



A Hard Road to Travel: New Hampshire Law of Local Highways, Streets, and Trails
2020 Supplement to the 2015 Edition
Supplemental Content Highlighted in Bold

Chapter 1
What is a Public Highway?
Page 19

Add a new citation following the paragraph titled “‘Viatic Use’ Only”

Recently, in an unpublished decision, the New Hampshire Supreme Court reaffirmed *King’s* holding that, although viatic uses are generally understood to be limited to use of a public road for public travel, where the legislature has adopted statutes, such as RSAs 231:160 - :161, permitting other uses of a public right-of-way, those uses will be deemed to be within the scope of a highway easement. *Society for the Protection of N.H. Forests v. Northern Pass Transmission Line, LLC*, No. 2016-0322 (N.H. January 30, 2017).

Chapter 1
Political and Other Signs in the Right of Way
Pages 35-36

Revise the content following the section header to read as follows:

Municipalities should exercise caution when attempting to regulate political and other signs. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) saw the U.S. Supreme Court reiterate that content based laws that target speech based upon its content are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling governmental interests. How *Reed* impacts RSA 664:17 and other New Hampshire statutes pertaining to political signs has not yet been tested in the Courts.

RSA 664:17 states, in relevant part, “[n]o political advertising shall be placed on or affixed to any public property including highway rights-of-way or private property without the owner’s consent.” Whether a sign constitutes political advertising is a content-based question, and, therefore, *Reed* indicates that caution should be exercised in the enforcement of this particular provision of the statute.

As municipalities regulate public highway rights-of-way for Class IV, V, and VI highways, municipalities would be the agency to determine whether signage is permissible. Private roads rights-of-way are controlled by their respective owner(s). State road rights-of-way are controlled by the state, and municipalities should not become embroiled in debates about signage on state rights-of-way.

RSA 664:17 states that, once an election is over, candidates have until the second Friday following the election to remove their signs, unless the election is a primary and the advertising concerns a candidate who is a winner. Again, *Reed* indicates that caution should be exercised in the enforcement of this particular provision of the statute.

No signs whatsoever may be placed on or affixed to utility poles or highway signs. RSA 664:17. In addition, no “advertising” may be affixed to “any object of nature [i.e. trees, mountains, etc.], utility pole, telephone booth, or highway sign, directly in such a manner that the object of nature, utility pole, telephone booth, or highway sign, is utilized as an integral part of the sign's support as distinguished from being only incidentally a support to the sign, such as the earth or ground upon which a sign.” RSA 236:75.

Political advertising may not be affixed to or displayed on or in vehicles used by police officers or any vehicle displaying government license plates and registered in the name of the state or any municipality. RSA 664:17-a.

Even where political signs are placed illegally, “no person shall remove, deface, or knowingly destroy any political advertising which is placed on or affixed to public property or any private property except for removal by the owner of the property, persons authorized by the owner of the property, or a law enforcement officer removing improper advertising.” RSA 664:17. RSA 664:17 allows political advertising placed on or affixed to any public property may be removed by state, city, or town maintenance or law enforcement personnel.

Political advertising removed prior to election day by must be kept until one week after the election at a place designated by the state, city, or town so that the candidate may retrieve the items. RSA 664:17. Official traffic control signs, of which there are several types, are placed in the highway right of way by the governmental agency that regulates that highway. See RSA 236:1; RSA 41:11; RSA 47:17. Traffic signs are discussed further in Chapter 6. Municipalities may be able use the zoning authority granted by RSA 674:16 to regulate advertising signs on private property consistent with the rules promulgated in *Reed*. However, regulation of signs on private property pre-and-post-*Reed* raises complex constitutional questions involving freedom of speech and the eminent domain power, and should be thoroughly discussed with your municipal attorney prior to attempts at regulation.

This chapter has focused on the division of rights between the public as easement-holder and the underlying soil owner/abutter. Other abutter rights issues are covered in the chapters on highway creation, discontinuance, and regulation. On issues of town liability to highway abutters, see Chapter 6. On issues of highway drainage, see Chapter 11.

Chapter 2
How are Local Highways Created?

Page 46

Revise the last sentence of the first paragraph of the section entitled ‘Adversity’ to read as follows (highlighted text added):

See also *Mahoney v. Canterbury*, 150 N.H. 148 (2003) (property owners’ assertion of claim that prior owners treated the road as private during 1800s actually supported town’s position that continuous public use during that time was adverse); *Blagbrough v. Town of Wilton*, 145 N.H. 118 (2000) (nature of use must show that owner knew or ought to have known that the right was being exercised not in reliance upon his permission but without regard to his consent); **Town of Dunbarton v. Michael Guiney**, 173 N.H. ___, 2020 N.H LEXIS 14 (Decided February 5, 2020) (incidental plowing of a small piece of property to reach a safe place to turnaround town plow trucks was not a public use calculated to apprise owner of claim of adverse use).

Chapter 3
New Hampshire’s Highway Classification System

Page 65

**Add a new paragraph following the listing of cities and towns under heading Class IV:
Urban Compact Section Highways**

In 2018, the legislature amended RSA 229:5 to include a new section, which authorizes the commissioner of transportation to establish additional compact sections to create class IV highways in any municipality by agreement with the municipality. This expansion of authority does not change the commissioner’s authority to unilaterally establish compact sections in the previously listed cities and towns.

Chapter 4
Discontinuance of Highways

Page 70

Add a new paragraph following the first complete paragraph under the title “Procedure”

Note that the discontinuance procedure requires a clear and unambiguous vote of the legislative body to discontinue the highway. *See, Davenhall*, at 697. Wording such as “discontinue and throw up” has been held by the New Hampshire Supreme Court to be ambiguous, and the Court has held that such ambiguity allowed the Class VI highway to continue to exist. *Town of Goshen v. Casagrande*, 178 A. 3d 1252 (N.H. 2018) (holding that a town vote in 1891 to “discontinue and throw up” a portion of a highway on the condition that another town would “throw up theirs to meet us” was ambiguous and, therefore, the

unmaintained portion of the road remained a Class VI highway open to the public). NHMA recommends that a warrant article to discontinue a highway use a phrase such as “discontinue completely” or “discontinue absolutely,” not wording such as “abandon,” “close,” or “throw up,” which do not reflect the statutory wording “discontinue.”

Chapter 5
Special Categories of Layouts and Roads
Page 82

Revise the first paragraph of the Section titled “Summer Maintenance Only” to add the highlighted sentences:

The name may sound confusing, but “highways to summer cottages” merely means a special type of Class V highway that is required to be kept open and maintained only between April 10 and December 10 and is exempt from being maintained at other times. RSA 231:79. **By majority vote of the legislative body this period of non-maintenance may be extended to a period beginning no earlier than November 15 and end no later than April 30. RSA 231:81. The extended period shall remain in effect until amended or rescinded by majority vote of the legislative body.** It is legally irrelevant whether any “cottages” exist, or what part of the year those cottages might be used. RSA 231:80 requires “highways to summer cottages” to be marked with signs posted at their entrances, stating the times of the year when they are open and closed.

Chapter 6
Liability, Regulation, and Maintenance Duties
Page 107

Add the following sentence to the end of the section entitled “Supervision and Duties”

An elected Road Agent is not an employee for the purposes of the Fair Labor Standards Act. Scarnici v. Town of Pittsburg, 2018 DNH 208; 2018 U.S. Dist. Lexis 180477 (Decided October 22, 2018)

Chapter 6
Liability, Regulation and Maintenance Duties
Page 113

Add a new citation following the first full paragraph following the title “Speed Limits”

In addition, recently amended RSA 265:62 allows the governing body of a municipality to petition the Commissioner of Transportation to recommend a seasonal decrease in the posted *prima facie* speed limit on any part of the state highway system that is seasonally congested by pedestrian and bicycle traffic.

Chapter 6
Liability, Regulation and Maintenance Duties

Page 114

Add a new citation following the paragraph titled “Minutes Should Memorialize
Testimony”

See Brentwood Distribution LLC v. Town of Exeter, No. 2014-0729 (N.H. July 7, 2016) (holding, in an unpublished opinion, that municipalities could consider public safety in addition to road damage when making a determination to impose a weight limit).

Chapter 6
Liability, Regulation and Maintenance Duties

Page 115

Replace the paragraph titled “Prior Permission” with the following:

As an initial matter, even if no weight limits have been imposed, no abutter or other private person or entity may excavate or disturb the ditches, shoulders, embankments, or improved surface of any highway (including a Class VI), absent prior written authorization from appropriate local officials (for example, select boards, highway agent, or city or town council). RSA 236:9 through 236:12. This may take the form of actual excavation, but might also include damage caused by a heavy truck on a road weakened by the spring thaw and similar damage. Prior to granting authorization to disturb the highway, a municipality may impose rules and regulations, **including requiring the payment of a fee to excavate on paved roads**, and may require the person to provide a bond for the satisfactory restoration of the highway. **If the municipality opts to impose, by ordinance, a fee under RSA 41:9-a to excavate a public road, the fee must be reasonably calculated to compensate for road degradation and diminished road life expectancy.** *Liberty Utilities Corp./Energy North v. City of Concord*, No. 2015-0510 (N.H. June 16, 2017) (holding, in an unpublished opinion, that a fee of \$5-per-square-foot of excavation was reasonably calculated to compensate for road degradation and diminished road life expectancy).

If the municipality requires a bond, the bond requirements must, by statute, be equitably and reasonably applied to other bonded 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 from an insurance company. However, when the public health or safety is in danger, a person may take “such immediate action as may be necessary” to address it, so long as they notify the municipality at once. RSA 236:9. It is not a prerequisite to have enacted a weight limit restriction for this law to apply. Nevertheless, in *Kerouac v. Hollis*, 139 N.H. 554 (1995), a town strategically used a weight limit to prevent road damage by excavators.

Chapter 6

OHRV (RSA 215-A) and Snowmobile (RSA 215-C) Use on Highways

Page 119

Replace third full paragraph with the following:

City or town councils and select boards may authorize the use of sidewalks and Class IV, V, or VI high- ways and bridges, or portions thereof, by OHRVs. RSA 215-A:6, IX. **Under prior law, the governing body of a municipality could vote to allow or prohibit OHRVs on Class IV, V, or VI highways with no notice or hearing requirements. Amendments in 2019 now require the governing body to hold “a duly noticed public hearing advertised at least 14 days in advance in a public location in the city or town and notification to abutters by verified mail pursuant to RSA 451-C:1, VII” in advance of any change in local rules. The cost of the notice to abutters is to be borne by the person or organization asking the governing body to alter the currently existing local rules.** Violations of the use restrictions on a town highway are enforced by the local police department.

Chapter 6

Maintenance of Private and Class VI Roads

Page 123

Add the following paragraph after the paragraph “Equal Protection Issues”

Statutory Repair Duty to Maintain Private Roads. Where there is no express agreement or requirement governing the maintenance of a private road, RSA 231:81-a now provides that where 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. The statute also affords the right to bring a civil action to enforce these reciprocal private road maintenance obligations and makes an abutting property who damages a private road liable for its repair and restoration.

Chapter 6

Liability, Regulation and Maintenance Duties

Page 125

Replace amounts in the first three full paragraphs of \$35,000 with \$125,000.

Chapter 10

Bridges

Page 183

Replace the second full paragraph dealing with “red listed” bridges with the following

RSA 234:25-a requires the Department of Transportation to maintain a list of “red-list bridges” and defines a structurally deficient bridge as “a bridge with a primary element in poor or worse condition (National Bridge Inventory (NBI) rating of 4 or less).” Such bridges are “red-listed” for priority repairs or replacement and include highway bridges owned by the state or a municipality as well as railroad bridges owned by the state. Separate lists of red-list bridges are maintained for state-owned and municipally owned bridges. The department is required, at a minimum, to inspect state owned bridges on the list biannually and municipally owned bridges annually. The department must notify the governing body of a municipality, on or before **April 1** of each year, of any red-list bridges owned by the municipality and any state-owned red-list bridge within the municipality. RSA 234:25-b.

Chapter 13
Utility Lines and Other Private Enterprise Highway Uses
Page 207

Revise the first full paragraph under Trees: Owner Consent Required to read as follows

As detailed in Chapter 1, trees in highway rights of way are presumed to belong to abutting landowners, subject only to the town’s right to cut them when they endanger traffic. RSA 231:172, I provides that “no such licensee shall have the right to cut, mutilate or injure any shade or ornamental tree, for the purpose of erecting or maintaining poles, or structures...without obtaining the consent of the owner of the land on which such tree grows.” However, as amended in 2009 **and later, in 2015**, after significant damage caused in a series of ice storms, the statute goes on to provide that licensees are presumed to have consent to “cut, prune or remove shade or ornamental trees growing on land located within the right-of-way, **or which may fall upon the right-of-way**, that pose an unreasonable danger to the reliability of equipment installed at or upon licensed utility facilities.” In other words, utilities may cut trees within the right of way **or which may fall into the right of way during a storm**, whether they are located on abutting land or not, to avoid damage to the poles, lines, or other structures.