowner or third parties, arising out of the use and occupation of the Landowner's property and the maintenance or repair of said road.

Landowner is responsible for transporting any children to the nearest regular school bus stop.

What if the Application is Denied?

- ▶ Appeal to the ZBA.
- ▶ RSA 674:41, II allows ZBA to “make reasonable exception” to the requirements of RSA 674:41.
- ▶ ZBA may issue the building permit directly on appeal, and subject to conditions if it chooses, if it finds that issuing the permit will not:
 - ▶ tend to distort the official map
 - ▶ increase the difficulty of carrying out the master plan
 - ▶ cause hardship to future purchasers or undue financial impact on the municipality

What Must the Applicant Demonstrate?

Applicant must demonstrate:

- ▶ “practical difficulty or unnecessary hardship,” and
- ▶ the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets.

What does “practical difficulty or unnecessary hardship” mean?

- ▶ Not defined in statute...but we probably know what they mean...
- ▶ Refer to the unnecessary hardship test for variances in RSA 674:33, I(b)(5). *Merriam Farm, Inc. v. Town of Surry*, Case No. 2011-311 (decided July 18, 2012).
- ▶ *Merriam Farm* was an unpublished decision, meaning not binding.



What Does It Look Like When An Applicant Fails?

Vachon v. Town of New Durham Zoning Bd. of Adjustment, 131 N.H. 649, 625 (1989).

ZBA decision upholding Board of Selectmen's denial of a building permit under RSA 674:41, II, was affirmed where ZBA found:

“that due to bare rocks, narrowness, swampy areas, ledge outcroppings, close bankings, and seasonal flooding, Webster Road was ‘... probably one of the worst ...’ class VI roadways in the town. The ZBA further found that police, fire, and rescue vehicles would have serious difficulties in reaching the properties, thus ‘creat[ing] a substantially increased risk for the inhabitants of such ... proposed building[s], and an increased possibility of financial impact to the municipality in terms of increased liability or exposure to claims, injury to town employees and/or damage to Town equipment in trying to reach those properties in emergency situations, etc.’”

The ZBA also found that it would be inconsistent with the town's master plan to allow erection of the plaintiffs' buildings.



Suggested Resource:

NHMA's
Hard Road to Travel

MUNICIPAL ASSOCIATION

T. 1941

+

2020 Supplement



for joining me today!



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