

A Hybrid - Hard Road to Travel October 4 , 2023

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Today's Presenters




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Agenda

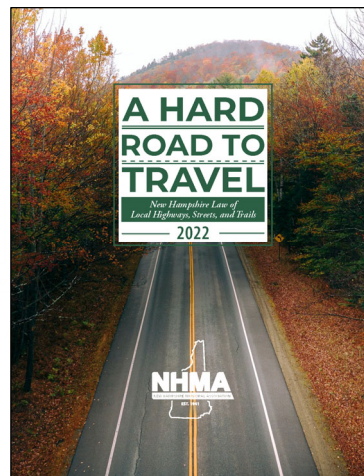


- ▶ Formation & Classification-
Jonathan
- ▶ Liability, Regulation & Maintenance
- **Jonathan**
- ▶ Development on Class VI or Private
Roads - **Steve**
- ▶ Weight Limits, Timber Hauling
Operations & OHRV's - **Steve**
- ▶ Drainage Issues - **Steve**

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New A Hard Road to Travel

- ▶ All electronic
edition
- ▶ Statutory and case
law updated
- ▶ New content
Chapter 12 - Local
Funding of
Highways

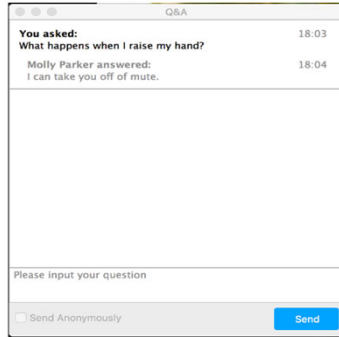


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How Do I Ask a Question?



The chat function for this workshop has been disabled.



In order to ask a question of our host or a panelists, open the Q&A function found in the Zoom toolbar. Type you questions in the Q&A and they will be answered in the order they are received.

Once your question has been answered, it will then appear under the *Answered* tab.

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Formation & Classification

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Road Terminology



- ▶ Right of Way
 - ▶ "a right to pass over another's land more or less frequently according to the nature of the use to be made of the easement"- *Jean v. Arsenaault*, 85 N.H. 72
- ▶ Private Road
 - ▶ Can refer to a discontinued road, a class VI road, subdivision roads that are still under development, etc. Main factor is that municipality has no duty to maintain, however public may still have a right of way.
 - ▶ The term "private road" is commonly used to describe municipal responsibility, not necessarily the public's right to access.
- ▶ Public Road
 - ▶ Roads subject to reasonable regulation by public authorities, duty to maintain, and where the town, city or state holds the right of way.

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State Roads


Class I	Primary State System
Class II	Secondary State System
Class III	State Recreational Road
Class III-a	Boating Access Roads

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Municipal Roads


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

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What's a Public Highway?

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



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- Layout of new roads – *Select Board RSA 231:8*
- Acceptance of new roads – *Select Board 674:40-a*
- Maintenance of existing roads – *Select Board 231:65*
- Town Road Construction Standards – *Select Board RSA 41:11, RSA 47:17, VII, VIII, XVIII*
- Approval of new subdivision Roads – *Planning Board RSA 674:36*
- Planning for new and existing roads – *Planning Board RSA 674:2, II*
- Capital Improvement Planning for roads – *Planning Board Subdivision & Site Plan Road Construction Standards – Planning Board RSA 674:36, I, (e); RSA 674:44, II, (d) (c) (f)*

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NHDOT Geometric Design Standards For Local Roads

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September 1990

NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION
MINIMUM GEOMETRIC & STRUCTURAL GUIDES FOR LOCAL ROADS AND STREETS

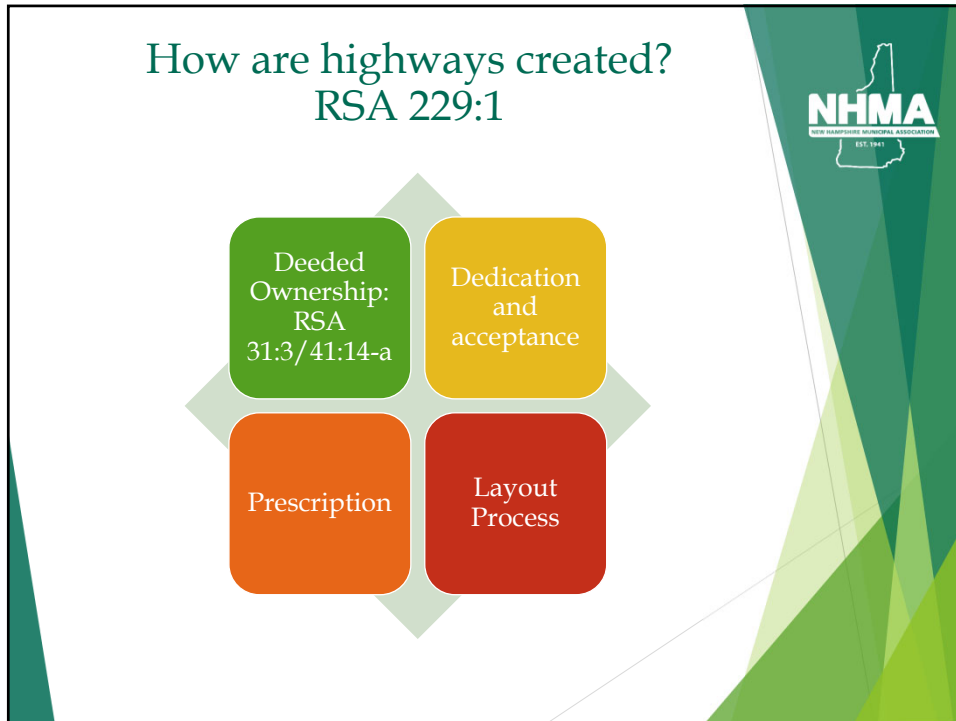
Average Daily Traffic (Veh./Day)	0-50	50-200	200-750	750-1500	1500 & OVER
Pavement Width (Feet)	18 min.	20	20	22	24
Shoulder Width (Feet)	2	2	4	4	8-10
Center of Road to Ditch Line	15	16	18	19-21	Varies
Pavement Type	Gravel	Asph. Surf.	Hot Bitum. Treated	Hot Bitum.	Hot Bitum.
Slope of Roadway	4%	3%	3%	2%	2%
Base Course Depth-(Gravel)	12"	12"	12"	12"	18"
(Cr., Gravel)	-	-	4"	6"	8"

Notes: 1. Gravel surface should be paved where steep grades occur.
2. For average daily traffic over 1000 veh./day paved shoulders should be considered
3. Base course depths may need to be increased in areas of poor soils

Scale 1"=5'

► <https://www.nh.gov/dot/org/projectdevelopment/planning/documents/SuggestedMinimumDesignStandardsforRuralSubdivisionStreets.pdf>

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Dedication vs. Acceptance

Dedication	Acceptance
<ul style="list-style-type: none"> • Case law / RSA 231:51 (<i>Duchesnaye</i>) • Clear & unequivocal <u>intent</u> • Filing & recording subdivision plan • May be implied 	<ul style="list-style-type: none"> • Vote of legislative body • RSA 674:40: planning board, then town meeting • May be implied (<i>Hersh v. Plonski</i>) • RSA 674:40-a: delegated acceptance to select board


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Statutory Layout RSA 231:8

- ▶ Petition required
- ▶ “Occasion”
- ▶ Steps:
 - ▶ Notice
 - ▶ Planning Board, then legislative body
 - ▶ Hearing
 - ▶ Return
 - ▶ Damages
- ▶ Right to appeal

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Conditional Layout / Betterment Assessments

- ▶ RSA 231:23 (“conditional layout”); RSA 231:28 through :33 (“betterment assessment”)
- ▶ Betterment is better!
 1. Hearing
 2. Abutters Petition
 3. Apportionment
 4. Collection

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Liability, Regulation & Maintenance

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Liability


- ▶ General Duty of Care to Travelers
- ▶ Liability to Abutting Landowners
- ▶ Discretionary Function Immunity & Other Protections

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General Duty of Care to Travelers

RSA 231:90 - :92


**Correct
Insufficiencies
after Notice**



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Insufficiencies Caused by Weather

- ▶ Municipalities are provided enhanced protection for insufficiencies caused by bad weather, if they are properly prepared.
 - ▶ Even notice of an insufficiency may not make a city or town liable if they have an adequate winter weather policy
- ▶ Sidewalks are part of the public highway, and the statutory duty of care applies equally to sidewalks as it does to highways, so be sure to include sidewalks in any weather policy.



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► **Inclement Weather Maintenance Policy:**

► *What's Your Plan?*
RSA 231:92-a

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Snow Plows



- RSA 265:6 and 265:6-a
 - Municipalities have some protections from liability when the town is actually engaged in work upon a road
 - Other vehicles are required to yield the right-of-way to vehicles engaged in road work
- Make sure that you are following proper safety precautions
- Consider including plow damage in your winter maintenance policy

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Americans with Disabilities Act

- ▶ All roads and sidewalks must comply with applicable ADA regulations
- ▶ *Tinker v. Tilton*
 - ▶ Plaintiff sued town claiming that a particular town sidewalk on which he frequently traveled in his wheelchair was not cleared of snow and ice, blocking his path
 - ▶ The town argued that under their policy, the sidewalk was closed during the winter
 - ▶ The Court did not accept this argument and ruled that the town needed to make the sidewalk accessible by removing snow and ice
 - ▶ Very limited opinion that raised a lot of questions



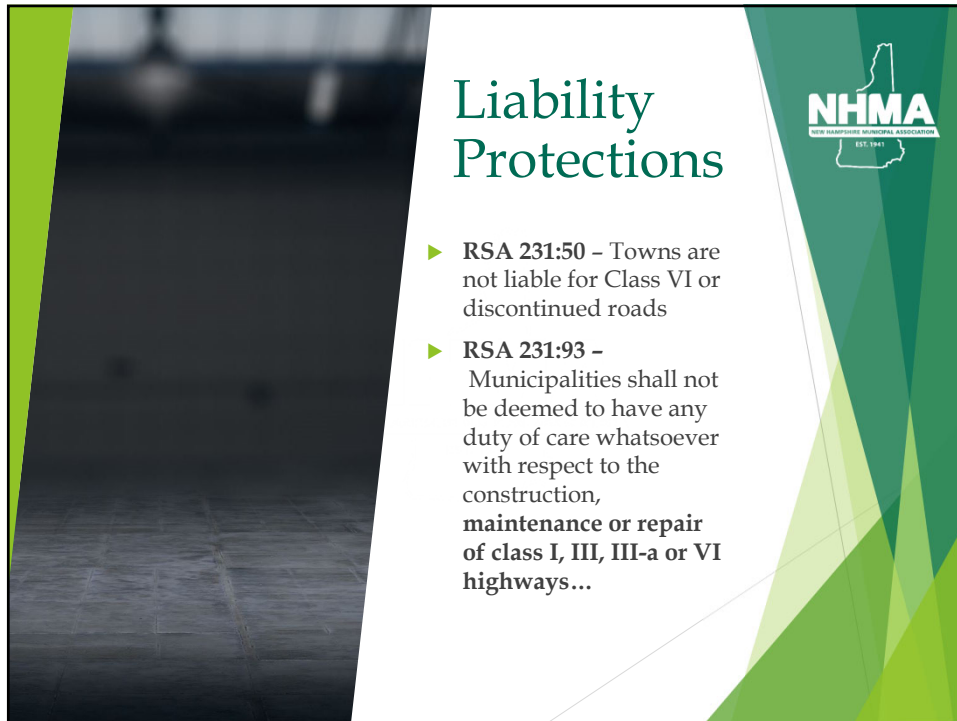
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Class VI Roads

- ▶ RSA 231:50 relieves towns and cities of “all obligations 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”
- ▶ Therefore, towns need not worry about insufficiencies, noticed or otherwise, on Class VI roads.
- ▶ However, if a town is performing some function on a Class VI road, they should take care not to act negligently.



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Liability Protections

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- ▶ **RSA 231:50** – Towns are not liable for Class VI or discontinued roads
- ▶ **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...

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Discretionary Function Immunity

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- Who does it cover?
- Does the municipality really have “discretion”?
- Is it really a policy decision?
- Was the decision carried out properly?

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**RSA 31:105:
Indemnification
of Municipal
Officials**

Shields officials from individual liability from negligence or other acts . . . if acting in the scope of employment or office.



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Tree falls on the road . . .





► **Duty to cut and maintain RSA 231:150**

► **Hazardous Tree Declaration RSA 231:145**



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- ▶ What if the hazardous trees are along a scenic road?
- ▶ RSA 231:158

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Liability to Abutting Landowners

- ▶ Road Salt Contamination → RSA 231:92 won't protect!
- ▶ Liability for Trespass
- ▶ Right to access highway

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Liability for Damage to Town Roads



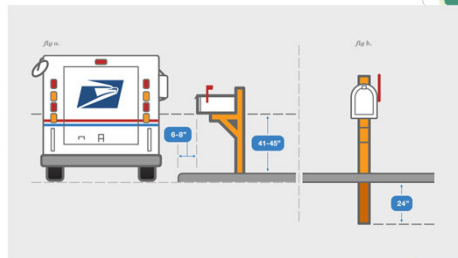
- ▶ Criminal Liability - RSA 236:38
- ▶ Civil Liability for Damage - RSA 236:39
- ▶ Restoration - RSA 236:11
- ▶ Diverting Water - RSA 236:19
- ▶ Snow Obstruction- RSA 236:20- **STATE ROAD ONLY**

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Mailboxes



- ▶ Town may be liable for damage
- ▶ “Properly placed”



<https://www.usps.com/manage/mailboxes.htm>

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REGULATION

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Driveways - RSA 236:13



- **Planning Board or Governing Body authorized to approve driveway permits on town roads.**
- **Must adopt driveway regulations.**
- **Delegate permit issuance and enforcement to Road Agent or other designee**
- **Continuing authority over any driveway even if no permit issued.**
- **Property owner can be ordered to fix driveway that is hazard to traveling public or threat to road integrity**

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Street Names & Numbers

- Assigning names—RSA 231:133
- Assigning numbers—RSA 231:133-a
- E-911



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Street Signs

- ▶ All signs must comply with Federal Highway Administration's Manual on Uniform Traffic Control Devices (MUTCD). RSA 47:17, VIII(a).
- ▶ "Unauthorized" signs, signals, markings, or devices are prohibited under RSA 265:14.



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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.

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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.



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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*



Gunther Ct
PRIVATE ROAD


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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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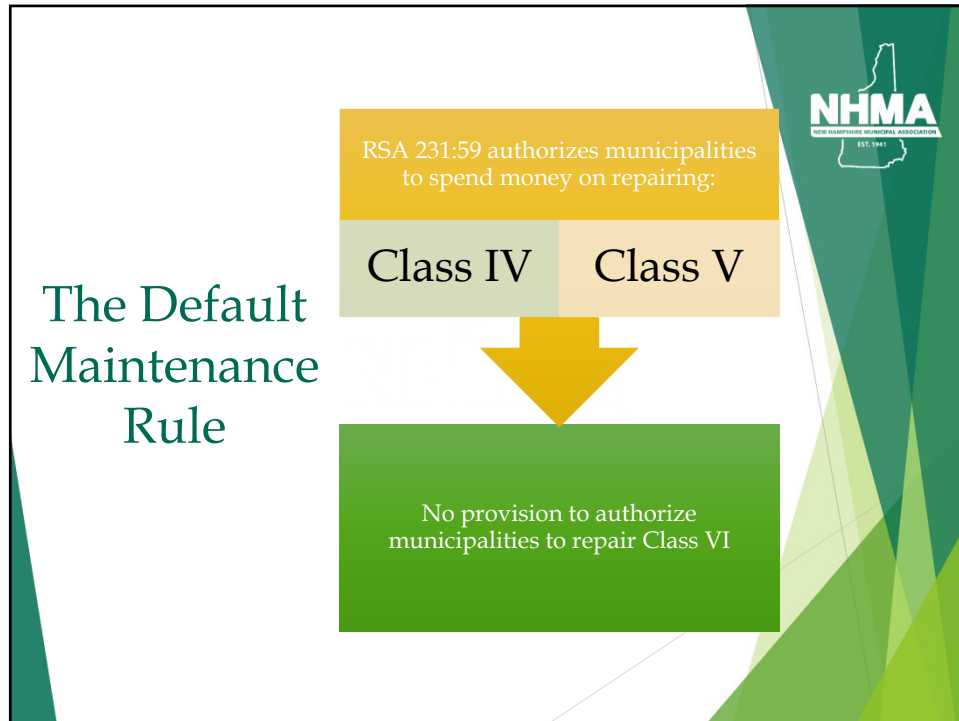
Limiting Access to Certain Persons

- ▶ 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,1.](#)
 - ▶ 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.

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MAINTENANCE

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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.”

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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.**

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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.

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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, as it applies in all municipalities that have adopted RSA 674:35 authorizing the planning board to approve subdivisions.
- ▶ 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.

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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.
- ✓ RSA 674:41 applies to new buildings, as well as to remodeling, additions, or conversions to year-round use of already existing buildings.
- ✓ Also, the first sentence of paragraph II speaks of the "structure or part thereof," implying that any physical expansion of the structure triggers the obligation to comply.



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A Class V Road or Better



- ▶ “Class V or better” road previously laid, or appears on an official map, or has been accepted.
- ▶ 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
 - ▶ A street on a subdivision plat approved by the planning board; or
 - ▶ A street on a street plat made by and adopted by the planning board; or
 - ▶ 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.

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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).

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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.

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But what about “Grandfathering?”

- ▶ Some municipal zoning ordinances “grandfather” existing lots. However, such zoning clauses do not make existing lots exempt from the state frontage requirement of RSA 674:41. Paragraph III:
 - ▶ “This section shall supersede any less stringent local ordinance, code or regulation, and no existing lot or tract of land shall be exempted from the provisions of this section except in accordance with the procedures expressly set forth in this section.”

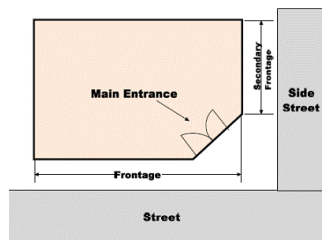
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RSA 674:41 Applies to Building Permits in General

- ▶ 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.

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How Much Frontage?



- ▶ Statute is concerned that there is frontage on Class V road, not how much.
- ▶ *Amount* of frontage is governed by local zoning ordinance, not statute.



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Minimal Steps to Allow Development on Class VI or Private Road?

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

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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

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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.

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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.

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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.

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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

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What Must the Applicant Demonstrate Under 674:41, II?

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.



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ZBA Decision Denying Relief Under 674:41, II

Vachon v. Town of New Durham Zoning Bd. of Adjustment, 131 N.H. 623 (1989).

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

Due to bare rocks, narrowness, swampy areas, ledge outcroppings, close bankings, and seasonal flooding, Webster Road probably one of the worst class VI roadways in the town.

The ZBA found that police, fire, and rescue vehicles would have serious difficulties in reaching the properties - substantially increased risk for the inhabitants

Increased possibility of financial impact to the municipality due to 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.

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Legislative Body Authorizing Exception. RSA 674:41, II-a

- ▶ Provides another way for a lot to be exempted from the frontage requirements of the statute. The legislative body (town meeting or town/city council) may vote in the same manner as it would vote on a zoning ordinance to grant an exception from the law for any lot, including island lots for islands served exclusively by boats.
- ▶ In town meeting towns, the vote may occur at an annual or special meeting.
- ▶ The question must first be submitted to the planning board for its approval. If the planning board approves, a simple majority vote of the legislative body is sufficient; if the planning board disapproves it, a 2/3 legislative body vote is needed.



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Weight Limits, Timber Hauling Operations & OHRV's

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Using the Weight Limit Statutes: RSA 231:190 - :191

No requirement that the town have a weight limit ordinance.

The select board/governing body must establish weight limits under RSA 231:190 and RSA 231:191.

These statutes permit the select board to enact maximum weight limits on Class IV, V and VI highways, both seasonally and year-round.

Enactment must be approved by a majority of the members present at a public meeting.

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Weight Limit “Seasonal or Otherwise”



- ▶ A road weight limit (whether year-round or seasonal), should be supported with testimony or evidence from the road agent or highway engineer.
- ▶ The hearing record should reflect that the limit was necessary “to prevent unreasonable damage or extraordinary municipal maintenance expense,” citing facts and experience as much as possible to back up this conclusion.
- ▶ Municipalities can consider public safety in addition to road damage when deciding to impose a weight limit. *Brentwood Distribution LLC v. Town of Exeter*, No. 2014-0729 (N.H. July 7, 2016)

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Weight Limit Posting, Granting Exemptions

- ▶ Weight limits must be posted legibly and conspicuously at all entrances from other highways using “weather resistant materials.” RSA 231:191, II.
- ▶ The names of those officials legally authorized to grant exemptions must be posted in the town hall.
- ▶ Exemptions must be granted “in an expeditious manner.”
- ▶ A municipality must grant an exemption if the weight limit would entail “practical difficulty or unnecessary hardship” by causing “significant interference” with a commercial enterprise.
- ▶ Such an exemption may, of course, be subject to reasonable conditions and bonding. However, the exemption may be denied if it “would be detrimental to public safety.” RSA 231:191, V.

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Weight Limit Exemption Hearing upon Request

- ▶ If a commercial or industrial company located in the municipality is impacted by a weight limit, it may request a public hearing on the matters by sending the request via certified letter to the governing body.
- ▶ The hearing must be held within 15 working days of the receipt of the request; otherwise, enforcement of the weight limit must be suspended for the remainder of the year or until the hearing is held. RSA 231:191, VII.



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Timber Hauling Operations and Driveway Permits

- ▶ Municipalities can require a temporary driveway permit for a logging operation.
- ▶ That driveway permit could ensure safe sight distance and temporary signage warning of trucks entering and exiting
- ▶ Permit could also require installation of an apron at the driveway to protect the adjacent road surface.

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Timber Hauling Operations and Bonding



-  A bond may be required to ensure any damage to the adjacent road is repaired due to operations over a temporary driveway, or due to an operation granted an exception to a weight limit due to difficulty or hardship.
-  The bond requirements must be equitably and reasonably applied to similarly situated vehicles using the highway.
-  The type of commodity being transported “shall not” be the determining factor for requiring a bond or for the dollar amount of the bond. RSA 236:10.
-  The person or entity providing the bond shall determine the type of bond furnished, and it may be in the form of cash, letter of credit acceptable to the municipality, or a bond

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OHRV's & SNOWMOBILES

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City or town councils and boards of selectmen may regulate the operation of OHRVs within city or town limits. **215-A:15, IX**

No person can operate an OHRV on any public right of way of unless permitted by the city or town councils or select boards. **RSA 215-A:6, II.**

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Procedure to approve OHRV use on a designated road or a sidewalk – RSA 215-A:6, IX



- ▶ Governing Body must hold duly noticed public hearing advertised at least 14 days in advance in a public location in the city or town.
- ▶ Give notice to abutters of the affected road/sidewalk by verified mail.
- ▶ Following a duly noticed public hearing, except in the case of an emergency closure, local authorities may change the allowable usage of a class IV, class V, or class VI highway by OHRVs by giving notification to the supervisor of the bureau and removing any signs that no longer apply.
- ▶ If there is a private petitioner seeking opening of a road to OHRV use that petitioner shall bear the expense of verified mail notification to abutters of property


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OHRV's Operational Limitations



- ▶ Where OHRV operation is permitted on town roads speed limit is 20mph.
- ▶ OHRV operators must keep to the extreme right and yield to all conventional motor vehicle traffic
- ▶ When crossing a town road the operator must:
 - ▶ Cross at a 90 degree angle
 - ▶ Bring OHRV to a complete stop at edge of road
 - ▶ Yield to all oncoming traffic
 - ▶ Must possess valid driver's license

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City or town councils and boards of selectmen may authorize the operation of snowmobiles on sidewalks and class IV, class V or class VI highways & bridges.
RSA 215-C:8, IX

No person can operate a snowmobile on any public right of way of unless permitted by the city or town councils or select boards.
RSA 215-C:8, II

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Highway Drainage

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Preventative Measures

- ▶ When accepting or laying any new highway:
 - ✓ Require a recorded deed that explicitly describes all culverts and other drainage structures and conveys them to the municipality, together with all rights of entry necessary to maintain drainage easements connected with these structures.
 - ✓ The deed should refer to a recorded survey plan that shows all drainage structures and the directions of flowage.
 - ✓ Planning board regulations should require that any plan that shows a road must also show drainage, and that the subdivider must reserve and retain drainage easements every time an abutting lot is conveyed to a buyer so that these rights can be conveyed later to the town.
 - ✓ The town can and should require these issues to be taken care of, even if a developer argues that the road will remain forever private.



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Duty to Manage Surface Flow

- ▶ When constructing and maintaining a road the municipality shall:
 - ✓ Employ bridges, culverts, other drainage structures etc. — to ensure that water that flowed naturally before the road was laid out can continue to flow from one side of the highway to the other.
 - ✓ Otherwise, the municipality will be liable to upstream property owners for any flooding or backup that might occur. See, *Clair v. Manchester*, 72 N.H. 231 (1903); *Rowe v. Addison*, 34 N.H. 306 (1857).
 - ✓ Municipality also has the right to take action necessary to protect the road from flooding, although it will be liable to abutting owners for any injury resulting from a negligent exercise of that right. See, *Wheeler v. Gilsum*, 73 N.H. 429 (1905).



80

Right to Reasonably Manage Surface Waters



- ▶ *Franklin v. Durgee*, 71 N.H. 186 (1901)
 - ✓ City of Franklin maintained highway culverts for many years conveying water across public road to a depression on abutter's adjacent land
 - ✓ Abutter placed earth on their land stopping the flow of water causing damage to the road
 - ✓ City sued the abutter to remove the stoppage
 - ✓ NH Supreme Court rules: "Whether an obstruction of the natural flow of surface water by a landowner in the use of his premises constitutes an actionable wrong when injurious to another, depends upon the reasonableness or unreasonableness of such use, which is a question of fact, to be determined at the trial term in view of all the circumstances of the particular case."

81

Drainage Easement by Prescription?



- ▶ Can the municipality claim an easement by prescription for older drainage structures?
 - ✓ New Hampshire law has long recognized that a private landowner can acquire prescriptive rights in the flow of water
 - ✓ A NH municipality can acquire and own property in the same manner as a private individual, including by acquiring a drainage easement by prescription
 - ✓ Elements of acquiring an interest in land by prescription:
 - ❖ To establish a easement there must have been public use of a drainage way or structure on private land
 - ❖ Continuously without interruption for a period of twenty years.
 - ❖ The public use must be shown to have been adverse to the interests of the owner of the property burdened by the drainage way or structure.
 - ❖ *Town of Dunbarton v. Guiney*, 173 N.H. 1, 6 (2020)

82

Damages from Change of Grade – RSA 231:75

- ▶ Statutory method for landowners to recover damages if their property is harmed as a result of a change in the grade of a public highway (for example, adding fill or ditching).
- ▶ It applies only when the highway work was done “by the authority of” the municipality and is the sole remedy available for this kind of damage.
- ▶ Notice must be given to those whose land may “reasonably be affected” by planned work outside of the highway right of way (except in emergencies, as described in the statute).



83

Damages from Change of Grade – Procedure

- ▶ Any persons whose property has been damaged, and not just abutters, may seek relief for changes in grade within 6 months after the completion of the work.
- ▶ A claimant must provide notice of any alleged damages to the select board.
- ▶ The board then must hold a hearing and render a decision within 30 days.
- ▶ An aggrieved landowner who is dissatisfied with the select board’s decision may appeal to the superior court.
- ▶ The court will review the municipality’s decision regarding the need for the work and the methods used for abuse of discretion only, and a jury trial is available on the question of damages only.



84

Overburdening the Drainage Easement

- ▶ If a municipality increases or concentrates the quantity of surface water and unreasonably fails to provide an outlet, it may be liable for damages. Each case will depend upon its own facts and circumstances – topography, existing watercourses, how long the culvert has existed, and what rights were secured by the municipality when the road was originally constructed.
- ▶ The property owner's alteration of the natural or existing runoff patterns, the nature and importance of his use of the land, the foreseeability of the harm and the amount of resulting injury are factors to be considered in determining whether the owner's control of diffused surface waters on his land is reasonable.
- ▶ *Micucci v. White Mountain Tr. Co.*, 114 N.H. 436, 437 (1974)



85

Drainage Alteration by Abutters

- ▶ Under RSA 236:19, “any person who shall place any logs, earth or other substance within the limits of a highway, or upon land in the vicinity of a highway by which the water in a stream, pond or ditch is turned upon the highway and injures or renders it unsuitable for public travel, shall be guilty of a violation if a natural person, or guilty of a misdemeanor if any other person.”
- ▶ A complaint under RSA 236:19 can be brought in the local circuit court, district division.



86

Driveways and Drainage Structures

- ▶ RSA 236:13, VI provides that all private driveway connections, including related drainage structures like culverts, remain the continuing responsibility of the landowners – even if they are sited within the highway right of way and regardless of whether the driveway pre-dates the town's driveway permit system.
- ▶ If any driveway connection threatens the highway due to plugged culverts, siltation, etc., the town can order the owner to repair it. If the owner doesn't, the town can do the repair and charge its costs to the owner (these costs cannot be added to a property tax bill).



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