

HOT TOPICS IN HIGHWAY REGULATION

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TODAY'S TOPICS

- ATVs & OHRVs on Municipal Roads
- Development on Class VI and Private Roads
- Regulating Use of Class VI Roads
- Scenic Road Designation

PRELIMINARY MATTERS

“Road,” “highway,” “street,” “way” – all mean the same thing in this context. NH statutes use the term “highway” but there really isn’t any magic language UNLESS your ordinance defines these words.

What is a “road” or “highway”?

- Not a single “thing” but layers of various rights to travel, use and regulate an area
- Public road is really an easement for the public to travel plus associated rights to facilitate travel, protect the public and protect the road
- Different parties may “own” different aspects

OHRVs and Snowmobiles on Municipal Roads

OHRV (ATV, UTV) = “any mechanically propelled vehicle used for pleasure or recreational purposes running on rubber tires, tracks or cushion of air and dependent on the ground or surface for travel...whether covered by ice and snow or not....” RSA 215-A:1, VI.

Snowmobile = “any vehicle propelled by mechanical power that is designed to travel over ice or snow supported in part by skis, tracks, or cleats...no more than 54 inches in width and no more than 1,200 pounds in weight....” RSA 215-C:1, XV.

Snowmobiles are excluded from the definition of OHRV.

OHRVs – Road Use Limitations

- Default is OHRVs are NOT permitted on any public road
- DOT may specifically authorize OHRV use on portions of State public roads, subject to some limitations in RSA 215-A.
- Municipal governing body may authorize on any Class IV, V or VI.
- Where permitted on municipal roads, general speed limit is 20 mph, must keep to the extreme right, and yield to general traffic
- Not on railways with tracks intact, not at airports, not in cemeteries

MUNICIPAL AUTHORIZATION TO USE PUBLIC ROADS

City/town council or select board may authorize OHRV use of Class VI, V or VI road; also sidewalks or bridges thereon

- Vote may only be taken after public hearing
- Notice at least 14 days in advance, to public (at least 2 places) and by verified mail to all owners of abutting property on such road.
- Person who petitions governing body to authorize OHRV use pays the cost of notice for the hearing
- Authorization may be revoked or changed in same manner.
- RSA 215-A:6, IX

Snowmobiles - Road Use Limitations

- Default is snowmobiles are NOT permitted on any public road or snowbanks adjacent to them.
- DOT may post specific state roads as “not maintained for winter use” where snowmobiles are permitted instead of conventional motor vehicles. RSA 215-C:10.
- Municipal governing body may authorize on any Class IV, V or VI with public hearing (but no notice to abutters required). RSA 215-C:8, IX.
- Where permitted on municipal roads, general speed limit is 20 mph, must keep to the extreme right, and yield to general traffic
- Not on railways with tracks intact, not at airports

Local Ordinances/Bylaws

Municipal governing body may adopt ordinances regulating OHRV and/or snowmobile use within municipal boundaries, RSA 215-A:15, RSA 215-C:31

Local ordinances may not conflict with state law

Enforcement of local ordinances is the responsibility of local law enforcement

Violation of local ordinances = criminal “violation”

DAMAGE TO PROPERTY

Operator/owner of OHRV or snowmobile is responsible to the owner of any land where trees, shrubs, roads, or other property have been damaged by travel. RSA 216-A:19 RSA 215-C:34

Property owner may bring action in superior court to recover:

- Cost of cleanup and restoration of land to prior condition
- Up to 3X actual damages, depending on the level of culpability for the conduct
- Reasonable attorney's fees

LIABILITY AND ASSUMPTION OF RISK

Municipalities may not be held responsible for any accident resulting from the use of an OHRV or snowmobile on a frozen body of water. RSA 215-A:14; RSA 215-C:4

Any owner of land (including municipality) may post against use by OHRVs and/or snowmobiles. RSA 215-A:34; RSA 215-C:55

Any rider/driver of OHRV or snowmobile “accepts, as a matter of law, the dangers inherent in the sport, and shall not maintain an action against an owner, occupant, or lessee of land for any injuries which result from [the] inherent risks, dangers, or hazards” of use. RSA 215-A:5-c; RSA 215-C:55

DEVELOPMENT ON CLASS VI ROADS & PRIVATE ROADS

RSA 674:41 a/k/a “statewide zoning”:

In general, 674:41 prohibits building permits for lots unless “the street giving access to the lot” is a Class V or better (*i.e.* municipally-maintained) public highway.

WHAT DOES 674:41 SAY AND HOW DOES IT WORK?

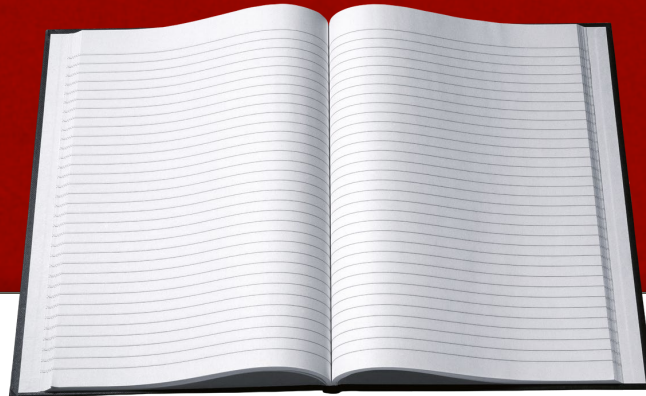
BUT...

674:41, I (b) – (e) lists exceptions to the rule, with extra conditions.

The street giving access to the lot may be

- (b) a “paper street”
- (c) a Class VI highway, *IF*...
- (d) a private road, *IF* ...
- (e) an existing street constructed before the adoption of 674:41, and shown on a subdivision plat approved before the local planning board was authorized to do subdivisions, and with other buildings on other abutting lots

Note: Statutory Headings May Be Misleading...



Although RSA 674:35-:42 are grouped under the heading “Regulation of Subdivision of Land”, RSA 674:41 applies to building permits in general, and is not limited to only those building permits issued through the subdivision process.

See Vachon v. Town of New Durham Zoning Bd. of Adjustment, 131 N.H. 623, 629 (1989) (rejecting argument that RSA 674:41 was limited to lots developed through the subdivision process because the title of the section was “Regulation of Subdivision of Land.”)

WHERE DOES IT APPLY?

The statute applies in virtually all communities because it is not dependent upon the adoption/existence of local zoning, nor the adoption of a local building permit process.

Grandfathered lots are not exempt from the statute's requirements either. *See* RSA 674:41, III. The statute preempts any less stringent local regulation, and thus the municipality cannot exempt lots from having approved frontage.



A RIGHT-OF-WAY EASEMENT ACROSS ANOTHER'S LAND CANNOT BE USED AS THE "ACCESS"



“Street giving access” means “a street or way abutting the lot and upon which the lot has frontage. It does not include a street from which the sole access to the lot is via a private easement or right-of-way, unless such easement or right-of-way also meets the criteria set forth in subparagraphs I(a), (b), (c), (d), or (e).” RSA 674:41, III.

Legislative change in response to the Supreme Court’s decision in Belluscio v. Westmoreland, 139 N.H. 55 (1994) where the Court held that, under a prior version of the statute, an easement was sufficient access.

RSA 674:41 DOES NOT REQUIRE A CERTAIN AMOUNT OF FRONTAGE ON THE “STREET GIVING ACCESS TO THE LOT”



RSA 674:41 is concerned with the existence of the frontage, not amount. The amount of frontage required is governed by the individual municipality’s zoning ordinance. As the New Hampshire Supreme Court once said, “the *sine qua non* of "frontage" is the property's location, making it more a creature of geography than geometry.” Cosseboom v. Town of Epsom, 146 N.H. 311 (2001).

Inherent in most municipalities’ definitions of frontage is that the frontage must be on a Class V or better highway. So there is usually some overlap between state and local law.

674:41, I(C): WHAT IS A CLASS VI HIGHWAY?



Created 3 Ways:

1. Layout pursuant to RSA 231:21;
2. Discontinuance of Class V (or better) highway subject to gates and bars pursuant to RSA 231:45; or
3. Lapse - Failure of the municipality to maintain and repair a Class V (or better) highway in suitable condition for travel thereon for 5 successive years or more as set forth in RSA 229:5, VII

674:41, I(C): WHAT IS A CLASS VI HIGHWAY?



Class VI Highway Features:

- Remains a full public right-of-way
- Still subject to municipal regulatory authority (use, excavation and disturbance, driveways, weight limits)
- **No municipal obligation to maintain or plow** (RSA 231:59 does not allow money to be expended to repair Class VI highways)

674:41, I (D) WHAT IS A “PRIVATE ROAD”? (NOT EASILY CATEGORIZED)

No statutory definition. “Street” is defined in the statute as “road, lane, alley, . . . and other ways.” RSA 672:13.



Such a road is a non-public road in the sense that it need not be open to the travelling public, and there is no obligation on the part of the municipality to repair or maintain the road.

RSA 674:41, I PERMITS BUILDING ON LOTS WITH FRONTAGE ON CLASS VI HIGHWAYS, OR PRIVATE ROADS, IF :

- a) The local governing body after review and comment by the planning board has voted to authorize the issuance of building permits for the erection of buildings on said class VI highway or a portion thereof; and
- b) The municipality neither assumes responsibility for maintenance of said road nor liability for any damages resulting from the use thereof; and
- c) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds.



**MUNICIPALITIES
MAY ENACT
POLICIES TO
ALLOW
CONSTRUCTION
ON CLASS VI
HIGHWAYS AND/OR
PRIVATE ROADS**

The municipality is not required to adopt a town-wide policy, and may simply examine each request on a case-by-case basis. See Blagbrough Family Realty Trust v. A & T Forest Products, Inc., 155 N.H. 29 (2007).



Some communities also create policies that allow construction on only some Class VI highways or private roads, or even sections of those streets.

MUNICIPALITIES ARE NOT OBLIGATED TO ALLOW CONSTRUCTION ON CLASS VI HIGHWAYS OR PRIVATE ROADS

Remember: Property Access is Not Guaranteed.

- Buyers of property are deemed to have notice of RSA 674:41 restrictions.
- The inability to build on a lot with insufficient access is not a “taking”.
 - “It is undoubtedly true that plaintiff’s land cannot be used for residential purposes without the expenditure of substantial additional sums to improve the Old King’s Highway. Yet it is also true, as the trial court properly found, that the plaintiff carelessly ‘purchased’ this problem.” *Trottier v. Lebanon*, 177 N.H. 147 (1977).



MUNICIPALITIES ARE NOT OBLIGATED TO ALLOW CONSTRUCTION ON CLASS VI HIGHWAYS OR PRIVATE ROADS

It is the firmly established law in this jurisdiction that municipalities are empowered to regulate by means of a zoning ordinance frontage requirements, which exclude access routes unsuited for expeditious travel. The State Supreme Court has also recognized the importance of requiring frontage on locally maintained highways. *See, e.g., Vachon v. Town of New Durham Zoning Board of Adjustment*, 131 N.H. 623 (1989), *Trottier v. City of Lebanon*, 117 N.H. 148 (1977).

“The basic purpose of requiring frontage on a Class V highway or better, 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. That purpose is defeated if the purported access route is not suitable for travel.” 15 P. Loughlin, *New Hampshire Practice, Land Use Planning and Zoning*, § 29.18 (2d ed. 2000) (citing *Trottier v. City of Lebanon*, 117 N.H. 148 (1977)).



“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) (quotation and omissions omitted).



WHAT TO CONSIDER WHEN DECIDING WHETHER TO ALLOW DEVELOPMENT ON A CLASS VI HIGHWAY/PRIVATE ROAD:



- Emergency Access
- Access to/Extent of Demands on Public Services
- Length of road needed for access
- Width and grade of the road
- Drainage infrastructure
- Condition of the Road
- Number of lots accessed
- Necessity of Maintenance/Sharing of Maintenance/Cost of Maintenance
- Likelihood of future lay out / connection to existing road network

**WHAT TO
CONSIDER WHEN
DECIDING
WHETHER TO
ALLOW
DEVELOPMENT ON
A CLASS VI
HIGHWAY/PRIVATE
ROAD:**



Caution: RSA 674:41 is concerned with sufficient road access to a property, not with development.

Do not deny permission for reasons relating to something other than adequacy of the road (*e.g.* keeping land wild, scattered development).

Use zoning, master plan, and subdivision regulations to regulate density of development, not 674:41.



The landowner must execute and record a release and indemnification agreement prior to issuing the building permit. This is 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.

COMMON TERMS OF A CLASS VI / PRIVATE ROAD WAIVER:

- Municipality assumes no responsibility for maintenance, including snow plowing, nor liability for any damages resulting from the use of the road
- (If permission is granted to maintain Class VI highway) 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.

ZBA APPEAL PROCESS



RSA 674:41, II allows for a landowner to appeal to the zoning board of adjustment a decision of the governing body denying a building permit on a Class VI highway / private road, and for the zoning board to “make reasonable exception” to the requirements of RSA 674:41

ZBA'S STANDARD OF REVIEW

RSA 674:41, II provides that ZBA may issue the building permit directly on appeal, and subject to conditions if it chooses, if it finds that the circumstances of the case do not require the building to be related to existing or proposed streets, and 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



LANDOWNER MUST ALSO DEMONSTRATE THAT HE/SHE WILL EXPERIENCE “PRACTICAL DIFFICULTY OR UNNECESSARY HARDSHIP” IF THE PERMIT IS NOT GRANTED.

What does this mean?

The terms “practical difficult and unnecessary hardship” are not defined in the statute. The Supreme Court has stated that these terms, although stated in the disjunctive, are interchangeable and refer to the unnecessary hardship test for variances set forth in RSA 674:33, I (b)(5). *Merriam Farm, Inc. v. Town of Surry*, Case No. 2011-311 (decided July 18, 2012)



(NOTE: The *Merriam Farm* decision was not a published decision and is not binding precedent. Nevertheless, it may give us a glimpse into the Court’s thinking.)

The ZBA's notice of decision "shall be in writing, together with the reasons for the decision, and shall be subject to review in the manner described in RSA 677."



674:41, II ZBA APPEAL: CASE EXAMPLE

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

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

USE AND MAINTENANCE OF CLASS VI HIGHWAYS

- Class VI highways may be rendered virtually impassable by years of non-maintenance, but this does not destroy the public right to use!
- RSA231: 59 - Municipalities may not expend public funds to maintain Class VI highways. RSA 231:59
- RSA 231:93 - Municipalities have no duty of care whatsoever with respect to the construction, maintenance or repair of Class VI highways
- RSA231:21-a, II: “[T]he municipality shall have the same regulatory authority over [Class VI] highways as is the case with class V highways, including but not limited to the authority to regulate their use pursuant to RSA 41:11 and RSA 47:17, VII, VIII and XVIII, to regulate the excavation or disturbance of such highways pursuant to RSA 236:9 through 236:11, to regulate driveways and other access pursuant to RSA 236:13, and to establish weight limits pursuant to RSA 231:191.”

PRIVATE MAINTENANCE OF CLASS VI HIGHWAYS

In connection with a building permit granted under RSA 674:41, municipalities may also grant private parties permission to repair, maintain and/or plow the Class VI road used to access a lot. *See* RSA 236:9-12.

Terms for inclusion in Class VI Highway Maintenance Permit (or include in Municipal Liability Waiver):

- Landowner is responsible for any road maintenance and repair work
- Town is not responsible; owner indemnifies town
- A specific description of maintenance that may be performed
- Any special conditions for maintenance (e.g. no disturbance of nearby wetlands)
- Landowner may not prohibit/interfere with authorized public use of road; public use does not entail public contribution to maintenance
- Town retains full authority to regulate public use of the road, including gates and bars
- If multiple landowners use Class VI highway for access, joint maintenance agreement between landowners

GATES & BARS ACROSS CLASS VI HIGHWAYS

- All Class VI highways are “deemed subject to gates and bars”. RSA 231:21-a.
- Any gates or bars maintained by private landowners may not prevent or interfere with public use of the highway, and must be capable of being opened and reclosed by highway users.
- RSA 231:21-a, I: “The selectmen may regulate such structures to assure such public use, and may cause to be removed any gates or bars which fall into disrepair or otherwise interfere with public use of the highway.”

USE AND MAINTENANCE OF CLASS VI HIGHWAYS

- Some limited municipal maintenance of a Class VI highway may be enabled by declaring the highway an “Emergency Lane”
- RSA 231:59-a:
 - “a town may raise and appropriate, and the selectmen may expend, money for the repair of any class VI highway or private way which has been declared an emergency lane...”
 - Repairs may include “removal of brush, repair of washouts or culverts, or any other work deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles.”

REGULATION OF CLASS VI HIGHWAYS: CONVERSION TO MUNICIPAL TRAILS

Alternative Regulation:

RSA 231-A allows Reclassification of a Class VI highway to a Class A or Class B Municipal Trail.

- A Class A trail is a full public right-of-way, subject to trail use restrictions which do not apply to access by abutters for existing uses.
- A Class B trail is a full public right-of-way, subject to trail use restrictions, with no exceptions for abutters.
- **Limits development of new buildings or structures along trail.**
- RSA 231-A:7 and :8: management and maintenance of trails may be delegated to volunteer organizations, with limited liability.

SCENIC ROADS

What is a scenic road?

- A public road granted the specific legal designation “scenic road” under RSA 231:157.
- Legislative body must vote to designate (town meeting, town council, city council) or to rescind designation.
- Select Board may place question on warrant; or by petition of at least 10 voters (or landowners along the road even if not voters).
- Within 10 days after petition is filed, municipal clerk notifies all abutters along the road by regular mail that the question will be on the warrant.

EFFECT OF SCENIC ROAD DESIGNATION

- Municipality must maintain and update annually a public list of all roads or portions of roads designated as scenic.
- What does it mean?
 - Some activities that would involve cutting, damaging, or removing trees require extra approval before they can happen
 - “Tree” for this purpose = “any woody plant which has a circumference of 15 inches or more at a point 4 feet from the ground.” RSA 231:158
 - Some activities that would involve removing or damaging stone walls require extra approval before they can happen

EFFECT OF SCENIC ROAD DESIGNATION

- Planning Board consent is required before:
 - Municipal or state repair, maintenance, reconstruction or paving work on the road IF it will involve cutting, damage or removal of trees, or the removal or destruction of any portion of a stone wall.
 - Utility installation or maintenance of poles, conduits, cables, wires, pipes IF it will involve cutting, damage or removal of trees, or the removal or destruction of any portion of a stone wall.
- Public hearing before Planning Board:
 - Notice published in newspaper twice, second time to be at least 7 days prior to hearing. Also posted in at least 2 public places.

EFFECT OF SCENIC ROAD DESIGNATION

- Does NOT change underlying classification of road
- Does NOT completely prevent tree cutting/stone wall removal
- Does NOT, by itself, give abutters a right to notice before trees are cut (other laws do that for all public roads)
- Does NOT prevent future development
- Does NOT guarantee that a road will remain unpaved; it has no effect at all on whether a road is paved
- Does NOT restrict the use of property or the road other than the requirement for Planning Board permission for certain acts

EXCEPTIONS TO PLANNING BOARD CONSENT REQUIREMENT

Road Agent: with written permission of governing body, may remove trees governing body has declared to be a public nuisance, if the tree poses “an imminent threat to safety or property.” Notify Planning Board and governing body afterward of what was done and why.

Utilities: for “emergency restoration of service” that has been “interrupted by facility damage,” utility may do work necessary without prior permission. Notify Planning Board and governing body afterward of nature of emergency and work performed.

Abutting Landowners: scenic road designation has no effect on ability of abutters to remove trees or stone walls on their own property – and remember that abutters often own the land under the road, which means they own the trees growing from it.

ADDITIONAL LOCAL REGULATIONS

Legislative body (town meeting, town council, city council) may adopt additional regulations for scenic roads, such as:

- Criteria to be used by Planning Board in deciding upon requests to cut trees or affect stone walls on scenic roads
- Protections for trees smaller than 15 inches in circumference 4 feet above the ground, for the purpose of establishing regenerative growth along the road

Violations: any person who violates scenic road law or any additional regulations is guilty of a “violation” and liable for any damages that result.

OTHER WAYS TO PROTECT TREES?

Acquire title to the underlying land along the road. This makes the municipality the owner of the trees rather than the abutter.

Take tree rights under the tree warden law, RSA 231:154. This is a form of eminent domain and damages must be paid to abutting owners of trees along the road.

Municipally-planted trees under RSA 231:149. Tree warden or person approved by governing body may plant trees within the public road right of way.

Tree warden may designate seedling trees within right of way as shade/ornamental tree; if abutter doesn't object within 30 days of notice, it becomes municipal tree. RSA 231:149 and :150

Questions?

Comments?

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