A HARD ROAD TO TRAVEL

New Hampshire Law of Local Highways, Streets, and Trails

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NEW HAMPSHIRE MUNICIPAL ASSOCIATION

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PREFACE

Road questions arise frequently across the spectrum of municipal issues—from land use regulation and development to liability, maintenance, and financing. This handbook is designed as a general guide to statutes and case law to help municipal officials sort their way through many of the complex legal questions involved with municipal highways, but it does not constitute complete legal advice. We advise municipal officials to read the actual statutes carefully, and to seek legal advice from the municipality's regular attorney in matters dealing with specific highway issues. Issues of highway design and maintenance engineering are not covered in this handbook.

ACKNOWLEDGEMENTS

The New Hampshire Municipal Association (NHMA) first published a handbook on highway law, *Roads & Highways Manual*, written by Barton L. Mayer, Esq., in 1986. *A Hard Road to Travel* was originally written by H. Bernard Waugh, Esq., when he was chief legal counsel at NHMA and published in 1997. It was revised in 2004 by NHMA legal staff. A 2015 update was completed by former NHMA Staff Attorney C. Christine Fillmore to reflect changes in statutes and additional case law since 2004. It was then edited by NHMA Legal Services Counsel Stephen Buckley and NHMA Staff Attorney Margaret Byrnes. This 2022 edition includes statutory and case law updates and other revisions since the publication of the 2015 update. We hope it will continue to be a popular resource for municipal officials to turn to when confronted with the numerous legal questions that are asked about local roads and highways.

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CHAPTER ONE

WHAT IS A PUBLIC HIGHWAY

"ROAD" V. "HIGHWAY"

Is there a difference between a road and a highway? Legally, not really. New Hampshire statutes and court opinions generally use the term "highway" to describe everything from a six-lane interstate to a dirt track through the woods. There is a slight preference for "highway," as the term is defined in RSA 229:1 regarding legal ways to create a public highway. Accordingly, while both terms appear in this book, "highway" is used most often to reduce confusion. As you will see, the important issue with highways is not what they are called, but whether they are public or private.

A PUBLIC EASEMENT

Public Easements as Distinguished from Public Land

Many local officials make the mistake of thinking of local roads as "town-owned land," but a public highway is simply an easement held in trust by government for the use of the public. The underlying land is usually, although not always, owned by abutting landowners. The earliest New Hampshire cases support this principle. *Makepeace v. Worden*, 1 N.H. 16 (1816); *Troy v. Cheshire Railroad*, 23 N.H. 83 (1851).

It is possible for a municipality to also own title to the land over which the highway (easement) runs, but that's usually not true. Even when the municipality owns title to the land, the notion of a "public highway" is still a totally separate issue from ownership. Think of a road, legally, as two distinct layers—one layer being its ownership status and the other layer being its highway status. A municipality can own a strip of land without that land being a public highway. Conversely, a strip of land can be a public highway while the layer under the highway (the land) is owned by someone other than the municipality. This first chapter is about the legal relationship between these two layers.

There is a third legal layer known as the private easement that can co-exist along with the highway easement and can spring back into importance if the public highway is discontinued. The private easement will be discussed further in Chapter 4.

A Peculiar Type of Easement

Referring to a highway as an "easement" doesn't explain much about the legal rights involved with highways. An easement is, generally, the right of one party to use property of another. Black's Law Dictionary 6th Ed. (1991). Easements come in all colors and shapes, with the division of rights between owner and easement-holder being either spelled out in a document, such as a deed, or implied by the context in which the easement was created. *See*, *Flanagan v. Prudhomme*, 138 N.H. 561 (1994); *Dumont v. Wolfeboro*, 137 N.H. 1 (1993); *Nadeau v. Durham*, 129 N.H. 663 (1987).

A "public highway" is a very particular type of easement. The rights of the public versus the landowners are not spelled out in any single statute or other writing. Instead, the concept of a "highway," and the splitting of rights that the word stands for, is a product of cultural evolution, rooted in ancient case law stretching back to ancient Rome.

RSA 229:1 is entitled "Highways Defined," but this statute is only a list of ways in which highways can legally be created. *See* Chapter 2. It does not define the legal rights that attach to a highway. Likewise, the so-called "definition" in RSA 21:26 simply explains that a highway includes all bridges thereon.

Private Easements

To begin understanding the complexities of road issues, it helps to have a basic understanding of easements and of the rights associated with their creation.

Private easement rights are normally attached (or "appurtenant") to a piece of property. If A has an easement to pass over B's land, the right to do so usually runs with A's land, so that if A sells her property, the buyer also will have a right to pass over B's land. By contrast, the public as a whole has rights in a public highway, rights unattached to any particular property or even to any other set of rights.

Private easements normally benefit one landowner (owner A) but constitute a burden upon the other (owner B). In the example above, owner A probably had to pay Owner B for that right of way, but in the case of a public highway, the law in many respects assumes that the underlying landowner is not only burdened, but also benefited.

It is this burden-plus-benefit paradox that makes highways unique. It is true that the existence of the highway limits the landowners' rights and land value—at least on the actual right of way strip. The landowner may not, for example, build a structure on the right of way or otherwise obstruct the public's right to travel over the highway. *Dumont v. Wolfeboro*, 137 N.H. 1 (1993). As we will see in Chapter 6, the governing body generally may not permit such obstructions, either. *Marrone v. Hampton*, 123 N.H. 729 (1983). But a highway also creates rights and land value for owners. Land value increases with access. This paradox explains the odd fact that a landowner is procedurally able to ask for damages both when a highway is laid out (see Chapter 2) and when that same highway is later discontinued. *See* Chapter 4. Access is valued, but not noisy traffic.

'Viatic Use' Only

Exactly what are the rights of the public on a public highway with regard to the owner of the underlying land? The law limits the public to "viatic use" of the highway. This legal term comes from the Latin "via"—as in, for example, "Via Appia," the ancient Roman road called the Appian Way.

"Viatic use" means any use reasonably incidental to the purpose of traveling. *Lydston v. Rockingham Cty. Light & Power Co.*, 75 N.H. 23 (1908). It has been held to include the use of boats transported on trailers to public waters (*Opinion of the Justices*, 94 N.H. 501 (1941)); the moving of buildings from one site to another (*Graves v. Shattuck*, 35 N.H. 257 (1857)); people gathering to watch a parade (*Varney v. Manchester*, 58 N.H. 430 (1878)); children at play rolling hoops (*Dow v. Latham*, 80 N.H. 492 (1922)); hoses pumping gas to cars parked in the street (*State v. Scott*, 82 N.H. 278 (1926)); and roadside car parking (*Opinion of the Justices*, 94 N.H. 501 (1941); *Stott v. Manchester*, 109 N.H. 59 (1968)). In addition, riding an animal (most often a horse) or driving an animal-driven vehicle are viatic uses subject to the same rights and duties applied to vehicles under RSA 265:5.

Viatic uses evolve over time. As we will see in Chapter 13, the areas around and under highways are also properly used for a variety of communication and transmission purposes. The New Hampshire Supreme

Court noted in *Opinion of the Justices*, 101 N.H. 527 (1957) that "As science develops highways may be used for any improved methods for the transmission of persons, property, intelligence or other means to promote sanitation, public health and welfare. Such use of the public highways constitutes a proper highway purpose even though it may be new and is subordinate to the primary use of the highways for the traveling public." *See also*, *King v. Lyme*, 126 N.H. 279 (1985).

There are limits to the public use of a highway. An underlying landowner has the right to prohibit members of the public from doing things that are not considered viatic use. A town can't, for example, put up a building in the right of way (*Winchester v. Capron*, 63 N.H. 605 (1886)). One old case suggests that travelers' horses cannot graze upon roadside grass. *Varney v. Manchester*, 58 N.H. 430 (1878). In the case of *Hartford v. Gilmanton*, 101 N.H. 424 (1958), a public highway ran along the edge of Loon Pond, a public body of water. The New Hampshire Supreme Court said the public had the right to use the road for access to the pond, but not for "sun bathing, loitering, picnicking, ball playing or other uses associated with parks and playgrounds," because these uses were not viatic and thus "not within the original purpose of the taking for which damages were paid." Id. at 427.

In a later case, however (*Papademas v. State*, 108 N.H. 456 (1968)), the state had widened a highway next to a lake for a boat ramp and parking space for boat trailers. The Court said these uses were "the normal change in mode of transportation required in a transfer from dry land to water," and that the use of boat trailers was a "natural development of means of transportation." Trailer parking thus was consistent with viatic use of the highway.

Bicycling and walking, though regulated, are just as legitimate as vehicle use. *See*, *Dow v. Latham*, 80 N.H. 492 (1922). The Court said children's play is no less a legitimate use of a street than car travel. It is a common belief that pedestrians are prohibited from being on a street except in a crosswalk, but this isn't true, even under the modern "rules of the road" found in RSA chapter 265. The only locations where walkers crossing a highway are required to use crosswalks is "between adjacent intersections at which traffic control signals are in operation." RSA 265:36. Where a "Walk/Don't Walk" signal is in place, pedestrians must obey the signal when crossing the street. RSA 265:11. At all other locations, their duty is merely to yield to oncoming vehicles, except in crosswalks, where walkers have priority. When a sidewalk is available, pedestrians must use it; when no sidewalk is available, pedestrians must walk on the shoulder, or, if there is no shoulder, as far away from the center of the road as practical. If a pedestrian is walking on the road because there is no alternative, he or she must walk on the left. RSA 265:39. In general, pedestrians are required to follow all traffic signs and regulations that apply to them. RSA 265:34, :35, :36.

In a recent 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*, 2017 N.H. LEXIS 24 (2017).

Public Right to Equal Treatment by Regulators

The rights of viatic use do not belong absolutely and in full to each citizen as an individual. When a public highway is involved, those rights are no longer subject to the wishes of the underlying landowner, but rather are subject to reasonable regulation by public authorities (i.e., the federal government, the state, and, for town roads, the town).

It is important to distinguish between the public highway easement and other easements held by the town. Compare a public street with, say, a driveway leading to a house taken by tax deed. Both are, in some sense, rights of way held by the town. But with the driveway, the town could legally limit its use to tenants living in the house. The town may not limit a public highway in this way since it is, by definition,

open to public use. In fact, this is one of the key, defining traits of highways: they are for public use. Therefore, any regulation enacted by the town must treat all members of the public the same way.

In the case of *State v. Moore*, 91 N.H. 16 (1940), Concord had passed an ordinance requiring anyone doing trucking in the city to get a license, but licenses were only granted to people "thoroughly familiar with the topography" (that is, local businesses). The city claimed the ordinance helped control crowding on the streets, but the Court said it violated the constitutional principle of equal protection:

> [R]elief from highway congestion may not be accomplished by unfair discriminatory measures. While the use of the highways is a privilege, the privilege may not be granted arbitrarily and be bestowed at will and pleasure as a favor to some groups of travelers while imposing a deprivation of use upon others…[P]ermission of highway use for the local business..., while such use for other trucks and job-teams is thus restricted, displays a disregard, if not defiance, of the principle of constitutional equality.

It is this same principle of equal treatment that supports the proposition that a town cannot put up a locked gate on a Class VI highway, giving keys only to the abutting landowners. (Class VI highways will be discussed in depth in Chapter 8.) Granted, a town or city does have authority to "exclude...vehicles altogether from certain ways" (RSA 47:17, VIII, applicable to towns via RSA 41:11), but all members of the public must be treated equally, without giving special privileges to local landowners.

OWNERSHIP OF THE FREEHOLD 'SOIL'

The Presumption of Private Ownership

Since a highway is only a public easement, the title to the land underneath (the "freehold," "fee simple" interest or "right of soil" as it is called in old cases) is presumed to belong to the owners over whose land the highway was created, or their successors. *Makepeace v. Worden*, 1 N.H. 16 (1816). A municipality that wants to claim title to the land has the burden of proof (*Copp v. Neal*, 7 N.H. 275 (1834)), and the fact that the strip of land is, or was, a highway, does not, considered alone, constitute sufficient evidence of ownership of the underlying land.

Land Fronting a Road Includes Half the Roadway

The presumption against public ownership under roads is so strong that even when a landowner's deed has a metes-and-bounds description that does not include the highway (or that recites the nearest highway boundary line as the lot's boundary line), it is still held to convey title to the center of the highway. *Copp v. Neal*, 7 N.H. 275 (1834). The center is defined as the line halfway between the edges of the legal right of way. *Luneau v. MacDonald*, 103 N.H. 273 (1961). The same is true when a lot is shown on a subdivision plat. Any lot fronting on a street or private way shown on the plat is presumed to include title to the center of the street or right of way. *Sawtelle v. Tatone*, 105 N.H. 398 (1964); *Gagnon v. Moreau*, 107 N.H. 507 (1967); *Duchesnaye v. Silva*, 118 N.H. 728 (1978). This presumption can be rebutted, however, if the wording of a deed shows a contrary intent. Consider *Davis v. Lemire*, 122 N.H. 749 (1982), where a lot fronting a cul-de-sac was held to run only to the cul-de-sac's edge, not the center, because the developer, in the deed, had reserved the right to abandon construction of the cul-de-sac, thus indirectly revealing an intent to retain title to it.

The above proposition does not necessarily affect overall lot dimensions. The mere fact that an owner abutting a highway is presumed to own to the center line does not mean that a rear boundary measured from that highway automatically will be measured back from that center line. Again, the language of a relevant deed may control. *See*, *Holbrook v. Dow*, 116 N.H. 701 (1976).

The notion of ownership to the center assumes, of course, that there is an owner on the other side. Where one person owns the land on both sides, the center line is irrelevant. When there's no owner on the other side—as when the highway abuts the Atlantic Ocean—the one owner is presumed to own the "soil" of the whole road. *Sheris v. Morton*, 111 N.H. 66 (1971).

Government Can Take Title by Deed

The notion of abutter ownership to the center of the highway is only a presumption. In modern times, the state has followed a practice of taking a deeded fee interest in the soil under all new highway layouts. Many municipalities also now require deeds to the title (soil) as a condition of accepting new streets. There is no hard-and-fast rule. Only thorough research will reveal the true owner. For examples of thorny road problems see *Easements and Reversions* (Landmark Enterprises 1991) by Donald A. Wilson of Newfields, especially Chapters 6 through 8.

Rangeways

"Rangeway" is the popular name for strips of land reserved for highway purposes in some pre-revolutionary charter grants from the King of England to the original "proprietors" of towns, who initially owned all the township land in common. In fact, all New Hampshire land titles are traceable to the King of England. Highways were actually built on some of these strips. See, for example, a road map of Pembroke, often cited as a town whose map today shows the layout of many of its highways along rangeways. But rangeways ran in straight lines, heedless of hills or bogs, so most weren't built on.

Sporadic but persistent rumors run that towns own title to rangeways, especially those that have, or once had, highways on them. Indeed, in 1834, even the New Hampshire Supreme Court wrote in dictum (that is, language in an opinion that is not crucial to the outcome of a case) that towns "have frequently claimed the title in cases of ancient rangeways laid out by the original proprietors." *Copp v. Neal*, 7 N.H. 275 (1834).

To figure out whether there is truth to this theory, it is necessary to take a short look at how rangeways were handled over the years. At first, the proprietors governed the townships, but, as settlement gradually increased, the inhabitants of the town assumed control over the town government through town meeting and the select board[1], while the proprietors maintained ownership and control of the residual land in the township. In 1766, the Provincial Assembly passed a statute authorizing select boards "to exchange any lands left for highways, or any highways or any Part of them where a way is not necessary to be Continued, for other lands more suitable therefor …" 3 *Laws of New Hampshire, Province Period* 1745-74, p. 382 (1915). This language implies that the town owned the "lands left for highways" (that is, the rangeways) in order to "exchange" them. In 1791, the New Hampshire General Court enacted a statute to allow towns to "sell or exchange any land left or appropriated in such town for highways tho' not actually improved for that purpose . . . ." 5 *Laws of New Hampshire* 1784-92, p. 577 (1916). This language, too, suggests town ownership of the rangeways.

Records of various town votes and conveyances from the period confirm the apparent belief that towns owned rangeways and could convey title to rangeway land. Within a few decades, however, assumptions about ownership of rangeways evidently changed. In 1829, the 1791 statute regarding exchange or sale of rangeways was repealed. Laws 1829, Chapter 52. Then, in a major revision of highway statutes, the legislature in 1842 abolished the dedication and acceptance method of creating highways (it was restored in 1945) and released all outstanding dedications of land for highway purposes, which presumably included the dedication of all rangeways not already used as highways. Revised Statutes, 53:7; *State v. Atherton*, 16 N.H. 203, 213 (1844). Finally, in *Morgan v. Palmer*, 48 N.H. 336, 337 (1869),

1 "Select board" will be used throughout this publication and has the same meaning as "selectmen" or "board of selectmen." See RSA 21:28, II.

the Court observed that "these rangeways were reserved and designated by the proprietors in their original allotments, for public highways if needed … ; practically … these rangeways, when not converted into public highways by the towns, have been treated as a part of one or both of the adjoining lots." If the statement in *Morgan v. Palmer* describes all rangeways, then they probably ceased to exist legally in 1842. If, on the other hand, ownership of the rangeways was reserved by the proprietors and transferred by some means to the towns themselves, as widely believed by those who lived during the relevant period, then the 1842 statute has not eliminated them, and they survive as separate parcels.

It is true that in *Moultonboro v. Bissonnette*, 105 N.H. 210 (1963), the town was held to own title to a landing place on Lake Winnipesaukee that had been reserved in the town's royal charter and later laid out. The fact, however, remains that no New Hampshire Supreme Court opinion, to date, has ever held that a town owned title to land reserved for highways under a charter. The language in *Morgan v. Palmer*, 48 N.H. 336 (1869) seems, on the contrary, to suggest that a rangeway was only the dedication of an easement for highway purposes (like a so-called "paper street"), rather than title to the underlying soil. The trouble with the theory that towns own the rangeways is that there is little or no direct documentary evidence for it. Towns did not acquire title to proprietary lands automatically. *South Hampton v. Fowler*, 52 N.H. 225, 228 (1872). Proprietors could transfer title either by vote or deed, *Atkinson v. Bemis*, 11 N.H. 44 (1840), but no such records seem to exist for rangeways. On the other hand, early municipal titles have been established without proof of a conveyance. In *Baptist Society in Wilton v. Wilton*, 2 N.H. 508 (1822), the town's title to land was recognized chiefly because it was originally reserved by the proprietors for the ministry. Even in *Moultonboro v. Bissonette*, 105 N.H. 210 (1963), the town's title to a public "landing place" was established through language in the 1763 town charter and town meeting votes indicating town possession of the area in subsequent years. The Court noted the special difficulties in determining early town land titles and recognized the validity of establishing such titles on the basis of ancient documents and municipal activity. In the only modern case touching on the subject, *Eaton v. Rivard*, 131 N.H. 85 (1988), Seabrook citizens tried to claim public rights in an easement that had been reserved in ancient deeds "to be kept open and in common for the use of the proprietors of the beach." The Court said, however, that "the incorporation of the proprietary into a town did not cause title to the common lands to change from the proprietary to the town, unless the act of incorporation specifically provided for such a change."

Why do rangeways matter today? As Attorney Peter Loughlin summarizes in his treatise on municipal highways:

> [t]heir chief significance today … is the ownership question which they present to developers of tracts of land bisected by them. There seems to be little consensus on the ownership of these strips of land which were once owned by the proprietors. It is not even clear that the incorporation of the proprietors into a town caused the common lands to change from the proprietary to the town unless the act of incorporation specifically provided for such a change.

Loughlin, 16 *New Hampshire Practice: Municipal Law and Taxation* §. 44.14.

This almost-forgotten controversy resurfaced in 2008 when a bill was introduced into the House (HB 1491) to establish a study committee to study the "ownership and disposition of rangeways." The House voted HB 1491 "inexpedient to legislate," but the debate will no doubt continue among interested surveyors, real estate lawyers, and history buffs.

In short, any claim of town title to rangeways is still up for debate. A town will need sufficient documentation to prove ownership over any particular rangeway. What's important, though, is that the rangeway issue is only about title to a strip of land. Title status and highway status are two separate legal layers. Even if a town were held to own title to a rangeway, that would not necessarily lead to the

conclusion that a public highway exists thereon. Nor does the lack of title mean that it isn't a highway. Highway status can only be conferred on a strip of land in the methods set out in Chapter 2, even over rangeways.

Trees, Plants and Stone Walls Along the Roadside

Why does it matter who owns the title, or "soil"? First, if the highway is ever completely discontinued (see Chapter 4), the issue of who recovers the right of use and possession may well hinge on fee ownership. But beyond that, even if the road is never discontinued, the owner retains some right to use the land in ways that don't interfere with the public's viatic use. Common questions arise over the area between the actual traveled way and the edge of the legal right of way, which usually extends several feet into what a homeowners likely considers to be his or her yard. Who has control over trees and shrubs, either growing naturally or planted there? Who is in charge of stone walls?

Ownership of Trees Within the Highway

A highway, in the legal sense of the full public right of way, is usually wider than the actual traveled portion. *See* Chapter 2. Within most highways in the state grow trees that don't interfere with travel and indeed enhance the road's appearance. RSA 31:52 recognizes an abutter's right to "plant, rear and protect" such trees "between the carriage path and sidewalk in any public street or highway…if it does not interfere with public travel." Under New Hampshire case law, those trees are not considered part of the public's "highway" rights, but remain the property of the title owner, who indeed has the right to use reasonable force to protect those trees from destruction by users of the highway. *Graves v. Shattuck*, 35 N.H. 257 (1857). In *Laconia v. Morin*, 92 N.H. 314 (1943), a large elm tree between the street and sidewalk, prized by the city, was cut down by the abutting owner. The city sued for trespass, but the Court, after finding no evidence that the city owned the "soil" under the street, held that Morin could cut the tree if he wished:

> The abutting owners were left with the right to use the [highway area] for any purpose not inconsistent with the public travel, and it is to be presumed that such rights extended to the thread [i.e., center] of the way… The abutting owner having retained title to the land, the trees growing thereon belonged to him…The owner may not be deprived of [trees] for public use for shade and ornamentation without purchase or condemnation proceedings. *Id.*

Likewise, even when a town itself cuts trees from the right of way, the wood products (firewood or lumber) belong to the owner of the "soil" and cannot be appropriated by the town. *Baker v. Shephard*, 24 N.H. 208 (1851). So, normally a town could not, for example, heat the town hall with firewood cut along town roads unless it paid the owner of the trees the fair value of the wood taken.

However, even if the municipality does not own the soil, it has an opportunity at the time a highway is laid out to assess damages to abutting owners "to provide for the maintenance or planting, from time to time, within the limits of such highway, of such shade and ornamental trees as may be necessary for the preservation and improvement of such highway." RSA 231:154. There is a similar opportunity regarding existing roads, with the same proceedings available as for laying out a highway by the select board. This process gives the municipality, in addition to its ordinary viatic rights, a public easement to protect, preserve, and renew those trees. RSA 231:154.

Can Abutters Be Prevented From Cutting?

Modern municipalities often want to preserve roadside trees. Is this possible in light of the *Morin* case? In the case of highways, abutters almost always own the rights of way and the trees, *Bigelow v. Whitcomb*, 72 N.H. 473 (1904), subject to the municipality's transportation easement to maintain a public road over the land. This means that landowners generally have a right to grow, maintain or cut down their trees as they see fit. They also have a right not to have their trees pruned or removed without their consent, except pursuant to statutory procedures explained further below. For the future, the town or city could require a deed to the title underneath all new streets and highways it accepts. If the municipality acquires the soil as well as the highway, the reasoning in the *Morin* case doesn't apply, and the municipality would be held to own the trees. As another option, RSA 231:154 allows a municipality to take the tree rights at the time a highway is laid out, even if it doesn't take full title.

Contrary to common belief, a town cannot control an owner's cutting of roadside trees by designating the highway as a scenic road. RSA 231:158, IV provides that designation of a road as scenic "shall not affect the rights of any landowner with respect to work on his own property, except to the extent that trees have been acquired by the municipality as shade or ornamental trees pursuant to RSA 231:139-156...." Grasping the fact that land within a highway is usually the property of abutters leads to an understanding of the limitations of the scenic road law. It does not restrict landowners from cutting trees even within the right of way. See Chapter 5 for more on scenic roads.

Tree Wardens: Planting and Acquisition

Fortunately, RSA 231:139 through :154 (originally enacted in 1901) give a surer solution to preventing the cutting of trees within the right of way. Any town or city may provide for the appointment of a tree warden (by vote of the town meeting or town council vote in towns, and city council or mayor and board of aldermen in cities). Under RSA 231:139, I, the tree warden shall be a person known to be interested in planting, pruning, and preserving shade and ornamental trees and shrubs in public ways, village commons, parks, cemeteries, and other public grounds. A tree warden shall be qualified to perform the duties specified as demonstrated through adequate education, experience, or both, in arboriculture, ornamental horticulture, forestry, landscape maintenance, or other related fields."

The city or town then advises the Division of Forests and Lands in the state Department of Resources and Economic Development of the appointment, and the division maintains a public roster of tree wardens.

As determined by the city or town, the duties of a tree warden "shall be to help care for, maintain, protect, and perpetuate shade and ornamental community trees and shrubs in town public ways, village commons, parks, cemeteries, and other public grounds, and to advise the governing body from time to time as may be necessary to help accomplish that purpose." RSA 231:139, II. The tree warden works cooperatively with other municipal officers and agents to accomplish this purpose. RSA 231:139, II.

The tree warden has authority to accept on behalf of the municipality any gifts of well-grown nursery trees, and may set out such trees in the highways, cemeteries, commons, schoolhouse yards, and other public places, as indicated by the donor, and protect the same at the expense of the town to the extent that funds are available for such purpose. RSA 231:148. Note that this section does not obligate a municipality to accept every tree offered or to spend money that is not appropriated for that purpose.

The tree warden has statutory authority to plant (or supervise the planting of) trees in highway rights of way with the governing body's approval under RSA 231:149. In addition, when the tree warden, in the course of regular roadside tree clearing, identifies a young seedling tree or sprout that the warden believes should be maintained for future value as a shade or ornamental tree, the warden may notify the abutting landowner of the intention of the municipality to take and preserve the tree. If the abutter does not object

in writing to the tree warden within 30 days from the date of notification, the tree becomes the property of the town or city. RSA 231:149 - :150. The municipality then has full control over those trees. Moreover, the warden can also acquire existing trees within the highway right of way by agreement with the owner (gift or purchase at a fair price), or even without agreement by serving a written notice on the owner and the town clerk. RSA 231:141. The notice must include an appraisal of the fair value of the trees (provided by the tree warden or by a committee assembled for that purpose) as well as the number and location of each variety of tree. Consult the statute for details and follow it carefully. If an owner objects, he or she has 30 days after notice from the tree warden has been served to appeal to the governing body for damages, and, ultimately, the appeal may reach the superior court. The amount of damages is the only issue that can be appealed. Trees acquired this way by the tree warden should be tagged in a manner determined by the city or town. In addition, a record must be maintained of all trees taken in this manner, including the approximate location, name of abutting landowner, variety and approximate diameter, and date of acquisition. RSA 231:142. This procedure is, in a way, an exercise of the power of eminent domain, but it doesn't appear that the Eminent Domain Procedure Act (RSA Chapter 498-A) is triggered, since that law applies only to the taking of "lands, tenements and hereditaments." RSA 498-A:2, V. However, it may be useful to consult with the municipal attorney before taking trees, especially if the municipality has not taken trees within recent memory or the transaction involves a large number or high value of trees.

After a tree has been planted or taken, tagged, and recorded by the tree warden, the town has ownership and control over that tree. RSA 231:140. Nobody—private person or municipal worker—can cut the tree at this point unless the tree warden grants permission. Under RSA 231:147,

> It shall be unlawful to cut, destroy, injure, deface, or break any public shade or ornamental tree; or to affix to any such tree a play bill, picture, announcement, notice, advertisement, political or otherwise, or other device or thing, or to paint or mark such tree, except for the purpose of protecting it and under a written permit from the tree warden.

The party seeking to cut or remove such a tree must apply to the tree warden, who must hold a public hearing on the request. Notice of the time, date, and place of the hearing must be posted in at least two public places in the municipality as well as on the tree itself. The warden's decision may be appealed to the governing body. The tree warden may, at his or her option, grant permission for cutting or removal, without a hearing, if the tree in question is on a public way outside of the residential part of the town limits. The "residential part" is determined by the tree warden. If a residential area is identified, no tree within that area may be cut by the tree warden, except to trim it, or removed by the tree warden, without a hearing. RSA 231:144.

Roadside Cutting and Clearing by the Town

Even though trees on the highway are not usually town-owned, the town does not always need owner permission to cut one down. As discussed further in Chapter 6, municipalities have strong incentive under current law to be vigilant about the condition of trees alongside public highways because they face liability for failure to do so. However, in the vast majority of cases, the abutting owner must be notified before action is taken. If the municipality would like to, and the owner is willing, the municipality may contract to have the abutter perform the removal and be paid by the town the fair value of the benefit the abutter has conferred upon the municipality. RSA 231:151.

Abutter cooperation is a good thing, but what if the abutter does not want to help or opposes the tree cutting? The public's viatic use rights include the right to cut trees and bushes within the limits of public highway rights of way that, in the judgment of the governing body, may cause damage or pose a safety hazard to the highway or interfere with public travel. In fact, RSA 231:150 requires such cutting "annually, and at other times when advisable." However, trees with a circumference of more than 15 inches at 4 feet

above the ground cannot be cut until the owner is notified in writing by personal delivery or registered mail. Since "circumference" is the distance around, this requirement applies to trees with a diameter as small as 4.8 inches. The notice and appeal rights in these cases, as well as the exception for imminent threats, are the same under RSA 231:150 as for nuisance trees discussed in the next paragraph. Presumably, the tree(s) cannot be cut until the 30-day appeal period after notice is given (see paragraph below for detail). There is an exception, however: seedlings and sprouts identified and properly taken by the tree warden under RSA 231:149-:150 "shall be preserved, as well as banks and hedges of bushes that serve as a protection of the highway, or that add to the beauty of the roadside." RSA 231:150.

In addition, RSA 231:145 gives municipalities a way to declare dead or diseased trees to be a public nuisance. The governing body may declare any tree, either alive or dead, situated within the highway limits to be a public nuisance by reason of unreasonable danger to the traveling public, spread of tree disease, or the reliability of utility equipment. The notice and hearing process is strictly controlled by RSA 231:146. The governing body must provide written notice to the abutting landowner of a tree declared to be a public nuisance at the owner's place of residence or by registered mail to the owner's last known address. The notice must clearly state the intention of the municipality to remove the tree (and it makes sense for the notice to identify the tree as clearly as possible). The owner may appeal to the superior court within 30 days of the delivery or mailing of the notice and is entitled to a speedy hearing on the matter. The court may uphold the municipality's decision or overturn it in whole or in part. If the court overturns the municipal decision, it may order the municipality to take further action "as justice may require." If, on the other hand, the abutting owner does not appeal, or if an appeal is dismissed by the court, the municipality may proceed, and the landowner is relieved of any liability or responsibility regarding the tree(s) at issue as well as any stumps remaining after removal. RSA 231:146. Again, although the law does not explicitly say so, the notice requirement presumably means that the tree should not be cut until the 30-day appeal period is over. When the tree is finally removed, it is done with no compensation or cost to the abutting owner. RSA 231:145.

In the case of annual roadside clearing under RSA 231:150 and nuisance trees under RSA 231:145, notice to the abutting owner can be omitted only if "the delay entailed by such notice would pose an imminent threat to safety or property." RSA 231:145; RSA 231:150. This requirement of owner notice before cutting trees applies to all roads, not just those designated as scenic. Note that in the case of public trees under care of a tree warden, the procedure outlined in RSA 231:144 (notice placed on the tree, etc.) is used instead.

It is difficult to know what standards would govern if an owner objects after getting a notice or loves the tree so much that he or she actually appeals to court. No case has been reported on the matter. This right to notice is one of which most owners seem blissfully ignorant. But, as noted above, RSA 231:150 provides that "shade and fruit trees that have been set out or marked by the abutting landowners..., and young trees standing at a proper distance from the highway and from each other, shall be preserved, as well as banks and hedges of bushes that serve as a protection of the highway, or that add to the beauty of the roadside." If officials blatantly ignore this directive or want to cut trees that nobody could possibly think interfered with travel, then a court might second-guess them, although it is likely that any rational good-faith official decision will be upheld. After all, the principle of separation of powers demands no less. *See, Bergeron v. Manchester*, 140 N.H. 417 (1995), which held that the principle of separation of powers, and the need to limit judicial interference with legislative and executive decisions, both weigh against accepting a jury's verdict on the reasonableness of a road plan over that of the governing body itself.

Cutting by Utilities

Public utilities also have a statutory duty to maintain the reliability of their services and to protect the value of their equipment placed into the public right of way by license. These duties are enforced by the

Public Utilities Commission acting under RSA chapter 374 and its associated administrative rules. Yet, if either the municipality or the utility fails to obtain the consent of a tree owner, there may be liability for significant damages resulting from the injury or removal of the vegetation.

Following the ice storm of 2008, the New Hampshire Legislature reviewed the statutory scheme contained in RSA 231. Laws 2009, chapter 267 significantly amended sections 145 and 172 to improve the definition of vegetation that constitutes a "public nuisance" in the highway right of way and to improve the procedure used to obtain consent to cut from private landowners. Removal of a tree is now allowed if it constitutes a "public nuisance by reason of unreasonable danger to the traveling public, spread of tree disease, or the reliability of equipment installed at or upon utility facilities." The public utility may petition the governing body under the procedures of RSA 231:145. The removal may be immediate if there is an "imminent threat to safety or property." The statute is clear that the municipality's ability to remove nuisance trees in no way relives public utilities of their responsibility to identify, ask permission to cut, and then remove trees or limbs threatening transmission lines.

Alternatively, a utility may use the procedure contained in RSA 231:172. At least 45 days in advance of a non-emergency effort to prune or remove a shade or ornamental tree, notice must be provided to the landowner. Notice is given in person or sent by ordinary mail (not included in a utility or other communication), to abutting owners by the name and address on the municipal tax records. Alternatively, notice may be sent separately by electronic mail (but not as part of a utility bill or other regular communication) if the landowner has established regular electronic mail communication with the utility. The notice must include the name and contact information of a representative of the utility who may be contacted to schedule a personal consultation regarding the proposed activities. If the landowner does nothing within 34 days after notice is mailed, the cutting or removal may proceed. If the landowner contacts the utility to schedule a personal consultation and then objects, a hearing is available before the local governing body, who shall determine if the action is necessary and assess any damages against the utility to compensate the owner for loss of the tree. Note, however, that if the abutting owner (or a prior owner of that property) has granted the utility an easement that includes the right of the utility to cut or remove trees within the easement area, this process is not necessary because the easement already constitutes sufficient consent.

It is important to note, finally, that when the tree is located along a road formally declared a scenic road, the additional proceedings required under the scenic road statute apply. See Chapter 5 for more on scenic roads.

Abutter Liability for Road or Sidewalk Hazards

If a traveler is hurt on a highway— say, by a tree—the town's liability is covered by RSA 231:90 et. seq. *See* Chapter 6. But what about the liability of the landowner? If the abutter owns the soil under a road and has not granted control to the town under a law like the tree warden law, would the owner be liable if a tree known to be dead and dangerous fell on a traveler?

Until recently, it appeared that landowners had no legal duty to maintain the trees on their property to prevent harm to others from falling branches. This view resulted from language in *Belhumeur v. Zilm*, 157 N.H. 162 (2008), a case in which the plaintiff was injured when wild bees nesting in a tree on the defendant's property attacked him while he was in his own yard. The plaintiff claimed that the tree and bee nest were a private nuisance and that the defendant had been negligent in failing to remove the tree or bee nest.

The New Hampshire Supreme Court ruled that the case should be dismissed. As to the nuisance claim, the Court stated, "The 'established common law rule is that a landowner is under no affirmative duty to remedy conditions of purely natural origin upon his land even though they are dangerous or inconvenient to his neighbors.' Stated alternatively: 'In order to create a legal nuisance, the act of man

must have contributed to its existence.'" *Belhumeur, supra*. at 235.

As to the negligence claim, the Court held "that to require a landowner to abate all harm potentially posed to his neighbors by indigenous animals, plants, or insects naturally located upon his property would impose an enormous and unwarranted burden." *Id.* Since the statement of the rule in the opinion expressly included the word "plants," landowners were assumed to be safe from common law tort liability for damage from falling trees or branches if they simply let nature take its course. *Id.*

The Court revisited the issue in the 2011 case of *Pesaturo v. Kinne*, 161 N.H. 550 (2011). Here, the owners of adjoining property had a dispute over two trees, both rooted on defendant's land, but whose branches hung over the line and bothered the plaintiff. Plaintiff claimed that an oak tree with "swinging, dead limbs" limited her use of her driveway, while a pine tree had limbs that broke off and damaged a boundary fence. Just as in the *Belhumeur* case, the liability claims were based upon "private nuisance" and "negligence."

The Court rejected the private nuisance claim and restated the rule that, for a private nuisance to exist, there must have been some affirmative act taken to cause the problem. Apparently, this means that a person must have planted or tended the tree in question in some manner that caused the harm to defendant. A tree that has taken root naturally apparently cannot be the cause of a private nuisance.

The negligence claim was another matter. "We believe that a landowner should be held responsible for a decayed or defective tree that he permits to harm another because it would be an 'inherent injustice' to allow a landowner to 'escape all liability for serious damage to his neighbors merely by allowing nature to take its course.'" *Pesaturo*, 161 N.H. at 555. The Court retreated from its language in *Belhumeur* and announced a new rule: "…a landowner who knows or should know that his tree is decayed or defective and fails to maintain the tree reasonably is liable for injuries proximately caused by the tree, even when the harm occurs outside of his property lines. However, a landowner does not have a duty to consistently and constantly check all trees for nonvisible decay. Rather, the manifestation of the tree's decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm." *Id.*

The *Pesaturo* case serves as notice that all landowners now have a legal duty to maintain trees appropriately so as not to constitute an unreasonable risk of harm to others. This includes owners of trees in the highway rights of way. The abutting landowner now faces the risk of liability to the traveling public or a public utility if a defective or decayed tree falls on a pedestrian, vehicle, or utility line.

Also, a new theory of liability may be suggested by the *Pesaturo* case for trees that are intentionally planted in the highway right of way. Suppose an abutting landowner has planted trees in or near the right of way, and those growing trees now interfere with utility reliability, or they now shade the road and create conditions for enhanced winter icing. Because the trees have been planted, are they not now a "private nuisance" that may result in common law liability to the municipality or the utility?

Although, as we have seen, municipalities usually do not own trees growing along the edges of public highways, it is no longer prudent for municipal officials to simply "let nature take its course," or otherwise fail to actively manage the condition of such trees, because municipalities have the duty to maintain municipal highways. RSA 231:3. For municipally owned property, the duty falls to the governing body. In towns, the authority to act comes from the RSA 41:11-a duty to manage town-owned property. These trees must be inspected and maintained by the public and at public expense, as described above.

When it comes to sidewalks, abutters generally are liable only for defects that they caused, because sidewalks along municipal highways are part of the public right of way, and thus are part of the municipality's responsibility. RSA 231:113. In *Gossler v. Miller*, 107 N.H. 303 (1966), it was held that an abutter was not liable to a traveler for a defective sidewalk, even if the abutter knew of the defect. The fact that an abutter benefits economically from customer use of the street or sidewalk for parking and access makes no difference (*Ritzman v. Kashulines*, 126 N.H. 286 (1985)), unless the defect was caused

by the abutter's own act: for example, negligent construction of a building causing ice to fall on travelers. *Rutkauskas v. Hodgins*, 120 N.H. 788 (1980).

Municipal highway officials themselves should not place undue reliance on the issue of abutter liability for hazards originating within the highway right of way. Instead, if there is a sidewalk hazard or dangerous tree within the right of way, assume it is the town's responsibility to take care of it. Even if it turned out that a landowner were held to owe a duty to travelers, this fact wouldn't relieve the town of its own duty of care under RSA 231:92.

Abutter Liability for Hazards from Abutting Land

What if a tree outside the right of way is in danger of falling in the road or has dead limbs hanging out over the road? As a general rule, state law holds a person civilly liable for "plac[ing] any obstruction in a highway, or caus[ing] any defect, insufficiency or want of repair of a highway which renders it unsuitable for public travel..." RSA 236:39. Such a person becomes liable to pay the town for road repair costs as well as "all damages and costs which the…municipality shall be compelled to pay to any person injured by such obstruction, defect, insufficiency or want of repair established through an appropriate contribution claim or under the rules of joint and several liability ." A separate statute subjects an abutter to a fine if he or she "shall place, or suffer to be placed or to remain, any logs, earth or other substances 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." RSA 236:19. These laws clearly impose a duty on abutters to avoid knowingly engaging in conduct that damages the road. So for example, if an abutter permits a stone wall on the property to deteriorate to the point where it begins to crumble into a drainage ditch in the highway right of way, or onto the traveled portion itself, the municipality may hold the abutter liable both under RSA 236:19 for obstructing the necessary drainage structures and under RSA 236:39 for any repair costs and damages caused to third parties.

These statutes apply not only to intentional conduct by abutters but may extend also to "natural" conditions such as dead and diseased trees. Recent statutory changes and the *Pesaturo* case discussed in the section above make it clear that abutters are exposed to liability if they permit a natural condition on their property to affect the integrity of a public highway or threaten the traveling public. The landowner may now also have a greater risk of liability to the public utility for negligently causing damage to utility service. If a landowner negligently allows a defective or decayed tree to fall on a utility line, there may be common law liability to the utility. The chances that such liability could be imposed are enhanced if the landowner has received notice of the location and condition of such trees from either the municipality or utility.

Given these changes and the increased risk of liability faced by abutting landowners, it may be easier in the future for municipalities and utilities (which are already often willing partners in tree maintenance) to obtain consent from abutters for tree pruning or removal. Now landowners, too, have a strong incentive to cooperate in these efforts in order to avoid liability as well as the significant costs of tree maintenance and difficult task of finding a vendor who is willing to work for a private landowner on trees that are very close to utility property.

Given the language of RSA 231:92 (discussed in Chapter 6), if the town has actual notice of a dangerous condition arising out of a condition outside of the limits of the right of way but having the potential to affect the highway, it has a duty to do something other than ignore it. If town officials can't informally persuade the owner to cut the deadwood or to take care of the beaver dam or the falling ice—or at least to give the town permission to do so—it may be advisable to send a letter, by certified mail, to the owner, declaring that the tree, or dam, etc. is a potential danger to highway users, and stating that the town will consider the owner liable under RSA 236:39 for any injury to travelers.

Clearly, then, the owner would not be creating the hazard "under authority" of the town, either express or implied. If the owner still refuses to act, the town's standard of care under RSA 231:92, I(b) is merely one of avoiding gross negligence.

Officials normally have no right to enter upon private land to cut trees without the express consent of the landowner. If they do enter onto private land, they might find themselves liable for criminal trespass. RSA 635:2. On the other hand, it has been held elsewhere, in the case of private easements, that the easement-holder has a right to enter onto the owner's land to maintain or repair the easement when it is otherwise unavoidable. *See*, 28A C.J.S. *Easements* §170. The same may apply to highways, but caution is advised. While RSA 236:32 through :37 authorize a self-help remedy for the town "if any timber, lumber, stone or other thing is upon a...highway," these statutes permit only the removal of the obstruction from the highway itself. The statute implies, but does not clearly state, that municipal officials have the right to enter abutting land if the encumbrance can't be removed otherwise. A better course, if consent cannot be obtained, is to order the owner to remove the encumbrance, and if they do not, complain to a justice of the peace. RSA 236:35 and :36. Unauthorized entry onto private property is generally not advisable; consult your municipal attorney before doing so.

If the municipality does need to clear trees or other debris from the highway, what should be done with the material? In *Jarvis v. Claremont*, 83 N.H. 176 (1927), trees from abutting land had blown across a road. The highway agent cleared them and, using the above statutes, took the firewood to the basement of the town hall until the owner paid the town's clearing costs. But the Court held, based on the law's history and constitutional principles, that this cannot be done except in the case of intentional obstructions. An owner has no duty to pay for clearing trees that simply blew down.

Except in the case of an obvious emergency, ask permission to enter on private land first. If permission is denied, work with your municipal attorney before entering private land beyond the edge of the right of way to remove hazards to a highway.

Stone Walls: Breach and Removal

People have strong feelings about roadside stone walls. Symbols of New Hampshire's agrarian past, they exude a rugged permanence epitomizing the granite Yankee character. Can they be protected? Against whom? RSA 472:6, enacted in 1983, makes it a misdemeanor to deface, alter, or remove a stone wall or monument "made for the purpose of designating a point, course or line in the boundary of a tract of land…" The wall or marker can be moved without penalty only by authority of the legislature or a court, authorization by municipal officials to place the boundary more accurately, or "by mutual agreement between all landowners whose property lines are affected by the moving of the boundary."

The question is, does this law apply to roadside stone walls? Some argue that it does not since the abutter's soil rights go to the center of the roadway, and, therefore, the wall isn't really the "boundary of a tract of land." Furthermore, if one person owns on both sides of the right of way, the walls along the road are clearly not boundary markers. The New Hampshire Supreme Court has yet to offer any clear direction on this matter. But several factors argue that the law does apply to roadside stone walls:

- Stone walls usually are boundary markers. They are often the best evidence of where the right of way is located. *Hoban v. Bucklin*, 88 N.H. 73 (1936) (overruled on other grounds by *Hewes v. Bruno*, 121 N.H. 32 (1981)). Also, as discussed above, an owner's right of possession to the highway strip itself, unless it has been discontinued, is virtually non-existent. Thus, for all practical purposes, the right of way line is a very important boundary.
- Even when an owner's title runs to the center of a highway, the remainder of that tract is often measured from its edge. *Holbrook v. Dow, Inc.*, 116 N.H. 701 (1976). The wall may be

as crucial to identifying a tract as any line between two private owners. It therefore comes within the class of boundaries the legislature intended to protect under RSA 476:2. See 1983 NH Laws chapter 21.

- The scenic road law (RSA 231:158, IV) provides that designation of a scenic road doesn't affect a landowner "with respect to work on his own property…except that RSA 472:6 limits the removal or alteration of boundary markers including stone walls." This cross-reference is an indication of the legislature's recognition that RSA 472:6 is intended to apply to roadside stone walls.
- The driveway permit statute (RSA 236:13) was amended in 1997 to provide that state or local regulations, or a permit issued under them, "may contain provisions governing the breach, removal and reconstruction of stone walls or fences within, or at the boundary of, the public right of way, and any landowner or landowner's agent altering a boundary in accordance with such provisions shall be deemed to be acting under a mutual agreement with the city or town pursuant to RSA 472:6, II(a)." In the absence of such a permit or agreement, it seems the owner does not have the right to breach or remove a stone wall or boundary fence.

Therefore, it can be argued that a driveway permit issued under RSA 236:13 serves as a mutual agreement for the owner to breach the wall at the driveway site. For scenic roads, RSA 231:158 imposes additional requirements, including planning board permission, to satisfy the municipality's half of the mutual agreement. These situations are complicated and town officials should consult the municipal attorney.

Other Non-Viatic Uses: Encroachments

If the owner of the soil can keep trees in the right of way, one might think the property owner could also put-up fences and signs, as long as they were well back from the traveled way and didn't affect traffic. However, RSA 236:15 declares that any building, structure or fence within or over any highway is a public nuisance. "Cornices or other projections" are allowed if they are at least 12 feet above the highway surface, and "superstructures from one building to another" are permitted at least 16 feet over the surface. A town can enforce this statute through superior court injunction. *Manchester v. Anton*, 106 N.H. 478 (1965). Of course, local setback ordinances may be—and most are—more restrictive than this state law. But they cannot be less restrictive. For example, in *Marrone v. Town of Hampton*, 123 N.H. 729 (1983), the selectmen had given permission to a landowner to construct a seawall and some steps within a highway right of way. The Court said these encroachments did constitute a nuisance—that the construction of them could only have been legal if the highway were discontinued, but that discontinuance requires a vote of the town.

Mailboxes

The United States Congress, acting under the "post road" clause of the U.S. Constitution (Article I, Section 8, Clause 7), has declared all highways maintained by a state and its political subdivisions as post roads. Placement of mailboxes within the right of way is thus a legitimate viatic use of the highway, and snowplow damage to a properly placed mailbox should be viewed no differently than damage to any other abutter property: if the mailbox is damaged by town negligence, the town likely will be liable. *See* Chapter 6.

The question remains: what is "properly placed"? Can municipalities regulate mailboxes? Well, yes and no. The applicable Domestic Mail Manual provision published by the United States Postal Service states as follows:

Subject to state laws and regulations, a curbside mailbox must be placed to allow safe and convenient delivery by carriers without leaving their vehicles. The box must be on the right-hand side of the road

in the direction of travel of the carriers on any new rural route or highway contract route, in all cases where traffic conditions are dangerous for the carriers to drive to the left to reach the box, or where their doing so would violate traffic laws and regulations. Domestic Mail Manual, 508 Recipient Services § 3.2.6. (https://pe.usps.com/DMM300)

As stated above, postal customers are explicitly required to obey any local regulations when erecting mailboxes. On the other hand, the Postal Service does regulate how a mailbox must be placed by the owner in order to have mail delivered to it. Domestic Mail Manual, 508 Recipient Services, §3.1.4. Think of the municipality and the post office as two independent overlapping regulatory authorities. We can hope that the two sets of regulations will contain some points of intersection and consistency. See *Grover City v. U.S. Postal Service*, 391 F.Supp. 982 (C.D.Cal. 1975) (city ordinance forbidding mailboxes on sidewalks violated USPS rules on mailbox placement for curbside mail delivery and the USPS regulation preempted the city ordinance under the Supremacy Clause). If municipal regulations are so strict as to leave the citizens no options that also comply with Postal Service regulations, then people won't get their mail delivered to their homes; they may be required to pick up their mail at the post office. This may not be a legal problem, but it could be a political problem. If the town or city wants to regulate mailbox placement, check with the local postmaster to make sure owners are left with delivery options.

Political and Other Signs in the Right of Way

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 places 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 TWO

HOW ARE LOCAL HIGHWAYS CREATED?

A public highway is defined as an easement held in trust by government for the use of the public, including any bridge if the road it services is public, *Blagbrough v. Wilton*, 145 N.H. 118 (2000), and any sidewalks in the right of way, *Gossler v. Miller*, 107 N.H. 303 (1966). *See* Chapter 1. But how does government go about creating public highways? Understanding methods of public highway creation is important not only when the municipality wants to create new highways, but also when the legal status of an existing highway is uncertain. Legal status may have little to do with what's actually on the ground. The mere fact that a road is constructed doesn't necessarily make it a public highway, and a strip covered with tall, majestic trees may still be a highway, though probably Class VI.

Excellent references on the subjects covered in this chapter are *Roads Revisited: Creation and Termination of Highways in New Hampshire – An Update* by Paul J. Alfano, Esq. (46 N.H.B.J. No. 3, p. 56, Fall 2005.); Attorney Peter Loughlin's treatise *Municipal Taxation and Road Law*; and New Hampshire Practice Series, Vol. 16, sections 45.01 and 45.02.

THE 'DEFINITION' OF HIGHWAYS

RSA 229:1, although it is called a "definition," is actually a list of the only ways a highway can legally be created in New Hampshire. The four ways of highway creation are as follows:

- Highway layout, a statutory procedure governing municipal highways and, separately, state highways; "layout" refers to a legal process, not necessarily actual construction.
- Prescription, a legal doctrine that refers to actual use for public travel for at least 20 years prior to January 1, 1968.
- Dedication and acceptance, involving the dedication or donation of a roadway as a highway by the owner, and then acceptance by the city or town.
- Deeded ownership, involving the actual construction of a road over land in which a city or town has a deeded interest, either fee simple title or easement.

If a road's "highway" status is in question, it must be traced to one of these four legal methods of highway creation. The layout process is historically most important because that is how many existing highways, particularly older ones, were created. However, if old layout records have been lost, which is not uncommon, the only proof of highway status today may be its historic actual use under the doctrine of prescription. The layout process is used rarely today for the creation of new local roads and streets, but it is still used when a landowner has a dispute with a town that doesn't want to take over a road. The reason the owner resorts to the layout process is because the town's refusal can be appealed to, and possibly second-guessed by, the superior court. The vast majority of new highways today are created under the doctrine of dedication and acceptance.

When the status of a road is unclear, a difficult situation may arise for the select board. For example, what if residents believe their road is a public highway and ask the road agent to begin plowing it? A

decision must be made about whether or not to do that, and that decision rests on the status of the road (is it a public highway or not? If so, what class of highway is it?). In *Gordon v. Rye*, 162 N.H. 144 (2011), the New Hampshire Supreme Court held that a governing body (select board, town council, city council/mayor and board of aldermen) has no authority to make a judicially-binding decision about whether a road has become a public highway; only a court has jurisdiction to make that determination.

The case stems from a 1996 request by property owners for the town to plow a portion of their road. It was undisputed that the end of the road was private, but the status of the part for which plowing was requested was uncertain. After plowing the road for several years, the select board became concerned about the status of the road and decided to hold a hearing to determine whether it had become a public highway through prescription. (If so, presumably, it would continue to be plowed.)

The hearing was conducted using the procedures in RSA Chapter 43, relying on the provisions of RSA 43:1: "On petition to the selectmen for the laying out or altering of highways, or for laying out lands for any public use, and generally for the purpose of deciding any question affecting the conflicting rights or claims of different persons, their proceedings shall be governed by the following rules." After the select board determined that the road had not been established as a public highway by prescription, the property owners petitioned the trial court for relief and, after the select board's decision was upheld, appealed to the Supreme Court.

The opinion focused on whether the select board had authority to decide the legal status of the disputed portion of the road, under RSA Chapter 43 or any other statute. The Court read the language of RSA 43:1 narrowly, finding that it applied only when the select board is petitioned to hold a hearing on a question affecting the rights or claims of individuals for the layout or alteration of a highway or some other matter for which another statute authorizes select board to hold a hearing. This matter involved the determination of whether a road had become a public highway by prescription, and thus RSA Chapter 43 did not apply.

The Court then considered whether selectmen have authority to make a quasi-judicial decision about the status of a road at all in a manner that would bind the town, the property owners, and the public, and found that they do not. It reviewed RSA 41:8, RSA 41:11, and RSA 47:17, VII, VIII (regarding a select board's authority to manage the prudential affairs of the town and regulate highway usage), as well as various statutes regarding the layout of public highways. The Court held that none of these statutes conferred authority on a select board to make a binding determination of whether a road is a public highway or not. As a result, it concluded that such matters must be decided by the superior court, and that the proper avenue for resolution of the question would be a petition for declaratory judgment filed with the court under RSA 491:22, I. Although not discussed in the opinion, select board members, in the course of exercising their statutory authority regarding maintenance, use, and regulation of roads, must make assumptions about the status of roads as a basis for the rest of their decisions. This case does not affect those sorts of administrative decisions.

Below is a closer look at each of these four methods of highway creation.

DEDICATION AND ACCEPTANCE

In order to prove a highway was created via the legal theory of dedication and acceptance, there must be evidence of both an act of dedication and an act of acceptance. Both steps are necessary; neither one alone is enough. Why? Because by requiring the municipality to accept the highway, the law "generally protects the public from having an undesirable dedication thrust upon it, as where the concomitant burdens of maintaining a street, park, or other public service outweigh the public benefits." *Hersh v. Plonski*, 156 N.H. 511 (2007).

What's a 'Dedication'?

Highway dedication isn't described in the statutes (although it is mentioned in RSA 231:51 and implied in the subject matter of RSA 674:40 and 674:40-a). It takes looking at case law to find out what dedication is. It helps to know that from 1842 through 1945, there was no legislative authority in New Hampshire to create a highway by dedication and acceptance. The legal theory of dedication and acceptance was not operative during that century-long gap. *See, Harrington v. Manchester*, 76 N.H. 347 (1912) for details. Thus, the relevant cases are either modern ones or very old ones.

A dedication is some voluntary action by the landowner showing a clear and unequivocal intent that the road be accepted by the municipality (or the state, for state highways) and used now or in the future by the public for the purpose of travel. RSA 231:51, along with a long line of fairly consistent cases, provides that dedication of a public street can be accomplished by "being drawn or shown upon a plan of lands platted by the owner, and the sale of lots in accordance with such plan…." *See, Polizzo v. Hampton*, 126 N.H. 398, 401 (1985) (an offer of dedication of a street may be made in several ways, among them by the filing of a subdivision plan with a planning board); *Duchesnaye v. Silva*, 118 N.H. 728, 731 (1978) (filing of a plan constituted an offer of dedication, as did the sale of lots by reference to that recorded plan 40 years later); *Young v. Prendiville*, 112 N.H. 190 (1972) (dedication was properly accomplished by the filing of a plan and the subsequent sale of the lots); *Harrington v. Manchester*, 76 N.H. 347 (1912) (company manifested an unequivocal intention to dedicate streets to the public use by platting lots and selling them in accordance with the plan). For more than 150 years, dedication has included actions showing intent to permanently donate a particular strip of land to the public to be used as a highway, such as by fencing it off in a manner suitable for a highway. *State v. Atherton*, 16 N.H. 203, 209 (1844). But the mere fact that an owner has given temporary permission for some segment of the public to pass—permission that might easily be revoked or withdrawn—does not rise to the level of a highway dedication. *Wasson v. Nashua*, 85 N.H. 192 (1931).

It is also interesting to note that the cases cited above imply that there may be more than one point in time when an event occurs that could constitute "dedication," and possibly more than one event or behavior that could constitute "acceptance." The *Duchesnaye* case actually states on page 731 that there are multiple acts of dedication:

> Both plaintiff and defendant Silva agree that the 1904 filing of the Cascade Plan constituted an offer of dedication of the proposed streets to the city of Berlin….Both parties also agree that the sales of lots by reference to the recorded plan in 1944 and 1950 constituted offers of dedication.

However, although modern highway acceptance is designed to be a planned, controlled process, dedication (and as explained below, acceptance) may be implied by conduct of the owner. In *Hersh v. Plonski*, 156 N.H. 511 (2007), the New Hampshire Supreme Court reaffirmed the viability of the old common law rule that "dedication and acceptance" is not limited to formal action by municipal legislative bodies pursuant to statutory procedures:

> Both an offer to dedicate and an acceptance may be express or implied.… [A]cceptance may be by express acts that include adopting an offer of dedication by ordinance or formal resolution, or implied by acts such as opening up or improving a street, repairing it, removing snow from it, or assigning police patrols to it…. Id. (citations omitted).

In discussing implied dedication and acceptance of highways, the Court cited *State v. Atherton*, 16 N.H. 203 (1844), the leading New Hampshire case on the subject. The opinion thoroughly reviews the evolution of this ancient doctrine from English common law through New Hampshire cases of the early 19th Century. Dedication could be proven by some act indicating an intention to dedicate, such as fencing land in a manner suitable for a highway and permitting the public to use it.

The leading case concerning implied dedication and acceptance dates from 1844 because, in 1842, the legislature abolished dedication and acceptance as a method for creating public highways. Revised Statutes 53:7. The elimination of dedication and acceptance by the legislature was said to substitute "a definite and simple rule for one that was uncertain and perplexing." *State v. Morse*, 50 N.H. 9, 16 (1870). For the next 100 years, highways could be created only by the layout process or 20 years' public use.

Dedication and acceptance was re-introduced by statute in 1945, when the legislature enacted it as an alternative to the laborious layout process and the prolonged and haphazard prescription method. It has functioned as the principal means of highway creation, as described above, ever since. However, municipal officials must also remain aware that, under *Hersh v. Plonski*, the term "dedication and acceptance" still retains its common law meaning.

Today, the most common act of dedication is the filing and recording of an approved subdivision plat by the owner. *Polizzo v. Town of Hampton*, 126 N.H. 398 (1985). Nevertheless, the owner's intent is the key. The recording of a plat with a roadway shown on it would most likely not constitute a dedication if notations on the plan, or other circumstances, show that the developer intends the road to remain private.

What Is 'Acceptance'?

A formal vote of acceptance by the legislative body—either the town meeting in towns (*Polizzo v. Hampton*, 126 N.H. 398 (1985)), town council in towns with a charter providing therefor (RSA 49-D:3), or by the city council in cities (*Perrotto v. Claremont*, 101 N.H. 267 (1958))—is always sufficient as an acceptance, triggering legal highway status even before any act of maintenance or repair occurs, as long as the municipality also complies with RSA 674:40. This statute was rewritten and clarified in 1998. Under RSA 674:40, a proposal to accept a dedicated street must first go to the planning board for its approval or disapproval. If the planning board approves, then a simple majority vote of the legislative body is required for acceptance. If the planning board disapproves, then a two-thirds legislative body vote is required. The statute clarifies that the simple majority or two-thirds majority vote required is calculated on those "present and voting" on the question.

IMPLIED ACCEPTANCE UNDER HERSH V. PLONSKI.

"[P]roof of acceptance by the public must be unequivocal, clear and satisfactory, and inconsistent with any other construction." *Hersh v. Plonski*, 156 N.H. 511 (2007). In the opinion, the Court discussed several examples of acts that could constitute acceptance of a road as a public highway, with the accompanying responsibility to maintain it thereafter in a suitable condition for public travel:

- Repairs directed by individual select board members, implying that a majority concurred in accepting the highway.
- A vote by the town to raise money to repair the road.
- Town repair of a private bridge regularly used by the public, citing *State v. Campton*, 2 N.H. 513 (1822).
- Setting up of guideposts or other acts of official recognition.
- Select board's removal of a house encroaching on a road, citing *Hopkins v. Crombie*, 4 N.H. 520 (1829).

A key point to take away from *Hersh v. Plonski* is that maintenance of a private road may imply acceptance of the road as a highway. About every town and city in New Hampshire has houses situated on private roads that are open to public use and thereby dedicated as potential highways. Some private roads predate municipal planning, such as the lakeside camp developments dating from the first half of the 20th Century, many of which now have winterized year-round dwellings. Other private roads are modern roads installed in subdivisions that are still under development. In both cases, residents are apt to request municipal snowplowing and summer maintenance to keep the roads passable. Municipal officials may feel an obligation to provide services out of concern for public safety and a sense of fairness toward fellow taxpayers. However, the New Hampshire Supreme Court has ruled that municipalities cannot spend public funds to maintain private roads or driveways, unless (a) such maintenance is subordinate and incidental to public highway maintenance and (b) the landowner pays the additional costs incurred by the town in providing the service. *Clapp v. Jaffrey*, 97 N.H. 456 (1952). The doctrine of implied acceptance of public highways, revived by *Hersh v. Plonski*, intensifies the legal risks associated with public maintenance of private roads. Inasmuch as private road maintenance is not authorized in the first place, when a town, nevertheless, performs such work, it can readily be viewed as evidence of implied acceptance of that private road as a public highway.

Recommendations: When dealing with private roads, municipal officials must keep in mind the elements of common law implied acceptance of highways. It is not enough that the usual practice is to accept roads by town meeting vote. Municipal officials should refrain from maintaining private roads and at all times make clear that they (a) do not regard a private road as a public highway and (b) do not intend by their actions to accept it as public.

If officials insist on some limited maintenance of private roads, the following may help to prevent implied acceptance:

- For snowplowing, a layout for winter maintenance only under RSA 231:24, but this might create liability for the general condition of the road under RSA 231:90-:92-a.
- For summer maintenance only, a layout of a "highway to summer cottages" under RSA 231:81, but, again, it is unclear of the extent of liability for the general condition of the road.
- Formal agreements with property owners that clarify the private status of the road and recapture costs to satisfy the requirements set out in *Clapp v. Jaffrey*, 97 N.H. 456 (1952) (prohibiting municipalities from spending money to maintain private roads).
- "Emergency lane" designation under RSA 231:59-a to keep the road "passable by firefighting equipment and rescue or emergency vehicles," but this is justified only if the need is supported "by an identifiable public welfare or safety interest that surpasses or differs from any private benefits to landowners abutting such lane."

These options are obviously not without their disadvantages.

Delegation to Select Board under RSA 674:40-a. The legislative body (town meeting) may delegate acceptance authority to the select board, but only if certain conditions are met. Town meeting, either at the annual meeting or a special meeting, must approve a warrant article citing the statute and delegating the authority to accept dedicated streets as public highways. The warrant article may be inserted in the warrant by the select board or by petition. A simple majority is required for the article to pass. Town meeting may rescind this authority in the same manner. RSA 674:40-a, I.

Once delegation has occurred, the select board may accept dedicated streets, so long as the street in question is shown on a subdivision plat or site plan approved by the planning board, shown on the official map, or is on a street plat made and adopted by the planning board. If the street does not meet

those conditions, the select board may not accept the street; the matter must go to town meeting as if no delegation had been made. RSA 674:40-a, II. The select board must hold a public hearing prior to exercising this delegated authority to accept a road. RSA 674:40-a, III.

A highway accepted by the select board under this statute is automatically considered a Class V highway, subject to a municipality's duty of regular maintenance under RSA Chapter 231, unless it is otherwise designated "pursuant to statute." RSA 674:41-a, IV.

Planning Board Has No Acceptance Authority. Although planning board approval may often be a crucial prerequisite to the acceptance or layout of a highway under RSA 674:40 and 674:40-a, action by the planning board alone cannot constitute acceptance of a highway. For example, the fact that an approved plat showing the road has been recorded may constitute a dedication, but it does not constitute acceptance by the town. *See* RSA 674:38; *Neville v. Highfields Farm, Inc.*, 144 N.H. 419 (1999); *Beck v. Auburn*, 121 N.H. 996 (1981).

Planning Board/Governing Body Consistency. Attorney Peter Loughlin, in his treatise, 16 *N.H. Practice: Municipal Taxation and Road Law*, § 45.02, and Attorney H. Bernard Waugh, in the original edition of *A Hard Road to Travel*, suggest that if a developer has been led or allowed by local officials to believe that as long as local subdivision and zoning regulations are complied with the road will become a public street, then the select board or council might be forced to accept it, under an estoppel theory. Therefore:

- Planning boards should state clearly in their regulations, and also emphasize to every developer orally, that board approval of a street does not constitute acceptance as a highway or guarantee that the town will ever take over responsibility for the street. *See Jackson v. Ray*, 126 N.H. 759 (1985), where the Court denied estoppel-type relief because no one had ever told the plaintiff his roads would become town highways. *See* also, *Hermel and Denyse Fortier Revocable Trust v. Loudon*, 2013 N.H. LEXIS 113 (2013) (unpublished 3JX Opinion of the New Hampshire Supreme Court).

- Local officials should develop a consistent municipal road policy so that streets constructed to the standards approved by the planning board eventually are accepted, and those that are not constructed to those standards are not accepted.

RSA 231:133 requires that any new highway, either accepted or laid out, must be assigned a name as part of the process. (See discussion later in this chapter.)

Lag Time between Dedication and Acceptance: 'Paper Street'

"Paper street" is a term applied to a street shown on a recorded plan—a dedicated street—but one that has never been accepted by the town or city. Typically these streets exist on paper only. In 1912, in *Harrington v. Manchester*, 76 N.H. 347, the Court held that a dedication was considered permanent, and that a city could accept the highway at any later time, which was 38 years later in that case. But in 1913, one year after the *Harrington* decision, the legislature enacted the precursor to what is now RSA 231:51, which automatically terminated a dedication if no acceptance occurred within 20 years. Then in 1989, the legislature altered that statute so that now the governing body "may" vote to release a dedicated way after the 20-year period. So, for new dedications, there is no longer an automatic termination and, again, the dedication might last indefinitely if the municipality takes no action.

In summary, if a paper street was dedicated by the owner between 1893 and 1969, the dedication ended automatically unless acceptance by the municipality occurred within 20 years. Otherwise, terminating a dedication took, and now again takes, an act of the governing body.

Release Procedure. Today if a governing body wants to release a highway dedication (paper street) after the end of the 20-year period, all it takes is a simple vote of the governing body. On the other hand, if the release occurs before the end of the 20 years, RSA 231:52 requires the same complex procedure as for highway layouts, including notice to abutting property owners and a public hearing, and provides for appeal of the governing body decision to superior court. This is a complicated process, so it is advisable to work closely with the municipality's attorney.

What If a 'Paper Street' Is Never Accepted? If subdivision lots fronting a paper street that never gets accepted are sold, those lots often have no other access. Since it is well settled that abutters are presumed to own title to the center of a street or way (see Chapter 1), the owners of front lots sometimes claim possession of the paper street and try to block access to the back lot owners. That is what happened in *Duchesnaye v. Silva*, 118 N.H. 728 (1978). But the Court held that, although the front lot owners did own the "soil" to the center of the platted streets abutting their lots, every back lot owner nevertheless had an implied easement of access over those paper streets. These implied easements are not just a personal right to pass over them, but also the right to develop them from end to end for public access to the owner's property.

These situations are private property rights disputes, which municipal officials have no jurisdiction to settle. Therefore, the municipality should try its best to stay out of these disputes. If the municipality has been petitioned for a highway layout, which can occur even if a prior dedication has been released, then the municipality does have jurisdiction.

Buildings on a 'Paper Street.' Although planning board approval doesn't constitute highway acceptance, planning board approval is usually sufficient to give the owner the right to build on a lot for which that paper street provides the sole access (that is, frontage). RSA 674:41, I(b). However, buildings on a street approved by the planning board cannot be used or occupied until the street has been completed to the specifications mandated by the planning board, unless the board itself has voted to allow such occupancy. RSA 676:12, V. For more about the links between roads and land development, see Chapter 7.

Prescription

The most important streets in many municipalities may have no written records showing how they became public highways. Nobody doubts that they are highways, but nobody knows of any actual layout, or acceptance, or even in which decade or century to start searching for records. Although the status of each highway is dependent on the facts and circumstances in each case, many of these roads probably qualify as public highways under the legal theory of prescription—actual use for travel for at least 20 years prior to 1968. RSA 229:1. As we will see, the question of whether a highway was created by prescription is not merely one of historical interest; it has been the subject of relatively recent litigation.

The end of prescription theory for public highways has its roots in the Great Depression of the 1930s. During the height of the crisis, many municipalities discontinued some of their less important public highways to avoid having to pay the high cost of maintenance and repair. This reduced the pressure on already-strained municipal budgets and property tax burdens. However, in a great number of cases, the public continued to use the discontinued highways for travel just as they had before. Regular use by the public for at least 20 years (as described more fully below) can be enough to re-establish a highway that had been discontinued. As a result, highways that had been discontinued began to pop back into existence in the decades following World War II. The legislature amended RSA 229:1 to prevent the inadvertent re-establishment of public highways so that a highway can no longer be created without a more contemplative process involving the legislative and governing bodies.

Assemble a Record for Each Road

The legislature ended the operation of the prescription theory in 1968 by amending the definition of a prescriptive road in RSA 229:1. To prove the existence of a highway by prescription today, there must be evidence of at least 20 years of public use beginning at the latest on January 1, 1948. As memories fade, it gets harder to gather this evidence. If it is not already done, start assembling files on each public highway in the municipality. Place in each file any information relating to that road. Especially vital to collect is evidence—good enough for a court challenge—for each road's legal status as a highway, whether it is a reference to a written record of layout, dedication and acceptance, deed, or evidence of prescription. If personal recollections are all the municipality has to rely on to prove prescription, it is best to get them in writing in notarized affidavit form. These road pedigrees should be made part of the permanent records of the municipality. See the end of this chapter for sources of road file information.

The Elements of Prescription

The prescription theory was like a safety net—a fallback theory of highway creation—to resort to when everyone knew a road was a highway but other theories or records were incomplete. Today, though, this safety net is falling further and further into the chasm of the past, and unless the statutes change again, written records will become more vital than ever in years to come, which is why it is important to assemble a dossier on the legal status of all local roads.

If the municipality is relying on the prescription theory, be aware that evidence of 20 years of public use before 1968, by itself, isn't enough. Despite the simple wording of RSA 229:1, the courts have required proof of some additional elements. The person claiming the existence of a highway has the burden of proof by a "balance of probabilities" on each of the elements. *Arnold v. Williams*, 121 N.H. 333 (1981). Those elements include:

Uninterrupted Use. Public use during the 20-year period must have been "continuous." That doesn't mean travelers must have been present the whole time. Indeed, travel may be "intermittent and of slight volume," *Blake v. Hickey*, 93 N.H. 318 (1945), especially when such infrequency is "characteristic of the type of road claimed." *See also, Leo Foundation v. State*, 117 N.H. 209 (1977) (involving a road to a swimming hole at a lake). But there must not have been any breaks long enough to suggest that people stayed away because the underlying "soil" owner was keeping them away. "Uninterrupted," in other words, means uninterrupted by the owner. If, after at least 20 years of use, the road has simply fallen out of use by the public because of changing circumstances, but not because an owner is asserting ownership, it has already become a public highway and cannot be "abandoned"; it remains a public highway until it is formally discontinued by legislative body vote. *Gill v. Gerrato*, 156 N.H. 595 (2007). Of course, if the owner's attempts to interrupt the use don't occur until after the 20-year period, then it's too late to prevent the creation of a highway because an owner cannot acquire any adverse rights against the public once highway status has legally been established. RSA 236:30; *Windham v. Jubinville*, 92 N.H. 102 (1942). Also, see Chapter 4.

Definite Line of Travel. A public highway is not created by prescription across a parcel of land unless the route of public travel has a well-established consistency. Slight deviations from the path, however, do not defeat the running of the prescriptive period. *Weare v. Paquette*, 121 N.H. 653 (1981).

'Adversity.' To become a highway by prescription, public use must have been "adverse." This term means that the public who used the roadway claimed or believed that they had a right to do so and were not relying on the owner's permission. No actual written or oral declaration of adversity is required. *White Mt. Freezer Co. v. Levesque*, 99 N.H. 15 (1954). But the public's use must be open and obvious enough that the owner ought to have known a claim of right existed. *Arnold v. Williams*, 121 N.H. 333 (1981); *Wasson v. Nashua*, 85 N.H. 192 (1931). *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). *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. 1 (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).

If public use of a roadway originally began with the permission of the owner, the burden shifts to the person claiming the prescription doctrine to show affirmative evidence that this permission was actually withdrawn or repudiated before the beginning of the claimed 20-year period. *Warren v. Shortt*, 139 N.H. 240 (1994).

What Counts As Evidence Of Public Use?

The following types of evidence, among others, have been held to support proof of prescription: authenticated photographs and the testimony of lifelong residents of a community (*Weare v. Paquette*, 121 N.H. 653 (1981), and *Mahoney v. Canterbury*, 150 N.H. 148 (2003)); references to the road as a public highway in documents prepared during the 20-year prescriptive period (*Leo Foundation v. State*, 117 N.H. 209 (1977); *Gill v. Gerrato*, 156 N.H. 595 (2007)); historic maps showing the road before or during the claimed period (*Gill v. Gerrato*, above; *Williams v. Babcock*, 116 N.H. 819 (1976); *Mahoney v. Canterbury*, above); the existence of cellar holes for houses that seem to have had no other access (*Williams v. Babcock* above); archaeological evidence of stone walls lining the highway and the foundation of a mill which was accessed via the highway (*Gill v. Gerrato*, above); use of the highway to access a commercial entity (*Gill v. Gerrato*, above); and evidence of town maintenance during the period (*Catalano v. Windham*, 133 N.H. 504 (1990)). Again, see the end of this chapter for a list of sources for highway information.

Prescription against the Municipality: A Mandate?

In addition to the use of the prescription theory as one supportive of the rights of towns, it has also been used as a means of holding a town liable for road defects, *Ruland v. So. Newmarket*, 59 N.H. 291 (1897), and of forcing a town to pay for road maintenance it didn't want to assume, *Catalano v. Town of Windham*, 133 N.H. 504 (1990)). Maybe that's one reason the legislature eliminated this method of public highway creation in 1968. Given the 1984 amendment to the state constitution prohibiting unfunded mandates on municipalities (N.H. Const., Pt. I, Art. 28-a), it is questionable whether the legislature could re-establish the prescription method of public highway creation without providing a new source of funding to cover maintenance and liabilities for the new roads that would be created without any act of the municipality.

THE STATUTORY 'LAYOUT' PROCESS

Decreasing Use of 'Layout' Method

Historically, statutory layout was the method used to create most highways in New Hampshire. Acceptance was not a legally valid method of creation between 1842 and 1945. The power to lay out

highways, on the other hand, has belonged to New Hampshire towns and cities since before the laws were first compiled. *Grossman v. Dunbarton*, 118 N.H. 519 (1978). For details on the history of layout laws, see Loughlin, 16 *N.H. Practice: Municipal Taxation and Road Law*, § 53.03. Today, however, if municipal officials and landowners are all in agreement about the need to create a public highway, the dedication and acceptance process is the easiest procedure to follow. Before 1993, select boards would often use layout—a process completely under a select board's authority—as a way to avoid having to take road issues to town meeting, even when all parties were in agreement. But since then, with the enactment of RSA 674:40-a allowing the town meeting to delegate acceptance authority to the select board, even this reason for using layout has receded. Today the layout laws are mainly invoked if there is a dispute and somebody wants to reserve the right to appeal the town's decision to court, or there is a desire to use the betterment assessment option. *See* Chapter 5. Today, what matters most about layout from a practical standpoint is the fact that the town's decision can be appealed to superior court.

Layout as a Method of 'Alteration'

The layout process can be used not only to create a new road, but also to make a public highway out of a private road. *Locke Development Corp. v. Barnstead*, 115 N.H. 642 (1975). Furthermore, RSA 231:8 permits layout to be used to alter an existing highway. Thus, the layout process can be used as a method of reclassifying a highway from Class VI to Class V (see also RSA 231:22-a, V), or to widen or relocate an existing public road. *Nashua v. Gaukstern*, 117 N.H. 30 (1977). New Hampshire law does not allow special assessments against landowners to pay the costs of upgrading existing Class IV or V highways. However, if a majority of the affected landowners agree, a municipality may lay out a new Class V highway over land currently classified as a Class VI highway or a private road and assess the landowners for the cost of bringing the road up to town standards, with the costs subject to collection in the same manner as property taxes. This is known as a "betterment assessment." RSA 231:28 et seq. Such a layout, however, also requires a determination of "occasion" as explained below. *Green Crow Corp. v. New Ipswich*, 157 N.H. 344 (2008).

Petition Required

RSA 231:8 permits the select board to lay out a highway "upon petition." *New London v. Davis*, 73 N.H. 72 (1904). The petition is filed with the select board. In cities and towns with councils, the selectmen's role and powers devolve upon the council. RSA 47:1, RSA 49-C:15 and RSA 49-D:3, I(a). There is no minimum number of signatories to the petition—one signature alone is sufficient. And apparently the petitioner need not have any personal interest in the case, although in order to appeal a person must be "aggrieved." RSA 231:34; *See also, Bennett v. Tuftonborough*, 72 N.H. 63 (1903).

The petition requirement means, technically, that the select board cannot lay out a highway on the board's own volition. But it is likely that at least one citizen could be persuaded to file a petition, and nothing would prevent one of the select board members, in his or her private capacity, from being the petitioner.

RSA 231:8 doesn't provide any detail about what information a layout petition must contain, although many 19th-century cases discussed that issue. Loughlin, 16 *N.H. Practice: Municipal Taxation and Road Law* § 53.06. RSA 231:12 does not bind the select board to the precise description specified by the petition; therefore, denial of a layout petition based on inadequate information in the petition most likely would not be upheld by a court.

Denial without Notice or Hearing?

RSA 231:9 seems to imply that a valid layout petition can simply be denied without any notice or hearing at all if "the selectmen are clearly of the opinion that such petition ought not to be granted."

But unless the petition is clearly frivolous, or filed by someone without the slightest real interest, governing bodies should not do this. First, since the decision can be appealed to the superior court (RSA 231:8), the lack of a public hearing would provide little record upon which the court could rely to support the select board's decision.

Also, the New Hampshire Supreme Court has held that when local decisions will affect property values, the owners are constitutionally entitled to some kind of notice and hearing. *Calawa v. Litchfield*, 112 N.H. 263 (1972). While the right of appeal may satisfy this constitutional requirement, the court may find failure to hold a public hearing unfair.

Required Governing Body Procedures

The layout procedure of RSA Chapter 231 is technical and complex, and requirements for conducting select board's hearings in RSA Chapter 43 cannot be ignored. Moreover, the Eminent Domain Procedure Act (RSA Chapter 498-A) also applies to highway layouts since it was intended by the legislature to be a complete and exclusive procedure to govern all condemnations or takings of property for public purposes. RSA 498-A:1; *See also, Nashua v. Gaukstern*, 117 N.H. 30 (1977). If other statutes besides RSA Chapter 498-A impose prerequisites to the exercise of taking authority, those statutes must be followed as well. *See, Gaukstern* (above) and *Keene v. Armento*, 139 N.H. 228 (1994). Given these complexities, if the municipality receives a petition for highway layout, the advice of the municipal attorney should be sought early in the process. The following list of steps is intended as a checklist.

Notice. Notice must be given to "the first petitioner" and every other landowner over whose land the proposed route will pass (RSA 231:9), even when the petition is to "alter" an existing highway— for example, Class VI to Class V status. Notice must be given at least 30 days prior to the date of the hearing and must contain enough information to let the person know when and where the hearing will be and what it is about. A copy of the petition could be included with the notice.

The notice must go not only to owners, but also to "tenants for life or years, remaindermen, reversioners, or holders of undischarged mortgages...dated not earlier than 20 years prior to...the petition." RSA 231:10. Gathering this information requires a title search at the registry of deeds.

If the person being notified lives in New Hampshire, personal delivery to the residence, or by certified mail, is sufficient. If the person is out of state, RSA 231:10 requires notice to be served on a local caretaker or sent by registered mail to the owner's last known address. However, RSA 43:2 also requires notice by publication, so arguably both methods should be used in the case of out-of-state owners. If the owner is unknown, notice posted in two public places in town is sufficient. RSA 43:3 requires at least one posted notice.

Failure to notify a party could cause a court to declare the layout invalid, but invalidity is not automatic. In fact, the only parties who can raise the issue are those who were due notice but didn't get it or waive it. *State v. Richmond*, 26 N.H. 232 (1853); *Parish v. Gilmanton*, 11 N.H. 293 (1840).

Referral to Planning Board and Legislative Body. If the municipality has a planning board that has been delegated subdivision review authority, and if the petitioned highway hasn't already been approved as part of a recorded plat, RSA 674:40 prohibits laying out the highway without submitting the question first to the planning board and then to the legislative body. In towns, the legislative body is town meeting (or, in a few cases, the town council). If the planning board approves the layout, then a majority vote of the legislative body is required; if the planning board disapproves, a two-thirds vote is required. Again, this step can be omitted only if the planning board already has approved the road as part of a recorded plat.

The law doesn't mandate any particular timing relationship between the step required by RSA 674:40 and the governing body's own hearing (see below), but both requirements must be satisfied before a layout is complete. In cities and town council towns, where the legislative body and governing body are the same, these steps can be combined.

Hearing. As in land use hearings, those whose property may be affected by a highway layout have a right to present evidence. RSA 231:11. The hearing must be before the governing body itself, not a surrogate committee. *Nashua v. Gaukstern*, 117 N.H. 30 (1977). The governing body must also make a personal examination of the route of the proposed highway.

'Return.' The "return" (RSA 231:16) is the written record of the governing body's decision. It must contain a description of the highway, including its width, and must be recorded with the town or city clerk. The filing of the return isn't just a formality; it is the essential step that legally converts the strip of land into a "public highway." *State v. Dover*, 10 N.H. 394 (1839); *Rogers v. Concord*, 104 N.H. 47 (1962). Since RSA 231:17 prohibits actual use or construction on the land before damages are paid or tendered, and since the filing of the return legally creates the highway (giving the municipality responsibility for maintenance), the return should be delayed at least until damages are paid or tendered, perhaps even until after construction.

Payment of Damages: Procedure. RSA 231:17 through RSA 231:20 govern the issue of how and to whom damages must be tendered. These statutes should be followed carefully. Remember that RSA Chapter 498-A has certain detailed procedures that also must be followed whenever the underlying owner has not agreed on (or waived) damages:

- Initial disclosure to the property owner. RSA 498-A:4, I.
- The value of the land being taken must be determined by an impartial appraiser, and the owners have the right to an appraisal at the expense of the municipality. RSA 498-A:4, II(a) and (b).
- Reasonable efforts to negotiate must be made. RSA 498-A:4, II(c).
- A written notice of offer must be made containing the elements listed in RSA 498-A:4,III. A list of all notices of offer must be made public. RSA 498-A:4, III(d).
- Service of the notice must be by certified mail with special provisions applying to minors or unknowns. RSA 498-A:4, IV(a).
- If the offer is accepted, transfer and damage payment must be complete in 30 days unless the owner agrees to an extension. RSA 498-A:4, IV(b). If the offer is not accepted within 30 days, the town proceeds within 90 days to a "declaration of taking" under RSA 498-A:5 through RSA 498-A:12, a procedure under the jurisdiction of the Board of Tax and Land Appeals (BTLA).

Governing Body's Expenses

The title search, service of notices, and compliance with other procedural requirements may involve significant expense. RSA 231:10-a provides that when a layout petition is for the reopening of an existing highway closed subject to gates and bars—that is, for reclassification of a Class VI highway to Class V using the layout process—the petitioners must bear these costs. But for layouts of new highways, it is not clear whether the municipality can charge these expenses to the benefited landowners. RSA 231:23 allows a layout to be conditional upon the benefited owners paying damages and construction expenses. It could be argued that this allows the municipality to charge the expenses of the layout procedure too.

Appeals

Under RSA Chapter 498-A, a dissatisfied landowner must appeal the amount of damages to the BTLA. But the underlying issue—whether a highway should or should not be laid out at all—must be appealed to the superior court. An appeal must be filed within 60 days. RSA 231:34. This statute allows damages issues to go to the superior court too, and thus seems to conflict with RSA Chapter 498-A. Perhaps the superior court would transfer appraisal and damages issues to the BTLA since that is the BTLA's area of expertise under RSA Chapter 498-A. The BTLA's decision itself can be appealed to superior court. RSA 498-A:27.

The person filing a layout appeal must be "aggrieved," which means that he or she must have an interest different from that of the public generally. *Bennett v. Tuftonboro*, 72 N.H. 63 (1903). The court hearing on whether the layout should occur is a trial de novo—that is, the court can hear new evidence and is not restricted by the decision already made by the governing body. *V.S.H. Realty, Inc. v. Manchester*, 125 N.H. 547 (1983).

Factors for Granting or Denying Layout Petition – "Occasion"

The select board's decision-making on a layout petition is a quasi-judicial task of determining whether there is an "occasion" for the layout. RSA 231:8. The word "occasion" has been construed to require consideration of "the public exigency and convenience" and the rights of the affected landowners. *Waisman v. Manchester*, 96 N.H. 50, 53 (1949) (quoting *Dudley v. Cilley*, 5 N.H. 558, 560 (1832)); *Locke Development Corporation v. Barnstead*, 115 N.H. 642, 643 (1975). Thus, there are three factors that require balancing:

- The public convenience and public necessity for the highway;
- The financial burden to be imposed upon the municipality's taxpayers for construction and maintenance; and
- The rights of owners, if any, whose land would have to be taken.

The New Hampshire Supreme Court incorporates these factors into the two-step process it has used for the past several decades:

> The first step is to balance the public interest in the layout against the rights of the affected landowner. If the rights of the affected landowner outweigh the public interest in the layout, the layout is not justified and there is no occasion for it. If, however, the public interest justifies the taking of the land without the landowner's consent, the second step is to balance the public interest in the layout against the burden it imposes upon the town. If the balancing required by the second step favors the public interest, occasion for the layout exists.

Rodgers Dev. Co. v. Tilton, 147 N.H. 57 (2001); cited in *Green Crow Corp. v. New Ipswich*, 157 N.H. 344 (2008) and *Crowley v. Loudon*, 162 N.H. 768 (2011).

Factors which may be considered in assessing the "public interest" include: (1) integration within an existing road system; (2) ease of existing traffic flow; (3) improvement to convenience of travel; (4) facilitation of transportation for school children; (5) improved accessibility to business district and employment centers; (6) improved accessibility for fire, emergency and police services; (7) whether it would benefit a significant portion or just a small fraction of the town tax base or year-round residents; and (8) anticipated frequency of road use. *Green Crow Corp. v. New Ipswich*, 157 N.H. 344 (2008); *Crowley v. Loudon*, 162 N.H. 768 (2011).

Turning to the "town burden," issues which may be considered include anticipated construction and ongoing maintenance costs pertaining to the road itself, as well as the impact on the town's

infrastructure due to municipal growth, such as increased costs for school, fire, police and emergency systems. However, this applies only to the burden as it exists at that time. In *Green Crow Dev. Corp. v. New Ipswich*, above, the Court clarified that the analysis may not include consideration of the impact associated with the potential future development on the road under consideration for layout. It concluded, after reviewing planning and zoning statutes, that the legislature did not intend for a select board to use its authority to determine occasion for the layout or upgrade of a highway under RSA 231:8 as a vehicle for effectively conducting land use planning or zoning.

In the *Locke Development* case (above), the petitioners wanted the roads within a large second-home subdivision laid out as public highways. All owners had agreed to forego damages. There were 1,216 lots, 291 houses built or being built, 25 of which had year-round residents, and 29 children attending town schools. The development constituted about 41 percent of the town tax revenue. The New Hampshire Supreme Court found "public convenience and necessity" for the layouts, overturning the town's refusal.

Contrast that case with *Jackson v. Ray*, 126 N.H. 759 (1985), where the Court upheld a decision of the select board not to lay out a highway. The Court noted that the Town of Warren had only 600 to 650 residents and maintained some 17.6 miles of town highways. The town had tried to follow the state's guidelines for town road reconstruction, and the road in question didn't meet them. The petitioned road was .6 miles long, with four to seven people living on it, depending on the season. Two children attended school. Four houses had been built. Because the road did not satisfy the town's construction guidelines, it required an additional expenditure of $7,000 to $9,000, too great a burden on this small town.

The case of *Rockhouse Mountain Property Owners Association v. Conway*, 133 N.H. 130 (1990), involved a second-home development, like the Locke case, but it constituted only 0.5 percent of the local tax base, there were only four or five houses, none year-round, and the roads, all of which were dead-ends unrelated to the town's existing road network, would have taken between $137,500 and $1,162,000 to build. The Court found no public need for the roads and a tremendous potential burden on the town. The owners had offered to help pay for the construction through betterment assessments (see details in Chapter 5), but in many cases the amount of assessments would have exceeded the value of the lots themselves. The Court said the town was not required to take a betterment lien that might end up worthless.

More recently, in the case of *Crowley v. Loudon*, 162 N.H. 768 (2011), a request to lay out a "dead end" road was denied, the Court reasoned that the public interest was minimal where the road had few residents and was already designated as an emergency lane.

In an earlier case involving the Rockhouse Mountain development (127 N.H. 593 (1985)), the owners sought money damages from the town for its refusal to lay out roads. The Court said that there can't be an unconstitutional taking for merely refusing to add a property asset (a highway) that doesn't already exist, and that the decision of the select board not to lay out the roads is the type of discretionary decision for which local officials—and by implication the town itself—have good-faith discretionary immunity from damages actions. See Chapter 6.

Layout Subject To Conditions

Reasonable conditions can be attached to any layout. *New London v. Davis*, 73 N.H. 72 (1904) (condition that layout would be at no expense to the town); *Tracy v. Surry*, 101 N.H. 438 (1958) (layout would be subject to gates and bars to be erected and maintained by the petitioner who would bear the entire expense of constructing and maintaining highway and costs of land damages). RSA 231:23 explicitly allows the select board to make a layout conditional upon a person specially benefited paying the costs of construction and maintenance. This can be particularly useful when the highway already exists as a Class VI highway and the residents are seeking to have it upgraded to Class V status. See discussion of betterment assessments in Chapter 5.

Public v. Private Benefit

There are many cases—most of them pre-20th-century—discussing whether a highway can be laid out solely for private benefit. *Third Turnpike Road v. Champney*, 2 N.H. 199 (1820); *Knowles Petition*, 22 N.H. 361 (1851); *Gurnsey v. Edwards*, 26 N.H. 224 (1853); *Hopkinton v. Winship*, 35 N.H. 207 (1857). Earlier cases hold that private benefit alone does not justify a layout. Later cases hold that incidental private benefit does not invalidate the layout. However, where the private benefit far outweighs the public burden, layout may be denied. *Crowley v. Loudon*, 162 N.H. 768 (2011) (layout denied where there were few residents on a road already declared an emergency lane).

In *Rodgers Development Co. v. Tilton*, 147 N.H. 57 (2001), the Court said a layout decision first must be based on a balancing of the public interest in the layout with the rights of landowners affected by it. Public interest, the Court explained, includes several levels of necessity, from "urgent" to "need" to "convenience." The more urgent the necessity for the layout, the more significant invasion of landowner rights would be justified. A layout for convenience would justify little imposition on landowner rights. Second, the select board must balance the public interest in the layout with the burden it imposes on the town. In this case, which involved the development of a shopping center, the Court held that the burden of maintenance costs on the town would be outweighed by the development potential to the shopping center cite, noting that the development would not present a burden to the school system that a residential development would. As to private benefit, the Court said that the law is well settled that when property is taken for a highway, it is for the public use whether or not it benefits a private party.

The issue of "burden" on the town was at the heart of *Wolfeboro Neck Property Owners Association v. Town of Wolfeboro*, 146 N.H. 449 (2000). The road in question was part of a subdivision approved by the planning board upon the posting of a $360,000 bond to assure proper construction of the road. Upon recommendation of the public works director, the bond was released. Later, the town refused to accept or lay out the road because deficiencies in its construction would be a burden on the town. The select board's refusal to find an occasion to lay out the road was appealed. The New Hampshire Supreme Court eventually held that any burden on the town resulted from its own unreasonable actions in inspecting the road and releasing the construction bond and, therefore, burden on the town should not be weighed in determining whether an occasion existed for layout.

Measuring Damages to Underlying 'Soil' Owners

Measuring damages resulting from the layout of a road involves first determining who the underlying owners are. Most layout petitions today involve existing private roads or paper streets shown on a recorded plat. Usually the owners of abutting lots actually own the underlying soil (see Chapter 1 on the presumption of abutter ownership), although occasionally the original developer still owns the roadway. To account for this possibility, notice of the layout petition should be given to lot owners and developers, if possible. In cases of uncertainty, RSA 231:19 allows depositing the damages with the court, which then determines ownership.

It may be that the parties will agree to waive damages. Most owners want town-maintained road access, especially where a private road already exists and they aren't giving up any more land. Even if an owner doesn't waive damages, where the highway is being laid out over an existing private right of way (platted road or deeded easement), the owners are entitled to nominal damages only. *Wilkins v. Manchester*, 74 N.H. 275 (1907); *Price v. Keene*, 122 N.H. 840 (1982).

When damages are due, RSA 498-A:4, II(a) requires calculation by an impartial appraiser of the fair market value of the owner's entire parcel as of the date of the taking minus the fair market value after the taking. *Stratton v. Jaffrey*, 102 N.H. 514 (1960). The difference, adjusted for added benefit resulting from the new road, is the amount of damages, if any.

Damages may be due when a layout interferes with an existing easement, even where the new highway gives a superior means of access. In *Price v. Keene*, 122 N.H. 840 (1982), the city council laid out a paved road across a portion of Ms. Price's old easement. The Court said, "Even though the city will provide her with an alternative route, and even though (she) may have suffered no more than nominal damage, the fact remains that the easement expressly granted to the plaintiff will no longer exist. This amounts to a taking of a property right..." As a result, the plaintiff was entitled to at least a hearing on damages.

Roads Constructed on Town-Owned Land

One of the four categories of highways defined in RSA 229:1 is a road constructed over land to which the town owns deeded title or an easement. In *Polizzo v. Hampton*, 126 N.H. 398, 401 (1985), the New Hampshire Supreme Court made it clear that this is an entirely separate category of highway.

Acquisition in fee simple of the underlying soil by the municipality probably doesn't provide an easier way to create a public highway than the other three methods of public highway creation. It normally takes a vote of the legislative body to accept a deeded interest in real estate (RSA 31:3) although as of 2001, the legislative body can vote to delegate real estate acquisition to the governing body. RSA 41:14-a. (Another exception is acquisition of conservation land by a conservation commission under RSA 36-A:4) Acceptance of a dedicated highway can be delegated to the governing body under RSA 674:40-a. Getting a deed to the property and then building the road on the deeded land still may not be easier for the municipality than acceptance of a dedicated road. In an eminent domain proceeding under RSA Chapter 498-A, in a situation where the landowner does not want to convey the real estate to the municipality, a court would likely require the municipality to follow the highway layout requirements in RSA Chapter 231 if the only public need cited for the taking is the desire to create a highway (although see the *Gregg* case, below). The municipality will likely be held to the same "occasion" standards for judging public need as required under the layout process.

If a town owns land on which it wants to construct a driveway for use by employees only, not the public, to a municipal water plant, for example, does RSA 229:1 mean that this driveway is a "highway" that must be open to the public and free of encroachments, unless discontinued? In *Cooperative School District v. Gregg*, 111 N.H. 60, 63 (1971), which involved a taking of land for a driveway to a school building, the Court said "the fact that the access road or driveway which the plaintiff intends to construct on the land taken from the defendants will be used by members of the public to reach the school facilities does not make it a public highway...." However, that case was about procedure only, not about public use rights.

Location and Width of Highways

Municipalities occasionally become involved in disputes with property owners over the boundaries of a highway or street. To help avoid this situation, the municipality should obtain a deed for all new highways, whether created by acceptance or layout. Ideally the deed not only will contain a description of the highway and its width but should also refer to a recorded survey plan showing the road's exact boundaries and the location of any culverts and associated drainage easements.

Consider whether the municipality should acquire fee title or an "easement for public highway purposes." There may be no reason for a town to take more than a highway easement. RSA 231:154 allows the town to acquire tree rights without taking title. The deed should mention tree rights and reference the statute. Taking fee title may create complications later if the highway is discontinued and it is unclear whether the discontinuance includes an intent to convey title to the abutters. However, fee title may be appropriate if the town someday wishes to develop the land for purposes other than

pure "viatic use." See Chapter 1. In addition, there are legal differences between land that is owned by the public in fee simple absolute and land where the municipality merely holds an easement interest allowing travel over the land. The differences can be significant under certain circumstances. In *Arcidi v. Rye*, 150 N.H. 694 (2004), the town believed it could install a subsurface utility line under land on which it held an easement for travel, but the Supreme Court held that such a right was not included in the deed creating the interest. The municipal attorney should review all proposed deeds conveying rights to the municipality to assure that the property interest created is the interest intended.

In either case, make sure the deed contains references to culverts and drainage easements, as well as the town's right to maintain them, even when it requires entering onto abutting land. *See* Chapter 11.

New Layouts: Width

For highways created by layout, the width and location of the highway are required to be stated in the return. RSA 231:16. A select board may lay out a highway over the most suitable ground without regard to intermediate limits or particular monuments described in the layout petition. RSA 231:12; *Caouette v. New Ipswich*, 125 N.H. 547, 553 (1984).

Older Highways: Width

There is a common mistaken belief that there is standard highway width from which setbacks must be measured. Some zoning ordinances contain a presumption of minimum highway width for purposes of construing and computing setback regulations. Actual width, however, varies on a case-by-case basis. In towns where ancient layout records are preserved, the width is often stated—for example, by describing the highway as a "three-rod road" (one rod equals 16.5 feet).

Another common mistake is to assume that the width of a highway—especially one established under the "prescription" doctrine—is no more than the actual traveled portion, plus any ditches. *Blake v. Hickey*, 93 N.H. 318 (1945). In *Hoban v. Bucklin*, 88 N.H. 73 (1936) (overruled on other grounds by *Hewes v. Bruno*, 121 N.H. 32 (1981)), the width of the road was in question, with circumstantial evidence that it had been laid out at three rods wide, but also with evidence that it qualified as a highway by prescription. The Court said:

> [A] highway established by prescription is not as a matter of law restricted to the track of actual travel... [W]here the road has been fenced out for many years about the usual width, and there is nothing to control it, a jury would be justified in finding the whole space between the fences to be a public highway... [T]he space between the wrought road and its exterior limits may be needed for various purposes, as for furnishing earth..., constructing culverts and watercourses, making changes in the traveled path, and avoiding obstructions by snow (citations omitted)... Where there are fences or (stone) walls on opposite sides of the wrought road, ...a varying distance between them is not alone enough to destroy their evidentiary value in properly locating the lines... A highway laid out with a width of three rods may have a greater width in such part of its course where more than three rods have in fact been taken for use for highway purposes for the period of prescription (emphasis added).

The Court also said there was no rule holding the center of the traveled way to be the center of the right of way. In sum, for older roads, the best evidence of width is the evidence on the ground, especially stone walls. Walls and fences can be more important than the line of the traveled way—even more important than a statement of width in old layout records.

Road Boundary Disputes: Reestablishment of Lines

A select board is given authority by RSA 231:27 to "reestablish the boundary lines" of any local highway "which shall have become lost, uncertain, or doubtful" by following the procedure outlined in RSA 228:35. (The powers given to the commissioner of the Department of Transportation are exercised instead by the select board.) The process allows the select board to have a surveyor prepare a plan showing the boundaries where the town believes they originally were. Copies of the plan are sent by registered mail to all abutting owners, the secretary of state, and the town clerk. The boundaries shown on the plan then become the legal boundaries of the highway, but any owner can petition the superior court for damages within 60 days. The owner is entitled to a jury trial but also has the burden of showing that the boundaries were originally established in a different location. RSA 228:35.

The statute hasn't been cited in any New Hampshire Supreme Court case, but the Town of Stark used it successfully in reestablishing boundary lines of a road created by prescription in a case where the abutter had attempted to erect stout poles at the edge of the traveled way. *Joyce v. Town of Stark*, Coos Superior Court No. 88-E-62 (July 11, 1990).

Street Names and Numbers

It is obvious that a new highway needs a name, but whose responsibility it is to choose the name? May existing highways be renamed or re-numbered?

The idea is deceptively simple: highway names and numbering systems should be clear and logical so that emergency workers can respond quickly to a call for help. Reducing response time for emergency calls is the purpose of New Hampshire's coordinated statewide enhanced 911 system (E-911). RSA 106-H:1. However, a drive through many older New Hampshire communities or a glance at a newspaper is all it takes to see that there are still quite a few confusing names and numbering patterns. This is hardly surprising in a state where highways have been developed, changed, and extended for well over 350 years.

As a result, it is not uncommon to find the same name on several different highways (for example, Portsmouth's Sherburne Road, Sherburne Street and Sherburne Avenue) or highways with confusingly similar names (Wedgewood Road, Edgewood Road, Ledgewood Drive). Street numbers may be non-sequential or completely out of proportion to the actual distance between properties. The practical results of all of this can range from annoying to profoundly serious, depending upon the nature of the emergency and the familiarity of the emergency workers with the area.

Of course, change is never easy. Even people who understand the need to rename or renumber a highway may resist the change for sentimental, historical, or logistical reasons. People may have lived or owned property at the same address for many years (or many generations). Going through the annoyance of changing their address with the postal service as well as every utility, creditor, financial service, and friend who sends them mail (when they have not even moved!) is not something that makes many people happy. A clear understanding of the legal process is an important first step for local officials who may face difficult questions from citizens.

Assigning and Changing Highway Names. The governing body of the town, city, or village district (select board/town council, city council/mayor, and board of aldermen or board of village district commissioners) has the authority to assign highway names within the municipality. RSA 231:133, I. Highway names must be assigned as part of the initial layout or acceptance of a new highway. RSA 231:133, II. In selecting a name, the governing body is not bound by any name previously assigned to the highway by any private owner, developer, or anyone who dedicated the highway to the municipality. No name may be assigned which is already assigned to another highway within the municipality, or which is confusingly similar to any existing name, or which otherwise might delay emergency response. RSA 231:133, II.

The governing body may also change the name of a highway "at any time when in its judgment there is occasion" for doing so. RSA 231:133, I.

The naming of a new highway is part of the layout or acceptance process. The governing body votes at a public meeting to select a name for the new highway. The process may be exactly the same for a name change, but there are additional options. In towns and village districts, the governing body has the option (but not the obligation) to hold a public hearing on the name change and to submit the new name(s) to the legislative body (town meeting or village district meeting) for approval. Voters in towns and village districts may also submit petitioned warrant articles for a highway name change under RSA 39:2. See, RSA 231:133, I, II. Once a new name or a name change has been approved by one of these methods, the governing body is required to make a return (file a record) of the change with the town, city or village district clerk, as appropriate. The clerk will make a record of the new or changed name and forward a copy of the record to the commissioner of the New Hampshire Department of Transportation. RSA 231:133, III.

Interestingly, the governing body also may change the name of any private highway within the municipality "when the name change is necessary to conform to the requirements of the enhanced 911 telecommunications system." RSA 231:133, I.

Assigning and Changing Highway Numbering. As with highway names, the governing body has authority to assign or change address numbers on highways within the municipality. RSA 231:133-a. Before assigning or changing highway numbers, the governing body or planning board must hold a public hearing with at least 10 days' notice, posted in two places in the municipality, published in a newspaper of general circulation in the municipality, and sent by first class mail to all record owners of property to be numbered or renumbered (as indicated by municipal records). However, if all of the owners (as shown on town records) voluntarily consent to their property being numbered or renumbered, the public hearing is not required. RSA 231:133-a. After the hearing, the governing body should vote on assignment or change of highway numbers at a public meeting. Each municipality assigning or changing highway numbers is encouraged to notify the New Hampshire Bureau of Emergency Communications of that assignment or change as part of the state's E-911 system. RSA 106-H:10.

The governing body has authority to assign or alter address numbers of buildings and other property along any public or private way in the municipality by a similar process. RSA 231:133-a.

Coordination with State E-911 Requirements. Municipalities are encouraged to provide the Bureau of Emergency Communications annually with a verified master street address guide and a verified street address guide so that the state can maintain an up-to-date E-911 database. RSA 106-H:10. A "verified master street address guide" is an alphabetical listing of all street and house number ranges within a municipality, including the beginning number and the highest possible number on each public or private street with multiple structures. RSA 106-H:2, VIII-a. A "verified street address guide" is a listing of all numbered structures on each public or private way with multiple structures within the municipality. RSA 106-H:2, XIII-a.

Coordination with Subdivision and Site Plan Approvals. These statutes do not provide much guidance on the details of coordinating highway naming and address numbering by the governing body with the planning board's approval of subdivision and site review applications. The solution may be a bit different for each municipality. To determine what makes sense for any particular town or city, it may be helpful to look at the systems that the municipality already has in place.

One item to consider is whether or not the municipality has already done E-911 mapping. A list of towns and cities that have done this is available on the Bureau of Emergency Communications' Web site, as well as a link to the Bureau's Addressing Standards Guide, an informational publication providing suggestions for naming and numbering (**www.nh.gov/safety/divisions/emergservices/nh911/911mapping.html**). If

E-911 mapping has already been completed, it is likely that the governing body has developed a system and a policy regarding highway names and address numbering.

It is also important to look at how other local ordinances, regulations, and policies affect highway naming and numbering. The local building permit or certificate of occupancy ordinance and regulations might require an approval from the governing body for highway names and/or numbers before the building permit or certificate of occupancy may be issued. It may also be appropriate to require subdivision applicants to obtain approval from the governing body for new highway names before subdivision approval will be granted. Numbering decisions may take longer than name assignments because of the public hearing and notice requirements; therefore, it may make more sense to require address numbering approval as a condition subsequent to a subdivision approval (something that must be done within a certain time after the approval is issued).

Yet another way to approach the issue is to require proposed subdivision plats to indicate the center line of all proposed highways in 50-foot increments to facilitate later E-911 address numbering, but not to actually require the numbering approval as part of the subdivision process. This can be very helpful at a later time when the governing body assigns address numbers, particularly if it is following the Bureau of Emergency Communications' recommendation of one address on each side of the highway for every 50 feet in length. It is also worth checking to see if E-911 numbering is already required by other ordinances or regulations in the municipality, because if it is, then planning board regulations might not need to incorporate it.

For more information, see the New Hampshire Bureau of Emergency Communications publication *Addressing Standards Guide* (**https://www.nh.gov/safety/divisions/emergservices/nh911/documents/2013AddressingStandards.pdf**) that may be downloaded from the Bureau's Web site (**www.nh.gov/safety/divisions/emergservices/nh911/911mapping.html**).

Creating Local Road Files: Sources of Information

As discussed in the rest of this chapter, the status of a road is critical information, and it depends upon a variety of factors. The information needed to determine whether something is a public highway at all, and if so, what class of highway (discussed in Chapter 3), is important to assure that the municipality:

- receives all of the state aid it should pursuant to RSA Chapter 235;
- is not unintentionally causing a road to change from Class V to Class VI by reason of non-maintenance;
- is able to comply with all municipal accounting standards, including GASB 34;
- is able to properly regulate the roads for the safety of all travelers; and
- is able to properly plan and budget for winter and summer maintenance activities.

The remainder of this section is a shortened version of a 1996 Municipal Law Lecture given by Stephen T. Nix, attorney and land surveyor, titled *The Basics of Highways and Streets*, which was replaced by the original edition of *A Hard Road to Travel*.

Because of the high potential for legal disputes and liability with respect to local roads, it is vital that towns collect information on the legal status, location, and width of every road or street in town. The file should contain things like:

- Any information pertaining to the history of the road—records of a layout, dedication, and acceptance, or evidence of prescription, for example, maps or other descriptive evidence of

width. For newer roads, it could include copies of the recorded deed.

- Any survey or subdivision plats of land fronting that road.
- Copies of any governing body votes establishing regulations on that road, including weight limits, stop signs, no parking zones, etc.
- Copies of construction or reconstruction plans—especially helpful to help prove the exercise of design discretion for liability prevention purposes. *See* Chapter 6.

The task of collecting information need not all be done at once, and many files could remain empty for years. But if you work closely with local surveyors, realtors, title attorneys, etc., and you allow them to add their information to your official files, you will quickly collect enough information to make your efforts pay off. Anyone who is going to devote substantial time to collecting information for these files should be as familiar as possible with highway law, especially the law concerning the different methods of highway creation (this chapter) and discontinuance (Chapter 4), so that he or she will know what type of information to look for. Here are some of the sources of information to check:

- Town or city clerk's records of town meetings or city council meetings are especially relevant evidence on the question of votes of acceptance or discontinuance. Some towns may have complete copies of all their records back into the 1700s. Records pertaining to highways since 1930 will have to be gleaned and copied from town clerk records, using a page-by-page review. There's simply no other way.
- Other municipal records relevant to roads, their width, location, etc., might also be found in town engineering department or highway agent files; planning board files on particular subdivisions; assessors' records (although, of course, the fact that a road is shown on a tax map is not, by itself, evidence of legal status).
- State Archives, located at 71 South Fruit Street in Concord, where copies of all town records prior to 1930 pertaining to local roads are located. The originals are mostly in the form of metes-and-bounds descriptions, but the Archives also has graphic plots, drawn from these descriptions by members of the New Hampshire Land Surveyors Association, using the same scale as the 15-minute U.S. Geological Survey quadrangle maps. This series of maps has been discontinued. (If you have any of these old maps, or find any covering your town at old bookstores, yard sales, etc., treat them like gold.) The problem with using these records is that you often don't know which road the description corresponds to. The trick is to overlay and match the drawn plot with a known road shown on one of the 15-minute quads. The State Archives also has copies of various historical maps, including the Philip Carrigain maps of 1816, which purport to show all highways existing at that time. Another source of road evidence at the Archives is the New Hampshire Department of Transportation (DOT) right of way maps on microfilm. The originals are at the DOT.
- Other historical sources include: published town histories (many of these were written back around the time of the centennial celebration in 1876 and may contain a chapter detailing local roads existing at that time); town historical societies and libraries, and town plotting plans (these are also available at the State Archives and at the New Hampshire Supreme Court Library); various historical maps showing the locations of old highways, found at the New Hampshire State Library and the New Hampshire Historical Society.
- County records include all the plans on file at the Registry of Deeds pertaining to your town, as well as superior court and county commissioners' records. (In former days, highway layouts were at least partly under jurisdiction of the court and commissioners.)
- New Hampshire Department of Transportation Right of Way Division has the originals of old right of way maps, many of which describe highways that today are town highways. Other

valuable sources of evidence at the DOT include the official state highway maps by county and various aerial photographs of highway corridors.

- The Supreme Court Library has a set of the Laws of New Hampshire, Volumes 1-10, covering the period before 1835—many of the highways laid out by the legislature in these early days have become portions of town highways. The New Hampshire Supreme Court Reports also contain records of cases that might have affected roads in your town. Since these cases are not indexed by town, however, the best way to make use of these records is through a computer search using the name of your town and the word "highway."

CHAPTER THREE

NEW HAMPSHIRE'S HIGHWAY CLASSIFICATION SYSTEM

The highway system in New Hampshire is broken down into seven distinct classes. They are I, II, III, III-a, IV, V, and VI. Class I, II, and III highways are state highways, controlled and maintained by the New Hampshire Department of Transportation (DOT), except for the "unimproved" sections of Class II highways, which are still maintained by towns. Class I and II highways are laid out by a commission appointed by the governor and council. RSA 230:8. Class III-a highways are state boating access highways under the authority of the director of the New Hampshire Fish and Game Department. Class IV, V, and VI highways are local highways, and they are the focus of the major part of this book.

STATE HIGHWAYS

Class I: Primary State System

Class I consists of all existing or proposed highways of the primary state highway system, except those portions within the compact sections of cities and towns as designated by the Department of Transportation in RSA 229:5, V. Even within the urban compact areas, however, turnpikes and interstate highways remain Class I highways and are under the full control of the state. RSA 229:5, I; see also, RSA 230:1, 2.

Class II: Secondary State System

Class II consists of all highways in the secondary state highway system, except those portions within the compact sections of cities and towns as designated by the Department of Transportation in RSA 229:5, V. The state is responsible for the costs of reconstruction and maintenance of all Class II highways that have been improved to the satisfaction of the DOT commissioner. RSA 230:3. Other Class II highways—those not improved to the DOT's standards—are maintained by the city or town in which they are located. Those highways are eligible to be improved to DOT standards with the use of state aid funds, as those funds become available. RSA 230:4.

It is not always easy to identify Class I and II highways based on route numbers. Class I consists of both federal route numbers and state route numbers. Some Class II highways have no numbers at all. The only way to know for sure is to consult the Department of Transportation's maps of the "Primary" and "Secondary" systems, first created in 1945 and located at the DOT offices in Concord.

Class III: State Recreational Roads

This class consists of all recreational roads leading to, and within, state-owned reservations designated by the legislature. RSA 229:5, III. An example would be campground roads inside state parks. The Department of Transportation has responsibility for reconstructing and maintaining these roads once

they have been designated by the state Department of Resources and Economic Development and DOT commissioner within state reservations designated by RSA 233:8. When authorized by the legislature, with the approval of the governor and council, the DOT commissioner may lay out and construct a public road to a private recreational area. RSA 233:1 through :7. Any Class III public road that leads primarily to a private recreational area is maintained by the owner or operator of that area unless other arrangements are made. RSA 233:9. Class III highways may be regulated by the commissioner of the Department of Resources and Economic Development. RSA 233:8.

State Highways and Local Planning

In 1979, the legislature enacted RSA 230:6, which prohibits any construction or major reconstruction by the state of any Class I, II, or III highway unless the city or town in which the highway is located has adopted a zoning ordinance or a master plan. This limitation does not apply to construction or reconstruction of bridges on Class I, II, or III highways, nor does it apply to limited access highways laid out under the provisions of RSA 230:44 through 54.

Class III-a: Boating Access Roads

This relatively new class consists of all new boating access roads from any existing road to any public water in the state. Class III-a roads are limited access highways. They are designed for through traffic, and abutters have no right of access to them. They may be laid out subject to gates and bars or restricted to foot travel, travel by certain vehicles, or both. The Fish and Game Department has the same authority for Class III-a roads that is delegated to the Department of Transportation for limited access facilities. RSA 229:5, III-a; see generally, RSA Chapter 233-A.

Prior to 1992 there existed RSA 230:63 through 71, under which the governor and council purchased and laid out "highways to public waters," which then became town-maintained Class V roads. These statutes were replaced in 1992 by the statutes on Class III-a designation. These older roads are still Class V even though the underlying title to the property is owned by the state. Fish and Game has sought to convert some of the old "highways to public waters" to Class III-a highways if they are in suitable locations and wide enough for boat trailer parking. Unless such a conversion has taken place, towns should keep treating the older "highways to public waters" the same way they have in the past.

MUNICIPAL HIGHWAYS

Class IV: Urban Compact Section Highways

Class IV consists of all highways within the urban compact section of the cities and towns listed below, as designated by the Department of Transportation. The compact section is described as the area of the "city or town where the frontage on any highway, in the opinion of the DOT commissioner, is mainly occupied by dwellings or buildings in which people live or business is conducted, throughout the year and not for a season only." RSA 229:5, IV. The boundaries are often marked by "Urban Compact" signs along the road. Pursuant to RSA 229:5, V, the DOT commissioner may establish urban compact sections in the following cities and towns only:

Amherst	Franklin	Manchester
Bedford	Goffstown	Merrimack
Berlin	Hampton	Milford
Claremont	Hanover	Nashua
Concord	Hudson	Pelham
Derry	Keene	Portsmouth
Dover	Laconia	Rochester
Durham	Lebanon	Salem
Exeter	Londonderry	Somersworth

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. The town of Hampton recently used this provision to reclassify a Class II road to a Class IV road.

Class V: Town or City Roads and Streets

Class V consists of all traveled highways other than Class IV that the town or city has the duty to maintain regularly. RSA 229:5, VI and 231:3. One common misunderstanding about Class V highways is that "Class V" refers to some set of construction standards. This is not true. If a town or city has a duty to maintain a road and does, in fact, maintain it, the road is Class V, regardless of the condition of the road or how little maintenance is done. Thus, a Class V highway can be anything from a one-lane dirt track to a six-lane boulevard. The phrase "Class V road standards" means nothing unless a town or city has created its own standards. One reason for the confusion is that in the past the state had a set of "TRA Standards" that towns were required to use when doing work with Town Road Aid funds. But that system has long been replaced by the block grant system. See Chapter 12 on highway funding.

The New Hampshire Supreme Court has made clear that a highway must be both traveled and maintained to be a Class V highway. In *Glick v. Ossipee*, 130 N.H. 634 (1988), the Court held that the mere fact that a road was used frequently by hunters, loggers, and fishermen did not make it Class V, absent town maintenance.

Class VI

Class VI consists of "all other existing public ways." RSA 229:5, VII. It includes all local highways discontinued subject to gates and bars and all highways that have not been maintained and repaired by the town in suitable condition for travel for five successive years or more. RSA 229:5, VIII. It is important to recognize at the outset that Class VI highways are full public highways in every respect except maintenance. *King v. Town of Lyme*, 126 N.H. 279 (1985). This concept has been codified by the legislature in RSA 231:21-a. That statute grants municipalities the same regulatory authority over Class VI roads that it has over Class V roads regardless of how the road reached Class VI status. RSA 231:21-a also provides that all Class VI highways "shall be deemed subject to gates and bars," and any gates and bars maintained by private landowners cannot be erected so as to prevent or interfere with public use of the highway. The gates and bars must be capable of being opened and closed by users of the highway. Chapter 8 of this book provides a detailed look at Class VI roads.

HOW CLASSIFICATIONS GET CHANGED

From Class IV or V to Class VI

RSA 229:5, VII provides that a Class IV or V highway may become Class VI in one of two ways:

- A vote of the legislative body (council or town meeting) to discontinue it "subject to gates and bars" pursuant to RSA 231:45 (see Chapter 4 for more on discontinuances); or
- The failure to maintain it "in suitable condition for travel thereon for 5 successive years or more."

The law on "lapse" is discussed further in Chapter 8. Action by the select board alone is not enough to reclassify a Class IV or V highway to Class VI. RSA 231:45-a. If the board intentionally refused to maintain a highway so that it would lapse to Class VI status, the road would be subject to notices of insufficiency under RSA 231:90 and the resulting duty to repair the road (discussed further in Chapter 6). This approach to reclassification violates the municipality's obligation to maintain its Class V highways and is not worth the liability exposure.

Reclassification from Class VI to Class IV or V

Under RSA 231:22-a, there are two ways to reclassify a highway from Class VI to Class V (or to Class IV in urban compact areas), regardless of how the road achieved Class VI status:

- A "layout" of a Class V (or IV) highway over an existing Class VI highway using the statutory layout process discussed in Chapter 2; or
- A legislative body vote to reclassify.

A third way to reclassify a highway from Class VI to Class V (or IV) is described in RSA 229:5, VI, which provides that if a highway has lapsed to Class VI status by virtue of five years of non-maintenance, but is subsequently regularly maintained and repaired by the town on a more than seasonal basis and in suitable condition for year-round travel for at least five successive years, then the highway returns to Class V status. A town may avoid the application of the statute if the highway is first declared an "emergency lane" pursuant to RSA 231:59-a. Emergency lanes are further discussed in Chapter 5.

The moment a road becomes Class IV or V, the town takes on a duty to keep it free of "insufficiencies." See Chapter 6. Thus, if the Class VI road to be reclassified is one of those with trees growing in the middle, the legislative body vote should include wording that either makes the reclassification effective at some later date, or makes it conditional upon betterment assessments. RSA 231:22-a, IV explicitly allows this. The betterment assessment process is discussed further in Chapter 5.

Discontinuance of State Highways

One of the lesser-known ways a road can become a town highway is by discontinuance of a Class I or II highway by the state. The state has the power to lay out highways. See, generally, RSA Chapter 230. The state also has the power to discontinue its highways. RSA 230:55 through :62. When the Department of Transportation alters or relocates part of a Class I or II highway, the commissioner has the authority to make a finding that there is no further need to use the old route as a state highway. If the commissioner makes such a decision, he or she must post notice of this finding in two public places in the town in which the highway is located and must give notice in writing to the select board. RSA 230:55. Within 60 days of getting this notice, the select board is required to give notice and hold a hearing using the same

procedure as for a layout petition to determine whether there is an "occasion" for using the old state highway as a town highway. RSA 230:56. The select board is also required to notify the commissioner in writing of its decision. If the select board decides that the road should be a town highway, or if the select board fails to respond to the commissioner within 60 days after getting notice, the highway and any interest held by the state are vested in the town as a Class V or VI highway. RSA 230:57. If the select board finds that an "occasion" does not exist, the board must notify the DOT commissioner, who must post notice in two public places in town that the portion of the highway is discontinued. RSA 230:58. Similar notice must be given to the owners of land over which the discontinued portion of the highway passed. RSA 230:59. The notice, or "certification," of the commissioner must be recorded by the town or the owners in the registry of deeds. RSA 230:60.

Reclassifying State Highways to Class IV

Another way the state may transfer road responsibilities to towns and cities is by reclassifying a section of a Class I or Class II highway as a Class IV highway (in essence, expanding the "urban compact" area of a town or city within which the town must maintain state routes). The DOT commissioner must first prepare a statement of rehabilitation work to be performed by the state, and no reclassification from Class I or II to Class IV may take effect until the highway surface is returned to reputable condition by the state. Rehabilitation must be completed during the calendar year preceding the effective date of the reclassification. RSA 229:5, IV.

State Reclassifications and the Mandate Issue

In 2001, the New Hampshire Supreme Court addressed the issue of whether reclassifying a state highway to a town highway violated Part I, Article 28-a of the New Hampshire Constitution. In *Nelson v. N.H. Dept. of Transportation*, 146 N.H. 75 (2001), the Court held that reclassifying two sections of Old Route 9 in Nelson to Class V status, thus requiring town maintenance, did not violate the constitutional prohibition against new, unfunded state mandates. As noted in the Discontinuance of State Highways section above, the select board could have determined that there was no "occasion" for the state highway to become a Class V town road, but that would have resulted in the complete discontinuance of the state highway, something the town did not want. In this case, the town had argued that the state's decision to reclassify the highway, rejected by voters at the town meeting, unconstitutionally burdened the town with new maintenance costs. The Court rejected the town's argument, reasoning that reclassification of roads between state-maintained and town-maintained classifications was part of a long-standing statutory scheme that predated the 1984 adoption of Article 28-a. The Court noted that the statutes authorizing the DOT commissioner to reclassify roads dated back to the 1940s. The Court further wrote, "That the contested segments [of Old Route 9] now serve only local traffic may be a new development; the town's responsibility for maintaining roads that serve only local traffic is not new."

CHAPTER FOUR

DISCONTINUANCE OF HIGHWAYS

THE LAW FAVORING HIGHWAY CONTINUANCE

A well-established principle of law is that public highways should be preserved; once public rights of way are established, the rights of the public should last indefinitely, unless a formal public decision is made to discontinue them. *Blagbrough Family Realty Trust v. A &T Forest Products, Inc.*, 155 N.H. 29 (2007).

This chapter will cover the discontinuance of local highways. On the issue of state highway discontinuance, see Chapter 3. The Class VI designation itself reflects this policy by allowing a highway to remain in existence, even though there is no present public need to maintain it. For more information on Class VI highways, see Chapter 8. Two other legal rules also reflect this "highway conservation" policy.

Highways Cannot Be Lost By Adverse Possession

Although an owner of private property can lose it by 20 years of adverse possession by others (the principle sometimes called "squatter's rights"), this doctrine does not apply to public property, including highways. RSA 477:33 and :34. In *Williams v. Babcock*, 116 N.H. 819 (1976), the Court held that once a road had been established by 20 years of public use (by prescription), its status was not changed by the fact that an abutting property owner subsequently barricaded it for more than 20 years. Thus, public rights, once acquired by prescription, cannot be lost by prescription. RSA 236:30 specifically provides that no person may acquire rights, as against the public, by enclosing or occupying any part of a highway for any length of time. *See also, Windham v. Jubinville*, 92 N.H. 102 (1942).

The Presumption against Discontinuance

Because the law recognizes a presumption against discontinuance, proving a discontinuance is a difficult proposition. In *Davenhall v. Cameron*, 116 N.H. 695, 697 (1976), the Court wrote: "Highway discontinuance is not favored in the law...and the burden is upon the party who asserts discontinuance to prove it by clear and satisfactory evidence." In the Davenhall case, there was circumstantial evidence that the road had ceased being used by the public, and certain deeds referred to the road as "old" or "discontinued," but this evidence was not sufficient to prove a discontinuance, in the absence of a formal vote of the town.

The mere fact that a highway has been physically abandoned or that trees have been allowed to grow in the right of way has never been held to constitute a termination of the highway. *Gill v. Gerrato*, 154 N.H. 36 (2006); *Thompson v. Major*, 58 N.H. 242 (1878). As the law stands today, the only legal consequence of nonuse and non-maintenance (aside from potential liability for insufficiencies, see RSA 231:45-a) is to convert the highway to Class VI, and not to discontinue it. RSA 229:5, VII; *Glick v. Town of Ossipee*, 130 N.H. 643 (1988).

COMPLETE DISCONTINUANCE

Procedure

The complete discontinuance of a local highway (Class IV, V, or VI) requires a clear vote of the legislative body. RSA 231:43. In most towns, that means a vote of town meeting upon an article properly inserted in the warrant of the meeting, by the select board or by petition. In charter towns, either the town council or town meeting must vote to discontinue, depending on what the charter provides, and in cities, a vote must be taken by the city council or mayor/board of aldermen, as appropriate. Action by the select board as the governing body is never sufficient to discontinue a public highway once it has been created. *Marrone v. Hampton*, 123 N.H. 729 (1983). The best evidence of a past discontinuance is a vote recorded by the clerk in the town report. *Blagbrough Family Realty Trust v. A &T Forest Products, Inc.*, 155 N.H. 29 (2007). 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*, 170 N.H. 548 (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." In 2020, *Bellevue Properties v. Town of Conway,* 173 N.H. 510 (2020) saw the New Hampshire Supreme Court revisit the rule of discontinuances. In short, the plaintiff owned a hotel that was accessed by a town road that ran through a parcel on which a large retail redevelopment was proposed. The retail developer proposed discontinuing the public highway and provide alternative access with a private road, that would remain open to the public, and offered an easement to the hotel. The plaintiff sued, claiming that the discontinuance would cause harm to the hotel's business. The Supreme Court upheld the discontinuance stating that the town's decision to discontinue a highway is not limited to ongoing maintenance costs, but that the town may decide to discontinue a highway for other reasons, and, if challenged, "the trial court may consider those interests in reviewing the town's decision." In this case, it was proper for the town to discontinue the public highway not because of maintenance costs but because there was a proposal for a large retail establishment and alternative access would be provided to properties serviced by the existing public highway.

Be aware that prior to 1945 the law required permission from a court, as well as the town vote, before certain highways could be discontinued. *See New London v. Davis*, 73 N.H. 72 (1904); *Williams v. Babcock*, 121 N.H. 185 (1981). This is no longer required. Presently, the only time a discontinuance requires court permission is when proceedings are pending in court against the town for neglect or refusal to lay out or repair that same highway. RSA 231:47. This historical perspective becomes important when researching the status of older roads.

These cases more-or-less settle the town's right to discontinue a highway and how they should go about it. But there are still questions that private landowners like to ask municipal officials such as – what rights do I have if the public highway that services my land is discontinued? Although that answer isn't strictly within the realm of what municipal officials do, it's good to know that there is an answer, and that it can be found in *Lauren Shearer v. Ronald Raymond*, 2020 N.H. Lexis 3 (decided January 13, 2021).

In *Shearer*, the plaintiff bought a parcel that was landlocked – it was accessible only by "Bowker Road." Bowker Road was laid out as a municipal road in 1766 but discontinued in 1898. It had long served to

connect the plaintiff's parcel to another still-existing municipal road. A gate was maintained along Bowker Road by the owner of the parcel "locking" the plaintiff's in, and that owner claimed that the plaintiff had no right to use the gate to access her property via Bowker Road. The New Hampshire Supreme Court disagreed. The ability of a property owner to access his or her property via a road was not extinguished merely because of the discontinuance of that road if that road is the only reasonable means of reaching that parcel. Instead, the easement for accessing that property continues until such time as it is extinguished. That ruling should put the minds of private property owners at ease. Even though the public may no longer be able to use the road, they – and the subsequent owners of their property – still can.

As for who maintains that private road? That's an interesting question. There is nothing in either the statutes or case that clarifies the relationship between "easement" and "private road." RSA 674:41, III defines "Street giving access" as "a street or way abutting the lot and upon which the lot has frontage" and was passed in response to the 1994 New Hampshire Supreme Court decision *Belluscio v. Westmoreland*. The intent of the legislature, therefore, seems to be to distinguish the two terms, but 2019's RSA 231:81-a states, in relevant part, "[i]n 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[.]" But, again, neither RSA 231:81-a nor any other statute define "private road," and there is no clear method to create them. As such, it's somewhat unclear when RSA 231:81-a would operate as there is no bright-line test to distinguish, for example, an easement for a driveway to serve a few houses in common from a private road.

Undoubtedly, the distinction – if any – between easements and private roads will be further refined in the coming years but, fortunately for municipal officials, that's something that will have to be worked out by the courts, legislature, and, more importantly, private landowners. Before a town may vote to discontinue a highway, written notice must be given to "all owners of property abutting such highway, at least 14 days prior to the vote of the town." RSA 231:43, II. Obviously, the select board will not know in advance whether the warrant article will pass, so notice must be given any time there is an article in the warrant calling for a highway discontinuance, regardless of how unlikely it is that the article will pass. Since the statute requires written notice to be sent to all abutting property owners, the best practice will be to research the registry of deeds immediately prior to sending out the notices to ensure that the town has an accurate abutters list. Notice must be given by "verified mail," defined as "any method of mailing that is offered by the United States Postal Service or any other carrier, and which provides evidence of mailing." RSA 231:43, II, citing RSA 451-C:1, VII. The municipality pays the cost of notice except when the warrant article is petitioned; in that case, the petitioners pay the cost. RSA 231:43, II.

Whenever a town votes to discontinue a highway that joins a highway in another town, the select board must notify the select board of that adjoining town, by registered mail within 15 days of the vote, that such discontinuance has taken place. RSA 231:44.

In *New London v. Davis*, 73 N.H. 72 (1904), the New Hampshire Supreme Court upheld a discontinuance that was conditioned upon a new highway being built. On the other hand, in *Cheshire Turnpike v. Stevens*, 10 N.H. 133 (1839), the Court ruled that a town could not discontinue a road while reserving the right to reopen it (although today this same result could be accomplished by making the highway Class VI). In *Grossman v. Dunbarton*, 118 N.H. 519 (1978), an old discontinuance vote where the voters clearly intended, as a condition, to create a private way, was held to be an unconditional discontinuance. Therefore, the best approach is to either completely discontinue a highway or discontinue it subject to gates and bars. Do only one or the other, without conditions. Placing conditions on the discontinuance creates too great a legal risk that either the conditions will be declared invalid or that the discontinuance itself will be declared invalid.

THE EFFECT OF A COMPLETE DISCONTINUANCE

Title

If a highway is completely discontinued, all town responsibility ends, and the public right of way ceases to exist. RSA 231:50. The right to use and possession returns to whomever owns title, which is presumed to be the highway's abutters (see Chapter 1), but subject to whatever private easements might exist (also discussed in Chapter 1). Towns may not discontinue a highway but reserve a right to open it again later. It is either a public road or it is not. If the road must be recreated in the future, one of the methods of creation allowed by RSA 229:1 must be used. In addition, a discontinued highway does not become a "private road" for the purpose of RSA 674:41, which would allow a building permit to be issued in the future. *Russell Forest Management, LLC v. Henniker*, 162 N.H. 141 (2011). See Chapter 7 for more information on RSA 674:41.

Sheris v. Morton, 111 N.H. 66 (1971) stands for the proposition that when a town votes to discontinue a highway, the town relinquishes all interests in the right of way, and the abutters are relieved of the burden of the public rights across the land. But that case did not involve a highway where the town had taken a deed purporting to convey the underlying land. Case law (see Chapter 1) supports the idea that ownership status is separate from highway status. That would mean that where the town took a fee simple deed when the road was accepted, the town would continue to own the land in fee simple even after the highway is completely discontinued. There is no New Hampshire Supreme Court decision on point, and there is certainly room to argue that some particular vote of discontinuance also incorporated an intent to relinquish title.

When the town has taken fee simple title, it is a good idea to address the title issue as part of the vote to discontinue. If the town does not intend to relinquish ownership, the warrant article should recite the source of title and should state that title is not being relinquished by virtue of discontinuing the road. If the town does intend to relinquish title, include with the vote a specific authorization for the town's interest to be deeded to the abutters or other intended party. *Neville v. Highfields Farm*, 144 N.H. 419, 427 (1999) (involving clarity of a town meeting vote regarding a change in location of a public highway).

Possibility of Private Easements: The Owner Consent Law

As discussed in Chapter 2, where a roadway is shown on a subdivision plat as the only access to lots, owners of those lots have an implied private easement over the road, including the private right to maintain the entire length of the road for public access to their lots. This is true even when such roads had, at one time, been public highways. These private easements preclude full use and possession by the underlying fee interest owner. *Duchesnaye v. Silva*, 118 N.H. 728 (1978), and cases cited therein. These easements can be extinguished by a deed from the owner of the right that is recorded at the Registry of Deeds.

Even where no plat exists, RSA 231:43, III provides that "no owner of land shall, without the owner's written consent, be deprived of access over such [discontinued] highway, at such owner's own risk." On its face, this language seems to apply to all landowners, not merely those with no other access. An earlier version of the statute, effective from 1943 to 1945, was limited to otherwise landlocked lots. 1943 N.H. Laws Chapter 68:2. Therefore, in those cases where towns have not obtained written consent from landowners to give up the right of access, any highway discontinued since 1949 is subject to private rights of way in favor of all abutting landowners.

Utility Easements Preserved

After 1992, whenever a street or highway is discontinued, any licenses that have been granted under RSA 231:159 through :182 for sewers, drains, pipes, power lines, etc. (see Chapter 13), are preserved as easements encumbering the underlying land, as long as they remain in active use. A town or city may discontinue them, but the intent to do so must be explicitly stated in the vote to discontinue the highway, or in some later vote. RSA 231:46; see RSA 230:58-a relative to state highways. By contrast, before 1992 a municipality had to explicitly reserve utility easements, as part of the discontinuance vote, in order for them to survive the discontinuance.

Discontinuance Subject to Gates and Bars

RSA 231:45 allows any Class IV, V, or VI highway to be "discontinued as an open highway and made subject to gates and bars, by vote of the town." The ability to do this became effective in 1903 (1903 Laws of New Hampshire Chapter 14), even before the classification system used today (including the Class VI category) became effective in 1945. Today, the word "discontinued" in this context is really a misnomer. When a highway is discontinued and made subject to gates and bars, the only thing that is actually "discontinued" is the town's obligation to maintain the highway. RSA 231:50. It is otherwise a Class VI highway subject to public use. See Chapter 8 on the meaning of "gates and bars."

There is no statutory duty to notify abutters in the case of a discontinuance subject to gates and bars, unless that requirement can be inferred from RSA 231:43. Nevertheless, it is highly recommended that some sort of notice be given to affected landowners since their right to appeal might be extended beyond the statutorily established six-month period following the vote.

RSA 231:45 further provides that a highway that is discontinued subject to gates and bars "shall not have the status of a publicly approved street." The New Hampshire Supreme Court made clear in *Metzger v. Brentwood*, 115 N.H. 287 (1975) that this language means only that the road is not publicly approved for zoning purposes. *See also Russell Forest Management, LLC v. Henniker*, 162 N.H. 141 (2011). In most other respects, however, the road remains a full public highway. *King v. Lyme*, 126 N.H. 279 (1985).

In *Stevens v. Goshen*, 141 N.H. 219 (1996), the Court addressed the effect of a vote to discontinue subject to gates and bars when the road at issue had already lapsed to Class VI status. The Court held that such a vote might still entitle an owner to damages if the owner could show that his or her land value would be affected by the realistic possibility that gates or bars would be installed. The Court wrote, "Gates and bars could prove a significant inconvenience to a landowner who must open and close several of them before arriving at his or her property." In rendering its decision, the Court made a finding that there are two kinds of Class VI highways: those that become Class VI due to nonmaintenance (lapse) and those that are discontinued subject to gates and bars. Highways in the former category were held not to be subject to gates and bars. Three years after the Stevens decision, the legislature addressed the same issue when it enacted RSA 231:21-a. Pursuant to that statute, all Class VI highways are deemed subject to gates and bars, regardless of how Class VI status was attained. In this respect, the statute supersedes the *Stevens* decision.

In addition to complete highway discontinuance and discontinuance subject to gates and bars, the option also exists to discontinue a road as a highway and convert it to a trail. RSA Chapter 231-A. That option is discussed in Chapter 9.

APPEALS OF DISCONTINUANCE DECISIONS

Procedure and Standing

Any person or other town aggrieved by the discontinuance of a highway or by a discontinuance subject to gates and bars may appeal the decision to the superior court within six months of the town vote. RSA 231:48. The party appealing must, after filing with the court clerk, serve the court's summons and a copy of the petition upon the town by giving them to or leaving at the places of abode of one of the select board members and the town clerk, as well as to the owners of land abutting the road. The court's summons will include a deadline for the service of this notice. Each party who is notified may become a party to the appeal by filing an appearance with the court. However, the effect of this service is that those served cannot then file their own separate appeals of the same discontinuance. The appeal then proceeds in the same manner as an appeal of a highway layout. RSA 231:48.

Statutes of limitation are strictly construed in New Hampshire. In *Wolf Investments, Inc. v. Brookfield*, 129 N.H. 303 (1987), the Court suggested (albeit not very strongly) that the six-month appeal period might be extended if an owner, exercising reasonable diligence, could not find out about the discontinuance until after the appeals period had run. Today, this problem is partly addressed by the notice requirement in RSA 231:43, but that statute arguably does not govern a discontinuance subject to gates and bars. The statute also does not require notice to other individuals who are not abutters but, nonetheless, may be "aggrieved" by the vote.

In *L & L Portsmouth Theatres, Inc. v. Portsmouth*, 117 N.H. 347 (1977), the Court addressed the question of who has standing to appeal a discontinuance. The Court ruled that an owner whose land abutted the road in question, but did not directly abut the section being discontinued, nonetheless had standing to challenge it. This case would suggest that standing in discontinuance cases is similar to standing in zoning appeals: Anyone who can demonstrate an effect on property value is able to appeal, regardless of whether the person is an abutter.

Questioning the Discontinuance Decision

If another municipality takes the appeal, it must show that the "aggrieved town's interest in maintaining the highway is greater than the burden that maintenance of the road would impose on the town that voted to discontinue the road." *Hinsdale v. Chesterfield*, 153 N.H. 70 (2005).

In the *L & L Portsmouth Theatres* case, the Court found that the question of whether a road should be discontinued is distinguishable from the question of whether the plaintiff would be entitled to damages.

In some older cases, the mere desire of a town to rid itself of a maintenance burden was held to be an adequate reason for discontinuing a road. Marlboro's Petition, 46 N.H. 494 (1866); *Tuftonboro v. Fox*, 58 N.H. 416 (1878). The construction of a new highway, rendering the old one unnecessary, was also held sufficient to support a discontinuance. *New London v. Davis*, 73 N.H. 72 (1904). However, in 2005, the New Hampshire Supreme Court overturned the Town of Chesterfield's vote to discontinue a portion of a road that continued into the Town of Hinsdale. Hinsdale v. Chesterfield, 153 N.H. 70 (2005). In this case, the evidence showed clearly that Chesterfield's motivation for discontinuance (here, discontinuance subject to gates and bars but with a locked bar, which the Court did not address) was simply to eliminate the traffic to and from Hinsdale because it bothered the abutters. Maintenance of that portion of the highway presented only a "minimal" cost, while the burden of discontinuance on the residents of Hinsdale was significant.

Damages and Discontinuance of Class V Highways

Any person damaged by the discontinuance of a highway, or by the discontinuance of a highway made subject to gates and bars, may petition the superior court for an assessment of damages. The petition must be filed within six months of the vote to discontinue, and a petition may not be filed if an appeal already has been taken under RSA 231:48. Thus, the remedies available to a person following a discontinuance are a challenge to the discontinuance itself under RSA 231:48 and a claim for damages under RSA 231:49. "To the extent that [the plaintiff] is specially damaged, as opposed to suffering harm similar to that sustained by the public in general, he can recover for the destruction or impairment of the right of access." *Wolfe v. Windham*, 114 N.H. 695, 697 (1974). The Wolfe case also stands for the proposition that if an owner has any alternative access to the system of public highways, the right of access remains unimpaired and damages are not due.

In *Cram v. Laconia*, 71 N.H. 41 (1901), the Court ruled that an owner is not entitled to damages just because access to the property is less convenient. These are not "special damages."

Two later cases, however, gave rise to the possibility of damages in those situations where the alternative access was not "reasonable." *State v. Shanahan*, 118 N.H. 525 (1978) involved the installation of curbing that limited direct access for customers from the street. The other access to the property was far less convenient. The Court, instead of finding that any alternative access was enough to defeat a damages claim, remanded the case to the trial court for a determination of whether the value of the property was "substantially diminished" because of the change in access. The Court wrote: "[W]hat might be considered a merely inconvenient or circuitous alternative means of access for one landowner might be an unreasonable alternative for another...To be compensable, the damages must be substantial and amount to severe interferences which are tantamount to deprivations of use or enjoyment of property."

The same rule was applied in *Orcutt v. Richmond*, 128 N.H. 552 (1986). The petitioner's land, whose only use was for timber management, had access by way of two Class V highways, only one of which was discontinued. Because of the topography of the property, she claimed that she could not remove timber from a large part of the land via the remaining road. The town's position (based on the *Wolfe* case) was that any alternative access was sufficient. The Court refused to dismiss the case, holding that the test was whether the remaining access was "reasonable" in light of the existing use of the land.

Discontinuance of Class VI Highway: Damages?

The complete discontinuance of a Class VI highway also entitles the owner to request damages (in the same manner as the discontinuance of a maintained highway). RSA 231:48 and :49. To date, there have been no cases on what the measure of damages would be in that situation. Since an owner retains a right of access over the discontinued highway at the owner's own risk pursuant to RSA 231:43, damages should probably be nominal at best. For such owners, the discontinuance of a Class VI highway results in an unmaintained road to be used at the owner's own risk, and this is what the owner had prior to the discontinuance. See Chapter 9 for a discussion regarding the discontinuance of trails.

SUMMARY: GOOD DISCONTINUANCE POLICIES

For all the same reasons that highway continuance is favored in the law, it is probably best to avoid complete discontinuances of highways unless absolutely necessary. It is often the case that the public right of way will be useful in the future. The only time complete discontinuance should be considered is when

there is some specific alternative use in mind for the land, perhaps a civic center, library, or an industrial complex planned by the only owner served by the highway.

If the only goal is to save on town maintenance costs, consider discontinuing the highway subject to gates and bars instead. That is the purpose of the Class VI classification, and the right of way will be preserved for future use, if necessary. Some municipal officials are hesitant about Class VI status because they are concerned it will create liability. On the contrary, municipalities enjoy significant statutory protections against liability and maintenance for Class VI roads. See, Chapters 6 and 8.

One thing Class VI status does not accomplish is prevention of development. However, complete discontinuance of a highway will not necessarily stop development either. The only way to control development, within the limits of the law, is through the proper use of zoning and planning regulations.

Other items for a local road discontinuance policy checklist:

- Make sure that the legislative body vote unambiguously and unconditionally qualifies as either a complete and absolute discontinuance or a discontinuance subject to gates and bars (or discontinuance by conversion to a trail).
- Make sure all landowners are notified of the discontinuance in advance so there will be a definite starting point for the six-month period in which to appeal or request damages. Contact owners and settle on damage amounts (or waiver of damages) in advance, to avoid surprises, and so that the total cost to the town will be known by the legislative body voting on the discontinuance.
- If there is any reason to believe the town holds title to the property, clarify at the time of discontinuance whether the town wants to retain title. If not, the legislative body should consider authorizing the execution of quitclaim deeds to abutters.
- If another use of the land is intended (for example, a public building), obtain the written consent of all abutting owners to waive the private access rights reserved under RSA 231:43. If they will not agree, those rights may need to be taken by eminent domain.

CHAPTER FIVE
SPECIAL CATEGORIES OF LAYOUTS AND ROADS

This chapter deals with several unique circumstances and types of highways, but keep in mind that all highways must be created in one of the four ways covered in Chapter 2 and must belong to one of the classifications covered in Chapter 3. For example, a scenic road is probably Class V and must have been either laid out, accepted, or otherwise created as a public way. The procedures discussed in this chapter are special categories of layouts and roads and are not a substitute for the legal principles discussed in these previous chapters.

CONDITIONAL LAYOUT AND BETTERMENT ASSESSMENTS

No General Special Assessment Law for Highways

Some states give towns and cities broad power to charge special assessments to landowners for any type of highway work done on public roads and streets fronting their land and specially benefiting that land. But New Hampshire has no general special assessment law for highways. Since municipalities have no powers beyond what the legislature gives them (*Girard v. Allenstown*, 121 N.H. 268 (1981)), most towns and cities in New Hampshire cannot assess benefited owners for improvements to existing Class IV and V highways but must pay for them by other means. See Chapter 12 on funding.

Specific Special Assessment Provisions. While there is no general special assessment law in New Hampshire, there are four legal mechanisms under which a municipality can finance certain limited types of highway improvements by charging only those property owners within an identified district. These four legal mechanisms are:

- **Central Business Service Districts.** RSA 31:120 through :125 authorize towns and cities to charge downtown business owners the cost of street and sidewalk cleaning and other "services related to the maintenance of an attractive and useful pedestrian environment." However, capital expenditures are limited to $20,000 per project, so major highway reconstruction is not included in this authority. The legislative body must adopt the relevant sections of RSA chapter 31, establish a formula for assessment of each property in the district, and approve a budget including the special expenditures.
- **Economic Development and Revitalization Districts.** RSA chapter 162-K authorizes creation of districts where tax-increment financing is used to finance the costs of highway and other improvements. The added property tax base of new development that occurs as a result of the improvements is used to finance the improvements. See RSA chapter 162-K for further information on this process.
- **Village Districts.** RSA 52:1(m) authorizes the formation of village districts for purposes of constructing and maintaining highways. This isn't truly a "town" means of highway financing, because once the village district is formed, it becomes a municipal entity separate from the town, with its own governing and legislative bodies. The costs of highway construction and

maintenance within such a village district are then assessed against all property lying within the district.

- **Impact Fees**. RSA 674:21, V authorizes municipalities to charge a fee to a property developer as part of a subdivision or other land use change to "help meet the needs occasioned by that development for the construction or improvement" of various capital facilities owned or operated by the municipality, including "municipal road systems and rights of way…." These fees may be assessed only after a capital improvements plan and an impact fee ordinance have been adopted by the municipality. The fees assessed are "a proportional share of municipal capital improvement costs which is reasonably related to the capital needs created by the development, and to the benefits accruing to the development from the capital improvements financed by the fee. Upgrading of existing facilities and infrastructures, the need for which is not created by new development, shall not be paid for by impact fees." If the municipality has not adopted an impact fee ordinance, it may still assess the developer an exaction for the cost of off-site improvement needs determined by the planning board to be necessary for the occupancy of any portion of a development but which are outside the boundaries of the subject property, including highway and drainage upgrades. RSA 674:21, V(j). For more information on impact fees, see Chapter 7.

City Charters. The authority to include special assessment clauses in a city charter is found in RSA 49-C:25 and 49-C:26. No similar power exists in the town charter law (RSA Chapter 49-D), even if a town adopts a town council form of government. RSA 49-D:3 may give town councils the same statutory powers as city councils, but special assessments are not one of the statutory powers of city councils under RSA chapter 47. The power to levy special assessments is therefore one of the advantages cities have over towns. RSA 49-C:26 requires cities that have special assessment power in the charter to enact, by ordinance, complete special assessment procedures, including plans and specifications, estimate of costs, notice and hearing, as well as collection of special assessments.

Conditional Layout and Betterment Assessment

Towns, as well as cities that do not have special assessment power in their charters, can assess landowners for road improvement costs only when a new Class IV or V highway is being laid out, or when a Class VI highway is being reclassified as Class IV or V. There are two relevant statutes: RSA 231:23 authorizes "conditional layout," and RSA 231:28 through :33 authorize "betterment assessment." What is the difference and which process should be used?

Conditional Layout. RSA 231:23 is a one-sentence law that provides that whenever a highway being created by layout will specially benefit an individual, the select board can make the layout conditional upon that individual bearing all or part of the cost of "constructing and maintaining it."

Betterment Assessment. RSA 231:28 through :33 authorize a "betterment assessment" procedure (described below) to be used either in conjunction with layout of a private road as a public way, or when a Class VI highway is reclassified as Class V under RSA 231:22-a.

Comparison of the Two Statutes. These two laws may seem to duplicate each other. They do overlap some, but the conditional layout statute was enacted in 1850, whereas the betterment assessment statutes were enacted in 1979. Here's an evaluative comparison:

- The betterment assessment law (RSA 231:28 through :33) contains clear procedures, whereas the conditional layout law (RSA 231:23) gives no indication of what procedures should be followed, which may result in uncertainty over the legality of the process used.

- Conditional layout authorizes charging the cost of maintenance to the benefited landowner. The betterment assessment law explicitly precludes passing maintenance costs to the owners. See RSA 231:33 and *Ritzman v. Kashulines*, 126 N.H. 286 (1985).
- The betterment assessment law can be used only when a road is being laid out over an existing private right of way, or when a Class VI highway is being reclassified as Class IV or V (see RSA 231:22-a, IV), whereas RSA 231:23 can ostensibly be used in the case of a new road.
- The betterment assessment law gives a town the same remedies for collection as in the case of property taxes, including a possible tax deed, whereas RSA 231:23 contains no collection or enforcement procedure. Therefore, some kind of security bond would be essential to protect the town's interests.
- Perhaps most notably, the betterment assessment law provides a mechanism to deal with a case where only some of the affected owners agree to the assessments—the counter-petition process described below. Conditional layout provides no way of dealing with unwilling owners. For this reason, conditional layout as authorized by RSA 231:23 should not be used whenever more than one landowner is specially benefited. The betterment assessment procedure is clearer and more enforceable.

Betterment Assessment Procedure

As with the layout process (see Chapter 2), the betterment assessment process is complex, and therefore local officials should work closely with the municipal attorney when betterment assessment is contemplated. Indeed, except in the case of reclassifying a Class VI highway (RSA 231:22-a, IV), the betterment assessment law must be combined with the layout procedure, making it doubly important to follow all the procedural requirements.

Hearing on Detailed Plans. The select board holds a hearing at which "details of the proposed construction, reconstruction or repairs, and the estimated costs thereof" must be revealed and explained in enough detail so that abutting property owners can decide whether to accept the proposed assessments. Notice of this hearing must be served at least 14 days prior upon all owners either abutting or served by the road and certainly upon anybody who is going to be charged the betterment assessments. The statute doesn't provide for how the notice should be served on the property owners, but using the same procedure as for layouts, as described in RSA 231:10 (see Chapter 2), is recommended. This hearing can be combined with the layout hearing at which the select board determines the "occasion" for the layout, although there is no requirement to combine the hearings. It's unlikely that all the design work needed to present the degree of detail required at a hearing under RSA 231:28 will be completed at the time of the first hearing on a layout petition, so there is nothing wrong with holding a second hearing to present this detail.

Abutters' Petition. RSA 231:28 provides that layout (construction) can begin 10 days after the betterment hearing unless a majority of the landowners abutting or served by the road present the select board with a petition not to conditionally lay out the highway. The reason for this counter-petition will normally be because the owners refuse to pay the costs estimated at the hearing. A valid counter-petition is one signed by owners of a majority of the number of lots subject to the betterment assessment.

Apportionment. RSA 231:29 provides that the select board must decide the following: whether all or only a part of the total cost will be assessed against the owners; how the burden is to be distributed among the owners (some parcels may be benefited more than others); and whether to prorate the assessments—up to 10 years is permitted. The statute does not require that these decisions be made before the hearing, but for due process reasons it is highly advisable, so the landowners have as much information as possible and can meaningfully evaluate whether to counter-petition.

Collection. All betterment assessments constitute a permanent lien on the benefited property. RSA 231:30. The select board commits the betterment assessment cost to the collector of taxes with a warrant, just as with property taxes, and the collector has all the same collection remedies, including interest, costs, and tax deeding. RSA 231:31. The select board can abate betterment assessments for good cause upon a petition filed within 2 months of the notice of tax by a person who is "aggrieved" by the assessment. RSA 231:32.

One factor influencing the select board's decision on a request for a layout subject to betterment assessments will be the value of the property being specially assessed. In *Rockhouse Mountain Property Owners Ass'n v. Conway*, 133 N.H. 130 (1990), the New Hampshire Supreme Court upheld a refusal of the select board to lay out private paper streets as highways subject to betterment assessments, in part because the amount of the assessment in some cases exceeded the value of the lots themselves.

Road Standards

When the cost of construction is being charged under betterment assessment, what road design standards will apply? RSA 231:28 allows the betterment procedure to be used only when the existing private or Class VI road "does not conform to construction standards and requirements currently in effect in the town." The words "currently in effect" are not defined in the statute, but an arbitrary standard is unlikely to be upheld. A consistent town-wide road policy should be adopted so that the standards the municipality uses for its own reconstruction projects, the standards required by the planning board for new subdivisions, and the standards required for municipal acceptance of dedicated roads are in line with each other. That doesn't mean that the standard must be the same for all roads. For example, standards for cul-de-sacs serving two or three dwellings can be, and should be, different from the standards for arterial highways. See Chapter 7.

HIGHWAYS CROSSING MUNICIPAL BOUNDARIES

Joint Governing Body Action

Occasionally, the layout of a new municipal road may benefit from the cooperation of adjoining municipalities, especially when it makes sense to integrate the new road into the existing road systems of the adjoining municipalities. From a legal standpoint, there is no reason one town can't lay out a highway that dead ends at the town line, but in most cases that is not useful. RSA 231:13 allows layout of a new road to be done by joint action of the governing bodies of the affected municipalities. The highway isn't laid out unless it receives a majority vote from each board separately. The boards must also reach agreement on apportioning the layout costs between the municipalities. RSA 231:14. In other respects, the layout procedure is the same as for a highway in one town (see Chapter 2), including the need for a petition and filing of a return. In the case of adjoining municipalities, the layout return is filed with the clerk of each affected town or city.

Superior Court Petitions

Because of a quirk of history, citizens proposing a highway to be located in more than one municipality have a second, separate legal pathway they can follow, in addition to RSA 231:13. Under RSA 232:1-a, they can file their petition directly with the superior court, which then refers it to the county commissioners. RSA 232:2. If the municipalities are in different counties, the case is referred to a joint board of county commissioners, which then makes a report to the court. See RSA 232:2 through :27 for more detail on this procedure.

The historical quirk is the fact that prior to 1981, all highway layout appeals were referred by the superior court to the county commissioners, who would report their findings to the court. *See,* 1945 N.H. Laws

Chapter 188:31 (former RSA 234:31). When the road laws were recodified in 1981, the sections calling for the referral of appeals to the county commissioners were stricken, except where the road is in two municipalities. RSA 232:1-a; *V.S.H. Realty, Inc. v. Manchester*, 123 N.H. 505 (1983). The odd thing is that, although the former statute dealt with appeals, the new statute—probably because it was combined in 1981 with the statute governing layouts in unincorporated places—clearly allows an original petition to the superior court in these cases, without any prior filing with the select board. This statute doesn't get much use, but in at least one case a joint board of county commissioners recommended, and the court laid out, a road in two towns, contrary to the wishes of both select boards.

HIGHWAYS TO SUMMER COTTAGES

Summer Maintenance Only

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.

To avoid confusion on the part of the traveling public, it may be better not to use the term "summer cottages" on the posted signs. A notation such as "summer highway only," with the relevant dates, might be less confusing.

How 'Summer' Status is Conferred or Removed

The summer cottages law was so vague in the past that it was possible to argue (and one superior court did once decide) that "highway to summer cottages" status hinged on whether there existed any year-round buildings served by that highway. This is no longer the case. The statute was rewritten in 1989, and it now provides that the "summer" designation is not affected at all by changes in use of the land served by the highway. RSA 231:81, III. Thus, if there are vacation homes served by a "highway to summer cottages," the fact that owners decide to move in year-round does not automatically mean the municipality must do year-round maintenance. A change occurs only if the designation is repealed formally, as explained below.

Designation. A highway can attain "summer" status in two ways, according to RSA 231:81, I:

- If the highway is already Class V, by a vote of the legislative body (town meeting in towns) to designate it as a "highway to summer cottages"; or
- By the select board, upon petition, to lay out or alter the highway, using the same procedure as for a layout. See Chapter 2.

RSA 231:81, II provides that these same two options can also be used for deciding to reopen a summer highway to year-round use and maintenance (essentially repealing its designation as a highway to summer cottages). Although the law doesn't indicate, it is likely that a complete discontinuance of a "highway to summer cottages" (or a discontinuance subject to gates and bars) would take the same procedure as for discontinuing any other Class V highway.

Winter Roads

Roads may be laid out that are open and maintained only between November 15 and April 1. They are called "winter roads." RSA 231:24. The only way a road can become a "winter road" is to be laid out that way, by petition, through a proceeding under the layout laws. See Chapter 2 for a detailed description of the layout process. Municipalities can charge yearly rentals to the property owners benefited by the winter road layout.

The winter road law was enacted in 1897 and has never been cited in a reported court opinion. The intent of the statute may have been an attempt to legitimize the plowing of private roads by towns, a practice not legally allowed without reimbursement to the municipality by benefited property owners. *Clapp v. Jaffrey*, 97 N.H. 456 (1952). Laying out winter roads for this purpose is not recommended, for several reasons. First, since the winter road law was enacted, highway liability law has changed significantly. New Hampshire municipalities no longer have complete sovereign immunity. Instead, municipalities now have the duty to prevent "insufficiencies" on all town-maintained highways. RSA 231:90 through :92-a. See Chapter 6 for more on liability.

Second, the New Hampshire Supreme Court has held, "Snowplowing alone does not keep a road in a state of repair or preserve it from decline. Maintenance or repair work such as repaving or 'cold-patching' in summer is required to protect against and combat the road's yearly erosion caused by rain, snow, and freezing temperatures." *Catalano v. Windham*, 133 N.H. 504, 511 (1990). Attempting to confer winter road status on an otherwise private road, where the only work to be done by the town is snowplowing, raises too great a risk that the town may be found liable for road insufficiencies caused by a private party's off-season maintenance, or lack thereof.

Scenic Roads

WHAT ARE THEY?

Any road other than a Class I or II highway can be designated a scenic road (RSA 231:157) by the legislative body of a city or town. Scenic road designation requires the state and/or the municipality to obtain written permission of the planning board prior to any repair, maintenance, reconstruction or paving work on the road if such work requires the cutting, damage, or removal of trees, or the removal or destruction of stone walls. Likewise, any utility or other person who wishes to install or maintain poles, conduits, cables, wires, pipes, or similar structures must obtain prior written consent of the planning board if the work involves tree cutting or removal of stone walls. RSA 231:158, II. Scenic road designation does not affect a municipality's eligibility to receive construction, maintenance, or reconstruction aid. RSA 231:158, III.

Trees Defined. RSA 231:157, I defines "tree" as "any woody plant" that is at least 15 inches in circumference at four feet from the ground.

DESIGNATION PROCEDURE

A petition signed by 10 voters, or landowners abutting the road (even if they are not voters), can initiate the scenic road designation process, details of which are found in RSA 231:157. The petitioners must provide the town clerk with a list of the names of owners of property abutting the road. Within 10 days of receiving the petition, the clerk must notify, by regular mail, all the property owners abutting the road, informing them that a scenic road petition has been received and that an article to designate the road will appear in the warrant of the next annual or special town meeting. Designation can be rescinded in like manner at the annual town meeting. In fact, in *Neville v. Highfields Farm, Inc.*, 144 N.H. 419 (1999), the New Hampshire Supreme Court held

that town meeting had the authority to rescind scenic road designation in order for the landowner to have a portion of the road relocated and then designate the relocated road as scenic, over the objections of the planning board.

Although the statute provides for a process initiated by petition, RSA 31:131 authorizes the select board to insert in the town meeting warrant any article that can be inserted by petition. The select board then would have the duty to notify the abutters, as required by RSA 231:157.

In cities and in towns with councils, voters or abutting property owners would initiate the scenic road petition, which would then be voted on by the city or town council. Presumably, the council would have authority to initiate the scenic road designation upon notification of abutting property owners.

PUBLIC LIST

Each municipality must maintain a public list of all roads, or portions thereof, that have been designated as scenic. The list must be updated annually and must contain sufficient information to permit ready identification of the location and extent of each scenic road by reference to a town map. RSA 231:157.

CUTTING TREES AND REMOVING STONE WALLS ON SCENIC ROADS

Notice and Public Hearing. Once a highway has been designated as a scenic road, the municipality and the state are required to seek the written consent of the planning board for any repair, maintenance, reconstruction, or paving work that would involve the cutting, damage, or removal of trees, or the tearing down or destruction of stone walls (or any portion thereof). Utilities must also seek consent before they erect, install, or maintain poles, conduits, cables, wires, pipes, or other structures if the work would similarly affect trees or stone walls. The planning board must hold a public hearing on any such request from the municipality or a utility. Notice of the public hearing must be advertised in a local newspaper two times. The second notice must appear in the newspaper at least seven days before the public hearing. RSA 231:158, II.

Exceptions. There are several important exceptions to the limitations on cutting trees and removing stone walls imposed by the scenic road statute, and local residents or municipal officials do not generally understand these exceptions. Lack of awareness of these exceptions has led to the common misconception that scenic road designation is a way to prevent tree cutting and stone wall removal altogether on designated roads. But abutting landowners are exempt from the statute's limitations, and road agents and public utilities enjoy significant exceptions as well. Scenic road status is not a way to make sure landowners get notice before trees are cut on the highway right of way adjoining their land. Municipalities are already legally required to give prior notice to owners before cutting trees on any public highway, not just on scenic roads (RSA 231:145 and :146, discussed in Chapter 1). In addition, even without scenic road status, utilities are required not only to give notice to landowners, but also to get their permission to cut trees. RSA 231:172 (see Chapter 13). It is also important to note that designating a highway as a scenic road, by itself, does not prevent future development, does not guarantee that a road will remain unpaved, and does not impose any restriction on the use of property or the highway other than the requirement for the government and utilities to obtain planning board permission in most cases before affecting trees and stone walls. *See, Cormier v. Danville Zoning Board of Adjustment*, 142 N.H. 775 (1998). Future use and development along a scenic road may only be accomplished through ordinary land use channels, such as zoning ordinances and historic district ordinances.

Road Agent. The road agent or his/her designee may remove trees that have been designated a public nuisance, in accordance with the process outlined in RSA 231:145 and :146, when the trees pose "an imminent threat to safety or property" without the consent of and prior public hearing by the planning board. However, the road agent must first obtain the written permission of the select board before removing nuisance trees. RSA 231:158, II.

Utility. When a public utility is involved in "the emergency restoration of service," it may perform work necessary to promptly restore utility service that has been "interrupted by facility damage" without a prior public hearing of the planning board and without written permission of the select board. After performing such work, the utility must inform the select board of the nature of the emergency and the work performed. RSA 231:158, II.

Landowners. Scenic road designation does not affect the rights of landowners to cut trees on their own property, unless the municipality has acquired the trees as shade or ornamental trees under the provisions of RSA 231:139 through :156. Landowners are also free to remove or alter stone walls on their property despite scenic road designation, within the limits provided in RSA 472:6 regarding boundary markers. RSA 231:158, IV. The only way for a municipality to prevent owner/abutters from cutting trees is by acquiring title to the highway strip, or by taking tree rights under the tree warden law. RSA 231:154. See also Chapter 1.

ADDITIONAL MUNICIPAL PROVISIONS

Municipalities can adopt scenic road regulations that are different from or in addition to those outlined above as part of a scenic road designation, or as an amendment to a previous designation. Amendments may be made in the same manner as the original designation. Additional provisions can include, but are not limited to, criteria used by the planning board in deciding upon requests to cut trees or remove stone walls, or protections for trees smaller than 15 inches in circumference at four feet from the ground in order to establish regenerative growth along scenic roads. RSA 231:158, V.

PENALTY

Any person who violates the scenic road law or any additional local regulations governing scenic roads is guilty of a violation and shall be liable for all damages resulting from such violation. RSA 231:158, VI.

CONSTITUTIONALITY

In *Webster v. Candia*, 146 N.H. 430 (2001), the Court held that the provisions of the scenic road statute were not impermissibly vague and that the statute gave adequate warning to the plaintiffs that certain size trees could not be cut without planning board approval. The Court upheld the planning board's denial of a request from a developer to cut trees on a Class VI road designated as scenic in order to improve the road for reclassification as Class V. Under the town zoning ordinance, cluster development was not permitted on Class VI roads. The developer had argued that the statute failed to include standards by which the planning board decides upon the request to cut trees. But the Court wrote, "We find it implied that the planning board will exercise its discretion consistent with the purpose of the road's scenic designation." That purpose, according to the statute's legislative history, was to "encourage the tourist attractiveness of our scenic roads in our towns and…permit the retention of trees and stone walls so characteristic of our New England scenery."

Rights of Way for Lumber Removal

RSA 231:40 through :42 provides a process whereby a landowner who wants to remove "lumber, wood or other material" may petition the select board to lay out a right of way for that purpose over someone else's land. The right of way can be created for a fixed length of time and made subject to other conditions.

PROCEDURE

The procedure is similar to a highway layout, described in Chapter 2, except for some special notice provisions outlined in RSA 231:42. After the select board receives the petition, the board must schedule a time to "examine the premises" and hear from the parties. At least 12 days' notice of the examination and hearing, as well as notice of the time the select board will consider claims for damages, must be provided to one or more of the petitioners and to persons owning or having an interest in lands through which the right of way will pass. The select board must also publish notice in a local newspaper at least 10 days before the hearing. Since this process involves a taking by eminent domain, the procedures outlined in the Eminent Domain Procedures Act (RSA Chapter 498-A) also apply. Because this is a complex procedure, local officials should consult their municipal attorney if they receive a right of way petition for timber removal.

If, in its discretion, the select board decides to lay out a right of way for removal of lumber or other material, any damages to be paid to the owner over whose land it passes must be paid by the petitioner. There is no requirement for the petitioner to reimburse the town for the expense of going through the layout procedure.

'OTHER MATERIAL'

The use of the phrase "or other materials" in the operative sentence of RSA 231:40 arguably allows the use of this statute to lay out a right of way for removal of gravel as well as for timber.

LEGAL ISSUES

There are major areas of uncertainty with respect to this statute, which has been cited in only one reported court decision. Since the only time this statute would be used is when the timberland owner had failed at negotiating a right of way with abutters, it is arguable that the statute violates the constitutional principle that the power of eminent domain shall not be used for a purely private purpose. New Hampshire Constitution, Part I, Article 12; *Merrill v. Manchester*, 127 N.H. 234 (1985). The Court has upheld a layout under RSA 231:23 of a Class VI highway to benefit only one person, so it would not be unprecedented. *Tracy v. Surry*, 101 N.H. 438 (1958). Nevertheless, many select boards refuse these petitions because the town would be inserting itself into one side of a private dispute. The statute authorizes select boards to act "in their discretion." We are aware, anecdotally, that some select boards have agreed to lay out rights of way for lumber removal, but no denial has yet been overturned by a court.

"Any person aggrieved" by the select board's decision on a petition may appeal to the superior court within 60 days. RSA 231:40 and RSA 231:34. In the only reported case citing this statute, the New Hampshire Supreme Court held that the owner of abutting property had no standing to enforce a timber owner's failure to obtain a lumber right of way over his own land just because the abutter had an easement to obtain well water from the timber owner's land. *Blagbrough Family Realty Trust v. A&T Forest Products, Inc.*, 155 N.H. 29 (2007).

A further question arises as to whether a timber removal right of way under this statute is available only to a landowner whose property is landlocked or has no other legal access. However,

the statute itself provides that an owner can petition for lumber removal right of way "when it becomes necessary for the convenient removal...." A right of way forced upon a landowner merely for another landowner's "convenience" would likely increase the doubts about the constitutionality of the taking, no matter how temporary.

Emergency Lanes

Municipal highway funds can be spent on Class IV and V highways only. RSA 231:59. However, in 1994 the state legislature recognized a public safety need to keep some Class VI highways and private ways passable for emergency vehicles without requiring the municipality to reclassify or accept them as Class V highways with all the maintenance and liability responsibilities (RSA 231:90 through :92-a) that accompany maintained roads. RSA 231:59-a allows municipalities to spend highway funds to keep a Class VI highway or a private road "passable by firefighting equipment and rescue or other emergency vehicles," but only if the select board, after a public hearing, declares the relevant road as an "emergency lane."

PROCEDURE

In order to declare an emergency lane, the select board must hold a public hearing. In the case of a private road, "all persons known to have an interest in the way" must be given notice by regular mail 10 days prior to the hearing, and the private road can't be declared an "emergency lane" without owner permission, which can be withdrawn at any time. RSA 231:59-a, III. The statute does not provide other notice requirements for the public hearing, but under RSA Chapter 91-A, the hearing is a public meeting requiring posting in at least 2 public places at least 24 hours in advance (although 10-14 days would be better to provide true due process), or publishing in a newspaper.

After the public hearing, the select board must first make written findings in the minutes of its meeting that "the public need for keeping such lane passable by emergency vehicles is supported by an identified public welfare or safety interest which surpasses or differs from any private benefits to landowners abutting such lane." RSA 231:59-a, II. In other words, a highway may not be declared an emergency lane solely for the private benefit of abutters on that highway.

If a road is declared an emergency lane, the municipality may then expend highway funds to remove brush, repair washouts or culverts, or do other work "deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles." A capital reserve or trust fund may be established for this purpose. RSA 231:59-a, I.

Declaring something an emergency lane does not alter its classification (a Class VI highway is still a Class VI highway). The municipality may regulate a Class VI highway which is an emergency lane to the same extent as it may regulate any other Class VI highway. Similarly, a private way that has been declared an emergency lane does not become a public highway open to public travel simply by becoming an emergency lane. RSA 231:59-a, IV.

LIMITED AUTHORITY

The limited authority to maintain Class VI roads and private ways granted in RSA 231:59-a—repairing culverts, removing brush—reflects the legislature's intention not to provide municipalities with a means to circumvent the normal procedures required for accepting and maintaining roads with the accompanying liability responsibility. However, when enacted properly, municipalities have strong protection from liability on minimally maintained emergency lanes. RSA 231:59-a, IV provides:

> A declaration under this section may be rescinded or disregarded at any time without notice. This section shall not be construed to create any duty or liability on the part of any municipality toward any person or property. Utilization of this section shall be at the sole and unfettered discretion of a town and its officials, and no landowner or any other person shall be entitled to damages by virtue of the creation of emergency lanes, or the failure to create them, or the maintenance of them, or the failure to maintain them, and no person shall be deemed to have any right to rely on such maintenance.

In other words, a municipality takes on no duty to abutting owners or the traveling public by declaring a Class VI highway or private way an emergency lane. The select board may ignore or rescind the designation at any time, and no particular standard of maintenance is required.

Limited Access Highways

Since 1961, municipalities have had authority to lay out limited access highways, using the layout process. RSA 231:53 through 56. With limited access highways, the normal division of rights between municipality and owner (see Chapter 1) no longer applies (RSA 231:54), and the municipality can limit abutters' rights to the same extent as the state can on limited access roads. RSA 231:56. For this reason, damages paid to the landowner will usually be substantially higher.

In order for a town to transform an existing local highway into a limited access highway, the layout procedure must be followed by laying out a limited access highway over an existing highway. The rights lost by abutting owners would be similar to a complete discontinuance. See Chapter 3. The amount of damages could turn out to be prohibitive.

Access to a municipal highway can also be regulated through driveway access standards. The number, location, and standards for driveway access can be controlled through RSA 236:13. See Chapter 6.

Previously Discontinued Highways

Any landowner who has no other access to his or her land by a public highway can petition the select board to lay out a highway subject to gates and bars (Class VI) in the same place any previously discontinued highway was located. RSA 231:22. The process is similar to a normal layout, with some notable exceptions. Local officials should consult the municipal attorney if they receive a petition of this sort. Issues such as whether the landowner already has a private right of easement (RSA 231:43) need to be sorted out with respect to damages or even whether the property, in fact, has no other access.

PUBLIC HEARING

Notice must be posted in 2 public places and sent to owners and abutters, but no public hearing is required unless one of the parties objects within 60 days in writing and asks for one. If so, the petition is, from then on, treated the same as the layout of a new highway. *Williams v. Babcock*, 116 N.H. 819 (1976).

NO DISCRETION

If no owner or abutter objects, the select board has no discretion, but must lay out the highway subject to gates and bars within 60 days if the board finds that the petitioner has no other access.

MAINTENANCE RESPONSIBILITY

Maintenance of the road, and of gates and bars, if any, continues to fall on the petitioner, who must also pay for any damages that become due to other landowners.

Highway Planning Corridors

RSA Chapter 230-A, the corridor protection statute, gives the state, municipalities, and other governmental units the authority to hold land in reserve for a future highway without immediately having to pay full damages. The governmental unit would hold a corridor protection restriction on the property, similar to a conservation restriction. The law is designed to help solve the problem of development along future highway corridors in anticipation of the state or municipality having to pay full market value. Also, towns and cities have been reluctant to use the official map law (RSA 674:9 through :14), which ostensibly allows a town to refuse all development permits, without paying any damages, by drawing lines of possible future streets on a map. See Chapter 7 for details on the official map law.

The corridor protection law can be used either alone or in conjunction with the official map law. Using a procedure similar to a layout, the municipality designates a highway planning corridor. The legal effect of the designation is that anyone who wants to develop, alter or expand a use within that corridor must, in addition to any other land use permit, also get a corridor permit. Once the permit is applied for, the governmental unit must either grant the permit, with the risk of later having to pay full market value for the development if the highway goes through, or pay damages and acquire a temporary development restriction. This ability to use eminent domain to take temporary development rights—for an amount similar to a leasehold—is the centerpiece of this law.

Scenic and Cultural Byways

RSA 238:19 through :24 call for the establishment, by the state, of a system of scenic and cultural byways (not to be confused with the scenic road law, to which it bears no direct relation). Designation is by a special state council created for the purpose. RSA 238:20. Either state or local roads may be designated, according to a set of criteria in the law (RSA 238:22), and only after a public hearing "in the area" of the proposed byway. Part of the council's job is to encourage towns and cities to make recommendations for local roads to include in the system (RSA 238:21, III) and to "provide municipalities with tools and ideas" for protecting scenic and cultural byways. RSA 238:21, IV.

Scenic byway designation does not preempt local planning and zoning authority. RSA 238:19, II. It also does not affect the operation of utilities or require lines to be relocated underground. RSA 238:22, II. It does not bind any municipality, because the council is required to rescind designation of the road at the municipality's request. RSA 238:21, VI. The council is given no rulemaking authority. The main impetus for this law, enacted in 1992, was the availability of federal funding and as a tourism marketing tool. The only restriction imposed on scenic and cultural byways is that "educating devices" (billboards, etc.) are prohibited, subject to certain exceptions. RSA 238:24.

CHAPTER SIX

LIABILITY, REGULATION, AND MAINTENANCE DUTIES

HIGHWAY LIABILITY: DUTY TOWARDS TRAVELERS

Putting Road Liability in Context

Ownership or custodianship does not, in itself, make a municipality an insurer, guaranteeing the safety of people on municipal roadways. "Cities and towns have not been, and are not now, guarantors of public peace, safety and welfare." *Doucette v. Bristol,* 138 N.H. 205 (1993). Usually, a municipality will not be held liable unless it does something wrong or is negligent. And municipalities typically carry sufficient insurance coverage for instances where they are negligent.

Of course, not all important policy issues can be reduced to liability questions. It is appropriate for municipal officials to be concerned about whether a particular policy or activity could result in injury to someone, even when the municipality would not be liable for the injury.

A liability analysis should include consideration of the municipality's future interests. If the town settles a claim based upon a particular type of conduct, word will spread, and the town may never be able to undertake that type of conduct again without other claims being brought. Consider long-term policies and whether it is important for the town to be able to undertake the type of activity. Important policies should not be defeated by an undue fear of liability.

The law of municipal liability is evolving more rapidly than many areas of the law. A qualified lawyer will rarely say there is no risk of liability associated with any particular activity. Since no options are completely risk free, a municipality cannot base all public decisions upon a fear of claims or lawsuits. Some municipal actions are required by the law, and some are clearly prohibited. In between, there is a vast amount of discretionary decision-making ability. The municipality's lawyer and insurance carrier can help analyze risks and decide when the risk of liability is great enough that it should influence a decision, and when it is not.

Still, town and city officials need to know what minimum duty the municipality has to the traveling public. A municipality's duty is the mirror image of its potential liability. Whenever a town is sued for highway-related injuries or damages, it has two basic defenses that may be used: statutory limits on the duty of care, and the doctrine of municipal official immunity as set forth in the common law (court cases). Because common law immunity is an effective way to fend off a liability claim without the necessity of reaching the duty-of-care question, it is important to examine it first.

A History of Sovereign Immunity

It is thought that the doctrine by which municipalities were held immune from liability for injury claims originated in the case of *Russell v. Men of Devon*, 2 Term Rep. 667, 100 Eng. Rep. 359 (1789). At the time that case was decided, the idea of a municipal corporation was in its infancy, and lawsuits were brought against the entire population of a community. Because there were no municipal funds (or insurance) from which to pay a judgment, individual citizens were required to pay out of their own pockets. Thus, in the

Russell case, the court held that it was better that an injured person be without remedy than that the public at large should be exposed to liability.

Two hundred years later, further reasons had evolved to justify municipal immunity. This evolution occurred by way of judicial decisions and not by legislative action. Through the years, courts had concluded that since a municipality derived no profit from the exercise of governmental functions that are performed for the public benefit, moneys raised by taxation for public use should not be diverted for paying injury claims.

The harshness of the doctrine of municipal immunity was alleviated to some degree as courts began to assign a dual character to municipal functions. On the one hand, municipalities were considered to be subdivisions of states and endowed with governmental functions. On the other hand, they were considered corporate entities capable of the same proprietary functions as private corporations. Immunity existed for claims arising out of the exercise of governmental functions, but not for claims arising out of the exercise of corporate or proprietary functions.

The law governing municipal immunity changed drastically in 1974 when the New Hampshire Supreme Court issued its decision in *Merrill v. Manchester*, 114 N.H. 722 (1974). In that case, the Court concluded that the doctrine of municipal immunity as it had evolved up to that time offended "the basic principles of equality of burdens and of elementary justice." The Court further wrote that the doctrine was "foreign to the spirit of our constitutional guarantee that every subject is entitled to a legal remedy for injuries he may receive in his person or property." As a result, the Court abolished municipal immunity effective July 1, 1975, with two exceptions. Municipalities remained immune from liability for acts and omissions constituting:

- The exercise of a legislative or judicial function; and
- The exercise of an executive or planning function involving the making of a basic policy decision characterized by the exercise of a high degree of official judgment or discretion.

The Court's decision made cities and towns responsible for injuries negligently caused by their agents, servants, and employees in the course of their employment or official duties.

The legislature responded to the *Merrill* case in 1975 by enacting RSA 507-B:2, I. That statute provided absolute immunity to municipalities in the ownership, occupation, maintenance, or operation of public sidewalks, streets, and highways. That statute was later declared unconstitutional by the New Hampshire Supreme Court in *Dover v. Imperial Casualty & Indemnity Co.*, 133 N.H. 109 (1990) because the statute treated people injured by government negligence differently than people injured by private negligence by denying the former their right to a judicial remedy. New Hampshire Constitution, Part I, Article 14. In response, the legislature amended RSA 507-B:2; the statute now recognizes municipal liability in connection with public ways, but limits it to the circumstances set out in RSA 231:90 through :92-a (discussed later in this chapter). Newly amended RSA 507-B:2-b further limits municipal liability in situations where the municipality's winter maintenance program is certified under RSA 489-C:2-a by shifting the burden of proof to the claimant in relation to treatment of all public roads, parking areas, and walkways.

In 1975, the legislature also enacted RSA 507-B:4, which limits the amount of money damages a municipality can be required to pay for claims arising out of bodily injury, personal injury, or property damage. The limit is $325,000 per person, and a maximum of $1,000,000 per occurrence. These limits of liability, however, do not apply if the insurance coverage applicable to any particular claim exceeds the statutory liability limits ($325,000/$1,000,000). This principle of law arose out of the case of *Marcotte v. Timberlane Regional School District*, 143 N.H. 331 (1999). In that case, a soccer goal located on school property collapsed and killed a second-grade pupil. The school district's insurance policy had a $1 million

limit. The Supreme Court held that the policy limit, not the $150,000 statutory cap, was applicable. RSA 412:3 makes the limits of municipal liability the same as the limits stated in RSA 507-B:4 or in the insurance policy, whichever is higher.

Under RSA 507-B:4, the same limits apply to individual officials so long as they act within the scope of their office and in good faith. In addition, RSA 31:104 provides personal immunity for municipal officials acting in good faith within the scope of their authority.

Discretionary Function Immunity: Rationale

The Court has given two reasons why municipalities and their officials continue to be immune from liability for discretionary judgments and policy decisions, even after the *Merrill* case, as long as they act in good faith.

Discretionary Immunity Precludes Chilling Effect. Justice David Souter wrote in *Rockhouse Mountain Property Owners Association v. Conway*, 127 N.H. 593 (1986), if officials could be sued for making discretionary decisions, "[t]he availability of actions for damages would 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'" The concept of sovereign immunity is based on the idea that certain essential, fundamental activities of government must remain immune from tort liability so that our government can govern. In other words, if municipalities were liable for every policy decision made and every ordinance passed, officials would spend so much time and money defending and settling lawsuits that they would have time for little else.

Separation of Powers. The constitutional principle of separation of powers is another reason for discretionary function immunity. It is the notion that judges constitute only one branch of government, and should not be allowed to second-guess the policy decisions within the authority of the legislative and executive branches of government, whether state or local. Courts must remain extremely reluctant to "'accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter.'" *Gardner v. Concord*, 137 N.H. 253, 256 (1993).

What is a Discretionary Function?

The definition of "discretionary function" has been provided by way of New Hampshire Supreme Court decisions. These are some cases involving state and municipal highways:

- ***Ford v. N.H. Dep't of Transportation*, 163 N.H. 284 (2012)**
  During an ice storm, a traffic light at the intersection of two state highways stopped working, and an accident occurred. Under discretionary function immunity, the state and its agencies are immune from liability for conduct that involves "the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty on the part of the state or any state agency or at state officer, employee, or official acting within the scope of his office or employment." RSA 541-B:19, I(c). (This is similar to municipal discretionary function immunity.) The state operates under the Manual on Uniform Traffic Control Devices, which contains "guidance" regarding alternative traffic direction during a period of failure. The Court held that the guidance portions of the document do not create mandatory duties on the part of the state. Therefore, the state had discretion in its response to traffic lights rendered inoperable because of severe weather-related power outages and was immune from liability.

- ***Appeal of Dep't of Transportation*, 159 N.H. 72 (2009)**
  A truck driver following a New Hampshire Department of Transportation (DOT) detour

route did not observe a "trucks turn right" sign and then collided with a low-clearance railroad bridge. The detour plan had been developed by the Bureau of Traffic in consultation with the City of Dover using the Manual on Uniform Traffic Control Devices. There was no separate truck detour route because trucks were barred by a weight limitation from using the closed road in the first place. The Court concluded that the state was entitled to discretionary immunity because a detour plan involves "weighing alternatives and making choices with respect to public policy."

- ***Bergeron v. Manchester*, 140 N.H. 417 (1995)**
  The deceased was killed at the intersection of a city street and a state highway. Several prior deaths had occurred at the same location. Warning signs had been erected, but the plaintiff claimed the state should have installed a flashing light as requested by the city's aldermen and dictated by the state's Traffic Control Standards, Statutes, and Policies Manual. The manual, however, indicated that three fatal accidents were merely the "minimum conditions" justifying signal installation. Thus, the Court held that the manual provided guidelines only, not mandates, and should be considered an "invitation to exercise discretion." The state was held immune. The plaintiff also claimed that the prior deaths gave the city actual notice of a hazard and it was negligent not to remedy it. With respect to that argument, the Court held that, while prior notice is a prerequisite to liability under the statute (discussed below), prior notice does not necessarily create liability. The city was not deprived of immunity for exercising its discretion.

- ***Trull v. Conway*, 140 N.H. 579 (1995)**
  This case involved a town police officer who, after discovering black ice on a state highway, notified the state but did nothing further. Before state trucks could salt the road, an accident occurred. The Court held that even with prior notice of a hazardous condition, town police had no duty to warn travelers of hazardous conditions on state highways.

- ***Sorenson v. Manchester*, 136 N.H. 692 (1993)**
  The plaintiff claimed her husband's motorcycle crash and death were caused by the city's negligence in allowing parking on both sides of Amherst Street, leaving it too narrow. The Court held that decisions of the board of mayor and alderman about parking regulations were discretionary functions for which there was immunity.

- ***DiFruscia v. N.H. Dept. of Transportation*, 136 N.H. 202 (1993)**
  The deceased drowned inside her car while it lay upside down in a drainage ditch adjacent to Route 28. The plaintiff claimed that the state should have constructed a guardrail at that point on the road. The Court held that the decision whether to install a guardrail is discretionary and, therefore, the state would have immunity for making such a decision. In this case, however, DOT records revealed that the original policy and plans had called for a guardrail. It was just never installed. Thus, the Court held that there was no immunity for the negligent implementation of a construction plan or policy.

- ***Gardner v. Concord*, 137 N.H. 253 (1993)**
  This case involved a slip and fall accident caused by a "declivity" where a sidewalk crossed an abandoned alleyway. The area had not been properly filled in, was not lighted, and was obscured by parked cars. The Court held that if the alleged defect were a result of a faulty plan, then there would be discretionary immunity, but if the defect were the result of faulty implementation of a plan, then immunity would not apply. The Court further held that the burden of proof was on the city to demonstrate that there was a plan. No such proof existed, so the city was not entitled to immunity. This case leads to the conclusion that it is always better to have a plan on file in order to be able to prove that discretion was indeed exercised. Of course, it will be equally important to ensure that the plan is properly implemented.

- ***Delaney v. State*, 146 N.H. 173 (2001)**
  This case illustrates that even if a plan is created to fix a problem, the plan must be followed using reasonable care. During heavy rain, water in nearby marshes periodically exceeded the drainage capacity of a culvert under Route 1-A in Hampton. The DOT hired a contractor to dig a trench from the ocean westward, past the plaintiff's motel to Route 1-A, in order to drain accumulating water. The plan provided for the trench to be dug and opened on the outgoing tide. Unfortunately, the contractor completed the work during the incoming tide, which eroded the trench, flooded the motel, and caused $285,000 in damage. Although the DOT argued its decision to construct a trench was a discretionary policy decision immune from liability, the Court concluded that the DOT and the contractor had negligently implemented the trench-digging plan. Immunity was denied. *See also Tarbell, Adm'r, Inc. v. Concord*, 157 N.H. 678 (2008) (when a municipality negligently fails to create a plan or policy, discretionary immunity does not protect it from liability).

The Duty Of Care Statute: RSA 231:90 – :92-a

In the *Trull* case, the Court never reached the immunity issue because it found no duty on the part of the town. *Trull v. Conway*, 149 N.H. 579 (1993). A municipality's duty toward travelers to protect them from hazardous road conditions is dictated by RSA 231:90 through :92-a. Those statutes were amended generally in 1991 following the Court's decision in *Dover v. Imperial Casualty & Indemnity Co.*, 133 N.H. 109 (1990). The Court's analysis of the proposed legislation can be found in *Opinion of the Justices*, 134 N.H. 266 (1991).

Those statutes provide that a municipality's sole legal duty is to correct "insufficiencies" as defined in RSA 231:90. An "insufficiency" is when a highway or sidewalk is not safely passable by those persons or vehicles permitted to use such highway or sidewalk, or when there exists a safety hazard not reasonably discoverable or reasonably avoidable by a person when using the highway or sidewalk in a reasonable, prudent and lawful manner. Therefore, a dirt road is not insufficient simply because it is not paved, and if a pothole was easily visible and avoidable, it also does not constitute an insufficiency.

When there is an insufficiency that causes damage, there will be no liability (that is, no breach of duty) on the part of the municipality, unless, pursuant to RSA 231:92, one of the following conditions exists:

- The municipality had received a written notice of the insufficiency warning it of the defect prior to the injury and failed to post warning signs immediately, and failed to develop a plan within 72 hours for repairing the insufficiency (such plan must then be implemented with "reasonable dispatch and in good faith"); or

- The municipality had actual notice or knowledge of the insufficiency and exercised gross negligence or reckless disregard in responding to that knowledge. Officials whose knowledge will require a response are: select boards or other chief executive officer (like a town or city manager), the town or city clerk, the officials responsible for streets and highways and on-duty police and fire personnel; or

- The defect was caused by an intentional act of a municipal officer or employee, acting with gross negligence or reckless disregard of the hazard.

In the case of *Bowden v. N.H. Dept. of Transportation*, 144 N.H. 491 (1999), the plaintiffs sued the state for negligence under a theory that their motorcycle accident was caused by a road surface defect. In affirming the trial court's dismissal, the Supreme Court concluded that actual notice of the defect alleged to cause an injury is required in advance of the accident to trigger a potential duty on the part of the defendant, and that allegations of constructive notice will not suffice.

Insufficiencies Caused by Bad Weather. Even if injury or damage is caused by an insufficiency and even if a municipality had knowledge of the insufficiency in advance, the municipality will not be

liable if the insufficiency was caused by bad weather, so long as the municipality (1) had a written bad weather policy adopted in good faith prior to the storm and (2) was following that policy without gross negligence or recklessness. This statutory protection, found at RSA 231:92-a, applies to public highways, bridges, and sidewalks, but does not apply to public parking lots or driveways. *See Johnson v. Laconia,* 141 N.H. 379 (1996).

In *Cloutier v. Berlin*, 154 N.H. 13 (2006), the Court held that the insufficiency law does not mean that the municipality can never be liable for injuries resulting from defects in a highway, whether in good weather or bad, but it does create a special standard of care that is different from the standard expected of private corporations. The court also clarified that the presence or absence of liability insurance does not change the legal duty owed to users of the highway, but instead changes the amount of monetary damages that may be recovered from a municipality if it is found liable for the injuries caused by a highway defect.

In *Ford v. N.H. Dep't of Transportation,* 163 N.H. 284 (2012), the severe power outage following the 2008 ice storm rendered a traffic signal at the intersection of two state highways inoperable. Local police notified the NH DOT of the problem, but it had not been repaired some 18 hours later when a crash occurred. A person injured in the crash sued both the municipality and the state for negligence. The municipality was found not liable, since it had no duty to maintain the signals on a state highway and no duty to provide traffic control on a state highway. The state was found not liable because it was following its bad weather policy in good faith and had no additional duty under either state or federal law to provide alternative traffic direction during the period the signal remained in failure.

Sidewalks are part of the public highway. *Gossler v. Miller*, 107 N.H. 303 (1966). Thus, the statutory duty of care applies equally to sidewalks as it does to highways. (See discussion on ADA below for further information regarding liability for sidewalk maintenance.)

Summary: Guide to Avoiding Liability to Travelers

These are some points to assist municipalities in avoiding liability to the traveling public:

Inclement Weather Maintenance Policy. It is important to develop an inclement weather maintenance policy or set of priorities and ensure it is followed. RSA 231:92-a. The policy does not have to be complex; it can and should allow for discretion and flexibility. Most importantly, it must be capable of being followed without ambiguity or confusion. In a town with a highway agent, the policy should be ratified by the select board because it has responsibility for supervising the highway agent.

Central Reporting System. It is vital to have a system of central reporting for all road insufficiencies so that as soon as one is discovered:

- A written record can be made; and
- A record of action to be taken (within 72 hours) can be filed.

The reporting system should be taught to all municipal employees, but employees of the police, fire, and highway departments should be particularly knowledgeable and regularly refreshed about the system. Written reports are potentially risky because they document notice of defects. Nevertheless, if a municipality judiciously maintains a central reporting system, it can be used as evidence that, if no notice appears in the reporting system, the municipality did not have any prior notice.

Record of Potentially Hazardous Conditions. Upon receiving notice of a potentially hazardous condition, make a written record of what was decided about it. Under RSA 231:91, a town is not liable for non-action where it "determine[s] that no such insufficiency exists." A town can avail itself of the statutory protections afforded under RSA 231:91 by maintaining a written record documenting the exercise of discretion.

Record of Performed Maintenance or Repair Work. Whenever maintenance or repair work is done, either in response to a report of insufficiency or as scheduled maintenance, there should be a design or procedure on paper governing that work. In the absence of written records, it will be difficult to demonstrate that discretion was exercised about the project. Of course, the plans and procedures should be followed in reasonably close detail in order to prevent a claim of negligent implementation.

Cooperation with Local Law Enforcement. Road agents and public works directors should work with their local police departments to ensure all police officers understand the breadth of municipal liability and discretion involved with road maintenance. Accident reports should be drafted accordingly. For example, if there is a minor accident on an icy road, the officer might find it more appropriate to report the cause of accident as "driving too fast for conditions" instead of "slippery roads." The latter description may leave the door open for someone to pursue a claim of municipal liability.

Duty with regard to Class VI or Discontinued Highways?

RSA 231:50 relieves towns and cities of "all obligation[s] 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." (Highways "subject to gates and bars" are Class VI highways. RSA 229:5, VII.) In addition, RSA 231:93 provides that municipalities have no duty of care whatsoever with respect to the construction, maintenance, or repair of Class VI highways.

However, the New Hampshire Supreme Court has construed this immunity narrowly. In *Bancroft v. Canterbury*, 118 N.H. 453 (1978), the Court held the town liable where it had placed a steel I-beam and a quantity of sand across the entrance to a discontinued bridge. The Court reasoned that the statutory immunity didn't apply where the plaintiff sought damages sustained from the town's negligent construction or maintenance of a barrier to the discontinued bridge. The *Bancroft* decision preceded the evolution of the present discretionary immunity doctrine and the standard of care statute. Nevertheless, its holding is illustrative of the Court's potentially strict application of the above statutory protections. Although a municipality is not liable for a Class VI or discontinued road, it should provide notice to travelers regarding maintenance, in a non-negligent way. For instance, erect signs where town maintenance ends, such as "Town Maintenance Ends 100 Feet Ahead" or "Unmaintained Class VI Highway beyond This Point. Travel at Your Own Risk."

Standardized Signs: The MUTCD and State Law

New Hampshire law requires that all erection, removal, and maintenance of traffic signs and signals "conform to applicable state statutes and the latest edition of the Federal Highway Administration's Manual on Uniform Traffic Control Devices (MUTCD)." RSA 47:17, VIII(a). The MUTCD allows for the exercise of discretion and flexibility. Section 1A-4 states: "[W]hile this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment. It is the intent that the provisions of this Manual be standards for traffic control devices installation, but not a legal requirement for installation." Section 2C-40 further provides that warning signs "other than those specified above may be required under special conditions."

In addition, RSA 265:14 prohibits any person from placing, maintaining, or displaying on or in view of any way any "unauthorized" sign, signal, marking, or device which purports to be or is an imitation of or resembles an official traffic control device or railroad sign or signal. The statute also prohibits any sign or device that attempts to direct the movement of traffic or that hides from view or interferes with the effectiveness of any official traffic control device or any railroad sign or signal. This statute permits a municipality to remove all such non-conforming traffic signs or devices "without notice." Depending on

the circumstances, it may be wise for the road agent to seek local or state police backup when removing non-conforming signs.

However, state law does not prohibit signs on private property adjacent to highways that give "useful information" of a type that cannot be mistaken for official signs. RSA 265:14, III.

THE AMERICANS WITH DISABILITIES ACT

Under the federal Americans with Disabilities Act of 1990 (ADA), local government services cannot discriminate against persons with disabilities. All roads, including sidewalks, must comply with applicable ADA regulations, which are contained in the ADA Accessibility Guidelines (ADAAG). The most recent guidelines and helpful publications may be found at **www.ADA.gov**. The discretionary immunity doctrine will not protect a municipality from liability for failing to comply with these regulations. The ADAAG requirements include, but are not limited to, the following:

- Minimum walk widths (ADAAG 4.3.3) with allowance for regularly-spaced passing widths. ADAAG 4.3.4.
- Maximum slopes (ADAAG 4.3.7) or ramp requirements. ADAAG 4.8.
- Adequate space around protruding objects. ADAAG 4.4.
- Stability of surfaces. ADAAG 4.5.
- Accessible parking spaces in public parking lots and loading zones. ADAAG 4.6.
- Curb Ramps. ADAAG 4.7.

Public sidewalks are part of the local program of services available to everyone, and if sidewalks are provided, the ADA requires that they be made accessible to the disabled as well. The particular provision in question provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Until recently, there was a question about whether a sidewalk was classified as a "facility" or a "program" under this federal law. The question is important because a "facility" that was constructed prior to the effective date of the act (January 26, 1992) need not come into compliance until it is modified. However, a "program" must be readily accessible to and useable by persons with disabilities, and this requirement applies to all existing facilities, regardless of when they the programs were constructed or modified. See the federal Department of Justice website (**www.ada.gov/smtown.htm**) for an explanation of the responsibilities of small municipalities under the ADA.

Recently, the National League of Cities joined other groups in asking the U.S. Supreme Court to hear an appeal by the City of Arlington, Texas, from a decision of the Fifth Circuit Court of Appeals. *Frame v. The City of Arlington*, 632 F.3d 177 (2011), *cert. denied*, U.S. Supreme Court Docket No. 11-746 (February 21, 2012). The Fifth Circuit Court of Appeals found that sidewalks are a "program." The city asked the Supreme Court for review, and to find that sidewalks are "facilities," and thus preserve the discretion of municipal officials to determine when to rebuild sidewalks. The appellants argued that finding sidewalks to be a "program" could cause significant financial impact to public works programs throughout the county. The government argued the opposite. The Supreme Court declined to hear the case, in part because three other federal appeals courts had previously determined that newly constructed or altered sidewalks constitute a "service, activity or program" for purposes of the ADA, making municipalities responsible for

their continued accessibility. These cases are *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993); *Barden v. City of Sacramento,* 292 F.3d 1073 (9th Cir. 2002); and *Ability Center of Greater Toledo v. Sandusky*, 385 F.3d 901 (6th Cir. 2004). In the *Sacramento* case, the Supreme Court had also declined to take up the city's appeal.

Since the obligation to maintain sidewalks is a "program access" obligation, the statute of limitations on an alleged ADA violation does not begin to run until the plaintiff (the disabled person) knows or should know that he or she is being denied the benefits of those sidewalks. Thus, any sidewalk must be made and kept accessible at all times. This ruling is consistent with an order issued by the New Hampshire Supreme Court in 2009. *Tinker v. Tilton,* Docket No. 2009-0012 (June 10, 2009). Although the order may not be cited as precedent, it may be useful in predicting future New Hampshire court rulings. In the order, the Court found that the Town of Tilton was required under the ADA to keep a town sidewalk clear of snow, ice, and debris so that it is accessible to and usable by persons with disabilities.

A disabled plaintiff sued the Town, claiming that a particular Town sidewalk on which he frequently traveled in his wheelchair was not cleared of snow and ice, thus blocking his path. Under the ADA, governmental agencies are required to maintain public "facilities" in a manner that makes them readily accessible to and usable by persons with disabilities. The Town agreed that the sidewalk was a "facility" but argued that it had closed the sidewalk during the winter, affecting disabled and non-disabled people equally. However, in an earlier ruling in the same matter, the Court found that seasonal closure did not automatically comply with the ADA.

In this decision, the Court referred to guidance from the Federal Highway Administration to conclude that the Town, as a public entity, has a maintenance obligation for all public facilities that includes "insuring the day-to-day operations keep the path of travel on pedestrian facilities open and usable for persons with disabilities, throughout the year," including "reasonable" snow removal efforts. However, the Court did not rule on whether the Town's snow removal efforts were "reasonable" because the Town removed no snow or ice from that sidewalk no matter how inaccessible the sidewalk was rendered. "The refusal to remove any snow is not a reasonable limit upon the removal of snow, but is an abdication by the town of its obligation altogether."

This decision may raise more questions than it answers. The Court very specifically limited the decision to the particular sidewalk about which the plaintiff had complained, and ruled on no other sidewalk in that or any other town. However, it is unclear (1) whether a municipality is required to keep every sidewalk clear of snow or only specific sidewalks; (2) what "reasonable snow removal efforts" might be, and how long after a storm a municipality may take to clear the sidewalks; (3) what percentage of a municipality's budget must be spent on snow removal before it becomes an unreasonable burden under the ADA; and (4) why this case involving a federal law was brought in state court.

The exact specification of what constitutes an "accessible sidewalk" is also an issue that is somewhat unclear. Stay tuned for new rules issued by the Federal Highway Administration regarding these issues.

TOWN LIABILITY TO ABUTTING LANDOWNERS

Statutory Protection Not Applicable

The discretionary immunity doctrine significantly reduces a town's duty (and liability) to road travelers, but it does not limit its liability to abutting landowners. A town, as the manager of the highway easement, owes the same duty of care to abutting property as a private landowner does. For instance, in *Wadleigh v. Manchester*, 100 N.H. 277 (1956), the Court held that the city was liable for damages caused to buildings resulting from highway blasting.

The discretionary immunity doctrine may shield a town from liability to landowners, but, as with injuries to travelers, its availability depends on the facts of the case. In *Cannata v. Deerfield*, 132 N.H. 235 (1989), the plaintiff abutter complained of flooding from poorly installed culverts and sued the select board and the town. The Court dismissed the claim against the individual select board members under the good faith official immunity doctrine. RSA 31:104. Importantly, though, the Court stated that the discretionary immunity doctrine does not bar

> a claim which alleges that the municipality negligently…invaded an adjoining owner's property rights. The distinction, in our view, is one between providing immunity for a discretionary decision whether to install storm drains and sewers, and not providing immunity for the allegedly negligent manner in which that decision is carried out.

Id. at 242.

Presumably, if the case had involved a decision "whether to install storm drains and sewers," discretionary immunity would have applied. *See also Harvey v. Hudson*, 112 N.H. 365, 369 (1972) (planning board's approval of site plan without adequate drainage facilities "is precisely the type of 'discretionary'…decision which should not subject a town to potential liability").

Road Salt

A municipality enjoys certain statutory protections against liability in connection with its winter maintenance policy. RSA 231:92-a provides, in relevant part, the following:

A municipality shall not be held liable for damages…arising out of its construction, maintenance, or repair of public highways and sidewalks …unless such injury or damage was caused by an insufficiency, as defined by RSA 231:90, and:

(a) The municipality received a written notice of such insufficiency…, but failed to act as provided by RSA 231:91; or

(b) The selectmen, mayor or other chief executive official of the municipality, the town or city clerk, any on-duty police or fire personnel, or municipal officers responsible for maintenance and repair of highways, bridges, or sidewalks thereon had actual notice or knowledge of such insufficiency, by means other than written notice pursuant to RSA 231:90, and were grossly negligent or exercised bad faith in responding or failing to respond to such actual knowledge; or

(c) The condition constituting the insufficiency was created by an intentional act of a municipal officer or employee acting in the scope of his official duty while in the course of his employment, acting with gross negligence, or with reckless disregard of the hazard.

Conversely, a town has no liability protection for damage to abutters' drinking wells, crops, shrubbery, or any other abutting property that has been negatively impacted by road salt. New Hampshire courts have not directly addressed the issue of municipal liability to abutters in this context.

Under the theory of unconstitutional taking, an aggrieved abutter may be entitled to compensation notwithstanding the absence of liability. In *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 343-44 (Me. 1973), the Maine Supreme Court held:

> Assuming arguendo that the salting operations of the [state] were both authorized and reasonable and, hence, that such operations cannot be treated as a "nuisance" or "trespass," there is yet one avenue of compensation still open to the plaintiff, for while it is true that the Legislature may authorize that which otherwise would be a "nuisance" or "trespass," it

> is equally true that the Fifth Amendment of the United States Constitution prohibits the "taking" of property for public use without "just compensation."

See also Timms v. State, 428 A.2d 1125, 1126 (Vt. 1981). In *Timms*, the Vermont Supreme Court held, "The liability under our constitutional provision is not dependent on negligence but on the taking of private property and this unlawful taking gives the right of action."

The New Hampshire Supreme Court has addressed the concept of municipal liability for trespass on private property (although the case did not involve highways). *Tarbell, Adm'r, Inc. v. Concord*, 157 N.H. 678 (2008). In this case, the plaintiff owned an apartment building in Concord. A brook flowed under and through the property by a channel and exited through a culvert. The city operated a water treatment facility on a nearby lake, including a dam, a reservoir, and an emergency overflow spillway, which flowed into the brook. The city followed a reservoir management plan to maintain a proper level of water in the lake. In late 2005, water levels rose due to unusually heavy rainfalls. The city consulted an expert for advice on its options to address a potentially large runoff event. The city considered this advice, developed a plan and acted accordingly. In May 2006, record rainfall caused the lake to overflow into the emergency spillway and into the brook, resulting in severe water damage to the plaintiff's property. The plaintiff sued the city for negligence as well as trespass and nuisance. The Court held that discretionary function immunity does not protect a municipality from liability for the creation of a nuisance or actual trespass. These claims involved the invasion of private property. The New Hampshire Constitution protects property owners by prohibiting the government from unreasonably depriving them of a vested right to use their property. *See* N.H. Const. pt. I, arts. 2, 12. When the government does unreasonably deprive an owner of a vested right, we say that a "taking" has occurred, and the Constitution requires the government to compensate the property owner reasonably for that loss. In this case, the plaintiff alleged that the city created a private nuisance and intentionally trespassed upon the property in a way that amounted to a physical taking of the property. The Court noted that nuisance involving an invasion of private property resembles an unconstitutional taking, and that creating a state of affairs dangerous to life and limb goes significantly beyond mere negligence. As a result, municipal immunity could not protect the city from these claims.

Damages for 'Changes in Grade'

RSA 231:75 through :78 provides a 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. RSA 231:76, III. The governing body must notify 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). RSA 231:75, I. 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 only for abuse of discretion, and a jury trial is available only on the question of damages.

HIGHWAY AGENTS

Where the Statute Doesn't Apply

All municipalities in the state construct, maintain, and repair highways, bridges, and sidewalks. Some municipalities have delegated these responsibilities to a "highway agent" (sometimes referred to as "road agent"). RSA 231:62. In cities, highway maintenance is one of the administrative services required to be specified by charter or local ordinance (RSA 49-C:21); some charters have "highway commissioner" positions created by the state legislature. In towns that have adopted the town manager system, the highway function is legally under the charge of the manager (RSA 37:6, VII(b)), and the adoption of the manager system automatically supersedes any highway agent position, regardless of whether the position is elected or appointed (RSA 37:6, VII, concluding paragraph).

Town Options

All other towns (that is, non-manager towns without an applicable charter clause) have the following options, as set by vote of the legislative body:

- One or more highway agents elected every year, or every two years, or every three years (RSA 231:62, 62-a and 62-b);
- One or more appointed highway agents, with terms of one, two, or three years (RSA 231:62, 62-a and 62-b); or
- An appointed "expert agent." RSA 231:64.

The law is unclear regarding the difference between an appointed agent and an appointed expert agent. An appointee serves for a definite term (one, two, or three years). By contrast, a town may hire an expert based on expertise, who can be retained indefinitely based on merit and performance, subject to whatever contract or personnel policies may be in effect.

Depending on the town's population, the procedure for changing the term of an appointed road agent varies. If the town's population is less than 4,500, then the town must propose a change through secret ballot on the floor of the town meeting. If the town's population is greater than 4,500, then it must do so by official ballot. Compare RSA 231:62-a and 231:62-b. Interestingly, if a town seeks to change the position from elected to appointed (or vice versa), no ballot is necessary—irrespective of a town's size. RSA 669:17-b. One reason to change from an elected to an appointed position is that an elected officer is required to be a town resident. RSA 669:6. Particularly in a smaller town, it may be difficult to find a person with the expertise and experience for the job, so appointing the road agent is one way to broaden the pool of potential appointees.

Supervision and Duties

Whether road agents are elected or appointed, they must perform their duties "under the direction of the selectmen." RSA 231:62. The select board has authority to adopt written general policies regarding highway maintenance, such as the winter maintenance snow and ice policy. The select board evaluates the work of the road agent in achieving the financial goals it has set, the satisfaction of the public with the condition of roads, and the physical maintenance of town roads, bridges, and sidewalks. The Supreme Court has analogized the relationship to that of an owner and independent contractor. *Grimes v. Keenan,* 88 N.H. 230, 234-35 (1936) (city charter with language similar to RSA 231:62).

Because the road agent works under the direction of the select board, the board may remove a road agent (even one who is elected) for deliberate refusal or neglect to comply with the select board's lawful instructions or to perform legal duties. RSA 231:65. As at least one town has learned, there is nothing in the law to prevent an elected road agent who is removed by the select board under this section from being re-elected.

According to RSA 231:62, the highway agent has charge of the construction, maintenance, and repair of highways, bridges, and sidewalks and other activities as voted by the town. Additional duties that may be authorized by a vote of town meeting include charge of rubbish collection, public dumps, parks, cemeteries, playgrounds, beaches, forests, and shade and ornamental trees. RSA 231:63. Highway agents are sworn to the faithful discharge of their duty and give bond to the satisfaction of the select board for the faithful performance of the duties of office, pursuant to RSA 231:65. The select board may supervise the methods and manner of performance of road agents. RSA 231:65. Agents must keep accurate accounts showing all moneys received and paid out by them, and shall settle their accounts before January 1. RSA 231:68. The agent should give the select board weekly expenditure statements and should receive money from the treasurer only on the order of the select board. According to RSA 231:66, compensation of the road agent is set by the town or the select board.

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)

The Conflict of Interest Issue. RSA 95:1 prohibits a public official from selling goods or commodities valued in excess of $200 to the municipality, except by open competitive bidding. In smaller municipalities, it is not uncommon for highway agents who have their own construction businesses to be elected or appointed. Some of these agents may utilize their personal resources to perform town work, without competitive bidding. There are no reported cases wherein an agent has been fined for violating RSA 95:1, but governing bodies should bear this statute in mind regarding the road agent.

Nevertheless, towns should be proactive to avoid this conflict issue by adopting policies combining the use of town-owned equipment and resources purchased competitively (instead of private resources owned by a highway agent) and competitive bidding for larger jobs. See RSA 31:59-a on establishing the optional position of purchasing agent. Another way to approach the issue might be to have an appointed "expert agent" under RSA 231:64, who likely would be considered an employee or contractor rather than a person "holding public office."

REGULATION OF LOCAL HIGHWAYS

Governing Body's Statutory Authority

Unlike other powers, a town select board may exercise its authority to regulate highways without prior action by the town meeting. RSA 41:11. Select boards are afforded the same broad powers as city councils under RSA 47:17, VII, VIII, and XVIII:

- Use of Public Ways. To regulate all streets and public ways, wharves, docks, and squares, and the use thereof, and the placing or leaving therein any carriages, sleds, boxes, lumber, wood, or any articles or materials, and the deposit of any waste or other thing whatever; the removal of any manure or other material therefrom; the erection of posts, signs, steps, public telephones, telephone booths, and other appurtenances thereto, or awnings; the digging up the ground by traffic thereon or in any

other manner, or any other act by which the public travel may be incommoded or the city subjected to expense thereby; the securing by railings or otherwise any well, cellar, or other dangerous place in or near the line of any street; to prohibit the rolling of hoops, playing at ball or flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets and sidewalks, or to frighten teams of horses within the same; ….

- Traffic Devices and Signals.

  (a) To make special regulations as to the use of vehicles upon particular highways, except as to speed, and to exclude such vehicles altogether from certain ways; to regulate the use of class IV highways within the compact limits and class V highways by establishing stop intersections, by erecting stop signs, yield right of way signs, traffic signals and all other traffic control devices on those highways over which the city council has jurisdiction. The erection, removal and maintenance of all such devices shall conform to applicable state statutes and the latest edition of the Manual on Uniform Traffic Control Devices.

  (b) The commissioner of transportation shall only approve the installation and modification of traffic signals as to type, size, installation, and method of operation.

- Automobile Parking Controls. The city councils shall have the authority to adopt such bylaws and ordinances as are necessary to control the parking, standing and stopping of automobiles within the city limits, including ordinances allowing for the towing or immobilization of automobiles for nonpayment of parking fines and creating parking fines recoverable by means of civil process.

Notwithstanding the select board's broad highway regulatory authority, towns should be aware of the following factors, which may impact the legality of any proposed regulation:

- Is the subject matter of the proposed regulation covered in greater detail by a state statute? The state may have preempted the subject area through existing, extensive regulation. For instance, in *State v. Driscoll*, 118 N.H. 222 (1978), certain Rochester regulations regarding emergency vehicle sirens were preempted due to inconsistency with state statutes governing emergency vehicles.

- Does the proposed regulation treat all members of the public equally and impartially, and is otherwise consistent with notions of equal protection as required under the state and federal constitutions?

- Does the proposed regulation unreasonably restrict the rights of abutting landowners?

- Is the proposed regulation inconsistent with the road's status as a public highway? *See Marrone v. Hampton*, 123 N.H. 729 (1983), where the Court held that the select board had no authority to allow abutter encroachments, since that effected a discontinuance, which could only occur by vote of the town.

- Does the proposed regulation unconstitutionally restrict the First Amendment rights of the public, that is, free speech, free assembly, or free exercise of religion? *See State v. Hodgkiss*, 132 N.H. 376 (1989).

EXAMPLES OF REGULATIONS.

Use of Highway for Sale of Merchandise: In *Stamper v. Selectmen, Town of Hanover*, 118 N.H. 241 (1978), the Court upheld the select board's power to prohibit the use of certain streets for the sale or display of merchandise. (This authority is now contained in RSA 31:102-a.) The Court stated that the

town meeting had no power to curtail the select board's authority over street regulation. The *Stamper* Court wrote:

> The powers contained in RSA 47:17 VII and VIII were granted to the selectmen…under article 6 of the charter and RSA 41:11. This power was not therefore dependent upon any delegation under article 7[.] Id. at 244.

However, it is important to note that regulating the use of highways for the sale of merchandise implicates constitutional issues of equal protection and freedom of speech. RSA 31:201-a requires municipal licensing of vendors to meet equal protection requirements (similarly situated people and groups may not be treated differently) and to include conditions that are reasonable and deemed "necessary for public convenience and safety." These limitations have real-world consequences. In *Harrington v. City of Brentwood*, 726 F.3d 861 (6th Cir. 2013), the Sixth Circuit Court of Appeals was asked to determine whether a municipal ordinance violated the First Amendment free speech rights of the newspaper's owner and employees. The ordinance originally prohibited the use or occupation of any portion of any public street, alley, sidewalk, or right of way for the purpose of storing, selling, or exhibiting any goods, wares, merchandise, or materials. The ordinance was amended during the pendency of the lawsuit to prohibit only the sale or distribution of newspapers and similar materials on the traveled portion of streets and the handing of such materials to the occupant of any motor vehicle on the street as well as any actions intended to cause an occupant to hand anything to the person on the street. The Court found that, as amended, the ordinance was a constitutionally-permissible content-neutral time, place, and manner restriction that left open reasonable alternative channels of communication.

"No Through Trucking": In *State v. Hutchins*, 117 N.H. 924 (1977), the Court affirmed a local ordinance regulating the routes on which hazardous materials could be transported within Portsmouth. In doing so, the Court cited RSA 47:17, VIII, which authorizes a city council to "exclude such vehicles altogether from certain ways...." (Governing bodies of towns have the same authority through RSA 41:11.) However, such regulations should be enacted only after consultation with the municipal attorney, because if they are not sufficiently narrow, they may violate the prohibition against permanent encroachments on the viatic use of public highways. *See Marrone v. Hampton*, 123 N.H. 729 (1983). Also, under RSA 236:3-a, fuel delivery trucks are exempt from seasonal weight limits on state roads with DOT approval, which casts doubt on the validity of a total exclusion of those vehicles from town highways. In addition, federal regulations prohibit local regulations on and near the "National Network" of highways that bar travel by trucks meeting federal dimensional and weight standards. *See* 23 C.F.R. §658.19. A better approach is through the imposition of weight limits, discussed below, because they are on a firmer statutory footing and require certain exceptions.

Procedure for Enacting Highway Regulations

The procedures for enacting highway regulations are not governed by a particular statute. Some city charters specify ordinance enactment procedures for the council, or mayor and aldermen. These procedures, where they exist, should be followed in connection with the promulgation of highway regulations. Where there is no charter provision, councils or select boards should hold a public hearing, provide notice and an opportunity to be heard, and, finally, make a record of the action taken.

Hold a Public Meeting. The Right to Know Law (RSA Ch. 91-A) requires an action of a public body, such as adopting a highway ordinance or regulation, to take place at an open public meeting. RSA 91-A:2, II.

Provide Due Process Notice. The New Hampshire Supreme Court has suggested that, when a governmental action will potentially affect the use of private property, the public has a constitutional right to notice and an opportunity to be heard. *See, Calawa v. Litchfield*, 112 N.H. 263 (1972). The notice

requirement requires only public, and not actual, notice. As such, a town can generally satisfy this due process requirement by posting notice of the regulation in two public places in town and publishing notice in a local newspaper approximately one week prior to any hearing. At a minimum, the contents of the notice should indicate where a copy of the full, proposed regulation is available (for example, town clerk's office) and the location and time of the hearing.

Conduct a Public Hearing. Prior to the select board's vote, the town should conduct a hearing at which the public has a meaningful opportunity to comment on the proposal.

Record of Enactment. After the hearing and vote, the vote should be recorded in the minutes. A copy of the minutes should be filed with the town clerk and road files. The record of proper adoption of regulations must be available to enforcement officials for use in court to prove the regulation's existence.

Posting of All Highway Regulations

Any highway regulation aimed at the public using the highway must be posted on the affected highway. Otherwise, it has no effect. RSA 236:3. All posted traffic signs or devices enjoy a presumption of legality. RSA 236:5 and RSA 265:9, III.

As stated above, all road signs must be in conformity with the Manual on Uniform Traffic Control Devices. Importantly, "traffic signals" (RSA 47:17, VIII(b)—see definition at RSA 259:111) must be approved by the New Hampshire Department of Transportation (DOT). Accordingly, a town's inventory of traffic signs should be registered with the DOT.

Enforcement and Penalties

Any person who violates a regulation adopted by the select board under RSA 41:11 for which there is no separate penalty under Title XXI (the statutes governing motor vehicles) is guilty of a "violation." RSA 41:11-a. Under RSA 651:2, II-a, violations may carry a fine and require prosecution in court. Alternatively, towns may establish an administrative enforcement procedure for its regulations (including, presumably, those enacted under RSA 41:11) with fines up to $1,000. RSA 31:39-c and RSA 31:39-d.

Private Signs along the Public Highway

The law regarding private signs along public ways distinguishes between signs placed in the right of way on adjacent private land. It also contains certain provisions particular to political signs.

In the Right of Way. Both RSA 236:6 and RSA 265:14 prohibit any unauthorized sign that imitates an official sign or attempts to regulate traffic. Further, encroaching "structures" (including signs) are prohibited under RSA 236:15.

On Adjacent Private Land. Although the state regulates billboards and other advertising along federal aid highways, municipalities should regulate signs outside the right of way on town roads through zoning ordinances. Such regulatory action, though, may be ineffectual against pre-existing commercial signs, which potentially enjoy constitutional "grandfathering" protection as nonconforming uses. See, for example, *Loundsbury v. Keene*, 122 N.H. 1006, 1010 (1982). The Court held, "Thus, if the trial court finds that the signs [which preexisted the ordinance that required their removal] are not otherwise harmful then the…ordinance must be found unconstitutional as applied[.]"

Political Signs. Political signs in the right of way are regulated by RSA 664:17, with the state having control over state highways and local officials having control over municipal highways. The law prohibits

political advertising from being placed on or affixed to any property, public or private, without the owner's consent. This means that political advertising may not be placed in the municipal highway right of way (or on any other municipally-owned or controlled property) without the permission of the governing body or its designee. Political advertising may be placed within state-owned rights of way as long as the advertising does not obstruct the safe flow of traffic and the advertising is placed with the consent of the owner of the land over which the right of way passes (which may be the state or the abutting property owner). 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. Advertising signs, political or otherwise, may never be placed on or affixed to trees, utility poles, or highway signs. RSA 664:17; RSA 236:75. Political advertising may be affixed to or displayed on or in vehicles (even when they are parked on government property), except for vehicles used by police officers and any displaying government license plates and registered in the name of the state or any municipality. RSA 664:17-a.

Even if 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." 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.

Nevertheless, it is entirely appropriate for a town or city to regulate the placement of signs, political or otherwise, on public fixtures—so long as the regulation is content-neutral. *State v. Hodgkiss*, 132 N.H. 376, 382 (1989). There, the Court held, "Because the apparent justification for the [regulation] thus turns entirely on the unsightliness…without regard to the substance of any message…, the ordinance qualifies as a content-neutral regulation[.]"

The United States Supreme Court has afforded significant First Amendment protections to political signs on adjacent property, that is, land outside the right of way. In *Ladue v. Gilleo*, 512 U.S. 43 (1994), local regulations prohibited a resident from maintaining a Gulf War protest sign in her yard. The *Gilleo* Court held the regulations unconstitutional, finding there is simply no First Amendment substitute for this convenient method of free speech. The Court did leave the door open for some restrictions, however—for example, size or placement—as long as the owner retains the full ability to deliver the message. However, municipalities should act with great caution before regulating political signs on adjacent property, including consultation with the municipal attorney.

TYPES OF ROAD REGULATIONS COVERED BY SPECIFIC STATUTES

Speed Limits

RSA 265:60 prescribes basic prima facie speed limits for certain types of roads, that is, limits that apply even without any local regulation, irrespective of whether signs are posted. For example: (a) In a posted school zone, at a speed of 10 miles per hour below the usual posted limit from 45 minutes prior to each school opening until each school opening and from each school closing until 45 minutes after each school closing; (b) 30 miles per hour in any business or urban residence district as defined in RSA 259:118; (c) 35 miles per hour in any rural residence district as defined in RSA 259:93, and on any class V highway outside the compact part of any city or town as defined in RSA 229:5, IV. RSA 265:60, II. See statute for additional details. RSA 265:63 authorizes local officials to further reduce speed limits below those set forth in RSA 265:60. In both rural and urban areas, the minimum speed limit is 25 miles per

hour. RSA 265:63, I. Speed limits can be made lower at intersections (RSA 265:63, I(a)) and in school zones (RSA 265:60, II(a)). 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.

Before altering speed limits, a town must perform an engineering or traffic investigation to determine the proper speed on those particular highways. RSA 265:63, II. A municipality is not required to hire outside consultants if it has sufficient staff to perform the investigation internally. RSA 265:63, II-a. As an aside, we are aware that the DOT recommends that such a study include an analysis of the current speed distribution of "free-flowing vehicles." The DOT commissioner must approve any speed limit alteration on a state highway—including, presumably, Class II and IV portions maintained by a town or city. RSA 265:63, IV. In all cases, altered speed limits must be posted on the affected highways. RSA 265:63, III.

Load Weight Limits

RSA 231:190 and 231:191 authorize the council or select board to enact exact maximum weight limits on Class IV, V, and VI highways, both seasonally and year-round. Towns and cities often use that authority in the months of April and May when the winter is coming to an end, the soils and pavements of highways freeze during the cooler overnight hours, and then thaw during the relatively warm daylight hours. This "freeze-thaw cycle" can cause pavement to crack or break and potholes to open. Once the pavement is open to infiltration of surface water from rain and melting snow, the overnight freezing and expansion of the underlying soil creates frost heaves (also called "tenting") and leads to permanent failure of the surface. On an unpaved highway, the surface materials absorb water during the day and turn to mud when the water can't infiltrate into the frozen layers below. Heavy vehicle movement in the mud causes rutting, which traps even more water in the next cycle. If heavy vehicles can be kept off the roads until the freezing weather has passed, it is possible to avoid significant and expensive damage to the road.

In order for municipalities to have enforceable road weight limits, they should comply with the following:

Minutes Should Memorialize Testimony. Whenever the governing body votes to establish a weight limit (whether year-round or seasonal), the written minutes of the meeting should reflect testimony from the road agent or highway engineer. Particularly, the 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. This conforms with the statute's purpose "to avoid causing damage which may result in hazards to public safety or excessive municipal expense," while not "unreasonably infring[ing] on the efficient movement of unprocessed natural resources, manufactured goods and other commercial products essential to a healthy state economy." RSA 231:190. It also ensures that the municipality acts within its grant of authority to enact weight limits only "to prevent unreasonable damage or extraordinary municipal maintenance expense." RSA 231:191, I. Municipalities typically lift the restrictions once the weather of "mud season" has passed, but extended closure may be justified. If a road has been seriously damaged, there may be a real need to keep the restriction in place until repairs can be completed. *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).

Limits Must Be Posted. The weight limit must be posted legibly and conspicuously at all entrances from other highways using "weather resistant materials." RSA 231:191, II.

Identify Officials with Authority to Grant Exemptions. The names of those officials legally authorized to grant exemptions from the weight limit (that is, select boards, highway agents, or street commissioners) must be posted in the town or city hall. Exemptions must be granted "in an

expeditious manner." RSA 231:191, III. A municipality may condition an exemption upon bonding and restoration of the highway if damage occurs. The weight limit statute does not discuss allowable bonding requirements further, but guidance may be found in RSA 236:10, under which municipalities are authorized to require a bond as part of permission under RSA 236:9 for any person to disturb the traveled way, ditches, or other areas of a highway. Such bonds may be imposed to provide for the satisfactory restoration of the highway but must "be equitably and reasonably applied to other bonded vehicles using the highway."

The statute goes on to describe the method for determining the bond:

> The type of commodity being transported shall not be the determining factor for requiring a bond or the dollar amount of the bond. 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 from a bank or lending institution licensed in New Hampshire and acceptable to the person giving written permission, or a bond furnished by an insurance company. The person or entity granting permission shall not arbitrarily withhold funds from any cash bond or letter of credit, but shall first make a good faith effort to resolve any differences with the contractor doing the excavation or restoration.

The municipality may also impose other reasonable conditions. For example, an oil delivery truck could be required to use the road prior to 10:00 a.m., when it is more likely that the surface is still somewhat frozen from the overnight drop in temperature, or deliveries could be based on a weather forecast when the temperatures are as low as possible.

Grant Exemption if Limitation Imposes 'Significant Interference.' A highway closure may cause hardships for homeowners who need to receive fuel deliveries, or for businesses located on a closed section. A municipality must grant an exemption to a person if the weight limit would entail "practical difficulty or unnecessary hardship" by causing "significant interference" with a commercial enterprise or land use that existed before the weight limit was posted. 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.

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.

Recourse for Damage to Road. A person who violates the weight limits or the terms of an exemption is guilty of a "violation if a natural person, or a misdemeanor if a corporate or other entity." RSA 231:191, VI. Criminal prosecution is required to enforce those penalties. In addition, anyone whose action damages the highway is liable for the cost of restoration of the highway (or may be required to restore it themselves) to a condition satisfactory to the person authorized to grant exemptions from weight limits. RSA 231:191, VI. However, the municipality cannot impose restoration costs on anybody without "reason to believe that the…damage…is attributable" to that person. RSA 231:191, IV.

Damage and Obstructions to a Public Highway

PRIOR PERMISSION.

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.

If permission has been granted and damage occurs, the municipality must initially make a good faith effort to resolve any differences with the contractor performing the excavation or restoration. If that is unsuccessful, the municipality may proceed to apply the cash bond or to collect on a letter of credit or bond to pay for the proper restoration of the highway. RSA 236:10.

Liability for Damaging or Obstructing a Public Highway. Municipalities may call upon several statutes if someone damages a public highway (including the traveled portion as well as ditches, embankments, sidewalks, and bridges) or causes any obstruction of the highway, whether or not weight limits have been established:

- Criminal Liability. RSA 236:38 provides that it is a misdemeanor to damage a public highway. In addition, a person who fails to obtain prior permission under RSA 236:9 to disturb the highway, or who violates rules or regulations imposed by a municipality for work on a public highway, is guilty of a violation if a natural person and a misdemeanor if any other person. RSA 236:14. Misdemeanors and violations may be prosecuted in court.

- Civil Liability for Damage. RSA 236:39 provides that a person who obstructs a highway or causes any defect, insufficiency, or want of repair to a municipal highway that renders it "unsuitable for public travel" is liable to the municipality for all damages to a highway, including full and current replacement costs of protective barriers and any structure or device that is part of the highway, as well as all damages and costs the municipality is required to pay to anyone injured as a result of the condition of the highway. The statute now defines "full and current replacement cost" to mean the actual or reasonable estimates of labor, including contracted labor, material, equipment, and overhead, without reduction due to depreciation. In *Smith v. State*, 125 N.H. 799 (1975), an abutter was held liable under RSA 236:39 for damaging a bridge and highway resulting from the abutter's negligent placement of two culverts in a river.

- Requiring Restoration. Under RSA 236:11, any person, entity or corporation who excavates or disturbs the shoulders, ditches, embankments, or the surface improved for travel of any highway "shall restore such highway to a condition at least equal to the condition that was present before the excavation or disturbance." To use this, however, the municipality should be able to demonstrate that the damage is reasonably attributable to the person being asked to restore the highway.

- Diverting Water into Highway Right of Way. Under RSA 236:19, any person who causes water to be turned into the municipal highway, rendering it unsuitable for public travel or damaging the highway, is guilty of a violation if a natural person, or a misdemeanor if any other person. Although this is a criminal fine, the statute provides that the municipality receives the fine collected by the court.

- Obstructions in the Highway. Buildings, structures and fences on or over a highway (with some exceptions) are public nuisances under RSA 236:15. A person who places or keeps such structures "so as to interfere with, hinder or obstruct the public travel" is guilty of a violation, and the superior court may order the building, structure, or fence removed. RSA 236:16. Ten days' notice to the owner of land enclosed by a fence obstructing a highway must be given before removing the fence. RSA 236:22. In addition, it is a violation for a person to leave or permit to be left anything "which has been used in aiding to repair or trig any vehicle" in the highway or in any gutter or drain adjacent to the road. RSA 236:28. The road agent may remove any obstructions in the highway right of way. RSA 236:29 and RSA 236:32. If the item is of value, the road agent may hold it until the costs of removal are paid (and must follow the statutory procedure for notice, etc.). RSA 236:32 – :37.

- **Snow Obstructions.** RSA 236:20 prohibits a person from plowing snow onto a state highway; such prohibited conduct constitutes a violation. Because the statute does not apply to local highways, towns and cities must enact local regulations to proscribe such activity. It is important to note that, although RSA 47:17, VII (which towns may use via RSA 41:11) seems to authorize municipalities to require landowners to keep the sidewalks in front of their property free of snow and ice, the New Hampshire Supreme Court found this requirement unconstitutional in *State v. Jackman*, 69 N.N. 318 (1898). No one may be required to pay for public sidewalk maintenance above the ordinary obligation of all citizens to pay taxes. *See also, Ritzman v. Kashulines*, 126 N.H. 286 (1985); *Rutkauskas v. Hodgins*, 120 N.H. 788 (1980). Why the law has not been amended in the 100-plus years since that opinion was issued is a good question.

Crosswalks

The establishment of a crosswalk is a form of traffic regulation that must be enacted by the local governing body. A crosswalk creates a location across a road where pedestrians have the right of way, and vehicles must yield absent traffic signals. Where traffic signals are in place, pedestrians must wait for the appropriate signal. RSA 265:35. In locations outside crosswalks, pedestrians must yield to vehicles (RSA 265:36), except between two signaled intersections, where pedestrians must use crosswalks.

Finally, the Manual on Uniform Traffic Control Devices recommends both signs and paint markings in non-signaled higher-speed areas. Some municipalities even place warning barrels in the middle of the traveled way in such locations.

Street Names and Numbers

Under RSA 231:133, the governing body has authority to assign street names. In towns, the town meeting has authority to vote on a street name through a warrant article (inserted either by the select board or by petition). Street signs must be placed in two conspicuous places on the street. For any new street, the street name is required to be made part of the layout or acceptance. Obviously, proposed names should not be "confusingly similar" to other street names in the municipality. Names chosen by developers are not binding on the municipality.

RSA 231:133-a provides that the governing body "may adopt a system for assigning or altering numbers of buildings and other property along any public or private way in the municipality." Prior to assigning or altering any numbers, the planning board is required to hold a public hearing with 10 days' notice. The notice must be given by posting in two public places in town, and by first class mail to all owners whose property is being numbered or renumbered. The planning board may forego a public hearing where the property owner or owners voluntarily consent to their property being numbered or renumbered. A town "is encouraged" to notify the Bureau of Emergency Communications of any action under this section in accordance with RSA 106-H:10. See additional discussion in Chapter 2.

Parades and Demonstrations

Under RSA 286:2, a license from the select board (or, in cities, the special licensing board—see RSA 286:3), is a prerequisite to holding parades, meetings, and processions on public ways. Although the statute, on its face, affords local officials broad discretion, officials must exercise this licensing authority in a constitutionally permissible manner. In *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *State v. Cox*, 91 N.H. 137 (1940), the United States and New Hampshire Supreme Courts, respectively, upheld the constitutionality of the statute so long as it was applied in a fair and non-discriminatory manner. As the United States Supreme Court stated:

> The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of the public highways has never been regarded as inconsistent with civil liberties[.]

Cox, 312 U.S. at 574.

The Court also wrote:

> If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets.

Id. at 576.

Consistent with First Amendment principles, select boards may not deny a license based on the identity or views of the applicant group, or the content of its message. Any restrictions imposed must be narrowly tailored and no more than is necessary to prevent any substantial disturbance, for example, traffic disruption, conflicts with other groups, etc. If restrictions are imposed, there must be adequate alternative means of expression or communication. *See, U.S. v. O'Brien*, 391 U.S. 367 (1968); *Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

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

An "Off-Highway Recreational Vehicle" (OHRV) is defined in RSA 215-A:1, VI as "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, or other unimproved terrain whether covered by ice or snow or not, where the operator sits in or on the vehicle. All legally registered motorized vehicles when used for off highway recreational purposes shall fall within the meaning of this definition; provided that, when said motor vehicle is being used for transportation purposes only, it shall be deemed that said motor vehicle is not being used for recreational purposes." OHRVs include utility terrain vehicles but not snowmobiles.

Generally, OHRVs may not be operated on a public highway. RSA 215-A:6, II (for exception regarding bridges, see RSA 215-A:8). Where they are permitted on town roads, the speed limit is 20 miles per hour. RSA 215-A:6, III(b)(2). OHRV operators must keep "to the extreme right and shall yield to all conventional motor vehicle traffic." RSA 215-A:6, IX. In addition, where they are permitted, a person crossing a public road must comply with the following: (a) the crossing shall be made at an angle of approximately 90 degrees to the direction of the public way and at a place where no obstruction prevents quick and safe crossing; (b) the operator shall bring the OHRV to a complete stop before crossing the shoulder or, if none, the public way, before proceeding; (c) the operator shall yield the right of way to all motor vehicle traffic on such public way which constitutes an immediate hazard to such crossing; and (d) the operator shall possess a valid motor vehicle driver's license or shall have successfully completed the approved OHRV safety training course. RSA 215-A:6, X.

City or town councils and select boards may authorize the use of sidewalks and Class IV, V, or VI highways 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.

Operating OHRVs carries an inherent risk of injury, and the law helpfully recognizes this fact. Under RSA 215-A:14, no town or city may be held responsible for any accident resulting from the use of an OHRV on a frozen body of water. In addition, RSA 215-A:5-a provides

> [i]t is recognized that OHRV operation may be hazardous. Therefore, each person who drives or rides an OHRV 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 such inherent risks, dangers, or hazards. The categories of such risks, hazards, or dangers which the OHRV user assumes as a matter of law include, but are not limited to, the following: variations in terrain, trails, paths, or roads, surface or subsurface snow or ice conditions, bare spots, rocks, trees, stumps, and other forms of forest growth or debris, structures on the land, equipment not in use, pole lines, fences, and collisions with other operators or person.

"Snowmobile" is defined in RSA 215-C as "any vehicle propelled by mechanical power that is designed to travel over ice or snow supported in part by skis, tracks, or cleats. Only vehicles that are no more than 54 inches in width and no more than 1200 pounds in weight shall be considered snowmobiles under this chapter." OHRVs are not considered snowmobiles.

Generally, snowmobiles may not be operated in the traveled portion of a public highway, which means "all areas of a public highway between the plowed snowbanks." RSA 215-C:6, II; RSA 215-C:1, XIX; RSA 482:A-3, VIII (for bridge exception, see RSA 215-C:8, XIII). Where they are permitted on town roads, the speed limit is 20 miles per hour. RSA 215-C:8, III(b)(2). Snowmobile operators must keep "to the extreme right and shall yield to all conventional motor vehicle traffic." RSA 215-C:8, IX. In addition, where they are permitted, a person crossing a public road must comply with the following: (a) the crossing shall be made at an angle of approximately 90 degrees to the direction of the public way and at a place where no obstruction prevents quick and safe crossing; (b) the operator shall bring the snowmobile to a complete stop before crossing the shoulder or, if none, the public way, before proceeding; (c) the operator shall yield the right of way to all motor vehicle traffic on such public way which constitutes an immediate hazard to such crossing; and (d) the operator shall possess a valid motor vehicle driver's license or shall have successfully completed the approved snowmobile safety training course. RSA 215-C:8, X.

City or town councils and select boards may authorize the use of sidewalks and Class IV, V, or VI highways and bridges, or portions thereof, by snowmobiles. RSA 215-C:8, IX. They may also authorize snowmobiles to use public highways which are not maintained in winter for conventional motor vehicles ("highways to summer cottages," discussed in Chapter 2), either solely or along with conventional vehicles being used to access abutting property. Where use is authorized, vehicles of any type being used for law enforcement, firefighting, rescue, and road maintenance have unrestricted access to those highways in either case. RSA 215-C:8, XII. This authorization may take the form of bylaws or ordinances but may not conflict with the provisions of RSA Chapter 215-C. RSA 215-C:31. Adoption of these regulations should follow the general procedures outlined earlier in this chapter for the adoption of highway regulations. Following a duly noticed public hearing (except in the case of an emergency road closure), city or town authorities may change the allowable use of municipal highways by giving notification to the state bureau of trails. RSA 215-C:8, IX and XII. Violations of the use restrictions on a town highway are enforced by the local police department.

Operating snowmobiles carries an inherent risk of injury, and the law helpfully recognizes this fact. Under RSA 215-C:4, no town or city may be held responsible for any accident resulting from the use of a snowmobile on a frozen body of water.

REGULATING HIGHWAY USE BY ABUTTERS

Driveway Connections, or 'Curb Cuts'

Municipalities may control how private roads and driveways are connected to local highways. RSA 236:13. A planning board may enact regulations using the same procedure as for subdivision regulations. "Regulations may address a number of subjects, including: (1) width, angles, slopes, and grades of connections; (2) curbs; (3) ditching and culvert standards to prevent erosion and preserve highway drainage; (4) adequate lines of sight to prevent safety hazards, and (5) limits on the number of accesses per parcel." For high-volume commercial connections, the DOT may require the applicant to install turn lanes or signals on the public highway itself. In towns and cities, these issues are more commonly handled through subdivision and site plan review, or through the impact fees enacted by zoning ordinance. RSA 674:21, V. The statute provides that a planning board may delegate the day-to-day administration of driveway regulations, including driveway applications, to a highway agent or code officer. In many smaller towns, this authority is often delegated to the select board. In addition, the municipality may, by ordinance or resolution, transfer the authority to approve the improvement and grading of streets to the governing body (and the responsibility for driveways under RSA 236:13). RSA 674:35, I.

Under RSA 236:13, VI, all private driveway connections, including structures like culverts, remain the continuing responsibility of the landowner—even if located within the right of way. It is immaterial whether the driveway connection pre-dates the town's permit system. If any driveway connection threatens the integrity of the highway due to plugged culverts, erosion, siltation, etc., the planning board or its designee can require the owner to repair it. If the owner refuses to effectuate such repairs, then the town may perform the work and assess the costs to the owner. Sidewalks, where they exist within the highway right of way, are part of the highway. *Gossler v. Miller*, 107 N.H. 303 (1966). Therefore, when a driveway interferes with a sidewalk, the municipality should have the same authority to require the driveway owner to address the situation.

Abutters' Right of Continued Access to Highway

An abutter's highway access is considered a property right. While it is subject to regulation, it cannot be entirely taken away without compensation. If a highway becomes a limited access road, or the owner is otherwise deprived of access, even for a temporary period during highway construction, the owner may be entitled to damages. *See, Paddock v. Durham*, 110 N.H. 106 (1970); *Capitol Plumbing & Heating Supply Co. v. State*, 116 N.H. 513 (1976).

For instance, an owner may be entitled to damages where a town installs curbing that eliminates an existing access point, provided that remaining means of entry and exist are not reasonable, and the property value is substantially diminished. *State v. Shanahan*, 118 N.H. 525 (1978). Importantly, a town is not required to compensate an abutting owner for "normal" regulations. *See, Treat v. State*, 117 N.H. 6 (1977).

In *Berlinguette v. Stanton*, 120 N.H. 760 (1980), the city issued permits to the defendant bank to demolish a building. After demolition commenced, the city determined that the construction created an unsafe condition and closed down certain streets to vehicular traffic for approximately 13 weeks. The plaintiffs, certain area merchants, alleged they lost business as a result of the demolition work and sued the city and other defendants. On review, the New Hampshire Supreme Court stated that an abutter has "a private right of access in that street or highway, which includes not only the right to go to and from the land but also the right to have the premises accessible to others." *Id.* at 762. Based on the *Berlinguette* decision, it may be inferred that a municipality is potentially liable to abutters whose access to a public way is impacted by a private construction project.

MAINTENANCE, CONSTRUCTION, AND REPAIR ISSUES

Temporary Closing and Detours

Select boards cannot close a road for an indefinite period to perform construction. Such a closure would constitute a discontinuance, which would require a vote by the legislative body. *See also, Marrone v. Hampton*, 123 N.H. 729 (1983) (only legislative body may discontinue a highway). However, RSA 234:38 permits a mayor or select board to "temporarily close or regulate travel" on any class IV or V highway or bridge as well as to establish detours. Obviously, this will be necessary from time to time when exigent circumstances regarding public safety exist (for example, a downed live power line across the road, an active fire emergency, a car-eating pothole, etc.). Similarly, highway maintenance required under RSA 231:3 may involve the closing of one or all lanes of traffic for plowing, grading, paving, installation of subsurface structures, etc. This authority should be exercised with caution so that a reasonable balance is struck between necessary interruptions of public travel and the maintenance of safety of the traveling public. Signals and signs for any road closing or detour should follow the standards set forth in the Manual on Uniform Traffic Control Devices. RSA 47:17, VIII.

Motorists have an obligation to yield to any authorized vehicle or pedestrian engaged in construction or maintenance of a highway in an area indicated by official traffic control devices. RSA 265:6-a. It is important for everyone's safety to mark clearly the areas in which construction/maintenance is being performed.

Obligation to Maintain Class IV and V Highways

Municipalities are required to maintain Class IV and V highways and the bridges and sidewalks along those highways and are permitted to raise and spend public money to do so. RSA 231:59; RSA 231:62. Maintenance includes plowing, salting, and sanding as needed to keep the roads passable. *Ritzman v. Kashulines*, 126 N.H. 286 (1985). As explained in greater detail earlier in this chapter, municipalities also have a duty to correct "insufficiencies" on public roads and sidewalks. An insufficiency exists when the road or sidewalk is either not safely passable or there is a safety hazard that is not reasonably discoverable by people using the road or sidewalk in a reasonable, prudent, and lawful manner. RSA 231:92.

Maintenance of Private and Class VI Roads

Municipalities should refrain from regularly maintaining (for example, plowing) private roads and driveways for several reasons:

Public Purpose Requirement. In *Clapp v. Jaffrey*, 97 N.H. 456 (1952), the Court stated that, under the Constitution, public funds must be dispensed for public purposes. Accordingly, in order for public maintenance of a private road or driveway to be constitutionally permissible, the activity must be "subordinate and incidental" to the needs of the town's own highways (i.e., it does not increase the town's equipment or personnel needs or alter its snow maintenance planning), and the benefited persons must fully reimburse the town so that no tax monies are spent. Unless both conditions are met, the municipality should not provide plowing services on private roads or driveways. The legislative body (town meeting, town or city council) has no authority to alter this legal situation. A town meeting vote to maintain one private road or all private roads in town is simply illegal and not enforceable. Using tax money raised from all citizens to provide a purely private benefit for a select portion of the citizens is not legal, no matter how small the amount.

Potential for Acceptance. Public maintenance of a road could arguably be construed by a court as an acceptance of the highway, resulting in the town's perpetual responsibility. See Chapter 2 for more information.

Turning a Class VI Highway into Class V. While Class VI roads are public roads, and the municipality has the authority to regulate their use, the municipality has no obligation or authority to maintain them. It is possible for a Class V road (usually thought of as an "ordinary" town road) to lapse into Class VI status over time. If the municipality fails to maintain or repair a Class V road for five successive years or more in suitable condition for travel, its classification automatically changes to Class VI. RSA 229:5, VII. Nevertheless, the road may once again become a Class V road (which the municipality must fully maintain and repair) if the municipality regularly repairs and maintains it on more than a seasonal basis, in a suitable condition for year-round travel, for at least five successive years. RSA 229:5, VI. *See* Chapter 8.

Liability Exposure Increases. If a municipality plows private roads or driveways, it may be exposed to greater liability for damages or conditions created by that maintenance activity. As explained above, towns and cities are granted significant protection from liability with respect to the use of public roads and the maintenance of public roads in winter, but the same is not true for private roads or driveways. This means a municipality might find itself forced to pay for injury or damage caused by the plowing activity on a private road or driveway that it would not be liable for on a Class IV or V road.

Equal Protection Issues. If a municipality elects to selectively maintain certain private and Class VI roads, it invites assertions of inconsistent and unfair treatment. Potentially aggrieved individuals may include: persons whose subdivision was not approved because of inadequate roads; those who are denied a building permit under RSA 674:41; or those who are requested to repair a damaged highway.

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.

Strategies. If a municipality has a need to clear snow and ice from Class VI or private ways, there are at least three possible methods that may be helpful: contracting for the work with the abutters, declaring a road an emergency lane, and laying out a road for winter maintenance. Of these three, emergency lane declarations (where appropriate) may be the better option.

In the absence of other options, if a town or city performs maintenance on a private road, it should charge a fee to the landowner that covers the municipality's expenses for that maintenance. It should also have a written agreement that explicitly recognizes that the road is not "dedicated" by the owner, that the town's maintenance does not constitute "acceptance," and that the owner will indemnify the town for any and all liabilities resulting from the work.

Any Class VI or private road may be declared an emergency lane by the governing body under RSA 231:59-a. An emergency lane declaration may only be made after a public hearing if the governing body finds that "the public need for keeping such lane passable by emergency vehicles is supported by an identified public welfare or safety interest which surpasses or differs from any private benefits to landowners abutting such lane." RSA 231:59-a, II. In other words, an emergency lane declaration should be made only when it is in the interest of the public—not just for the benefit of the abutters. If a road is declared an emergency lane, municipal funds may be spent to plow, remove brush, repair washouts or culverts, or do other work "deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles." RSA 231:59-a, I. The municipality then has the authority, but not the obligation, to maintain the road in that manner. An emergency lane declaration may be withdrawn or disregarded at any time by the governing body, and no one may recover damages from the municipality for failure to maintain an emergency lane. RSA 231:59-a, IV.

The other method is to lay out a "winter road." RSA 231:24. A winter road is a special category of Class V road that is open and maintained between November 15 and April 1 only. The only way a road can become a winter road is if it is laid out that way, by petition, through a formal proceeding held by the governing body under the layout statutes. RSA 231:8–:39. Municipalities can charge yearly rentals to the property owners benefited by a winter road layout to pay the damages for the layout owed to the owners of the land over which the road passes. The winter road law was enacted in 1897 and has never been cited to in a reported court opinion. The intent of the statute may have been an attempt to legitimize the plowing of private roads by town, which (as explained above) is not legal except in very narrow circumstances, or to facilitate the removal of logs, which may now be accomplished by layout of a logging road under RSA 231:40 – :42.

However, while winter road layout is an option, it does carry a risk. The New Hampshire Supreme Court has held that plowing alone does not keep a road in a state of repair or preserve it from decline. "Maintenance or repair work such as repaving or cold patching in summer is required to protect against and combat the road's yearly erosion caused by rain, snow and freezing temperatures." *Catalano v. Windham*, 133 N.H. 504, 511 (1990). Attempting to confer winter road status on an otherwise private road,

where the only work to be done by the town is plowing, raises a risk that the town may be found liable for road insufficiencies caused by a private party's off-season maintenance, or lack thereof.

Construction Contracts

BONDING. RSA 231:61 provides that a municipality may contract out highway work. For any work worth over $125,000, a town is required to obtain a payment bond "conditioned upon the payment by the contractors and subcontractors for all "labor and materials furnished in carrying out the contract. RSA 447:16. The purpose of a payment bond is two-fold. First, it protects subcontractors furnishing labor and materials. Second, it holds municipalities, as project owners, harmless from any liability arising out of non-payments.

Unlike payment bonds, a performance bond provides security to a municipality that the work will be performed per the contract. The law does not require a town or city to obtain a performance bond. Nevertheless, whenever a municipality engages in public contraction works in excess of $125,000, it should generally obtain both types of bonds to minimize risk.

Competitive Bidding. In the absence of a local ordinance, towns and cities are not required to use competitive bidding for any contracts, highway or otherwise. *Gerard Construction Co. v. Manchester*, 120 N.H. 391 (1980). The only exception is when a public official is involved in the sale of goods or commodities if the value exceeds $200, in which case competitive bidding is required. RSA 95:1. Some town or city charters may require competitive bidding as well. Towns may vote, by a warrant article at town meeting, to establish a centralized purchasing department for the town in accordance with RSA 31:59-a. If the warrant article is approved, the select board must appoint a purchasing agent, who may establish rules and regulations for competitive bidding for town purchases of goods or services. RSA 31:59-a – :59-d. Under RSA 447:16, any municipal project involving an expenditure of $125,000 or more must include as a condition of the contract sufficient security by bond or otherwise covering at least 100% of the contract price.

Where municipalities have enacted local purchasing or competitive bidding policies, the policies must be strictly followed. *Gerard Construction Co. v. Manchester,* 120 N.H. 391 (1980). The purpose of competitive bidding, as stated by the Court in *Gerard*, is "to invite competition, guard against favoritism, improvidence, extravagance, fraud and corruption and secure the best work or supplies at the lowest price practicable…." 120 N.H. at 396. Caution should be exercised in creating municipal purchasing policies. For small quantities of items that are readily available at any retail store at a fair price, the cost and delay inherent in competitive bidding is probably not warranted. For larger quantities of goods and services, the competition inherent in a competitive bid will likely result in the best price for the item or service. Competitive bidding procedures should be reviewed by the municipal attorney in order to assure that the specifications are precise and the procedures for review of the bid and determination of the winner are clear. In addition, the municipal attorney should be consulted on drafting and approving the award to the bidder and the written contract for the goods or services.

More detailed information on purchasing and competitive bidding policies is available in NHMA's publication, *Basic Financial Policies: A Guide for New Hampshire Cities and Towns.*

The New Hampshire Supreme Court has issued several decisions in cases challenging municipal competitive bidding practices. These cases have established some basic rules of fairness in the bidding process:

1. LOWEST BIDDER

If the town decides to use competitive bidding, the process must be conducted fairly. The town can reject all bids, but if it decides to accept one, it must choose the "lowest responsible bidder" who has

complied with all of the terms of the solicitation, without showing favoritism. *Curran, Inc. v. Auclair Transportation Inc.,* 121 N.H. 451 (1981). That does not mean that the lowest bid in dollar amount must be accepted in all cases; if that low bid has not responded to all terms of the solicitation, or has proposed materials that are different from those specified in the solicitation, or if the bidder cannot meet a required condition, such as provision of a performance bond, it may be rejected.

2. FAIR TREATMENT

All bidders must be treated fairly and equally with respect to the town's competitive bidding procedures, such as notice. *Irwin Marine, Inc. v. Blizzard, Inc.,* 126 N.H. 271 (1985).

3. CHANGING SPECIFICATIONS

The town cannot, after putting one set of specifications out to bid, decide to accept a bid that is calculated on different specifications. If the municipality desires to use the new specifications, it must reject all bids, advertise the new specifications, and allow the other responsible bidders to submit new bids based upon the new specifications. *Marbucco Corp. v. Manchester,* 137 N.H. 629 (1993).

CHAPTER SEVEN

ROADS, STREETS, AND LAND USE PLANNING

Since a public highway is a use of land, every road issue is also a land use issue. This chapter covers the links between public highways and municipal regulation of the use and development of private land, including new development on existing lots, planning board regulation of new roads, and paying for work on existing roads.

MINIMUM ROAD ACCESS REQUIREMENTS UNDER STATE LAW

RSA 674:41 has been characterized by some as zoning on the state level. It is a law that applies in all towns and cities unless the municipality does not have a planning board with subdivision approval authority. Under RSA 674:41, no building permit can be issued, nor can any building be built, on any lot unless that lot has access from one of these five types of streets:

- A Class V or better public highway, including one that has been previously laid out, or one that appears on the official map or has been accepted by the municipality (RSA 674:41, I(a), I(b)(1), I(b)(4)); or
- A road shown on a plat approved by the planning board—either a subdivision plat, or a street plat (RSA 674:41, I(b)(2) and (3)); or
- A Class VI highway, but only if the governing body, after review and comment by the planning board, has voted to issue building permits on that particular Class VI highway, or portion thereof, and then only if the owner has recorded a notice in the registry of deeds acknowledging that the town is not liable for maintenance or any damage that might occur as a result of the use of that road (RSA 674:41, I(c)); or
- A private road, but as with Class VI roads, only if the governing body, after review and comment by the planning board, has voted to issue building permits on that particular private road, or portion thereof, and then only if the owner has recorded a notice in the registry of deeds acknowledging that the town is not liable for maintenance or damage that might occur as a result of the use of that road (RSA 674:41, I(d)); or
- A street shown on a subdivision plat that was approved by the zoning board of adjustment or governing body before the planning board was granted subdivision jurisdiction. The street must already have at least one building on it and must have been constructed prior to July 23, 2004 (RSA 674:41, I(e)).

HOW TO INTERPRET RSA 674:41

Applicability. RSA 674:41 applies to all lots, including those in older recorded subdivisions never approved by the planning board, as well as new subdivisions under the jurisdiction of the planning board.

The only circumstance under which this law does not apply is in a municipality that has not granted subdivision regulation authority to the planning board. In *Vachon v. New Durham*, 131 N.H. 623, 629 (1989), the Court held that the statute applies to all building permit applications, not just those related to new subdivisions. The statute also must be considered if the erection of any building is proposed, even where the municipality requires no building permit. RSA 674:41, II.

RSA 674:41 applies to new buildings, as well as to remodeling, additions, or conversions to year-round use of already existing buildings. The statute provides that "no building shall be erected... nor shall a building permit be issued for the erection of a building" unless the proposed building complies with the statute. Also, the first sentence of paragraph II speaks of the "structure or part thereof," implying that any physical expansion of the structure must comply.

Frontage. The statute refers to the "street giving access to the lot." Generally, the lot must have actual frontage on one of the five types of streets described in RSA 674:41, I. An easement giving access to a "back lot" over the land of another will not meet the statutory standard unless the easement itself either is a public highway or is shown on a recorded plat approved by the planning board. In *Belluscio v. Westmoreland*, 139 N.H. 55 (1994), the Court approved a building on a lot whose only access was an unapproved deeded easement. But in 1995, reacting to the *Belluscio* case, the legislature enacted the second sentence of RSA 674:41, III: "For purposes of paragraph I, 'the street giving access to the lot' 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 subparagraph I(a), (b), (c), (d) or (e)." Along the same lines, the New Hampshire Supreme Court held that "an easement qualifies as a 'street giving access to a lot' only if it meets one of the criteria set forth in RSA 674:41, I(a)-(e)." *Russell Forest Management, LLC v. Henniker*, 162 N.H. 141 (2011).

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 of that statute provides: "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." This sentence was added in 1989, and thus supersedes the holding in *Battock v. Rye*, 116 N.H. 167 (1976), that a local grandfather clause exempts existing lots from road frontage requirements.

"Streets" and Driveways. A street, road, highway, way, lane, etc. is either some class of public highway, or it is not. If it is not, then a lot fronting on that roadway does not qualify to be built on under RSA 674:41, I(b) unless that roadway is shown on a plat approved by the planning board. Otherwise, it must satisfy the requirements of paragraph I(d) or (e). It is irrelevant how the highway became a public highway (layout, dedication and acceptance, prescription, or town-owned land). In addition, whether the roadway is colloquially referred to as a street or driveway doesn't matter with respect to this law. The word "street" as broadly defined in RSA 672:13 includes all ways. So, any roadway that passes muster under RSA 674:41 will count as a "street," no matter what it actually looks like, or whether or not it was intended to become public. The purpose of this statute is to give the planning board jurisdiction over access to all lots. The relevant construction standards are whatever standards the planning board decides to impose when the plat is approved. For example, many zoning ordinances or subdivision regulations have provisions for shared driveways. In a municipality with such a provision, a shared driveway, if shown on a plat and approved and recorded as part of that plat, would count as a street that satisfies this statute.

Street Plat. It is not completely clear how the term "street plat" as used in RSA 674:41, I(b)(3) is defined. However, this wording appears to be a historical quirk, rooted in the fact that the pre-1983 version of the subdivision enabling law—former RSA 36:19—didn't use the word "subdivision" except in the

title, but instead expressed the planning board's authority in terms of "empower[ing] the planning board to approve or disapprove, in its discretion, plats showing streets, or the widening thereof, or parks...." Former RSA 36:21 provided that the planning board must adopt subdivision regulations before exercising the authority granted by RSA 36:19 and that, therefore, "plats showing streets" included subdivision plats. So, the very concept of subdivision regulation began as the concept of regulating road access. In some states, it is still common to omit subdivision review where all lots front existing streets. In these states, lot size and other similar requirements are controlled solely through zoning. *See, Rathkopf's Law of Zoning & Planning*, Section 64.03(1)(c)).

A street plat is the same thing as a subdivision plat, except that it doesn't show any new lots—just a new street. Since both former RSA 36:19 and current RSA 674:41 are part of the subdivision review authority, the planning board, if it is asked to approve a street plat, should follow the same procedures it does for subdivision plats, including the notices and hearing required by RSA 676:4. Any new roadway shown on the plat, regardless of whether it is referred to colloquially as a street or driveway, should be required to be improved to whichever set of standards is applicable in the subdivision regulations, unless the board decides to grant a waiver to those requirements.

Class VI and Private Roads. If the lot is located on a Class VI or private road, the governing body has the authority to allow a building permit to be issued so long as the requirements of the statute are met. In either case, the governing body must first consult with the planning board and then decide whether buildings will be allowed on that specific Class VI or private road. A blanket prohibition on building on any private or Class VI road in town may run into constitutional problems; it would be far better for the governing body to consider specific factors such as the condition of the road(s), the distance a lot is from the nearest intersection with a Class V or better road, and similar facts. *See*, *Blagbrough Family Realty Trust v. A &T Forest Products, Inc.*, 155 N.H. 29 (2007) (statute permits governing body to assess building on both single lots and multiple lots). If building is allowed, the governing body must enforce the remaining condition as well. The petitioner must record a release at the registry of deeds containing the limits of municipal responsibility and liability ("the municipality neither assumes responsibility of said road nor liability for any damage resulting from the use thereof") and must present the governing body with evidence that the release has been recorded. Documentation of all of this should go into the road file for that particular road, as described in Chapter 2. The reason for the recording requirement is obvious: not only the present owner but all future owners are on notice of the status of the road and the limits of the municipality's liability and responsibility.

EXCEPTIONS TO RSA 674:41

RSA 674:41, II allows the zoning board of adjustment to grant an exception when a property owner wants to build on a lot that has no frontage on any class of highway and no frontage on any roadway approved by the planning board or other board prior to platting jurisdiction—for example, a lot whose only frontage is on a private roadway not shown on any plan approved by the board—or when the planning board has failed to approve a street plat submitted by the property owner. The statute must be read carefully because even though an exception is possible, the standards the owner must meet are quite stringent. To grant the exception and allow the building to be erected, the ZBA must find all of the following:

- That the enforcement of the minimum frontage requirements in RSA 674:41 would "entail practical difficulty or unnecessary hardship;" and
- That the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets; and

- That the erection of the building will not tend to distort the official map or increase the difficulty of carrying out the master plan; and
- That erection of the building will not cause hardship to future purchasers or undue financial impact on the municipality.

Analysis of Exception Standards. So far there has been no New Hampshire Supreme Court case construing this paragraph. (Note that the New Hampshire Supreme Court issued an opinion addressing this exact issue in *Merriam Farm, Inc. v. Surry* in 2012, but that opinion subsequently was withdrawn and not reissued.) Although land use case law gives good guidance on what "unnecessary hardship" is, at least for zoning variances, there is no New Hampshire case on what "practical difficulty" means. Clearly, though, the mere fact that a lot has no street frontage can't by itself constitute "practical difficulty," since, if it did, every lot that applied would automatically qualify and the statute would be rendered meaningless.

Although the four standards listed above might possibly be met in the case of an agricultural shed or primitive hunting camp, they will almost never be met in the case of a proposed year-round home because the "circumstances of the case" always require some relation to "existing or proposed streets." Also, because a lot with a year-round home but no access to maintained highways is cut off from emergency vehicles and other services, it likely will always constitute "hardship to future purchasers."

An alternative way to handle building requests on landlocked lots is through the street plat process described above. It gives the planning board the ability to consider the type of access road that ought to be required for the proposed use.

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 governing 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.

Zoning Ordinance Exceptions. Paragraph III of RSA 674:41 provides that this law supersedes any less stringent local ordinance. Therefore, it does not matter if the standards for a special exception in the local zoning ordinance are different from the four standards listed above. The zoning special exception does not apply. An exception under RSA 674:41 has nothing to do with a special exception under zoning. Similarly, although the planning board may be granted the authority in the zoning ordinance to waive certain of its requirements, a municipality may not grant its planning board the authority to waive RSA 674:41. The statute provides only for the limited exceptions described above and grants no other local authority to circumvent the statute's requirements.

Towns without ZBAs. In a town with no ZBA, the governing body (select board) must appoint five citizens to act as a special appeals board to determine whether an applicant qualifies for the exception under RSA 674:41, II.

THE TAKING ISSUE

If a town refused to allow any building on a lot solely because of RSA 674:41, wouldn't that be an unconstitutional 'taking' of property?

A full discussion of the regulatory taking of land is beyond the scope of this book. However, in *Trottier v. Lebanon*, 117 N.H. 147 (1977), the owner of land with frontage on a Class VI road only had been denied approval of a proposed subdivision because of a local frontage requirement. The plaintiff claimed an unconstitutional taking, but the Court denied the claim, finding:

> The facts show that prior to his purchase plaintiff made no inquiry as to the status of Old King's Highway, and the zoning problems posed by the deficient access route... 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.

Twelve years later, the Court upheld a denial of building permits and dismissed a takings argument because the denial was based on the statute; this holding implies that the statute is constitutional and does not present a takings problem (at least as applied in that case). *Vachon v. New Durham*, 131 N.H. 623, 629 (1989).

If a town's true motive for denying permission to build on a lot under RSA 674:41 relates to something other than the adequacy of the road—for example, because it wants the land to remain "wild" as some sort of preserve—then such a denial is indeed quite likely to constitute a taking. *See, Burrows v. Keene*, 121 N.H. 590 (1981). Furthermore, the way to regulate density of development is through a zoning ordinance (*see, Caspersen v. Lyme*, 139 N.H. 637 (1995)), or through the prevention of "scattered and premature" subdivisions, not through RSA 674:41. This law provides a way to regulate road access adequacy and is not a back-door way of regulating or preventing development itself.

WHO ENFORCES RSA 674:41?

Every local official involved with land use issues can have some role to play in enforcing the state frontage requirements contained in RSA 674:41.

- If the town has a building permit system, then whoever issues the permits, whether it is a building inspector, code officer, or select board, must refuse to issue the permit unless and until the lot complies with this law. If a town has no building permit system, it can still enforce this statute against an owner who builds without the required frontage through a citation, cease and desist order, or court action under RSA 676:17, :17-a or :17-b.
- The planning board has a major role in this statute under RSA 674:41, I(b). An owner of a lot with frontage on a pre-planning board, unapproved road only can apply to the planning board for approval of that road as part of a street plat as discussed above.
- The planning board can also get involved if someone submits a subdivision or site plan application on land that has no frontage of any of the types listed in RSA 674:41, I. If so, the application should be denied until it complies with RSA 674:41.
- The select board or town/city council will get involved whenever a lot's sole frontage is on a Class VI road or private road because, under the statute, it is the local governing body that must decide whether the municipality's policy will be to permit buildings on that road, or portion thereof. RSA 674:41, I(c) and (d).
- The select board or town/city council, as well as town meeting voters, also could become involved in a case where there was a long-existing private road pre-dating the planning board and not

shown on any approved plan, and the owners, instead of asking the planning board for a street plat approval, decide instead to petition for a layout of that road as a public highway. See Chapter 2.

- The zoning board of adjustment can get involved if the landowner decides to seek an exception under paragraph II of the statute.
- The town meeting could get involved in a case if the planning board refused to approve a street plat and the owner then petitions the town meeting to accept the road as a public highway under RSA 674:41, I(b)(4), which refers to RSA 674:40. See Chapter 2.

HOW RSA 674:41 APPLIES

Property Access Not Guaranteed. Municipal officers and boards frequently are pressured to issue building permits by an owner who insists he or she has a "right" to access the lot and build on it regardless of the status or condition of the road. Whether or not such a right exists is not a question the municipality has to answer under RSA 674:41. The only authority the municipality has is to follow the statute and either grant or deny the building permit based on the facts at hand. If the owner needs to take additional steps to obtain access that complies with the statute, then that is the owner's issue.

Consider this example. Before the advent of the planning board, Property Owner A sold the front half of a woodlot—the part with Class V road frontage—to Property Owner B for a house lot. Although Owner A has for years used B's driveway as access to remove firewood, Owner A has no deeded easement from his land to the highway. The driveway is not shown on any plat or plan. He now asks for a building permit to locate a small cabin on his woodlot. It is his belief that New Hampshire law guarantees him access to his property.

Owner A's belief about guaranteed access is a common misconception. The only statute that comes close to a guaranteed access is the owner consent section of RSA 231:43, which reserves an owner the right to access over a previously discontinued highway unless the owner gives it up in writing. See discussion in Chapter 4. This statute doesn't help Owner A, since his lot never had highway access.

Paragraph I of RSA 674:41 requires the building permit to be denied at this point, because Owner A doesn't have access via any of the types of "approved street" listed there.

In order to satisfy RSA 674:41, Owner A's first problem is to get a private easement from Owner B. Or maybe he can petition superior court for an easement by prescription or an easement by necessity. These legal doctrines relate to private easements, not public highways, so they are not described further here. A municipality does not normally get involved in the kind of private dispute Owner A may have with Owner B. It's a matter of private property law.

Assuming Owner A obtains the private easement, he must still meet the public requirements of RSA 674:41. Owner A's options are:

- Submit a street plat to the planning board showing the easement over Owner B's land as a driveway. RSA 674:41, I(b)(3). Presumably, the planning board's review could be of the expedited variety similar to boundary line agreements (RSA 676:4, I(e)) because no new lots are being created. The problem is deciding what street standards the planning board should apply. Unless the town's regulations contain relaxed driveway standards, the street standards in the subdivision regulations would apply, unless waived or relaxed by the planning board.
- In the alternative, Owner A can request an exception under RSA 674:41, II from the zoning board of adjustment. The board can add conditions such as, in this case, appropriate width and

construction standards for the driveway to make sure that granting the exception complies with the standards listed above. *See, Dube v. Senter*, 107 N.H. 191 (1966) (decided under RSA 36:26, which was the predecessor of RSA 674:41).

- Owner A could petition the select board for a layout under the statutes or petition the town meeting to accept the driveway as a public highway. See Chapter 2. Politically, it may be futile to ask the town to pay to build a highway for just one person. One possibility would be to do a conditional layout under RSA 231:23. See discussion in Chapter 5. If Owner B had refused to give Owner A a private easement, this might be the best option.
- If Owner A intends to construct a new driveway or "alter in any way" the manner in which his driveway enters the town highway, he also needs a driveway or curb cut permit under RSA 236:13, as discussed in Chapter 6.

Deeded Easement. Consider the same facts as in the example above, except that instead of wanting to build a cabin, Owner A submits an application to the planning board for a seven-lot subdivision. All lots will have access via a new road he wants to build on his 25-foot wide deeded easement, which he has obtained from Owner B.

The planning board cannot grant subdivision approval for buildable lots if Owner A's survey plat doesn't show the full length of the easement. A roadway can't count as approved under RSA 674:41, I(b)(2) unless its full length (to the nearest approved street) is shown on an approved plat.

RSA 674:41 would be satisfied if Owner A's plat showed the entire road including the easement across Owner B's land. But this approach may raise other problems for Owner A:

- The subdivision regulations may require a street wider than 25 feet. If so, Owner A's subdivision must be denied unless and until he can show that he has a legal right to dedicate the proper width of roadway. *Nadeau v. Durham*, 129 N.H. 663 (1987).
- Even if Owner A's easement over Owner B's land is wide enough, that easement may be described in the easement deed as access to only one lot, not seven. Owner A's easement rights as against Owner B may not include the right to subdivide.

TOUGHER LOCAL FRONTAGE REQUIREMENTS

For New Lots

While RSA 674:41 provides for state frontage requirements, it does not specify how much frontage. Presumably, it is just enough to give actual access to the lot. Most municipal zoning ordinances, however, contain minimum dimensions for frontage. These requirements are generally upheld when applied to prohibit new lots from being created without the required frontage. See, for example, *State v. Dean*, 109 N.H. 245 (1968). "Usually, frontage requirements can be justified on the basis that they are a method of determining lot size to prevent overcrowding." *Metzger v. Brentwood*, 117 N.H. 497 (1977). When the constitutionality of a zoning ordinance is challenged, courts apply the "rational basis" test. In *Boulders at Strafford, LLC v. Strafford*, 153 N.H. 633 (2006) (overruling *Metzger v. Brentwood* to the extent it referred to the rational basis test), the New Hampshire Supreme Court held that the rational basis test requires the ordinance to be rationally related to a legitimate governmental interest. Further, the Court held that the rational basis test "does not contain an inquiry into whether legislation unduly restricts individual rights, and that a least-restrictive means analysis is not part of this test." In other

words, frontage regulation may, indeed, restrict the use of land so long as the restriction is rationally related to the municipality's legitimate land use goals.

In *Goslin v. Farmington*, 132 N.H. 48 (1989), the town prohibited land from being subdivided unless every lot had a certain amount of frontage on a road built to town standards, including paving. The plaintiffs wanted a three-lot subdivision. They had the required frontage on a road that was improved in every way except the paving. They asked for a variance, claiming that having only one buildable lot on 11.8 acres was an "unnecessary hardship." The Supreme Court disagreed, saying the fact "that they currently have only one buildable lot instead of four does not create a hardship when the lot can still be used in a way permitted by the ordinance." *See also, Olszak v. New Hampton*, 139 N.H. 723 (1995) ("The plaintiffs do not have a right to build on every acre of their property.").

In 2008, the New Hampshire Supreme Court noted that ordinances may be made stricter over time to accomplish a legitimate goal, such as reducing density of development around a lake. *See, Nine A, LLC v. Chesterfield*, 157 N.H. 361 (2008). Ordinances may incorporate more stringent frontage requirements for a specific reason (in this case, the ordinance was amended to include a 200-foot frontage requirement).

Pre-Existing Lots

Many zoning ordinances have grandfather or lot-of-record clauses that exempt existing lots (those on record at the time the requirements were added to the ordinance) from frontage and area requirements so long as the use of those lots does not violate other zoning restrictions. If such a grandfather clause exists, pre-existing lots need not comply with current municipal frontage standards. *Seabrook v. Tra-Sea Corp.*, 119 N.H. 937 (1979). However, such lots still have to comply with RSA 674:41.

Even without such a grandfather or lot-of-record clause, attempts to strictly apply frontage requirements to pre-existing lots can run into constitutional problems. In *Metzger v. Brentwood* (see above), the plaintiffs wanted to build on a lot with 558 feet of frontage, but only 123 feet of that frontage was on a Class V road. A building permit was denied because the zoning ordinance required 200 feet of frontage on a Class V road. The Court held that the 200-foot requirement was unconstitutionally arbitrary and unreasonable as applied to the plaintiffs since they had enough frontage to assure adequate spacing between buildings and had adequate street access from that portion of their lot with Class V frontage.

There is no New Hampshire case law upholding a total prohibition on building merely because a pre-existing lot does not meet local frontage requirements. One case implies that such a prohibition would be enforceable, but the Court was not asked to answer that question directly. *Cosseboom v. Epsom*, 146 N.H. 311, 315-16 (2001) ("If we interpret the ordinance as exempting pre-existing lots from the "frontage" requirements, a landowner could be allowed to build on a completely landlocked parcel. Such a result could not have reasonably been intended by the drafters of the ordinance when it was promulgated."). It may be advisable for those towns without a frontage grandfather clause—as long as a pre-existing lot has the minimum access frontage required by RSA 674:41 and as long as no other zoning requirements will be violated—to consider a variance from the dimensional frontage requirement. The economic effect on the owner from denying such a variance will usually be devastating, whereas the benefit to the public of strict enforcement will normally be slight, possibly causing a court to find an unconstitutional taking as it did in *Metzger*. This possibility is why most ordinances have lot-of-record clauses.

Driveways or Curb Cuts

Another road issue that crops up in connection with development of existing lots is the planning board or governing body's authority to regulate access points to the public highways. RSA 236:13 was amended in

2014 so that the municipality may grant driveway authority to either the planning board or the governing body. 2014 N.H. Laws Chapter 125. Making sure curb cuts are safe and minimizing their number on higher-level arterial routes to keep traffic flowing are very important to keeping the municipality's road system functioning. RSA 236:13 was discussed in Chapter 6. Under the law each driveway permit must:

- Describe the location of the driveway, entrance, exit, or approach. The location shall be selected to most adequately protect the safety of the traveling public.
- Describe any drainage structures, traffic control devices, and channelization islands to be installed by the abutter.
- Establish grades that adequately protect and promote highway drainage and permit a safe and controlled approach to the highway in all seasons of the year.
- Include any other terms and specifications necessary for the safety of the traveling public.

Municipal fire chiefs are also frequently involved in the driveway permitting process. However, their authority comes not from RSA 236:13, but from the state fire code and the National Fire Protection Association (NFPA) code. A fire chief may impose additional requirements on driveway access related to the adequacy of access for public safety reasons, which is a separate issue from the municipality's authority regarding the intersection between the driveway and the public highway. So, for instance, a planning board/governing body would not likely be able to prohibit a very long driveway because that does not relate to the intersection, but a fire chief may be able to do so. *See, Atkinson v. Malborn Realty Trust*, 164 N.H. 62 (2012).

State Minimum Driveway Standards

RSA 236:13 contains a few standards that apply regardless of what local regulations may require, or whether there are local driveway regulations. RSA 236:13 applies to local as well as state highways. (Paragraphs I, II, III, and IV refer to the commissioner of the Department of Transportation, but paragraph V states that those same powers are conferred upon the planning board or governing body regarding municipal highways in municipalities where the board has been granted the power to regulate the grading and improvement of streets within a subdivision under RSA 674:35.) Some of the minimum standards are:

- No driveway connection can be more than 50 feet wide. RSA 236:13, IV(a).
- No parcel of land can have more than two driveway connections unless that parcel's highway frontage exceeds 500 feet (RSA 236:13, IV(b)) and (for commercial or industrial enterprises, or for subdivisions) unless it is proven that there is a 400-foot safe sight distance in both directions at a height of 3 feet, 9 inches above the pavement. RSA 236:13, III(b) and (c).

Owner Must Maintain

RSA 236:13, VI, enacted in 1997, provides that all private driveway connections, including structures like culverts, remain the continuing responsibility of the landowners, even if they are in the right of way and even if the driveway pre-dates the driveway permit system. If any driveway connection threatens the highway due to plugged culverts, siltation, etc., the planning board/governing body or its designee can order the owner to repair it. The order must describe the hazard, prescribe what corrective action or alteration in the location or configuration of such access shall be required, and set a reasonable time within which the action shall be completed. Such an order shall be sent by certified mail and shall be enforceable to the same extent as a permit issued under that provision. If the owner doesn't comply

within the time prescribed in the order, the municipality can perform the repair and charge its costs to the owner.

Such regulation may raise the question of whether the landowner has a vested right in the driveway as it exists. May the municipality require the owner to alter the driveway connection or move it to another location? Yes, in the right circumstances. Not even a grandfathered property owner has the legal right to maintain a driveway access that constitutes a potential threat to the integrity of a public road or to the public safety. This result occurs because RSA 236:13, VI specifically gives the municipality the authority to require repairs or changes to the driveway if it "is or becomes a potential threat to the integrity of the highway or its surface, ditches, embankments, bridges or other structures, or a hazard to the safety of the traveling public."

An owner's right of access can be limited by regulation, but it can't be denied altogether without paying compensation. *Tilton v. Sharpe*, 84 N.H. 43 (1929); *See also* Chapter 4. A town's exercise of authority under RSA 236:13 "cannot greatly impair or prohibit the use of the access unless it is purchased or taken by eminent domain with adequate compensation to the owner." *Treat v. State*, 117 N.H. 6 (1977).

A landowner's vested right of access consists only of reasonable access to the system of public highways in general, not of a particular access site. *Merit Oil of New Hampshire, Inc. v. State*, 123 N.H. 280 (1983). "[A] great variety of situations may arise in which the relative rights of the owner and the traveling public can be determined by no set rules or formulae, but in which the reasonableness of the proposed use must be determined by weighing its unusual dangers to the public against the inconvenience and disadvantage to the owner arising from its denial." *Tilton v. Sharpe*, 85 N.H. 138 (1931).

WHEN DOES A ROAD CONSTITUTE A LOT LINE?

It is commonly held that even when the same owner owns land on both sides of a highway, the highway always constitutes an automatic grandfathered lot line, meaning that the owner can sell the land on one side separately from the land on the other side, even without subdivision approval. In reality, this is not always true.

RSA 75:9 provides: "In determining whether or not contiguous tracts are separate estates [for tax purposes], the selectmen or assessors shall give due regard to whether the tracts can legally be transferred separately under the provisions of the subdivision laws...." Thus, it is clearly wrong for an assessor to automatically treat land separated by a road as separate lots for tax purposes. Assessors must look to the subdivision laws.

No Subdivision Created by Future Roads

The issue of when a road creates a lot line was clarified, at least for future new roads and easements, by RSA 674:54. This statute governs when governmental uses of land will be subject to a local hearing by the planning board. With respect to highways, which are a governmental land use, paragraph III(a) of the statute provides:

> This section shall not apply to…the layout or construction of public highways of any class, or to the distribution lines or transmission apparatus of governmental utilities, provided that the erection of a highway or utility easement across a parcel of land, shall not, in and of itself, be deemed to subdivide the remaining land into 2 or more lots or sites for conveyance or development purposes in the absence of subdivision approval under this title. For purposes of this subparagraph, "transmission apparatus" shall not include wireless communication facilities.

In the future, therefore, if the land starts out in common ownership and a highway or utility easement is laid out through it, that highway does not constitute a lot line in the absence of subdivision approval. If, on the other hand, the road is there first and a person who owns land on one side happens to acquire land on the other, those two tracts do not merge—at least not without a voluntary merger under RSA 674:39-a—and the road will continue to constitute a lot line.

(Note that as of 2010, RSA 674:39-a was amended so that municipalities are no longer permitted to merge lots in common ownership without a request by the owner, even if such a provision remains in their zoning ordinances.)

Do Existing Roads Constitute Lot Lines?

Those who think a road automatically constitutes a lot line often point to *Keene v. Meredith*, 119 N.H. 379 (1979). But that is not what that case held. In fact, the Court used an all-of-the-circumstances analysis. The plaintiff had bought two parcels of land separately on either side of an existing road. The town treated the land for tax purposes as two lots and had, in fact, previously issued a building permit for a house on one of the lots, knowing there was already a house on the other. There was no evidence the lots had ever been used in conjunction with each other. The Court decided that the lots were separate, but the key factor in the decision was the history of the owner's use of the land.

Two key questions can be distilled from the cases:

- Has the owner used the properties in conjunction with each other—for example, a farm or lumber yard straddling the road? If so, the land is probably a single lot despite the road.
- Have the two sides of the road been owned by the same person since before the highway was created? If so, the land is probably still a single lot despite the road. *Keene v. Meredith*, above; *Robillard v. Hudson*, 120 N.H. 477 (1980); *Appeal of Loudon Road Realty Trust*, 128 N.H. 624 (1986); *Mudge v. Precinct of Haverhill Corner*, 133 N.H. 881 (1991); *See Also, Rathkopf's, Law of Zoning & Planning*, Section 64.03(2)(a).

More recently, the New Hampshire Supreme Court has issued two opinions regarding "merger by conduct." "[O]wners can effectuate a merger of contiguous, non-conforming lots, independent of any town ordinance, by behavior that results in an abandonment or abolition of the individual lot lines." *Newbury v. Landrigan*, 165 N.H. 236 (2013); *See also, Roberts v. Windham*, 165 N.H. 186 (2013). In each of these cases, the property owner requested an unmerger under RSA 674:39-aa but was denied because the governing body found that the lots had been merged by conduct.

When the matter goes before a court, it will look at all of the facts and circumstances to see whether, over all, the owner (current or former) treated the parcels as if they were one. Courts will consider factors such as the description of land contained in the deeds in the chain of title (referring to the land as a single tract or parcel of land), the depiction of the land lines shown on any plans recorded by the current or former owners and whether or not they indicate that the old lines have been abandoned, and the actual use of the property by the current or former owners as a single lot rather than as separate lots. Examples of actual use indicating that internal boundaries have been abandoned include building structures across lots lines (homes, garages, etc.), building one home with assorted outbuildings across the various lots, plans and building locations calculated with setbacks from the outer boundary of the entire parcel, and placement of driveways across multiple parcels to serve a single home and outbuildings.

HOW A PLANNING BOARD ASSURES GOOD ROADS

Highways bind a municipality together and planning for adequate roads may be the most vital part of the planning board's duties. The different roles the planning board can play are:

- Laying out the town's long-term highway policies as part of the master plan. RSA 674:2, III(a).
- Financial planning for highway improvements as part of the capital improvements program. RSA 674:5 through :7.
- Adoption of an official map (RSA 674:9 through :14) or highway planning corridors. RSA 230-A.
- Review and approval of proposed new public highways prior to layout or acceptance. RSA 674:40 and RSA 674:40-a.
- Recommending to the legislative body the enactment of zoning ordinance provisions that direct intense uses to sites where the roads will handle them. RSA 674:16.
- Reviewing the adequacy of existing streets as well as new streets serving subdivisions (RSA 674:36, II(a) and (e)) and serving site plans (RSA 674:44, II(d), (e) and (f)), and imposing security requirements to make sure no development occurs unless street work is bonded or otherwise guaranteed. RSA 674:36, III and RSA 674:44, II.
- Preventing congestion and safety hazards through the regulation of driveway connections or curb cuts. RSA 236:13.
- Deciding whether to approve a street plat under RSA 674:41, I(b) or RSA 674:40, I (b) for a pre-existing lot with no street frontage when the lot owner wants to erect a building.

THE GUIDING VALUES OF THE MASTER PLAN

A prime duty of the planning board is to develop a master plan and keep it updated. RSA 674:1. RSA 674:2, III(a) states that the master plan may include a transportation section that "considers all pertinent modes of transportation and provides a framework for both adequate local needs and for coordination with regional and state transportation plans," including public transportation, park-and-ride facilities, and bicycle routes and paths.

The transportation section of the master plan is not one of the sections required before enacting a zoning ordinance. RSA 674:18. The purpose of a master plan is "to set down as clearly and practically as possible the best and most appropriate future development of the area under the jurisdiction of the planning board, to aid the board in designing ordinances that result in preserving and enhancing the unique quality of life and culture of New Hampshire, and to guide the board in the performance of its other duties in a manner that achieves the principles of smart growth, sound planning, and wise resource protection." RSA 674:2, I. The Supreme Court has downplayed the importance of a master plan. It cannot itself be used as the basis of any regulatory decision. *Rancourt v. Barnstead*, 129 N.H. 45 (1986). And it "need not, and indeed cannot, be particularly detailed in describing future land uses." *Triesman v. Bedford*, 132 N.H. 54, 63 (1989).

THE CAPITAL IMPROVEMENTS PROGRAM

Like the master plan, the capital improvements program (CIP) is merely advisory. Its purpose is to prevent surprise, not to lock the municipality into a spending schedule. "The sole purpose and effect of the capital improvements program shall be to aid the mayor or selectmen and the budget committee in their consideration of the annual budget." RSA 674:5. A good CIP process updates the plan every year, based on revised estimates of needs and revenues.

Role of the CIP in Land Regulation. A CIP is a statutory prerequisite for two types of ordinances: an impact fee ordinance under RSA 674:21, V and a long-term growth management ordinance under RSA 674:22. The Supreme Court has said that a CIP plays no mandatory role in the review of subdivisions or site plans. *Zukis v. Fitzwilliam*, 135 N.H. 384 (1992).

THE OFFICIAL MAP STATUTE

The official map (RSA 674:9 through :15) is not the same thing as a municipality's official zoning district map or public rights of way map. The official map law is intended to provide a method of reserving the location of future streets and of thereafter keeping landowners from building within the lines of those planned streets. But this process ostensibly takes place without any dedication (or other form of consent) by the owner of the land involved and without any opportunity to claim damages.

Use of this statute to reserve land for public roads may be constitutionally risky. The statutory scheme was enacted under the theory that a public appropriation of property wasn't an unconstitutional taking as long as the leftover property yielded a "reasonable return" to the owner. RSA 674:13, I(a). Modern case law, however, tells us this "reasonable return" or "economically viable use" test applies, if at all, only when gauging the validity of regulations that do no more than limit the owner's use of the land. When property is appropriated for public uses, on the other hand, a taking occurs and compensation is required—if not in money, then at least in terms of "roughly proportional" special benefits accruing to that particular property, not just to the public in general. *Robbins Auto Parts v. Laconia*, 117 N.H. 235 (1977); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In *Burgess v. Concord*, 118 N.H. 579 (1978), a homeowner raised a takings claim when the city prepared an official map of its proposed northwest bypass. The New Hampshire Supreme Court held that the city hadn't complied with initial statutory procedures and therefore, never reached the takings issue. However, other state courts, even early on, have held official mapping statutes to be unconstitutional in particular cases. *See, Jensen v. New York*, 369 N.E.2d 1179 (1977); *Caperton v. Lawrence*, 290 N.Y.S. 1016 (1936); and *See, generally* Anderson, *American Law of Zoning 3d*, Sections 26.03 and 26.14.

Reservation of land for public highways may be approached more conservatively under the highway planning corridor law found in RSA Chapter 230-A. See Chapter 5. That statute was drafted with the takings clause of the Constitution firmly in mind.

INTERNAL DEVELOPMENT ROADS

Construction Standards

Most new streets in New Hampshire in the last 60 years have been built by private developers as a

condition of being able to sell or develop the property fronting on those streets. RSA 674:36, II and 674:44, IV allow planning boards to impose these requirements, using the leverage of subdivision or site plan review. The courts have generally upheld them:

> We all know that where subdivision of land is unregulated lots are sold without paving, water, drainage, or sanitary facilities, and then later the community feels forced to protect the residents and take over the streets[.]

Blevins v. Manchester, 103 N.H. 284 (1961); S*ee, also Seabrook v. Tra-Sea Corp.*, 119 N.H. 937 (1979).

What kind of imposed construction standards will the courts uphold? That's not purely a legal question. A lot can hinge on what planning experts say is justifiable. Board members can use their own opinions, but those opinions have to be based on some evidence. An illuminating lesson is found in two contrasting cases: *Condos East Corp. v. Conway*, 132 N.H. 431 (1989) and *K&P, Inc. v. Plaistow*, 133 N.H. 283 (1990). In both cases, the planning board had disapproved a proposed development because the access road was too steep. Yet only one of the boards was upheld. In the *Condos East* case, the Conway Planning Board went against its own hired expert who had, in fact, said the road was adequate. The Court didn't say a board must believe its own expert, but it did say that if a board disagrees with its expert, it must have a reason. Here the planning board's disapproval was not based on any regulation, or any past practice and its decision cited no facts the experts hadn't already considered. Unsubstantiated conclusory opinions won't be upheld.

By contrast, the planning board in the *K&P, Inc.* case didn't have a regulation backing up its disapproval, but the town's engineer, police and fire chiefs, and safety committee had all recommended disapproval unless another access was built. In upholding the planning board's decision, the Court wrote:

> [S]ince the record reflects that potential hazards to public health, safety and welfare were considered by the Board, the court's conclusion that the Board was justified in exercising its responsibility to ensure that all subdivision plans do not threaten public safety was proper.

K&P, Inc., 133 N.H. at 291 (citing *Durant v. Dunbarton*, 121 N.H. 352 (1981)).

In *Cherry v. Hampton Falls*, 150 N.H. 720 (2004), the Court reviewed and upheld a planning board's denial of an application for special exception where a developer sought to install a paved subdivision road through an area of wetlands. The planning board found that the plaintiffs/developer "failed to address the extent of impact in the wetland[s] buffer areas" or "show that there [was] no feasible alternative as required" by subsections 8.5.1.2 and 8.5.1.3 of the town's zoning ordinance because they had not assessed the impact of the proposed road on the wetlands buffer. Subsection 8.5.1.2 of the ordinance required design and construction methods that "minimize detrimental impact" upon the wetlands, and subsection 8.5.1.3 required that there be no feasible alternative route that has "less detrimental impact" upon the wetlands.

On appeal the Court concluded:

> [I]t was neither unlawful nor unreasonable for the planning board to require the plaintiffs to establish that the design and construction of the proposed subdivision road would minimize detrimental impact upon the wetlands buffer and that no feasible alternative design would have a less detrimental impact.

Cherry, 150 N.H. at 724.

The next in this line of cases was *Malachy Glen Associates, Inc. v. Chichester*, 155 N.H. 102 (2007). The Court held that it was unreasonable for the board to reject the plaintiff's expert's opinion that a

particular drainage design would protect wetlands and to rely instead on board member's contrary opinion based on experience with a nearby pond, especially because the board did not list the flooding concern in its written decision.

More recently, *Continental Paving, Inc. v. Litchfield,* 158 N.H. 570 (2009), cited with approval by *Harborside Associates, L.P. v. Parade Residence Hotel, LLC,* 162 N.H. 508 (2011), involved an application for a special exception to build a gravel access road more than 60 feet from a vernal pool. The special exception criteria in the zoning ordinance included protection of ecologically sensitive areas and wildlife habitats. The developer presented the expert opinions of a wetland scientist and a field biologist that the proposed road would not contaminate sensitive areas nor adversely affect wildlife around the vernal pool in question. The ZBA denied the special exception, relying instead on a conservation fact sheet from New Hampshire Audubon and rules promulgated by the Maine Department of Environmental Protection that contained general information. The conservation fact sheet suggested a buffer of at least 100 feet around a vernal pool to protect water quality and a 300-yard radius of natural habitat for vernal pool breeders. Continental appealed to the superior court, which vacated the ZBA's decision and remanded to the ZBA with instructions to grant the special exception. "[T]he trial court found the lay opinions of certain ZBA members, based upon general information not specifically addressed to the subject site, to be insufficient to counter the uncontroverted expert opinions presented by Continental." Id. at 574.

On appeal to the Supreme Court, the Town claimed that the trial court erred in finding it unreasonable for the ZBA to give weight to general information about vernal pools. Citing the principle that ZBA members may base their conclusion upon their own knowledge, experience and observations, the Town argued the ZBA members' knowledge included information in the record that they could use to evaluate the opinions of Continental's experts. The Court disagreed: "We reject … the Town's contention that information contained in exhibits before the ZBA is transformed into 'personal knowledge' through individual ZBA members using such information to 'educate themselves.' Rather, the exhibits themselves were simply evidence before the ZBA." Id.

The Court likened the case to the *Condos East* case, noting that "[t]he same factors discussed generally in the conservation fact sheet and used by the ZBA to deny the special exception, namely, water quality and the safety of amphibians that use vernal pools to breed, were specifically addressed by Continental's experts and determined by them to not be negatively affected by the proposed road." Id. at 577. There was no evidence that the ZBA questioned the credibility or methodology of Continental's experts. Thus, the Court held that "trial court could reasonably have found, by the balance of probabilities, that the ZBA's decision was unreasonable." Id.

Land use boards should be aware that they do not necessarily enjoy wide discretion to rely on general standards and values expressed in publications of reputable organizations, rather than the specific opinions of experts retained by parties to address the facts of the application. Specific opinions of experts can be reliably countered by the specific opinions of equally qualified experts only. *See also, Trustees of Dartmouth College v. Town of Hanover, 171 N.H. 497 (2018) (* the planning board cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings. and then justify their reasoning through the application of general considerations).

APPROVAL OF PRIVATE ROADS

Most developers are only too happy to have a town accept a road so that maintenance will become the town's responsibility after construction. The voluntary submission by a landowner of a subdivision plat showing a road, later recorded, is normally presumed to serve as a dedication of that road, which the town

then has power to accept as a public highway. But this is only a presumption. Notations on a plat may evidence the owner's intention to have the road remain private.

Required Dedication? It is not altogether clear whether a planning board can mandate that roads be dedicated as public highways. Some states, like Massachusetts, have specifically denied municipalities authority to require dedication. *See, Rathkopf's, The Law of Planning & Zoning*, Section 65.03(3)(a). The New Hampshire subdivision enabling statute, RSA 674:36, doesn't mention conditioning a plat on interior road dedication, and, to date, no New Hampshire case discusses such a condition. But it would be logical to conclude that internal roads will not be treated any differently from other types of dedications under the constitutional rational nexus test discussed below. A required road dedication is an exaction, just like a mandated dedication of land or money (*J.E.D. Associates v. Atkinson*, 121 N.H. 581 (1981)), and will be subject to the same constitutional test.

The planning board's job is to regulate the adequacy of any access road, whether public or private, and to prevent building development from occurring without such road approval. So, the distinction between public and private roads is not one planning boards should be concerned about. After all, the planning board has no authority over the ultimate acceptance of a road by the town. This fact should be emphasized to every developer/applicant. The planning board cannot guarantee whether a road will end up public or private. *See, Beck v. Auburn*, 121 N.H. 996 (1981).

In *Davis v. Barrington*, 127 N.H. 202 (1985), the plaintiff wanted to erect an eight-unit condominium in one building served by a 900-foot "driveway." He claimed that since this road was intended to remain private, the planning board's subdivision road standards didn't apply. The Court said:

> There is...simply no support for this claim. The statutory and regulatory provisions governing subdivision do not distinguish between condominium and other forms of property development. And there is no basis in policy that would support the plaintiff's position. Although a condominium subdivision under one roof will not entail multiple lot or dwelling ownership in the traditional sense, it will involve multiple unit ownership. Therefore if its common features are deficient in matters of health or safety, they must be seen as affecting the public, not merely one family.... Hence the board's standards for street construction clearly do and should apply.

Planning boards should not insist on road dedication but should insist on compliance with road standards. Planning boards should avoid relaxing road standards upon a promise from a developer that the roads will remain private because, not only would the board be abandoning its duty to protect the public interest by assuring adequate access, but developers also simply cannot guarantee that any road will remain private. Once a development is sold, new owners can, and likely will, petition to have that road laid out as a public highway. If so, the only question the select board will legally be able to consider is the "public convenience and necessity" for that highway. See the section on layout in Chapter 2. The select board's authority would not be constrained by any former promise made by a developer to a planning board with no jurisdiction over highway status.

Private Maintenance through Covenants. One thing that can make it less likely that future owners will petition the town to take over a road is the creation of a private entity, such as a home or unit owners association, with power under deeded covenants to collect fees for maintaining roads in the development. However, there is no solid legal basis for turning down an otherwise approvable plan merely because of the failure to include covenants. There is a large body of law indicating that the system of public land regulation must remain entirely separate from the system of private land regulation through covenants. *See, Rathkopf's, The Law of Planning & Zoning*, Chapter 57. Furthermore, there are New Hampshire cases holding it improper for towns to impose maintenance duties on private owners. *Ritzman v. Kashulines*, 126 N.H. 286 (1985).

ROAD SYSTEM ARRANGEMENT

Planning boards, in reviewing subdivisions or site plans, have authority to "[r]equire the proper arrangement and coordination of streets...in relation to other existing or planned streets." RSA 674:36, II(c) and RSA 674:44, II(d). Planning boards also can require streets "to be coordinated so as to compose a convenient system." RSA 674:36, II(e) and RSA 674:44, II(e). The New Hampshire Supreme Court wrote, in *Garipay v. Hanover*, 116 N.H. 34 (1976):

> Subdivision controls are imposed on the supportable premise that a new subdivision is not an island, but an integral part of the whole community which must mesh efficiently with the municipal pattern of streets, sewers, waterlines and other installations which provide essential services and vehicular access.

It's striking how different modern subdivision street systems are from the typical grid pattern found in older city residential areas. There are several reasons for this, including the fact that flat places are increasingly already developed, if not protected from development, and newer streets must often hug the contours of hills. Second, modern planning discourages straight-line streets except on arterial thoroughfares. See *The Planning Board in New Hampshire*, by the New Hampshire Department of Business and Economic Affairs, Office of Planning and Development (2021), p. V-33 (**https://www.nh.gov/osi/planning/resources/documents/planning-board-handbook.pdf**)

The main influence on today's street design, though, is that municipalities want developers to pay for it. Grid neighborhoods are relics of days when municipalities built all the streets. Developers aren't happy paying for streets unless they have maximum freedom over street location and the streets serve only their subdivision, rather than adjacent property. Both these factors can frustrate the goal of a coordinated street system. Municipalities aren't powerless, however. In *Davis v. Barrington*, 127 N.H. 202 (1985), the Court upheld the town's prohibition on dead-end roads greater than a certain length. In *K&P, Inc. v. Plaistow*, 133 N.H. 283 (1990), the Court upheld a town's refusal to allow a subdivision without "back door" street access.

SECURITY FOR STREET CONSTRUCTION

In the earlier days of requiring developers to build streets, towns protected themselves by not allowing a plat to be recorded until the street was finished. Without a recorded plat, a developer couldn't sell lots. But in 1986, the legislature amended RSA 674:36, III and RSA 674:44, IV to require municipalities to allow a plat to be recorded before the streets and other required work are done, as long as the applicant gives the town or city "a performance bond, irrevocable letter of credit, or other type or types of security as shall be specified in the subdivision [or site plan review] regulations." In 1988, the statute was amended to clarify that "in no event shall the exclusive form of security required by the planning board be in the form of cash or a passbook." These statutory amendments allow a developer with few assets besides the land to pay for street construction by selling off lots. But municipalities are under much more pressure to be sure they get foolproof security. The courts have upheld planning boards that have disapproved applications solely because of the lack of good security. *Cutting v. Wentworth*, 126 N.H. 727 (1985).

No Occupancy Until Street Is Finished. It is vital to grasp that, while municipalities are now banned from making a developer finish a street before selling lots, or before starting building construction, state law prohibits buildings in a development from being occupied until the street work is done. The planning board can relax this requirement, however. RSA 676:12, V. This statute gives towns and cities some leverage over roads, in addition to required security.

Who Decides Security Issues? Some planning boards would just as soon leave security issues to someone else, but under the statute, it is the planning board that must specify in its regulations what constitutes acceptable security. In *Levasseur v. Selectmen of Hudson*, 116 N.H. 340 (1976), the Court said subdivision security issues are within the planning board's exclusive jurisdiction and can't be delegated to the town meeting or select board. Clearly, the planning board must set the amount of security in each case.

Control over Form. The planning board should consider seeking the advice of the municipality's attorney when making these security decisions. Be wary of a company's "standard" form without asking the town attorney to tailor it to fit the town's needs. Boilerplate language isn't good enough. The planning board needs to wield a firm hand over the form of security documents. Legally, a security arrangement consists of two elements: a promise by the developer to do certain described work and a promise by the guarantor—bank or insurance company—to pay certain amounts in case the developer defaults on that promise. Many municipalities either overlook the first piece altogether or fail to make sure that the two pieces are adequately linked in writing. The following are some of the mistakes towns have made:

- Failing to make sure the actual surety bond, irrevocable letter of credit, etc., incorporates by reference the precise details of what work is being secured. Make sure every required element—including paving, curbing, sidewalks, catch basins, drainage, culverts, headwalls, swales, lighting, landscaping, etc.—is described thoroughly in a written performance agreement that is signed by the developer and the securing entity. The agreement should state which official will oversee the construction and how decisions to release the security will be made. The statute requires periodic partial release of security as various improvements are completed. RSA 674:36, III(b).

- Accepting security whose duration is the same as the amount of time the planning board has allowed the developer to do the work. The problem created here is that if the security expires the day after the developer has defaulted, the municipality is left with no enforcement mechanism. A self-calling type of security is best, one where the money is automatically made available to the municipality on a certain date, unless released in writing by the municipality before that.

- Accepting a mortgage on the property itself as security, having its value depreciate because of a downturn in the economy and being left with the expense to the town, not just of completing the improvements, but also of trying to market the unsold portion of the subdivision. A lien on the development land itself as the only form of security is an inherently troublesome idea.

- Accepting a letter of credit from a local bank, which is then dishonored by the FDIC when the bank goes under. It's hard to guard against the kind of bank failures that occurred in the late 1980s, and the irrevocable letter of credit is still the preferred street security device in New Hampshire, but clearly a municipality has authority to scrutinize the financial health of any issuing institution.

It is also important to understand the differences between the various kinds of security a municipality may require. A mortgage on the subject property is self-explanatory, but there are differences between a performance bond, letter of credit, and cash bond.

- Performance bonds: A performance bond is usually a surety bond, an instrument expressing three-party contractual obligations by which the developer, as "principal," and an insurance company, as "obligor," agree to pay the municipality, the "obligee," a certain sum. The condition of the obligation is that the bond is null and void if the principal performs its obligation to the obligee, that is, if the specified improvements are properly installed.

  The municipality should make sure that the surety company is reputable, solvent, and subject to the jurisdiction of the New Hampshire courts, if that becomes necessary. Under RSA chapter 416 and RSA chapter 405, domestic and foreign surety companies are subject to regulation by the New Hampshire Insurance Department, which maintains a list of insurance companies licensed to do

business in the state available at its website. The site provides a link to the rating service, A.M. Best. The U.S. Treasury maintains a list of surety companies it has qualified to write surety bonds required by the U.S. Government.

- Letter of Credit: Letters of credit (LOC) are used for a variety of commercial purposes and are governed by Article 5 of the Uniform Commercial Code, RSA 382-A:5-101 to 117 in New Hampshire. An LOC is an undertaking by an "issuer," a financial institution, at the request of an "applicant," the developer, to pay a sum to a "beneficiary," the municipality, upon presentation of a documentary demand by the beneficiary. The document is termed a "draft" or "sight draft."

  The type of LOC that secures against a default in performance by the customer is the "standby" letter of credit, and there are several other key features that affect an LOC's usefulness as security for performance.

  An LOC is *irrevocable unless* otherwise specified. RSA 382-A:5-106. Obviously, an LOC must be irrevocable to be useful as security.

  An LOC *expires* one year after its date of issuance *unless* a specific expiration date is stated. The expiration date must be coordinated with the deadline for installation of improvements, as will be discussed below.

  The applicable state law and forum for settling disputes may be agreed in writing. RSA 382-A:5-116. The municipality should be assured that it can litigate, if necessary, in the New Hampshire courts using New Hampshire law.

  The LOC should be "clean"; that is, it must be written so that the municipality is able to collect upon presentation of minimal documentation attached to its draft, such as a simple written certificate from a municipal official that the developer is in default. If proof of default is required for payment, the issuer may assume a "fact-finding" role and potentially resist payment. The municipality must make sure it understands what will be required to collect: where the draft must be presented, whether presentation must be personal or by a specific overnight delivery service, etc. This is especially true if the issuing bank is out-of-state. The bank should also be required to specify its reasons for any dishonor so that the municipality will have a second opportunity to collect after making the necessary corrections.

  Some banks are willing to issue letters of credit that are "self-calling"; that is, the bank obligates itself automatically to send the specified sum to the municipality on a certain date *unless* the bank is notified that the required improvements have been completed. Obviously, this type of instrument, if available, relieves the municipality of many potential problems.

  As with performance bonds, the municipality must make sure that the issuer is a reliable institution. Counsel should review the terms of a LOC (and certainly should be consulted in any effort to collect funds, which can be a quite technical process).

- Cash Bonds: Cash delivered by the developer to the municipality or a third party as security for improvements is not uncommon, particularly for small amounts. The money is held under an "escrow" arrangement, set forth in a written agreement that details the circumstances under which the money will be returned to the developer or paid to the municipality. If and when the developer completes the work satisfactorily, the money is returned to the developer. Only when the developer defaults may the municipality take possession of the funds, and the municipality must then use the money to complete the stipulated work. Municipalities often view the arrangement as simpler than a performance bond or LOC. On the other hand, the inability of a developer to procure a bond or LOC may be a red flag as to the developer's financial condition.

Control over Enforcement. There is no reason a planning board can't delegate enforcement of secured conditions to a building inspector, highway agent, or other official. Most boards do so. Enforcement includes not only overseeing the work to make sure it meets specifications, but also any decision to call the security and use it to perform the work. Enforcement procedures should be included in the written performance agreement. Whatever the arrangement, it is imperative that someone in the process have the responsibility to monitor the status of the security and the project so that the security does not expire before the project has finished, security is released appropriately as the project reaches certain milestones, and that if there is a default, proper action is taken in a timely manner to enforce the security.

Needless to say, collection of funds under a bond or LOC is a last resort because it creates the responsibility to manage a construction project using those funds. Nevertheless, when it becomes clear that a developer cannot or will not complete installation of required improvements, and public health, safety, or welfare is at risk, the municipality should move swiftly to assert its claim to the funds.

Make sure there is a default

When the subdivision or site plan is approved, a date for completion of performance should be specified. Without a deadline, there is no default. For subdivision and site plan approvals, RSA 674:36, III(b) and RSA 674:44, IV(b) both provide that the planning board has the discretion to "specify a period for completion of the improvements and utilities to be expressed in the bond or other security in order to secure to the municipality the actual construction or installation of such improvements and utilities."

Make sure the security has not expired

It is critical that the deadline for performance be coordinated with the expiration of the performance bond or letter of credit. The LOC or bond will be useful only if the obligation to pay—the deadline for installation of improvements—arises before the LOC or bond expires. Moreover, the deadline to complete the work should precede the expiration date to allow enough time to inspect the work; notify the developer of noncompliance; determine that the developer will not return to work; confer with counsel; and present the surety with a demand for payment, all before expiration of the bond or LOC. The municipality should leave itself 60 days or more to accomplish these tasks comfortably.

Collecting on Performance Bonds

A surety company may not be inclined to pay a claim by a municipality on a surety bond. The company will have all the technical defenses under the terms of the bond and also the defenses of the developer on the underlying obligation, the subdivision or site plan approval. The developer will often claim some sort of fault on the part of the municipality. The developer will be contractually liable for any losses to the surety company. So, if the developer is still solvent, the surety company may turn over the defense to the developer. The result is apt to be protracted and expensive litigation.

Collecting on Letters of Credit

Collection on a "clean" LOC is relatively easy. The financial institution will honor the sight draft, provided it is properly presented. (The "self-calling" LOC is even easier.) If the developer has defenses on the underlying approval, the developer can sue the municipality, but at least the municipality will be holding the money in the meantime.

Collecting on Cash Bonds

A poorly conceived cash bond security arrangement can defeat its purpose. For example, in *Haverhill v. City Bank & Trust Co.*, 119 N.H. 409 (1979), the planning board's conditional approval, issued in 1974, required the developer to install roads and a water supply system, estimated to cost $78,000 for a 39-lot subdivision. An escrow agreement called for the developer to deposit $2,000 with the defendant bank in Massachusetts for each lot sold, that amount to be repaid if improvements were complete within three years. The developer failed to pay into the escrow account, and the bank failed to notify the town. When the town filed suit, the bank claimed it couldn't be sued in New Hampshire. Five years after the conditional approval, the Supreme

Court held that the bank was subject to the jurisdiction of the New Hampshire courts, and the case was remanded to the trial court for further proceedings to determine if the town could recover the money.

Cash Bonds and Bankruptcy Issues

Even with a well-crafted escrow agreement, a major risk with cash bonds is bankruptcy of the developer. The filing of a bankruptcy petition immediately creates an "automatic stay," an injunction, with certain exceptions, to prevent creditors from taking action against the debtor or the debtor's estate to recover any obligation existing on the date of bankruptcy filing. 11 U.S.C. sec. 362 (a). Violations of the automatic stay are subject to severe penalties, including actual money damages, punitive damages, and attorney's fees. Consult with municipal counsel to determine whether any collection or enforcement action would violate the automatic stay.

It is not entirely clear whether funds held in escrow on the date of bankruptcy are still the property of the debtor. *See, Strafford Savings Bank v. Bruce*, 122 N.H. 557 (1982). In the case of an escrow for improvements under a regulatory permit, it seems probable that the funds would not be viewed as the property of the municipality on the date of bankruptcy, unless there had been a default by the developer and some action initiated by the municipality to take possession and control of the money.

Even if the escrowed funds remained the property of the developer, the municipality might, like a lien holder, have a claim as a "secured creditor" in bankruptcy. If so, in the event of a default, the municipality would be entitled to the money in the ultimate distribution of the debtor's estate, and it might be possible to persuade the bankruptcy court early on in the case to release the money to make the necessary improvements.

In any case, the funds will probably not be available promptly in the event of bankruptcy.

Waiver of Security. If the developer is somebody local, trusted by all planning board members, you may be tempted to relax or waive security for street construction. However, to do so is a breach of the board's duty to safeguard the public purse. Although there is no New Hampshire case yet, at least one court has held that a planning board cannot legally waive security requirements. *Friends of the Pine Bush v. Planning Board of City of Albany*, 450 N.Y.S.2d 966 (1982).

Failed Security. Despite the planning board's best efforts, sometimes it will be faced with a half-done street, a failed developer, and no security to call upon. There are several options:

- The town could opt to leave it to the lot owners to figure out. In *Stillwater Condominium Association v. Salem*, 140 N.H. 505 (1995), the Court held that a planning board, in imposing conditions, is protecting the municipality's prosperity and doesn't owe a legally enforceable duty to lot purchasers. Therefore, if the town fails to make sure a developer does road work, lot owners trying to force the town itself to do that work might apply political pressure, but they can't apply the pressure of a liability lawsuit.

- Under RSA 676:4-a, I(e), a planning board can revoke subdivision, site plan, or street plat approval if security fails before work is finished. If some of the lots have already been sold, or if only part of a street is left undone, a revocation can be partial. RSA 676:4-a, III. The effects of plat revocation are to prevent lot sales (RSA 676:16) and to preclude the erection of buildings. RSA 674:41. But if most lots are already sold and built on, this remedy won't help the town much. There are also issues concerning the "vested rights" of the developer. In *AWL Power, Inc. v. Rochester*, 148 N.H. 603 (2002), the planning board voted to revoke approval of the subdivision and site plan approvals because the 13-year-old stalled project no longer conformed to zoning, and the board found that vested rights had not arisen. The revocation was overturned because the Court held that the project did have vested rights on account of $200,000 worth of public improvements, although this was well short of completion of the required improvements. Given the relatively low threshold

established by *AWL Power* for substantial completion and vested rights under RSA 674:39, it is unclear how effective a tool partial revocation will be.

- RSA 676:12, V prohibits any building in an approved subdivision or site plan from being occupied before required work is complete, unless the planning board explicitly allows it. To make sure buyers know about conditions that may affect their rights, a copy of the planning board's decision should be recorded in the registry of deeds along with the plat.
- Betterment assessment is a method of making the lot owners pay for road improvements, as described in Chapter 5. This option is available only when a private road or Class VI road is being converted to a Class V highway. For this reason, a subdivision road should not be accepted before it is complete. Not only does the betterment assessment option disappear, but also the town inherits the duty to maintain the road.

INADEQUACY OF OFF-SITE ROADS

Regulating developer-built roads doesn't seem as complex as the challenges municipalities face in managing existing highways. Bad roads may be part of New Hampshire's heritage, a legacy of the gradual decline in the population of northern New England between the Civil War and the 1960s. Ancient "turnpikes" that were once lively arteries of commerce directly linking several towns may be little more than dirt tracks used only by hunters or loggers. From a cost management viewpoint, these roads can be worse than nothing. At least if there were no road, a developer could be made to bear the responsibility for building one. With existing highways, however, developers try to squeeze as much mileage as they can from their vested right of access. Municipalities have some options to consider.

DISAPPROVING 'SCATTERED AND PREMATURE' DEVELOPMENT

It is well established under New Hampshire law that a landowner's vested right of access (see Chapter 4) does not include the right to develop land in a way that will overburden the road or unilaterally force the town to spend money to upgrade it. RSA 674:36, II(a) states that a planning board may adopt regulations that

> Provide against such scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services, or necessitate the excessive expenditures of public funds for the supply of such services[.]

"Without this limitation," the New Hampshire Supreme Court has said, "a private developer could single-handedly require an increase in the municipal tax burden." *Land/Vest Properties, Inc. v. Plainfield*, 117 N.H. 817, 825 (1977). The first New Hampshire case based on this "scattered and premature" language was *Garipay v. Hanover*, 116 N.H. 34 (1976). The plaintiff wanted to put a 49-lot subdivision at the end of a narrow, steep street with hairpin curves. He argued his subdivision couldn't be called "premature" because there were already 18 homes in the area. The Court rejected this argument:

> Prematurity is a relative rather than absolute concept[.] The board must ascertain what amount of development, in relation to what quantum of services available, will present the hazard described in the statute and regulations. At the point where such a hazard is created, further development becomes premature.

In *Zukis v. Fitzwilliam*, 135 N.H. 384 (1992), the Court gave the "scattered and premature" concept an even firmer anchor. The roads in that case were admittedly woefully inadequate even for the homes that the town had, over the years, already allowed to be built there. But the plaintiff argued that pre-existing inadequacies were the town's problem, not hers, and couldn't justify a disapproval. The plaintiff argued that denials based on the "scattered and premature" concept are a form of growth control that the town can't apply unless it has a growth control ordinance under RSA 674:22, along with a capital improvements program. The Court rejected both these arguments:

> Sandy Hollow Road and Templeton Turnpike are inadequate roads and they create serious safety problems as the area now exists[.] Consequently the point where such a hazard is created has already been surpassed. Although the hazard existed before the plaintiff's subdivision proposal was submitted, 'a planning board must consider current as well as anticipated realities' when ruling on a request for subdivision approval. Exposing more households to the risk that emergency vehicles would be unable to respond when their services were required does magnify the existing hazards.

Id. at 389 (internal citations omitted).

Under *Zukis*, a town that is already behind on road improvements is not doomed to fall further behind by having to approve projects on already bad roads. But caution should be exercised. In *Ettlingen Homes, Inc. v. Derry*, 141 N.H. 296 (1996), the Court said the "scattered and premature" provision can't be used as a substitute for comprehensive growth control regulations, when the inadequacies cited are town-wide factors, such as inadequate schools. For example, the planning board cannot decide to declare all subdivisions premature until the town improves its road maintenance efforts. Decisions like *Zukis* and *Garipay* can only be justified by site-specific factors.

IMPOSING OFF-SITE ROAD IMPROVEMENT COSTS ON DEVELOPERS

The obvious alternative to denying a "scattered and premature" subdivision is to ask the developer to pay to fix the road. Municipal authority to impose fees for off-site road improvements has a long and winding history.

Historical Treatment of Impact Fees. The ability to impose off-site road costs on a developer was first recognized in *KBW, Inc. v. Bennington*, 115 N.H. 392 (1975). But the issue of how much of the burden a developer can be forced to bear, from a constitutional viewpoint, was not addressed until the famous case of *Land/Vest Properties, Inc. v. Plainfield*, 117 N.H. 817 (1977). There, the Plainfield Planning Board had approved a subdivision with a condition that the owner upgrade two existing town roads. The board had used the but-for test, that is, but for this subdivision, would these improvements be required now? The Court said that's the wrong test:

> The subdivider can be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and special benefits conferred upon, the subdivision.

Land/Vest Properties, 117 N.H. at 823; *See also*, *Frisella v. Farmington*, 131 N.H. 78 (1988).

The *Land/Vest* decision was bolstered in *New England Brickmaster v. Salem*, 133 N.H. 655 (1990), which expanded the *Land/Vest* rationale of off-site road exactions to the process of site plan review:

> [T]o limit this power, as Brickmaster suggests, solely to the subdivision stage would render it largely useless. Given the variety of possible uses of non-residential property and the differences in the possible scales of multi-family housing developments, it will often

> be impossible for planning boards to make an adequate determination at the subdivision stage of what off-site improvements, if any, will eventually be required. In such cases, the effect would be to make the rational nexus test an impossible standard to satisfy.

See also, Lampert v. Hudson, 136 N.H. 196 (1992). The Court in *Brickmaster* rejected the notion that exactions could be imposed only when a project would otherwise be "scattered and premature." On the other hand, in the *Zukis* case (above), the plaintiff claimed that because the roads were already inadequate, an exaction was the town's only remedy, rather than a "scattered and premature" denial, yet the Court upheld the denial.

The New Hampshire Impact Fee Statute. Prior to the 1991 enactment of RSA 674:21, V, the impact fee statute, the *Brickmaster* holding established that planning boards had the authority under RSA 674:43 and :44 to condition the approval of a site plan upon payment for off-site road improvements. The late 1980s saw an increase in political support for developer impact fees, culminating in the 1991 impact fee law. This law, found under the statutory heading of Innovative Land Use Controls, sets forth a detailed scheme for the content and administration of a local impact fee ordinance. Due to the complexity involved, however, some towns chose not to adopt an impact fee ordinance.

Court Requires Impact Fee Ordinance. Prior to 2000, municipalities without impact fee ordinances still operated under the standards articulated in *Brickmaster* and *LandVest,* assessing fees for off-site improvements. Then the New Hampshire Supreme Court held, in *Simonsen v. Derry*, 145 N.H. 382 (2000), that without an impact fee ordinance, municipalities could no longer require developers to pay for off-site improvements. The Court wrote:

> RSA 674:21, V(i) does not preserve the 'existing authority' of a planning board under RSA 674:44 to condition the approval of a site plan upon the applicant's payment of money for off-site improvements. While the statute authorizes municipalities to impose impact fees, it comprehensively regulates the municipality's implementation of such fees. For example, the statute regulates the amount and uses of such fees (see RSA 674:21, V(a)), specifies procedures for assessing and collecting such fees (see RSA 674:21, V(d)), and provides for both an appeal process (see RSA 674:21, V(f)) and a waiver process (see RSA 674:21, V(g)). The statute's scope suggests that the legislature intended to preempt the common law rule set out in *N.E. Brickmaster. See* 15A *Am.Jur.*2d Common Law § 15 (2000).

Id. at 386.

The Court did note that the impact fee statute does allow the planning board to impose conditions on plan approval that would require expenditures to improve the applicant's own property.

Based on *Simonsen*, the rule from 2000 to 2004 was that municipalities may not impose the cost for off-site improvements unless the municipality has adopted an impact fee ordinance that specifically authorizes the assessment of impact fees for each particular type of capital improvement that the municipality finds the development impacts.

Using Impact Fee Ordinances. In this context, "impact fee" means a fee imposed on a development to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the municipality. One major difference between off-site exactions (discussed more in the next section) and impact fees is that impact fees may be assessed for a much wider variety of capital improvements. They are authorized for water treatment and distribution facilities; wastewater treatment and disposal facilities; sanitary sewers; storm water, drainage, and flood control facilities; municipal road systems and rights of way; municipal office facilities; public school facilities; the municipality's proportional share of capital facilities of a cooperative or regional school

district; public safety facilities; solid waste collection, transfer, recycling, processing, and disposal facilities; public library facilities; and public recreational facilities (except for open space).

The fee must be assessed in proportion to the share of municipal capital improvement costs reasonably related to the capital needs created by the development and the benefits accruing to the development from those improvements. Notably, impact fees may *not* be charged for upgrading existing facilities or infrastructure unless the need for the upgrade is created by the development. RSA 674:21, V(a).

Adopting an impact fee ordinance is a formal process. First, the municipality must have enacted a capital improvements program under RSA 674:4-:7. RSA 674:21, V(b). Next, an impact fee ordinance must be passed by the legislative body (town meeting, town council, or city council/board of aldermen) using the ordinary process for zoning ordinances under RSA 675:2-:4. This includes drafting by the planning board, public hearing(s), and a ballot vote by the legislative body (town meeting or city council/board of aldermen). The impact fee ordinance is generally part of a zoning ordinance. This makes sense because it goes hand in hand with the planning board's administration of subdivision and site plan review.

The actual assessment and collection of impact fees falls to the planning board. The ordinance should contain sufficient standards to guide the board in its assessment of the fees, including a methodology and specific measurements for the board to consider. The ordinance (or the planning board's regulations) may also include required procedures for the board to use when setting fees, such as whether the board must hold a public hearing before fees are set. Obviously, the actual cost of improvements will fluctuate over time and the proportion to be assessed to each development will be different, so a "one fee fits all for all time" approach will not work. Planning boards have discretion to adjust impact fees periodically as part of their administration duties, but they cannot do so in an arbitrary or unwarranted way. Adjustments may be upheld when the board follows the direction set by the standards in the ordinance. The New Hampshire Supreme Court has spoken approvingly of variables to be considered by a planning board that are "factual," that can be "periodically updated," and that require the board to "compile and assess the underlying data." *Caparco v. Danville*, 152 N.H. 722 (2005). The ordinance may also provide for a waiver process, including criteria for the board to consider in granting a waiver. It is important to note that the waiver criteria should be in the ordinance itself rather than in the planning board's regulations. RSA 674:21, V(g).

Impact fees are *assessed* at the time the planning board approves the site plan or subdivision. When no board approval is required, or has been made before the impact fee ordinance was enacted, the impact fees are assessed before, or as a condition for, the issuance of a building permit or other appropriate permission to proceed with development. "Impact fees shall be intended to reflect the effect of development upon municipal facilities as the time of the issuance of the building permit." RSA 674:21, V(d). Once assessed, the fees are collected when the certificate of occupancy is issued. If no certificate of occupancy is required, the fees are *collected* when the development is ready for its intended use. Alternatively, the planning board and developer are free to establish an alternate, mutually acceptable schedule of payment at the time the board approves the development. In this case, the board may require the developer to post some sort of security to ensure the future payment of impact fees. RSA 674:21, V(d).

Once collected, impact fees must be accounted for separately, segregated from the municipality's general fund, and may only be spent on the order of the governing body (i.e., select board/town council/city council/board of aldermen). They are exempt from general requirements of the Municipal Budget Act (RSA chapter 32) regarding limitation and expenditure of municipal funds. Importantly, impact fee revenue may be spent "solely for the capital improvements for which it was collected, or to recoup the cost of capital improvements made in anticipation of the needs which the fee was collected to meet." RSA 674:21, V(c).

There is a limit on how long a municipality may hold impact fees after they are collected without using them. The impact fee ordinance must establish a "reasonable time" within which the municipality will use

the funds, after which the funds must be refunded with any accrued interest. If the impact fee was calculated as a portion of a project for which the municipality was supposed to pay, the impact fees must be refunded if the municipality fails to appropriate its share of the project costs within that "reasonable time." In any case, the maximum amount of time considered to be "reasonable" is six years. RSA 674:21, V(e).

The requirement to return unused fees after no more than six years places responsibility on the municipality to keep track of the fees separately as they are collected and to review their status periodically (a process called "segregation"). Ideally, a review would take place at least once a year to prevent the municipality from wrongfully holding (and possibly spending) fees that should have been returned. A related issue is identifying who is entitled to the refund. What if the developer has gone bankrupt, or sold all the lots and moved on? If the developer cannot be found and it is not obvious who should receive the refund, the municipality may file a petition with the superior court either for declaratory judgment or a bill of interpleader. This is a type of lawsuit in which the municipality explains the facts and the background, describes their efforts to locate the developer, names everyone who may have a claim to the money, and asks the court to solve the problem. It also deposits the funds with the court at the time the petition is filed. Importantly, when the municipality files a bill of interpleader, it is entitled to collect the costs of the filing fee and its other expenses in filing the petition, so the petition should clarify those costs as well.

In 2010, these three requirements (segregating impact fees, spending them only for the purpose for which they were collected, and refunding unused fees after six years) combined to create the perfect storm in the Town of Hudson. In connection with a subdivision approval in 2000, a developer was required to pay the town a fee for improvements to an intersection. The money was placed in a separate account, but the records of expenditures did not fully explain the purpose for which they were spent. From 2005 to 2007 (now hitting the six-year mark), the town used the funds to pay for work to the intersection as well as other improvements to the road. The developer claimed the work was "general road maintenance" rather than improvements, and demanded a refund of the money. The town refused.

In the ensuing lawsuit, the developer claimed the money had been spent for purposes other than those for which it was collected. The town's records were confusing and the Court was unable to determine exactly which funds had been used for appropriate portions of the intersection improvement. Because of the "lack of adequate accounting," the Court ordered the town to refund a portion of the money to the developer. *Clare v. Hudson*, 160 N.H. 378 (2010). The lesson from this case was that municipalities must clearly account for all funds paid by a developer for impact fees (or off-site exactions). A municipality that can demonstrate through proper records that funds were spent only for the purpose for which they were collected within the six-year time frame is less likely to be required to refund those funds after a lengthy (and expensive) court proceeding.

In 2012, the legislature amended RSA 674:21, V to make the lesson of *Clare v. Hudson* part of the law by adding a new subsection (l):

> No later than 60 days following the end of the fiscal year, any municipality having adopted an impact fee ordinance shall prepare a report listing all expenditures of impact fee revenue for the prior fiscal year, identifying the capital improvement project for which the fees were assessed and stating the dates upon which the fees were assessed and collected. The annual report shall enable the public to track the payment, expenditure, and status of the individually collected fees to determine whether said fees were expended, retained, or refunded.

In other words, the law now requires municipalities to track each dollar from beginning to end: why it was collected, when it was collected, when it was spent and exactly why, and at what time any unused portion was refunded to the developer. This recordkeeping has always been a good idea, but it is now legally required.

The Enactment of RSA 674:21, V(j): Continued Viability of Off-Site Exactions. In 2004, the New Hampshire Legislature responded to the fallout from the *Simonsen* decision, which had significantly impeded the ability of municipalities to recover the increase in capital expenses related to residential and commercial development. RSA 674:21, V(j) now reads in part:

> The failure to adopt an impact fee ordinance shall not preclude a municipality from requiring developers to pay an exaction for the cost of off-site improvement needs determined by the planning board to be necessary for the occupancy of any portion of a development. For the purposes of this subparagraph, "off-site improvements" means those improvements that are necessitated by a development but which are located outside the boundaries of the property that is subject to a subdivision plat or site plan approval by the planning board. Such off-site improvements shall be limited to any necessary highway, drainage, and sewer and water upgrades pertinent to that development. The amount of any such exaction shall be a proportional share of municipal improvement costs not previously assessed against other developments, which is necessitated by the development, and which is reasonably related to the benefits accruing to the development from the improvements financed by the exaction[.]

Municipalities without impact fee ordinances that address exactions for road improvement may, once again, impose upon developers the cost of off-site improvements that are reasonably related to the proposed development and are within the guidelines of RSA 674:21, V as amended. *See, Robinson v. Hudson*, 154 N.H. 563, 569 (2006) (variance for building on lot with inadequate frontage on existing road could be conditioned upon owner paying its pro rata share of costs when internal development road was completed in the future).

Using factors originally outlined in the *Land/Vest* opinion, the Court noted in *Upton v. Hopkinton* that

> [f]actors relevant to determining a developer's proportional share of the cost for road improvements may include, but are not limited to: (1) the standard to which the town currently maintains the road; (2) the frontage of the proposed subdivision; (3) the potential traffic increase necessitated by the proposed subdivision; (4) the character and potential for development of the neighborhood served by the road; and (5) the number of residences presently fronting on or normally trafficking these roads.

157 N.H. 115, 121 (2008).

THE IMPACT OF DEVELOPMENT ON STATE HIGHWAYS

RSA 236:13 requires that all proposed connections for access onto state highways receive a permit from the Department of Transportation. The question arises whether a municipal planning board can consider a project's impact on state highways in deciding whether to grant approval. Two New Hampshire Supreme Court cases have considered this issue.

In *J.E.D. Associates, Inc. v. Town of Sandown*, 121 N.H. 317 (1981), the planning board had denied the developer's plan to connect a subdivision road with Route 121-A, a state highway, on the ground that increased traffic would make the intersection with Route 121-A hazardous. The planning board instead required the road to dead-end short of the proposed connection. The Court overturned the planning board, holding that the state has preempted control over access to state highways. However, in *Diversified Properties, Inc. v. Hopkinton Planning Board*, 125 N.H. 419 (1984), the Court upheld a planning board that had denied subdivision approval on the ground that a proposed access to a state highway was unsafe. The Court distinguished the *Sandown* case:

> In the *Sandown* case, the planning board…unlawfully impinged upon the State's authority to regulate access to State highways when it sought to control the access to Route 121-A from the Danville portion of the plaintiff-developer's property. The Sandown Planning Board's decision...had the effect of denying the plaintiff access to Route 121-A... In contrast, the Hopkinton planning board is not...denying the plaintiff access to a state highway... The facts as presented by the record indicate nothing more than a review of the proper considerations involved in the determination of subdivision approval or denial.

Id. at 420.

In consideration of these two holdings, though difficult to distinguish, if a municipality disapproves a plan showing a new curb cut onto a state highway, the reason for denial should be strongly based in traditional municipal planning considerations, including safety of access and effect of increased traffic.

A recent development involves the use of already-collected impact fees for improvements to state highways. Under RSA 674:21, V(k), enacted in 2012, impact fee revenues being held for construction or improvement of municipal roads may be spent for state highways within the municipality, but only for improvements that are related to the capital needs created by the development. These expenses may include items such as (but not limited to) traffic signals and signage, turning lanes, additional travel lanes, and guard rails. Obviously, approval is required from the state Department of Transportation for any such improvements.

The statute makes it clear, however, that municipalities are not permitted to assess impact fees going forward for improvements to state highways. This new provision simply permits municipalities to use fees they have already collected for those improvements to the extent they are related to the development. It is, in a way, an amnesty provision for municipalities that have already collected impact fees for improvements to state highways despite the fact that it was not authorized. The state is allowing municipalities to use those already-collected fees, but it does not authorize fees to be assessed specifically for that purpose in the future. Municipalities may still require a developer to make improvements to a state highway without collecting an impact fee to pay for it by using their authority to require off-site improvements (the "exactions" discussed above).

IMPACT ON ANOTHER TOWN'S ROADS

Where a road in one town provides access to a proposed development or land use change in another town, the town where the road lies does not have to impassively watch while its roads are affected by another town's development decisions. RSA 674:53 was amended in 1998 to allow towns whose roads are affected by border development to have a role in the application review and approval process. Specifically, RSA 674:53, IV provides:

> [N]o plat or plan showing land whose sole street access or sole maintained street access is or is planned to be via a private road or class IV, V, or VI highway located in an adjoining municipality shall be deemed approved for purposes of this title unless it has been approved by the planning board…of that adjoining municipality, provided however that the sole issue which may be addressed or regulated by the adjoining municipality shall be the adequacy of such street access, and the impact of the proposal upon it.

How to Apply the Statute. An applicant submits an application in one town for a 50-home subdivision. The property line of the subdivided parcel is also a municipal boundary, and the plan shows that the sole access to the subdivision will be via a Class V road coming from the adjoining municipality and

crossing the boundary into the subdivision. The planning board that receives the application should refer to RSA 674:53. Paragraph II of that statute sets forth the procedure to be followed. It essentially requires the planning board to contact the adjoining town's planning board to see if that town has any regulations that may impact the approval of the development. Furthermore, paragraph IV provides that the planning board in the adjoining town must also approve the plan. The applicant must submit the plan to that municipality, which may review it only with respect to road access and impact issues. If the adjoining town's planning board concludes that the proposed access plan is not consistent with its regulations, it may deny approval.

When a proposed development's only access to state highways (Class I and II) is via a town road maintained by an adjoining municipality, the adjoining town will be treated as an abutter in terms of receiving notice of the application pursuant to RSA 676:4. RSA 674:53, VII.

CHAPTER EIGHT

CLASS VI HIGHWAYS

INTRODUCTION

A Class VI road is defined as:

> All other existing public ways, and shall include all highways discontinued as open highways and made subject to gates and bars, except as provided in paragraph III-a [new boating access highways], and all highways which have not been maintained and repaired by the town in suitable condition for travel thereon for 5 successive years or more….

RSA 229:5, VII.

Although neither the state nor its political subdivisions are required to maintain them, Class VI highways are public roads. They must be open for public travel to the same extent as any other public highway, they are subject to all the same regulation by the select board and legislative body, and the public may perform work on the highway only with permission from the select board or road agent. As such, Class VI roads are generally subject to the same legal principles that govern all highways, including:

- Abutters' rights issues (Chapter 1);
- Methods of public highway creation (Chapter 2); and
- Town's regulatory authority, including use, excavation and disturbance, driveways, and weight limits (Chapter 6).

The real difference between a Class VI highway and a Class V highway is that municipalities have no obligation to maintain, repair, plow, or do other ordinary work on a Class VI highway. They have the ability to declare a Class VI highway an emergency lane under RSA 231:59-a (discussed in Chapter 6) but not the obligation. Despite this difference, it is important to remember that Class VI highways are still *public highways*. Confusion about that single fact leads to a lot of misunderstanding about what is permitted and not permitted with respect to a Class VI highway.

Formation of a Class VI Highway

In 1925, all non-maintained public highways were classified as Class VI. The gist of the Class VI category is the absence and/or discontinuance of maintenance. The law provides four ways that roads may qualify for Class VI status:

- Lapse (absence of maintenance for five years);
- Discontinuance subject to gates and bars;
- Layout subject to gates and bars; and
- Department of Transportation's discontinuance of a Class I or II highway.

LAPSE: ABSENCE OF MAINTENANCE FOR FIVE YEARS

The overwhelming majority of Class VI highways resulted from simple neglect, a consequence of rural population decline. The lapse or statute of repose component of RSA 229:5, VII provides that a road falls within the Class VI classification if it has not been maintained and repaired in suitable condition for travel for five successive years or more.

'Suitable Condition for Travel.' It is immaterial whether the road is "suitable for travel" so long as the town has not maintained and repaired the road for a period of at least five consecutive years. For instance, although a road that has not been maintained and repaired may be traveled, it does not become a Class V highway. *Glick v. Town of Ossipee*, 130 N.H. 643 (1988). In *Glick*, the trial court erroneously held that the Ossipee Mountain Road was a Class V road because, among other things, it had been traveled continuously for 30 years. The Supreme Court reversed, holding that a Class V road must be both traveled and maintained. The *Glick* Court concluded:

> [T]he legislature's construction recognizes that if roads could be designated [C]lass V highways [as opposed to Class VI] solely because they are "traveled," even those roads that have been discontinued subject to gates and bars would be [C]lass V highways deserving of regular town maintenance because people continue to travel them. The legislature clearly seeks to avoid this incongruous result by restricting the [C]lass V designation to highways that are both "traveled" and "maintained."

Resumption of Maintenance. Resumption of maintenance of a Class VI highway now affects its classification status, as a result of a 1999 amendment to RSA 229:5, VI. A Class V road that attains Class VI status as a result of a lapse of maintenance (see above) will revert to Class V status again if the town has maintained it for at least five consecutive years. The "illegal" maintenance and repair must be "regular" and "on more than a seasonal basis" so that the road is in "suitable condition for year-round travel." Class VI roads that have been maintained after having been declared emergency lanes under the procedures outlined in RSA 231:59-a do not revert to Class V status because of such maintenance.

If a town seeks to perform some minimal maintenance to a Class VI road, it should do so under the emergency lane statute. *See* Chapter 5. Independent of liability concerns, the emergency lane law (RSA 231:59-a) is an exception to RSA 231:59, which requires road maintenance monies be spent on Class IV and V highways only.

Also, a town's performance of maintenance or repair work may arguably be the basis for municipal estoppel arguments—that is, in a lawsuit involving a landowner, a town may be barred from arguing that it is not required to maintain a road due to its Class VI status. *Turco v. Barnstead*, 136 N.H. 256 (1992).

DISCONTINUANCE SUBJECT TO GATES AND BARS

RSA 229:5, VII authorizes a town to vote to discontinue an open highway and have it made subject to gates and bars. Importantly, the vote must be by town meeting and not the select board. When drafting a warrant article or vote by the legislative body to convert a highway to Class VI, the wording should closely reflect the language of the statute—"discontinue subject to gates and bars."

Prior to 1903, a town could only discontinue a highway completely. Only after the legislature promulgated Laws of 1903, Chapter 14:1, could a town discontinue an "open" highway and subject it to gates and bars. The term "gates and bars" is not expressly defined by statute, but the term historically refers to an owner's right to enclose premises for his or her own benefit—usually to confine livestock.

The owner required public travelers to open and close the gates or bars as a condition to travel. The term "gates and bars" first became associated with Class VI highways in 1925, when the legislature enacted Laws of 1925, Chapter 12:1, which provided a town had no duty to maintain any highway that had been closed subject to gates and bars.

It is important to note that, while gates and bars may be located along the road, they may *not* be locked and must be capable of being opened by those who wish to use the road. RSA 231:21-a.

LAYOUT SUBJECT TO GATES AND BARS

A town may categorize a strip of land as a Class VI road through the "layout" process. RSA 231:21 permits a highway to be laid out "subject to gates and bars." It states, in relevant part: "Any highway may be laid out subject to gates and bars.…In such case it shall be determined…by whom the gates and bars shall be maintained." RSA 231:21. The town's authority to lay out a road subject to gates and bars is also found in RSA 231:22 (titled, "Previously Discontinued Highway") and RSA 231:23 (titled, "Conditional Layout"). However, towns rarely exercise the "gates and bars" authority because it is unlikely that any such prospective roads would satisfy the "public convenience and necessity" test. *See* Chapter 2. Again, while the gates and bars may be placed along such a highway, they may not be locked. RSA 231:21-a.

DISCONTINUANCE OF CLASS I OR II HIGHWAYS

The commissioner of transportation has the authority to discontinue a Class I or II road as a state highway. In such instances, the highway may revert to the town as either a Class V or Class VI highway. RSA 230:57. The statute is silent regarding the classification criteria for determining whether a discontinued highway shall become a Class V or VI road. According to the Department of Transportation, the commissioner has the discretion to make such determinations.

ALL CLASS VI ROADS SUBJECT TO GATES AND BARS

In 1999, the legislature enacted RSA 231:21-a, which clarified for the first time that all Class VI roads, regardless of how created, "shall be deemed subject to gates and bars." The gates and bars may not interfere with public use, and must be capable of being opened and closed by users of the road. The select board is authorized to regulate the structures to assure public use.

Development along Class VI Highways

As stated above, Class VI roads are public highways for purposes of the public's right to use. However, they are distinct from other public roads for purposes of abutters using the road as access for an adjoining development.

CLASS VI ROAD NOT AN 'APPROVED STREET'

RSA 231:45 provides, in relevant part: "Any [C]lass IV, V or VI highway…may be discontinued as an open highway and made subject to gates and bars.…Such a discontinued highway shall not have the status of a publicly approved street." The statute was intended to alleviate pressure exerted by developers against towns to improve roads subject to gates and bars. In *King v. Town of Lyme*, 126 N.H. 279 (1985), the Court stated:

> The purpose of the act was to make it clear that towns were not responsible for maintaining highways discontinued subject to gates and bars.…The act amended RSA 231:45 in the face of growing concern that many areas were opening up to development and that developers might try to force towns to improve highways subject to gates and bars.

Although RSA 231:45 prohibited public improvements to roads that were discontinued subject to gates and bars, it did not expressly impose a similar restriction on Class VI roads that resulted from the five-year lapse period. Further, the statute did not address private development along Class VI roads. Depending on the condition of a particular road, each town dealt with private development differently. Such piecemeal planning predictably resulted in a lack of uniformity.

BUILDING ALONG CLASS VI HIGHWAYS: RSA 674:41, I(C)

In 1983, the legislature enacted RSA 674:41, I(c) to address the disparate approaches taken by municipalities when permitting development along Class VI highways. Under RSA 674:41, I(c), in order to construct a building along a Class VI highway, the following is necessary:

- The local governing body (select board), after review and comment by the planning board, has voted to permit building on that Class VI highway or portion thereof.
- The municipality assumes neither responsibility for road maintenance nor liability for any damages arising out of road use.
- Prior to the issuance of a building permit, the applicant produces evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds.

Authority to Deny Construction along a Class VI Road. RSA 674:41, I(c) allows a town to prohibit building along Class VI highways. In *Vachon v. New Durham*, 131 N.H. 623 (1989), the Court upheld a town's policy of prohibiting any building along a Class VI road if the driveway was more than 600 feet from the nearest Class V or better road. In doing so, the Court rejected the landowner's argument that the landowner had the right to build so long as it offered the town a release from liability. More recently, the New Hampshire Supreme Court clarified that the statute grants the governing body the authority to consider construction on a Class VI road on a lot-by-lot basis if the governing body wants to do so. It need not adopt a policy for all Class VI roads or even for the entire length of a road, but may tailor the policy as it finds appropriate based on the facts and circumstances at hand. *Blagbrough Family Realty Trust v. A & T Forest Products, Inc.,* 155 N.H. 29 (2007).

In lieu of denying a building permit, many towns have adopted policies restricting building along Class VI roads unless the owner/applicant agrees to upgrade the road for reclassification as Class V.

Exception from the Zoning Board of Adjustment. When the local governing board rejects an application for a building permit, an aggrieved owner can request an exception from the zoning board of adjustment. RSA 674:41, II.

Record Notice of Limitations at Registry of Deeds. For purposes of satisfying the statutory notice of limitations requirements, RSA 674:41, I(c) does not require any particular form. However, the following information should be provided as part of any notice:

- Landowner's name and contact information.
- Description of the property.
- Location of owner's deed at the registry of deeds (that is, book and page).
- Road's name.
- Road's status as a Class VI highway.
- Circumstances surrounding road's classification (for example, discontinued subject to gates and bars, five years of non-maintenance, etc).
- After the planning board's review and comment, the governing body has adopted a policy under RSA 674:41, I(c) that allows building on this particular Class VI highway. The notice should also detail when the policy was adopted and its location on file.
- Details regarding the issued building permit and its location on file.
- With reference to RSA 674:41, I(c)(2) and RSA 231:93, a statement that the municipality has no legal duty to maintain (for example, plowing, grading, drainage, etc.) the highway or any liability for damages resulting from road use. Further, the notice should provide that municipal services (for example, police, fire, ambulance, school bus transportation, etc.) may be unavailable at times.
- The owner agrees to these limitations of town responsibility and liability, and the owner is responsible for any road maintenance and repair work.
- Prior to performing any road repair or maintenance work, the owner must obtain approval of the governing body or highway agent under RSA 236:9. The notice should also describe types of work where the owner has permanent recorded permission to perform, together with any conditions.
- The road is a public highway, and the owner shall not prohibit authorized public use.
- Pursuant to RSA 41:11, the governing body retains full authority to regulate the public use of the highway, including the applicant's use, and the erection, of unlocked gates or bars.
- Witnessed signatures of the owner(s) and the local governing body.

The statutory notice requirement should not be taken lightly. At least one New Hampshire court has found that a town is required to provide maintenance to a Class VI highway where the landowner was unaware of a road's legal status. In *Turco v. Barnstead*, 136 N.H. 256 (1992), the Court held that a landowner had justifiably relied on a building permit as a representation that the town would provide some road maintenance.

Reclassification of Class VI Road to Class V

The law provides three instances in which a municipality may reclassify a Class VI highway as a Class V. The first two involve a conscious decision to reclassify the highway; the third may or may not be purposeful but should be noted so it can be avoided if the result is not what the governing body intends.

LEGISLATIVE BODY VOTE

Pursuant to RSA 231:22-a, the legislative body (town meeting) may reclassify a Class VI highway "by vote…as a [C]lass V highway, or as a [C]lass IV highway if located within the compact sections of cities and towns." The statute allows a town to reclassify a road irrespective of whether the Class VI status arose under the five-year lapse provision or by discontinuance subject to gates and bars.

Importantly, RSA 231:22-a allows the legislative body to delay the effective date of any reclassification, thereby affording a town an opportunity to upgrade or effectuate any repairs to a road prior to any status change. A town may also condition any reclassification upon compliance with betterment assessments, as provided in RSA 231:28 through 231:33. Property owners abutting or served by the road have the same rights and remedies as provided in these statutes, including the right to submit a petition not to conditionally reclassify the highway. Finally, the costs assessed against the owners cannot reflect construction standards any higher or more stringent than those reflected in the best town road giving access to the reclassified highway.

RECLASSIFICATION BY LAYOUT

A town may reclassify a *Class VI road* to Class V status through the layout process; this process involves laying out a Class V road over an existing Class VI road. Under this method, the town's governing body is responsible for laying out the "new" highway. The betterment assessment option detailed under RSA 231:28 et seq. is available under the layout process.

RECLASSIFICATION BY MAINTENANCE

Under RSA 231:59, towns are not authorized to expend public funds to maintain Class VI highways. Nevertheless, a Class V highway that became Class VI due to failure to maintain automatically reverts back to Class V status if a municipality regularly maintains the road, on more than a seasonal basis, in a suitable condition for year-round travel for at least five successive years. RSA 229:5, VI. If there is a Class VI highway that the municipality wants to maintain for one reason or another without causing it to change to Class V status, the governing body should consider declaring it an "emergency lane" if it meets all the requirements of RSA 231:59-a.

CHAPTER NINE

TRAILS

Forward-thinking towns and cities want trails. Trails of all types, from footpaths to snowmobile routes, are an indispensable link in New Hampshire's tourism economy. But beyond that, they're an integral thread in a municipality's quality of life. It is no secret that vigorous new businesses like to locate in places where their people can safely walk, bicycle, or even jog to work. According to Terry Pindell (*A Good Place To Live*, Henry Holt & Co. (1995)), nearby outdoor recreation is one of the top four things Americans in search of an ideal community are looking for. The master plan statute, RSA 674:2, includes a recreation section, but as was said in Chapter 7, the planning process should start with the vision element (that is, guiding principles) and should be an integrated whole. There is no hard line between transportation and recreation sections, and trails actually fit into both, with links to the conservation section as well. RSA 674:2, III(a) through (o).

While the term "public highway" has a substantial legal history and meaning (as detailed in Chapter 1), the term "trail" has no such legal heritage and, indeed, no exact European equivalent. In America, the word commonly meant a route (for example, the Oregon Trail) that, while physically not fit for handling carriages, was easily capable of being followed, often because it was blazed.

Today the word "trail" still evokes images of travel other than by motor vehicle, and that is how it is used in this chapter. The two key legal issues involving trails are:

- How can the public secure a privilege or legal right of passage in a manner other than by creating a full public highway?
- How can a route used for non-motor-vehicular public travel be protected from developments that would interfere with that use?

TRAILS OTHER THAN MUNICIPAL TRAILS

The focus of this chapter is locally planned and administered trails. But first, there are many other trails for town trail planners to coordinate with and perhaps borrow from. The following describes some of the legal arrangements that together weave New Hampshire's tapestry of trails.

National Forest Trails

The famous trail network of the White Mountain National Forest is what makes it, according to one survey, the second most popular outdoor tourist destination in America—behind Yosemite but ahead of Yellowstone. Since most of these trails are on federally-owned land, the trails themselves have no special legal status, other than use regulations affecting certain trails—no snowmobiles or bicycles in wilderness areas, no camping within 200 feet of certain trails, etc.

Appalachian Trail

The one and only trail shown on virtually every road map, this trail became official from a governmental standpoint with the passage of the National Scenic Trails Act (P.L. 90543) in 1968, although it had existed on an informal basis for years before that. The "AT" is a good model for local trail planners to look at because of the interlocking layers of cooperative responsibility—from the federal government (Park Service and Forest Service), to the state by way of RSA Chapter 216-D, to the non-profit Appalachian Trail Conference, to local trail clubs, to myriad volunteer maintainers and monitors. Nothing builds community better than people from all over working together on a recreation project like a trail. Cooperative agreements on local trails are allowed under RSA 231-A:7.

Although much of the AT is in the White Mountain National Forest, the corridor also passes through private land, with many and varied legal packages used for its protection, including outright purchase, easements, scenic easements, conservation easements, etc. For details about all this, call the Appalachian Trail Conference office in Lyme, 603.795.4935, or consult with the NH chapter of the Appalachian Mountain Club (amc-nh.org).

Volunteer-Maintained Trails on Private Land

Most trails in the state started out as extremely informal arrangements made with larger landowners by volunteer trail clubs—agreements consisting of little more than verbal permission or a bare-bones, unrecorded memorandum of understanding, with no government involvement. In fact, that's how most White Mountain trails began, even before the National Forest was established under the Weeks Act in 1911, and that's what the Appalachian Trail was, prior to 1968. Even today, volunteers maintain most trails and off-highway recreational vehicle (OHRV) routes in this state, whether on public or private land. Some groups, such as the Society for the Protection of New Hampshire Forests, have acquired tracts of conservation land on which trails are maintained. Other groups' status with landowners still consists of little more than long-standing oral permission.

Some trail users think (and many landowners fear) that a trail that exists for a long period of time somehow ripens into a permanent easement. This is normally not true. Although older cases say it is possible for the public to acquire an easement by prescription (*Elmer v. Rodgers*, 106 N.H. 512 (1965)), it is not clear that today's courts would distinguish between trails and highways that, as we saw in Chapter 2, have not been subject to creation by prescription since 1968. RSA 229:1. More importantly, to ripen into a prescriptive easement, the 20 years of public use must be adverse—that is, without the owner's permission. *See* Chapter 2. If the right of way is one that was established with owner permission in the first place, the adversity element can't be met without proof that owner permission was later revoked. *Warren v. Shortt*, 139 N.H. 240 (1994). That leaves most trails out. State law explicitly denies the creation of prescriptive easements in the case of OHRV trails. RSA 215-A:29, XI-a and XI-b. It is also arguable that any landowner who takes the "public recreational use" deduction under the Current Use Law (RSA 79-A:4, II) has granted permission for access, thus, ironically, negating any prescriptive easements.

As development pressures and/or owner anxieties increase, informal trail status can become less than satisfactory, and there may be a need to formalize arrangements. That does not mean owners necessarily give up rights. Indeed, formalization can benefit both landowners and trail groups—for example, by setting down in writing an easement's duration, or a landowner's right to revoke permission or to prohibit certain uses. The Municipal Trails Law provides one legal tool to consider in making such clarifications.

Trails on State Land

There is a wide variety of trails in state parks and state forests, some designed and maintained by the state itself, others conceived and maintained by volunteer groups, usually under a written memorandum of understanding from the Department of Resources and Economic Development (DRED).

State Trail System

RSA Chapter 216-F, enacted in 1973, authorizes the DRED commissioner to acquire land and easements for purposes of a trail system for "hiking, nature walks, bird watching, horseback riding, bicycling, ski touring, snowshoeing and off highway recreational vehicles." RSA 216-F:1, I. The commissioner can also restrict certain trails to certain uses. Trails that have been created utilizing this statute include the New Hampshire Heritage Trail, much of the state's OHRV trail network, and several "rails-to-trails" acquisitions. DRED contains a Bureau of Trails, under the Division of Parks and Recreation, whose responsibilities include coordination of establishing easements and rights of way for OHRVs (RSA 215-A:3, III), as well as planning, coordinating and developing the entire trails system in the state, including those on state land. RSA 215-A:IV-a. Towns and cities planning trail development may want to contact the Bureau of Trails.

The use of ATVs has grown in popularity in the last few years, but the location of new ATV trails has generated controversy. One of the controversial issues has been the authority of municipalities to regulate OHRV trails on private property when those trails are designated as part of the statewide trail system. The Bureau of Trails has argued that RSA Chapter 215-A, the statute regulating OHRVs, is a comprehensive set of regulations and, therefore, preempts municipal regulation. But the New Hampshire Supreme Court held that municipal site plan review authority over the development of OHRV trails on private land is not preempted. *Lyndeborough v. Boisvert Properties, LLC*, 150 N.H. 814 (2004).

As a result of that decision, legislation was introduced in 2004 to exempt OHRV trails from municipal site plan review, but it was repealed in 2006.

Bicycle Trails

RSA 230:74 and :75 authorize the DOT commissioner to establish bicycle routes. RSA 12-B:4 and :5 also call for the director of Community Recreation in DRED to designate bicycle trails and to develop a map of them for bicyclers. An example is the bicycle route along Interstate 89 in Concord.

Landowners' Own Trails or Woods Roads

No account of New Hampshire trails would be complete without mentioning the many routes that exist for a landowner's own purposes, yet are open to public use. True, the right to keep the public out is a fundamental property right. But this state, unlike some others, has a long tradition of public recreation on private land, and many owners voluntarily allow public access. Indeed, the state's hunting and wildlife management scheme relies heavily on such good will. The legislature encourages landowners to permit access by limiting their liability. RSA 508:14 and RSA 212:34.

Most hunters and hikers believe they have a right to assume that undeveloped woods or fields that are neither posted nor fenced are open to access—at least unless and until they're given a reason to believe otherwise (being asked to leave). Although not black and white, the law does bear out this assumption: A person isn't guilty of trespassing unless he or she enters or remains on property, knowing he or she isn't privileged to do so (RSA 637:2), and this state's laws do not contain any presumption of non-privilege that

might supply the "knowledge" element in cases of actual uncertainty. Furthermore, under the Current Use Taxation Law, land open to recreational use gets an extra 20 percent reduction in tax valuation (RSA 79-A:4, II), and the only requirement for such land to be considered "open" is that it not be posted (Current Use Board Rules, Cub 305.03)— a further implication that people can assume land that isn't posted is land is open, unless and until they learn otherwise.

One arena where there definitely is no presumption of privilege is in the operation of OHRVs, primarily snowmobiles and ATVs. RSA 215-A:29, XI prohibits OHRVs from being operated on private property without written permission, except where permission has already been given to a local club or the state's Bureau of Trails. See statute for details.

Using Highways as Trails

Highway rights of way can often be used for bicycle lanes or trails adjacent to the automobile roadway. Highways are sometimes used as connectors to link up otherwise unconnected off-road trails. However, RSA 215-A:6, II makes it illegal to operate an OHRV on any highway right of way unless the use of that particular highway for OHRVs has been authorized by the local governing body, in the case of local highways (RSA 215-A:6, IX), and by the Department of Transportation and Bureau of Trails in the case of state highways. RSA 236:56, II(d) and (e) and RSA 215A:9, V and VI. RSA 236:56 also prohibits motorbikes, motorcycles, trail bikes, and ATVs from being operated in the non-traveled portions of state highways, with certain exceptions. Snowmobiles, however, can operate in season on state highway rights of way, as long as they stay off the maintained traveled way and off sidewalks, unless a sidewalk is posted as open to their use. RSA 215-A:10. See Chapter 6 for more information on OHRV and snowmobile use and regulation.

MUNICIPAL TRAILS CREATION

Conversion of Highways

Although the trails statute, RSA Chapter 231-A, includes valuable provisions affecting all local trails, the main impetus for the law was to allow towns to create trails out of public highways. These are, of course, highways not needed for motor vehicle use—mainly Class VI highways. Many Class VI highways are already used as trails, and many more are usable as such, at least for the time being. But as towns have tried to designate these old roadways as trails on a more formal, permanent basis, it has become clear that Class VI status is not satisfactory. There is always the chance that a landowner will want to build, and/or use and maintain the road for vehicles. As was detailed in Chapter 8, permission under RSA 674:41, I(c) lies with the governing body, the membership and attitudes of which frequently change, making the future of a Class VI road as a trail always uncertain and unstable. Besides, while it's true that RSA 674:41, I(c) is vital as a means of preventing owners from foisting upgrading expenses onto the town itself, eventually an owner may come along who volunteers to shoulder the entire cost of the upgrade. Governing bodies fear (though no court has ruled on it) that for the town to disallow the upgrade at that point might require the payment of damages because, from the owner's viewpoint, disallowance is the equivalent of a complete discontinuance. *See* Chapter 4.

The approach to this dilemma in RSA Chapter 231-A was to allow a town to settle the uncertainty once and for all by permanently limiting the abutting landowner's rights to develop and pay whatever damages may be necessary, but without giving up the public's right of way, as would occur with a complete discontinuance. If no owner is relying on the old roadway for access, no damages may be necessary

at all. And even if the roadway does provide sole access for some parcels, paying damages (or buying conservation easements, for example) may pay off in the long run, especially if a municipality is forward-thinking enough to use this statute before the land is actually in the market for development. At any rate, this statute should be viewed in conjunction with a municipality's open space conservation efforts.

Class A and B Trails

If a town wants to reclassify any Class V or VI highway as a trail, it has two choices, labeled as "Class A" and "Class B" trails, both defined in RSA 231-A:1. The difference between the two lies in what rights the adjoining landowners retain. With a Class B trail, the owners have no special rights, and must obey any trail use restrictions imposed on the public by the town. Since an owner, in essence, loses all access rights with a Class B trail, the law provides that a highway that is an owner's sole access cannot be reclassified as a Class B trail without that owner's written consent. RSA 231-A:2, II. This requirement is consistent with the owner-consent clause of RSA 231:43 (discussed in detail in Chapter 4).

With Class A trails, on the other hand, the owners can continue to use the trail for vehicular access for forestry, agriculture, and access to existing buildings. But any new building development and all "expansion, enlargement, or increased intensity of use of any existing building or structure" is prohibited. The town is not obligated to maintain a Class A trail for the adjoining owners' benefit, although it can do maintenance work related to trail use.

Either type of reclassification takes a vote of the legislative body. The statute also allows any Class A or B trail that was previously a highway to be reconverted to a highway by vote of the legislative body. RSA 231-A:3, I. Class B trails can also be voted Class A, and vice versa, and either type can be completely discontinued (RSA 231-A:6), in which case the public right of way disappears entirely. Think of all this as a continuum of decreasing landowner rights: Class V highway > Class VI highway > Class A trail > Class B trail. Any vote that moves the status of the right of way further along this continuum to the right entitles the owner to ask for damages, but the owner is not entitled to damages by any vote going the opposite direction, or by a vote to completely discontinue a Class B trail. RSA 231-A:3, II; RSA 231-A:6.

Amount of Damages

A decision to reclassify a highway as a trail can be appealed the same way as a highway discontinuance. *See* Chapter 4. RSA 231-A:2 provides that "the amount of damages, if any, shall reflect the landowner use provisions set forth in RSA 231-A:1." How much in damages will a town have to pay? Again, there's no case law. Presumably the touchstone will be the difference in market value of the property before and after the town's action. Presumably owners with other reasonable highway access aren't entitled to damages. *See,* Chapter 4. Nobody knows for sure, but here are a few observations:

- For a highway to be reclassified as a Class B trail, an owner of land for which that highway is the sole access must give written consent. RSA 231A:2, II. The damages in such cases will be whatever amount the owner wants to hold out for (unless the matter goes to court, which entails its own costs).

- If a town already has a policy under RSA 674:41, I(c) of not permitting new development on Class VI highways, a landowner on a Class A trail isn't much worse off and, therefore, the switch from one status to the other should not entail substantial damages. If the right of way remains a Class VI highway, the owner has a chance of getting the select board to change its mind, or to get an exception under RSA 674:41, II. However, an owner is not without remedy on a Class A trail either. He or she can still petition for a reclassification back to a highway.

Realistically, this uncertainty over damages probably means RSA 231-A:2 will not be routinely used except:

- When all affected owners have other reasonable access;
- When all affected owners voluntarily waive damages, or agree on the amount; or
- When the town is also buying, or at least buying conservation easements upon, the affected parcels of land.

Trails on Town-Owned Land

RSA 231-A:5, II provides that towns and cities can establish trails over municipally-owned lands (this authority was never in doubt) so long as no reserved rights held by third parties are violated. In towns, the decision whether to cut a trail on town-owned land (or to allow a citizen group to do so) lies with the select board under its property management authority (RSA 41:11-a) unless the land is managed by the conservation commission, in which case the decision is up to the commission (RSA 36-A:4; RSA 231-A:5, II); or unless the land is a town forest, in which case it is up to the forestry committee (RSA 31:112); or unless the land is under the jurisdiction of a recreation or park commission, in which case that commission has management authority (RSA 35-B:2).

Municipal Trails across Private Lands

Towns and cities had been establishing trails long before the passage of RSA Chapter 231-A in 1993. RSA 231-A:5, III recognizes the continuing ability of municipalities to do this. A town or city can establish a trail anywhere, even where no highway of any class has ever existed, as long as the landowner(s) are willing. Any legal arrangement is available, including a Class A or B trail (as defined above) or any lesser interest "including but not limited to a revocable easement, revocable license, lease or easement of finite duration, or conservation restriction…." The municipal conservation commission may also use its authority under RSA 36-A:4 to acquire trail rights over private land. However, RSA 231-A:5 explicitly prohibits municipalities from using the power of eminent domain to establish trails.

Why Make Trail Status Official?

Suppose there is an informal route across a piece of town conservation land. What advantages are there in having the local legislative body or its designee officially establish that route as a trail? Or suppose there is a local camp group with a path up its favorite nearby hill. Why might the group (or the landowner) want to make it a municipal trail? Here are several reasons:

Regulation of Use. First is the ability to regulate the trail's use. RSA 231-A:7. Without official trail status, the only way to enforce the town's or landowner's wishes (for example, to prohibit dirt bikes), is to cite someone for trespassing—a lengthy remedy full of uncertainties, especially on land ostensibly open to public access. If it is a municipal trail, on the other hand, a violator can be issued a traffic ticket.

Liability Protection. Second are the statutory protections from liability. *See*, Liability, below. The owner is protected under statutes like RSA 212:34, even without trail status. But liability of maintenance groups isn't so clear.

Certainty. With trails on private land, municipal trail status confers the advantage of certainty and continuity. If it is a trail where there was never a formal easement, both owners and users can benefit from greater certainty. A town can serve as a good back-up entity to keep the trail going if the private group evaporates over time. Also, municipal interests in property cannot be lost by adverse possession. RSA 477:34.

Liability

There is no minimum maintenance duty for a trail as there is for a public highway, and the duty of care statute (see Chapter 6) does not apply to trails. On the contrary, in line with the legislature's desire to encourage public recreational access, RSA 231-A:8 protects both the municipality and owners of land over which a trail passes from liability by incorporating the provisions of RSA 212:34 and RSA 508:14. Under RSA 212:34, liability does not arise except for "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." RSA 212:34 was recodified by Ch. 214, Laws of 2012. All landowners, including municipalities, have no duty of care to keep premises safe for entry or use, or to give any warning of hazardous conditions, uses, structures, or activities unless:

- There is a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity;
- The landowner charges a fee for entry to or use of the premises;
- The injury results from actions of those who have permission to use the property, and the landowner owned a duty to keep the injured person safe from harm; or
- The injury results from an intentional act of the landowner.

This protection was expanded by Chapter 162, Laws of 2013, RSA 212:34, VI to protect the landowner against claims made by persons engaged in the construction, maintenance, or expansion of trails or ancillary facilities. In addition, RSA 507-B:11 grants municipalities and school districts immunity from liability for injury or property damage resulting from the use of skateboarding, rollerblading, stunt biking, or rollerskiing facilities on their property, so long as no fee is charged for the use of such facilities. Immunity is not available for wanton and gross negligence.

Under RSA 508:14, the threshold is even higher, namely "intentionally caused injury or damage." Many towns hesitate to open their lands for recreational activities such as trail use for fear of liability if someone gets hurt. A closer look at these statutes will help answer questions, such as:

- How much protection do they offer?
- Does a town or city expose itself to an unreasonable risk of liability by permitting, on municipally-owned property, recreational activities that involve inherent risks and dangers?

The term "unreasonable risk" is used because lawyers are rightfully hesitant to guarantee that liability risks can be completely eliminated. Courts can and do alter well-established rules of liability on which municipalities have relied. But the risk of changes in the law does not justify paralysis out of fear. The question is not one of eliminating all risk, but rather one of whether the municipal risk is unreasonable—whether liability fears are truly justified by the law and are so great as to cause a municipality not to do what it otherwise wants to do. If local officials really don't want to encourage hiking, trail biking, hunting, etc., because of true safety concerns, that's a responsible decision. But not every safety risk translates into a liability risk.

Case Law Applying These Statutes. The following are cases in which these liability protection statutes applied:

- *Fanny v. Pike Industries, Inc.*, 119 N.H. 108 (1979). The plaintiff, a 14-year old, was riding a mini-bike on state land where Pike was constructing a highway interchange. The New Hampshire

Supreme Court upheld a dismissal of the lawsuit based on RSA 212:34, because Pike, as the occupant of the premises, owed no duty of care to keep such premises safe for OHRV use.

- *Kantner v. Combustion Engineering*, 701 F.Supp. 993 (District Court of New Hampshire, 1988). This case involved people in a canoe who drowned, allegedly because of inadequate signs warning of a hydroelectric dam construction project ahead. The Court looked at both RSA 508:14 and RSA 212:34, first to determine whether they were constitutional, and held that they were, as bearing a "fair and substantial relationship to the object of the legislation" —the so-called "middle tier" level of constitutional scrutiny applicable to restrictions on the right to tort recovery—that object being to encourage increased public use of land for recreation without charge. Oddly, the Court held that RSA 508:14 did not apply because canoeists in the water aren't "users of land" for recreational purposes. But the Court said RSA 212:34 applied to the case and held that the dam construction contractor and subcontractor were "occupants" of the premises, that no consideration had been charged for the use of the river, and that, therefore, the limited immunity under RSA 212:34 did apply to protect them from liability.

- *Fish v. Homestead Woolen Mills, Inc.*, 134 N.H. 361 (1991). The plaintiff dove into Swanzey Lake and hit his head on a submerged rock. He sued owners of the dam for negligently allowing the water to get so low, and the owner of land from which he dove for failing to warn of the danger. Both defendants had prior knowledge of extensive use of the property by swimmers. With respect to the water level, the Court held that that was not the proximate cause of the injury, and that there is no duty to maintain water at "safe" levels. With respect to the property the plaintiff dove from, the Court held that RSA 212:34, I was clear and directly applicable, thus protecting the landowner from liability.

- *Collins v. Martella*, 17 F.3d 1 (1st Cir., 1994). This case also involved an injury suffered from diving into shallow water. The beach was owned by a property owners association and was posted as private. The Court examined both RSA 508:14 and RSA 212:34. The plaintiff argued that the statutes apply to "undeveloped" land only rather than a developed park. The Court rejected that contention because there is no language in the statutes suggesting that only undeveloped land is covered. The plaintiff next argued that the injuries were caused by "willful or malicious failure to warn." The Court wrote:

  > Collins notes that the dock was installed in shallow water and from this fact alone asks the court to infer that one or more defendants consciously disregarded a probability that someone would be injured by diving from the dock. I decline to accept this argument… [S]uch evidence…is simply insufficient, standing alone, [to evidence] actual knowledge that an injury such as the one Collins suffered was a probable result of the installation and use of the dock.

  The landowner was granted summary judgment (won the case) based on the liability limitation statutes.

- *Lorette v. Peter-Sam Investment Properties*, 140 N.H. 208 (1995). This case involved riding dirt bikes on the defendant's property and an injury resulting from riding off a 20-foot cliff created by a sand and gravel excavation. The defense was based on neither RSA 508:14 nor RSA 212:34, but rather RSA 215-A:34, which provides that the riders of OHRVs accept as a matter of law all dangers inherent in the sport. Among the dangers listed as assumed by the OHRV user are "variations in terrain, trails, paths or roads." The New Hampshire Supreme Court addressed the issue of whether this statute applies only to non-developed, non-commercial properties, and held that it was not so limited:

  > The plaintiff also argues that an abandoned pit is not an 'inherent danger' in the sport of OHRV use... Reading the provision as a whole, we note that trails, paths, and roads are

usually artificial, and it would therefore be illogical to read a 'natural' requirement into the statute.

The Court also rejected an argument that the statute applied only to posted land. Finally, the Court ruled on the statute's constitutionality. Following the federal court in the *Kantner* case (above), the Court found that the statute is constitutional, thus implying that RSA 508:14 and RSA 212:34 would be found valid as well.

More recently, three decisions in 2005 address the limits of immunity under these statutes:

- *Gordon-Couture v. Brown*, 152 N.H. 265 (2005). A young child drowned in a private landowner's pond during a birthday party. The landowner was held not immune from liability because the land was being used for a private activity and was not open to the general public.
- *Soraghan v. Mt. Cranmore Resort, Inc.*, 152 N.H. 399 (2005). A mother was injured while attending a ski meet for which her daughter and the daughter's ski team paid to participate. The landowner was held not immune because it was paid for use of the land.
- *Kennison v. Dubois*, 152 N.H. 448 (2005). A snowmobiler was killed in a collision with a trail-grooming machine operated by a nonprofit snowmobile club. The club groomed the trails without charge. The landowner held the property open for public use without charge. The landowner was immune, but the snowmobile club was not immune because it was not an "occupant" with possession and control of the land within the meaning of the statute. (This case prompted the enactment of RSA 508:14, II expressly extending immunity to persons who perform trail maintenance.)

In each case, the plaintiff had permission to be on the land and claimed that the injury was the result of negligent maintenance of the property or a failure to properly supervise those using the property. In each case, the defendants argued that the "recreational use" statutes provided them with immunity from liability, but in all three cases the argument failed to persuade the Court. While none of these cases directly involves a municipality, the holdings of the cases are important. In order for the immunity provisions to apply, the recreational property must be open to members of the general public, and there must be no charge for use of the property. *Coan v. N.H. Dep't of Environmental Services,* 161 N.H. 1 (2010) demonstrates the extent of immunity under RSA 508:14. The state was held not liable for the drownings of swimmers caused by the state's release of water from an upstream dam without warning because the swimmers had accessed the water from state-owned recreational land.

The most recent decision on recreational immunity is *Reed v. Portsmouth*, a decision of the US District Court for NH, No. 12-CV-164, 4/3/2013. The plaintiff was walking along a public street in Portsmouth and noticed a statue with a plaque in a public park. She entered the park to get closer to the statue, and was injured when she fell into a hole in the lawn that was obscured by grass. She sued the city for negligence, and the city sought summary judgment alleging it was immune from suit as a result of the "recreational use statutes," RSA 508:14 and RSA 212:34. The plaintiff countered, arguing that these statutes do not protect municipalities, that her walking across a lawn did not constitute a "recreational activity," and that even if the statutes did apply, the city had voluntarily assumed a higher standard of care for maintenance of the park and should be held liable.

The Court determined that municipalities were indeed intended to be beneficiaries of the statutory immunity protection based upon a plain reading of the text of the law. Further, pedestrian use of a park was found to be a form of "recreational activity," and thus a form of activity covered by the statute. Finally, the Court summarily dismissed the argument of a higher assumed duty, since there was no allegation that the presence of the hole in the lawn was in any way an intentional act of the city.

General Recommendations for Managing Liability. Neither the municipality, nor any other group allowed to use the land, should charge fees for these recreational activities, since that makes the anti-liability statutes no longer applicable.

In order to help avoid liability for "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity" and other exceptions under RSA 212:34, it makes sense that, if the town has actual knowledge of a particular recreational activity or is going to actively encourage it, there should be some type of inspection of the property to see if there are any hazards other than those inherent in the sport—hazards that aren't reasonably discoverable by the users. Keep on file a written report either that no such hazards were found, or, if they were found, what was done to eliminate or warn against them.

Obviously, since not all liability risks can ever be eliminated, it is still, as always, a good idea to have liability insurance.

Trail Maintenance

Trails in heavily-used urban parks will probably be maintained by municipal maintenance crews. But other trails may not get much maintenance, except by volunteers. RSA 231-A:7 specifically allows the governing body or its designee to delegate maintenance responsibilities to volunteers by means of a written cooperative agreement.

Any volunteer doing trail work can be protected against liability under RSA 508:17—at least against negligence. Volunteers can still be liable for "willful, wanton, or grossly negligent misconduct." RSA 508:17, I(c). To be recognized as a volunteer under this statute, there must be prior written approval from either the municipality or a nonprofit organization.

Wetlands Issues. RSA 482-A:3 prohibits dredging or filling or constructing structures in or adjacent to wetlands without a permit. It is possible to maintain walking paths without excavation or filling, but if trail maintenance requires excavation or building any bridges, this statute applies. In the case of recreational trails, paragraph XII of RSA 482-A:3 allows the law to be satisfied by filing a notice with the Department of Environmental Services and the Department of Resources and Economic Development. See statute for details. Among other things, the applicant needs to include a copy of a U.S. Geological Survey (USGS) map, showing the location of all wetland and water body crossings. Applicants must also comply with Best Management Practices for Erosion Control During Trail Maintenance and Construction published by DRED.

Trail Regulations

RSA 231-A:4 provides that regulation of public use of the trail can be imposed by the local legislative body (town meeting, in towns) or governing body (select board or council), or its designee, or even by a landowner as a condition of the trail easement. This ability to enforce regulations is one of the prime advantages of municipal trail status. Regulations "may include, but are not limited to, prohibition of motor vehicles, prohibition of wheeled vehicles, prohibition of off-highway vehicles, or restriction to specified modes of travel such as horse, bicycle or foot."

The key to enforcing these regulations is posting them. Posting must be at the beginning of the trail and anywhere else where the trail intersects public highways. Signs can also be posted at property boundaries where different restrictions become applicable.

If properly posted, these regulations are enforceable in the same manner as traffic regulations under RSA Chapter 265. Violators are guilty of a violation, and the standard traffic ticket can be used.

CHAPTER TEN
BRIDGES

DEFINITION

A bridge is defined in RSA 234:2 as a structure on a public highway that has a clear span of 10 feet or more, measured along the highway's center line, spanning a watercourse or other opening or obstruction to carry the traffic across. It includes the substructure, superstructure, and all approaches. (See RSA 234:2 for an additional definition regarding bridge aid for a combination of culverts acting as a bridge.) The function of this statutory definition is to help define municipal and state special maintenance duties and the special funding mechanisms for bridges.

Part of Public Highway

The land where the bridge is located either is part of a public highway or it isn't. *Maine-N.H. Interstate Bridge Auth. v. Ham's Estate*, 92 N.H. 277 (1943). A bridge is public if the road it services is public; a bridge is private if the road it services is private. *Blagbrough v. Wilton*, 145 N.H. 118 (2000). If it is public, it must have been created by one of the four methods of highway creation described in Chapter 2. A bridge is the same class of highway as the rest of the highway it serves. Legal rights involved with bridges are, for the most part, the same as for any other public highway as discussed throughout this book, but there are some issues unique to bridges.

MAINTENANCE DUTY

Carrying Capacity

The minimum required load-bearing capacity of bridges on town highways is 6 tons, as required by RSA 234:39. If the town has applied for bridge aid from the state and the application is pending, the 6-ton limit can be reduced to 3 tons. All load limits must be posted (see below). Any bridge that either can't carry the 6-ton minimum limit, or can't carry the loads it is posted to be able to carry, should be considered "insufficient" under RSA 231:90 through :92, as described in Chapter 6, and some action should be taken, such as posting it for a lesser weight. See Bridge Liability below.

Capacity requirements are different if the bridge was built or reconstructed with state bridge aid. RSA 234:4 requires newly constructed bridges using state aid to have a carrying capacity "of at least the legal load stipulated in RSA 266," which means they must be capable of carrying all vehicles that can legally travel on non-interstate state highways under RSA 266:18-a through :18-c. The allowable weight, under these statutes, depends on how many axles the vehicle has and how far apart the axles are, with exceptions covered under complex formulas. The legislature enacted these somewhat confusing requirements in 1994 at the urging of the trucking industry.

Prior to 1994, RSA 234:4 required any bridge built or rehabilitated with state bridge aid funds to have a carrying capacity of at least 15 tons, except covered wooden bridges. This minimum 15-ton capacity still applies to bridges rehabilitated with state bridge aid. For covered wooden bridges, the carrying capacity is still 6 tons, as required by RSA 234:27.

These capacity requirements are construction standards, not maintenance requirements. Therefore, municipalities do not have a mandated duty to maintain bridges to these state-law carrying capacities. The minimum maintenance duty would be the carrying capacity requirement of RSA 234:39—6 tons. The higher load-carrying requirement of RSA 234:4 applies to the initial construction and is not a maintenance mandate. If it were, it could very well be unconstitutional as an unfunded mandate in violation of Part I, Article 28-a of the New Hampshire Constitution. However, compliance with RSA 234:4 is a factor that the Department of Transportation (DOT) will consider as part of the state bridge aid application process.

Further, RSA 234:20 requires bridges on Class V highways that are constructed or reconstructed using bridge aid funds to be maintained "to the satisfaction of the commissioner of transportation." If the town or city doesn't comply with repair or maintenance orders of the commissioner, the DOT can do the work itself and charge the cost plus a 10 percent penalty to the town or city. This is most likely not an unconstitutional mandate because RSA 234:20 predates Article 28-a, and the town could avoid the mandate by choosing not to accept state bridge aid.

Local officials report that the DOT is very accommodating and willing to take a town's design preferences and other details into account with bridges on local highways. According to DOT representatives, the commissioner has issued few, if any, orders under this statute.

Inspection

RSA 234:23 imposes a duty on towns to inspect all bridges on roads maintained by the town every two years. The Department of Transportation assists with these inspections, to the extent it has personnel available, at no cost to the municipality under RSA 234:25. However, the municipality's legal duty to inspect still exists even if the DOT doesn't have personnel available. A report must be made of each inspection, filled out on a standard DOT form, as provided in RSA 234:23. The statute suggests hiring qualified engineers for this function. Reports must be retained as records by the town and should be made a part of the town's road files. Inspection reports should be incorporated into the town's road insufficiency reporting system. *See,* Chapter 6.

If the town doesn't carry out the bridge inspections, it can't apply for state bridge aid funds (RSA 234:23); but, at least as important, lack of inspections may expose the town to liability. See Bridge Liability below.

The Department of Transportation has considered certain structurally deficient bridges to be "red listed" for priority. 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.

POSTING LOAD LIMITS

The posting of bridges became much more important in 1986 with the enactment of RSA 266:18-b, :18-c, and :18-d. Under these laws, the DOT certifies certain trucks, allowing them to carry loads even heavier than the normal loads allowed on non-interstate highways. The certified limits are in many cases substantially higher than normal limits under RSA 266:18-a. For example, the normal total gross vehicle weight for combination vehicles is 80,000 pounds (RSA 266:18-a, I(i)), whereas certified vehicles can weigh as much as 99,000 pounds (RSA 266:18-b, III(j)). The legislature was persuaded to allow for these increased weights by arguments that not increasing them would overburden interstate commerce. Unfortunately, regardless of state law, no bridge or truck is immune from the laws of physics.

If a municipal bridge is not posted, the law assumes (and truckers will assume) that it is suitable for these heavy, certified trucks. RSA 234:39, in combination with RSA 266:18-c, V, requires the load limits for all bridges to be posted at the entrances to the bridge, unless the bridge is capable of bearing all loads allowed for certified vehicles—and very few locally-engineered bridges are.

Although RSA 266:18-c, V seems to apply to state bridges only, the statute also states, "For all other bridges or other structures it shall be the duty of the authority having jurisdiction to place similar signs," which applies the weight system to all municipal bridges.

The format for the signs required by RSA 266:18-c is:

- "Weight Limit X Tons."
- If the bridge is capable of carrying trucks with three or more axles that weigh over the basic limit, the sign should read, "Gross Weight Limit X Tons or Y % of Legal Loads."
- If the bridge can carry all normal weight vehicles under RSA 266:18-a, but not the certified vehicles under RSA 266:18-b, the sign should read, "No Permit Load/Legal Loads Maximum."

As an alternative to these wordings, the DOT has devised the following shorthand for bridge postings, which are commonly seen throughout the state. The basic distinction this system makes is between certified single-unit vehicles (single chassis) and certified combination vehicles (semi-trailer trucks, etc.):

No Sign Means the bridge can be crossed by all normal and certified vehicles without restriction.

C-1 Means the bridge can handle certified combination vehicles without restriction, but certified single-unit trucks must not cross if there's another vehicle over 6 tons on the bridge at the same time.

C-2 Means no certified vehicle (combination or single-unit) can be on the bridge if there's another 6-ton or heavier vehicle on the bridge at the same time.

C-3 Means certified single-unit vehicles can't cross at all, and certified combination vehicles can't cross if there's another 6-ton or heavier vehicle on the bridge.

E-1 Perhaps confusingly, this designation is actually less restrictive than C-3. Just as with C-3, single-unit certified vehicles are excluded, but there's no restriction on certified combination vehicles.

E-2 Means both types of certified vehicles are prohibited and only normal load vehicles can cross. This is the most common sign to see on local road bridges.

After inspection, if municipal officials have reason to doubt that a bridge can bear normal E-2 weight vehicles, as set forth in RSA 266:18-a, then the gross tonnage the bridge can safely carry must be posted—

"Weight Limit X Tons"—rather than using the above shorthand. To avoid bridge liability, municipal officials must pay as much attention to posting as to actual maintenance.

Enforcement

Because most towns don't have scales, they aren't able to enforce bridge weight limits strictly. But scales aren't the only evidence of weight: for example, if even the manufactured weight of the empty vehicle exceeds the bridge limit, the violation is clear. The fine for vehicles violating state weight limits is based on a sliding scale (RSA 266:25), whereas, perhaps inconsistently, the fine for violating a local bridge weight limit is $100 (RSA 234:41).

Another example of inconsistency of laws enacted at different times is the penalty for violating a road weight limit under RSA 231:191 (see Chapter 6), which constitutes a violation punishable by up to $1,000, but violating a bridge limit under RSA 234:41 is only a $100 fine.

Permit to Exceed Weight Limit

RSA 234:40 allows select boards or street commissioners to grant a written permit to exceed a posted load limit "under such regulations as [they] believe will permit a safe travel of such excessive load without damage to the bridge." If the municipal bridge experts think a waiver would create or lead to an insufficiency as defined in RSA 231:90 (see Chapter 6), then the requested exemption should be denied in order to avoid municipal liability for a highway insufficiency.

BRIDGE SPEED REGULATIONS

Towns may establish and post reasonable speed limits over any town-maintained bridge, and any violation of those regulations is considered a "violation" under the criminal code. Any fines collected under this section go to the town. RSA 234:32. In other respects, municipalities have the same regulatory authority over bridges as they do over the highway the bridge serves.

BRIDGE FUNDING

How much state money there will be for bridge aid in any year depends on the politics of legislative funding, but applications must be considered by the DOT commissioner in the order received. The commissioner is mandated to set parameters for how applications will be considered, including funding availability and anticipated design schedule. RSA 234:6. In the past, federal aid bridge replacement funds have also been available, but the application procedure for both is the same. The select board of a town, or mayor of a city, applies annually to the commissioner of transportation. RSA 234:5.

Applications must be on forms available in the district DOT offices, or from the administrator of the Bureau of Municipal Highways. The first form is an application for a preliminary estimate. Applications from towns must be signed by the select board. The Bureau of Municipal Highways then examines the bridge site and forwards an estimate to the town. Under RSA 234:10, one-fifth of the cost for state-aid bridges must be borne by the town or city, with four-fifths borne by the state. (The same split applies to county bridges, apportioning costs between the county and the state.) The next form is an application for construction, which must be submitted with proof that the town has appropriated its one-fifth share.

RSA 234:15. Once the plans are prepared, the Bureau of Municipal Highways sends the town a copy, and the town acknowledges its approval by means of a final form. Local officials with questions about any of these procedures should call the Bureau of Planning and Community Assistance at 603.271.2107. State bridge aid is specifically not available for the rebuilding of bridges covered by insurance, unless the cost of reconstruction exceeds the amount received from insurance. RSA 234:10-a.

RSA 234:5-a allows a city or town that has applied for state bridge aid for a closed bridge to replace or rehabilitate the bridge at its own cost and receive state funding at a later date according to the state bridge aid schedule. Certain conditions apply: the bridge must be closed in accordance with Department of Transportation recommendations; the bridge must be on the schedule for bridge aid; the bridge design must be approved by the DOT; bridge aid funds must be available in the year the bridge is scheduled to be replaced or rehabilitated; and the city or town must agree that it has no financial claim against the state if funds do not become available.

REHABILITATION OF WOODEN COVERED BRIDGES

Rehabilitation of covered bridges can also be authorized by DOT under the bridge aid program. Funds can be used for replacing floor beams and reflooring, reroofing, repair, or replacement of truss members and/or wooden arch members, or replacement or repair of piers, abutments, and wing walls. Any improvements made must be capable of a 6-ton carrying capacity. RSA 234:26 through RSA 234:31. There is also provision under RSA 234:31 for a municipality to vote to preserve an unused wooden covered bridge. Town meeting or a city or town council may vote to recommend to the state historic preservation officer to consider the bridge a historic site and have it conveyed to the state. After public hearing, recommendation by the historic officer and approval by the governor and council, the municipality transfers and relinquishes all rights and control over the bridge to the state.

BRIDGE LIABILITY

Prior to the 1993 rewriting of the highway liability laws, state law—while granting municipalities general immunity from most highway liability—specifically held towns liable for accidents occurring on defective bridges, culverts, or embankments. Former RSA 231:92. This old law was part of the group of statutes referred to by the New Hampshire Supreme Court as a "hotchpotch" and overturned as unconstitutional in the case of *Dover v. Imperial Casualty & Indemnity Co.*, 133 N.H. 109 (1990). Today, municipal liability for bridges is covered by the same statutes that apply to all sections of highway. Those principles are covered in Chapter 6 and are not repeated here, but keep in mind that pre-1993 cases dealing with bridge liability, based on the old statute, are no longer good law.

Responding to Inspections

While the statute hasn't been tested yet, a municipality's duty to inspect all bridges (RSA 234:23) will likely be treated by the courts as a non-discretionary duty, and failure to inspect will be deemed an intentional act under RSA 231:92, I(c), for which the municipality might be held liable. If a bridge inspection reveals an insufficiency, it should be treated as if a written "notice of insufficiency" had been filed under RSA 231:91. Warnings must be posted immediately, and some plan of action must be developed within 72 hours. *See*, Chapter 6.

Waivers as a Liability Risk

As was discussed above, RSA 234:40 gives authority to select boards or street commissioners to grant waivers from posted load limits, but only "on such conditions and under such regulations as [they] believe will permit a safe travel...without damage to such bridge." The bridge should be examined, or a recent inspection report should be consulted, before granting any waivers in order to determine whether the excess load can safely travel across the bridge. A paper trail of all steps taken and facts and issues considered in making the decision should be maintained. Failure to make a determination based on an inspection of the bridge could expose the municipality to liability.

TEMPORARY CLOSING FOR REPAIRS: DISCONTINUANCE

Occasionally it is necessary to close a bridge when it can't safely support 6 tons, or even the 3-ton limit allowed when bridge aid applications are pending. RSA 234:39. If the municipality decides to completely discontinue the bridge, the procedure is the same as for discontinuing any other section of public highway, as covered in Chapter 4, including the right of affected landowners to ask for damages.

But if the municipality intends to rebuild the bridge, RSA 234:38 permits "temporarily" closing the bridge in order to perform work. Those who are deprived of all reasonable access to their property due to a temporary closing are entitled to damages, even if the situation lasts only a short time. Damages are measured by the property's rental value during that time period. *Capitol Plumbing & Heating v. State*, 116 N.H. 513 (1976). The fact that owners may have to use a more circuitous route to reach their land doesn't entitle them to money damages. *State v. Shanahan*, 118 N.H. 525 (1978). *See,* Chapter 4. Thus, if someone is totally cut off by a closed bridge, a temporary bridge may offer a good alternative. Don't let the possibility of having to pay damages or finding a temporary alternative delay the closing of an unsafe bridge. The exposure to liability isn't worth it. Planning to prevent this and similar problems is discussed in the section on road system arrangement in Chapter 7.

BRIDGES BETWEEN TWO MUNICIPALITIES

Where a river serves as a town line, disputes are not uncommon over bridge maintenance, especially when, due to land use patterns, Town A believes the bridge benefits only Town B. For state-aid bridges, RSA 234:12 sets out a construction cost allocation formula (splitting the 1/5 that a municipality ordinarily bears in proportion to their last equalized valuation) that will apply "unless by mutual concurrence the two municipalities agree to some other financial arrangement." For other bridges, this issue is no different from the layout of roads in two towns (see Chapter 5), and RSA 231:14 allows the apportionment of layout costs to be set by joint action of the select boards at the time of the layout procedure.

An inter-municipal agreement under RSA 53-A can settle the issue of boundary line bridge maintenance in the future. Any arrangement the local politics will allow can be set up under that statute. For major bridges, a joint bridge-maintenance authority or committee might be considered.

When a bridge that is part of a Class IV or V highway crosses into another state, RSA 234:14 permits any municipality to contract with the other state or municipality therein for the "construction, reconstruction and maintenance" of the bridge and for the proportion of the cost that the New Hampshire municipality will contribute.

CHAPTER ELEVEN

BRIDGES

Road construction necessarily creates drainage issues for the road itself and typically interrupts the natural flow of groundwater on abutting lands. In constructing and maintaining roads, it is important that municipalities take appropriate actions both to provide for necessary road drainage and to minimize impacts to neighboring landowners.

DRAINAGE EASEMENTS

For New Roads, Get a Deed

As we said in Chapter 2, the best preventive medicine when a town accepts or lays out any new highway is to require a recorded deed that explicitly describes all culverts and other drainage structures and conveys them to the town, 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.

Of course, this is easier if the person conveying the highway to the town is the same person who owns the abutting land on either side—for example, a subdivider—but not so easy if the abutting land is already owned by others. Therefore, the planning board should require, both in its regulations and as an explicit condition of every approval, 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. As discussed in Chapter 7, 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. Any deed dedicating a road to the town should include language similar to the following:

> There are hereby conveyed the following easements as appurtenant to the parcel of land on which [name of highway] is located: namely, the right to drain and flow surface water from the culverts shown on the plan on lots [insert numbers or other descriptions] with the right to enter upon such lots on which the drainage easements are located for the purpose of maintaining and repairing such easements and assuring proper flow, and also including, if applicable, maintaining, repairing and replacing the culverts located in the highway.

Work closely with the municipal attorney to develop the proper forms and procedures and to fine-tune the language in each case.

Existing Roads: Implied Drainage Easements

Under New Hampshire case law, taking care of drainage is an inherent element of the town's legal authority to lay out and repair highways. *See, Hooksett v. Amoskeag Mfg. Co.*, 44 N.H. 105, 109 (1862). The Court said, "[W]hen a highway is laid out in a town over the land of any individual,…there is taken from him a

right…for…the public to pass, and also a right to put and keep the land over which the highway is laid in suitable condition for the public travel. This latter right is vested in the town by the law.…" *See also, Clair v. Manchester*, 72 N.H. 231 (1903) (quoting *Hooksett v. Amoskeag Mfg.Co.).*

Along with this right comes a duty toward the owner of adjoining land, "which, so far as regards the consequences of their acts and omissions in building and repairing, is not to be distinguished from the duty of an ordinary adjoining proprietor of land with respect to the premises of his neighbor." *Gilman v. Laconia*, 55 N.H. 130, 131 (1875). Thus a town, in constructing a highway in the past and in maintaining it today, has not merely the right, but the legal duty, to do whatever it takes—using bridges, culverts, 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 town 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). The town 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).

Drainage Easement by Prescription

If the town has not acquired an express or implied drainage easement, it may be possible, in the case of older drainage structures, to claim a drainage easement by prescription. The elements of an easement by prescription are described in Chapter 2; but here we are talking about a prescriptive drainage easement rather than a highway by prescription.

New Hampshire law has long recognized that a private landowner can acquire prescriptive rights in the flow of water. See, for example, *Johnson v. Labombard*, 94 N.H. 417 (1947) (for plaintiff to acquire prescriptive right to flow of spring water from defendants' land, use would have to be adverse for 20 years); *Taylor v. Blake*, 64 N.H. 392 (1887) (Court's entire opinion, certainly one of the shortest on record, consisted of one sentence: "The title of the plaintiffs, both by deed and by prescription, to the water diverted from them by the defendant, is quite too plain for discussion."); *Bucklin v. Truell*, 54 N.H. 122 (1873) (defendants acquired prescriptive easement to flood plaintiffs' meadow—"twenty years' use of the water of a stream or a pond in a particular way is evidence of a right to use it in the same way").

Since a town may acquire and own property in the same manner as a private individual, including by prescription, certainly it may acquire a drainage easement by prescription. Although RSA 229:1 limits the creation of highways by prescription to those that had been used as such for 20 years prior to January 1, 1968, the statute, by its terms, applies to highways only. There is no reason that it would prevent a town from acquiring a related drainage easement by prescription.

LIABILITY ISSUES

Landowner's Remedies

If a municipality, in constructing or maintaining a road, negligently causes harm to neighboring property, whether by flooding, runoff damage, or otherwise, it will be liable to the owner for the damages. In addition, regardless of negligence, if the town must damage abutting property to maintain the road properly, the abutting owner may have a statutory remedy for a taking.

Negligence

Historically, a municipality was immune from liability for injuries caused by negligent construction and maintenance of highways. *See, Cannata v. Deerfield*, 132 N.H. 235, 241 (1989); *Allen v. Hampton*, 107 N.H. 377, 378 (1966). "An exception to this immunity exist[ed], however, if the municipality, by the use of the land which it holds only for governmental purposes, such as a highway, negligently invades an adjoining owner's property rights." *Allen*, 107 N.H. at 378; accord *Cannata*, 132 N.H. at 241 (quoting *Allen*); *Clair v. Manchester*, 72 N.H. 231 (1903) (city liable for damage caused by inadequate culvert).

In *Merrill v. Manchester*, 114 N.H. 722 (1974), the New Hampshire Supreme Court eliminated the municipal immunity doctrine, except for acts requiring the exercise of a judicial or legislative function and acts requiring the exercise of an executive or planning function involving policy decisions characterized by a high degree of official judgment. The Court subsequently held, in *Cannata*, that the discretionary decision of whether to lay out a road or install storm drains and sewers qualified for municipal immunity under the *Merrill* exception, but that negligent implementation of such a decision did not. *See,* 132 N.H. at 242.

The *Merrill* decision spawned several legislative responses and further judicial review, which are discussed in Chapter 6. The bottom line is: if a municipality's negligent construction or maintenance of a road, culverts, drains, or other drainage structures causes damage to someone else's land, the municipality is liable. The unavailability of statutory immunity is discussed further in Liability Protection, below.

Taking

Negligence aside, if a municipality's necessary road maintenance operations result in damage to an abutting property, the owner may have relief under RSA 231:75 through :78. These statutes as amended in 2013 provide a 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. RSA 231:76, III. The governing body must notify 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). RSA 231:75, I. 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.

The purpose of the predecessor versions of the statute (and the new version does not appear to change this) is "to give a party injured, in substance, the same remedy for the assessment of these damages as is provided by statute on an original laying out." *Bartlett v. Bristol*, 66 N.H. 420 (1890). Thus, just as the select board assesses the damages sustained by each landowner when property is taken for the original laying out of a road under RSA 231:15, the board must do the same if additional property is taken or damaged as a result of subsequent changes or maintenance. *See, Vaughn v. New Durham*, 93 N.H. 81 (1943) ("The purpose…is to compensate the landowner for injury to his land caused by certain alterations in the adjoining highway, since recompense for such injury was not included in the sum awarded him for the taking of his land when the highway was laid out.") and *Hinckley v. Franklin*, 69 N.H. 614 (1899) ("The road, as built, being what the circumstances called for, was what was considered in the original award of damages.…This the landowner could rely upon, and, if changes were subsequently made, she was entitled to compensation.").

However, if the landowner had notice at the time of the original taking that subsequent changes would be required, there is no remedy under the statute, because those changes are presumed to have been accounted for in the compensation for the original taking. *See, Landry v. Manchester*, 101 N.H. 412, 414-15 (1958), where the Court held,

> [The] plaintiffs had notice of the duly established grade of the highways abutting their property before they purchased. Under our decisions, liability to the plaintiffs would only arise "by a change in the grade in the highway from what was established in the original layout."…[I]t is not always possible, financially or otherwise, for a city to immediately do all the work on a road necessary to make it conform to the conditions of the original plan.

(*quoting, Locke v. Laconia*, 78 N.H. 79, 81 (1916).

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. *See, Flanders v. Franklin*, 70 N.H. 168 (1899). 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.

In *Micucci v. White Mtn. Trust Co.*, 114 N.H. 436 (1974), the New Hampshire Supreme Court expounded on a property owner's right to deal with surface water. The issue was whether an owner who had constructed a parking lot for its business had unreasonably diverted surface water onto adjoining land. The Court said:

> The law in New Hampshire has been long established that a property owner may use, manage or control the diffused surface waters on his land in any manner so long as it is reasonable in view of his own interest and that of all other persons affected thereby. The owner's alteration of the natural or existing runoff patterns is a factor to be considered along with the nature and importance of his use of the land, the foreseeability of the harm and the amount of resulting injury in arriving at a determination of whether it is reasonable.

The same factors mentioned in the *Micucci* case ought to apply as well to actions by a town. Suppose, for example, the town wants to replace a smaller culvert with a larger one in response to changed circumstances upstream. If the result is merely that water remains in a natural watercourse and poses less of a back-up threat, obviously there is no problem. On the other hand, if the alteration directs an increased flow toward an established downstream use, the town may face liability.

Liability Protection

As stated in Negligence section, above, post-Merrill discretionary immunity shields a municipality from liability for "a discretionary decision whether to install storm drains and sewers," but not for "the allegedly negligent manner in which that decision is carried out." *Cannata v. Deerfield*, 132 N.H. 235, 242 (1989); accord *Hurley v. Hudson*, 112 N.H. 365, 369 (1972) (in decision presaging Merrill's abrogation of municipal immunity, Court held that even if it did abrogate such immunity, a "planning board's approval of [a] subdivision plan without adequate drainage facilities…is precisely the type of 'discretionary,' 'governmental,' or 'quasi-judicial' decision which should not subject a town to potential liability in tort"). If the town decides in good faith that a culvert is not needed, and this decision results in damage to a neighboring property, the town should be immune from liability; but if it decides the culvert is needed and then negligently fails to install it, or installs it negligently, it will be liable for any damage. *See generally, Gardner v. Concord*, 137 N.H. 253 (1993) (discussing discretionary immunity); *Ford v. N.H. Dep't of Transportation*, 163 N.H. 284 (2012).

In an effort to retain as much of the sovereign immunity doctrine as is constitutionally permissible, the legislature has addressed municipal liability for injuries related to roads in RSA 507-B:2 and RSA Chapter 231. Those statutes are discussed in detail in Chapter 6. It is fairly clear, as indicated in Chapter 6, that the statutory limitations on liability apply only to the town's liability to travelers, not to abutting landowners. This is evident from the preamble to RSA 231:90 et seq., which refers to the municipality's duty to "the traveling public." Further, the municipality's liability under Chapter 231 hinges on whether the road is "insufficient," a term defined by reference to whether the road is "passable," or whether "[t]here exists a safety hazard which is not reasonably discoverable or reasonably avoidable by a person who is traveling upon such highway." Thus, the only source of immunity is the judicially recognized discretionary immunity doctrine discussed above.

Therefore, to minimize liability for drainage work on highways, always have a plan and design on paper, approved by the local policy-making officials (at least by the highway agent or street commissioners; ideally by the governing body itself). Without this paper trail documenting the plan and the considerations that went into it, the municipality won't be able to show that policy discretion was exercised, or be able to claim good-faith immunity for the exercise of that discretion. Second, of course, the plan must in fact be followed to avoid claims of negligent implementation of the plan.

Drainage Alterations by Abutters

So far we have been discussing actions taken by the municipality that affect road drainage and the rights of private landowners if their property is damaged in the process. But what about the reverse situation—when a private landowner does something that alters the existing drainage and causes damage to a road or interferes with the use of it?

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" (for example, a corporation or partnership). The fine is paid to the town. A complaint under RSA 236:19 can be brought in the local circuit court, district division.

In addition, RSA 236:39 provides for civil liability under the same circumstances. Anyone who causes any defect or insufficiency in a highway is liable for all damages to the highway plus all damages the town may be compelled to pay to any person who is injured as a result of the defect or insufficiency.

It is impossible to list all the ways an abutter might alter drainage in a way that affects the public highway, but a partial list includes draining a sump pump into the culvert or ditch (or directly onto the highway), damming a stream so that the backup spills into the highway drainage, new construction that diverts stormwater into the highway, and an above-ground swimming pool that was not drained for the winter bursting during a freeze and draining during a thaw into the highway (with eventual refreeze on the highway).

Drainage Structures Installed by Abutters

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 planning board or its designee 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.

STATE PERMITS FOR LOCAL DRAINAGE WORK

Most new roads in New Hampshire are constructed by private developers before being accepted by towns. In those cases, it is up to the developer to get the proper state permits. But sometimes it is the town itself doing the work. Two statutes are particularly important to follow when working on drainage: RSA 485-A:17 and RSA Chapter 482-A.

Alteration of Terrain (RSA 485-A:17)

Any person (and municipalities are included in the definition of "person") must get a permit before either:

- Dredging or filling within or on the border of the state's surface waters—formerly referred to as a "non-site-specific" permit; or
- Significantly altering the characteristics of the terrain in such a manner to impede the natural runoff or create an unnatural runoff. This generally means disturbing a contiguous area of 100,000 square feet or more (50,000 square feet if within shoreland areas)—formerly referred to as a "site-specific" permit. *See*, N.H. Code of Administrative Rules, Env-Wq 1503.02, implementing RSA 485-A:17.

If the project is under those size limits, it may qualify for a "general permit by rule" and not require the full permitting process. The qualifications are listed in Env-Wq 1503.03. In general, the "non-site-specific" part of this statute won't apply, since if the project is within or on the border of surface waters, a wetlands permit (below) also will be needed. Wetlands permits cover this situation so two permits are not required.

Regardless of the size of the project, refer to the statute and administrative rules (which have been amended significantly over the years) as well as the Department of Environmental Service's website for requirements, application processes, and exemptions well before conducting any work.

Wetlands Permits

RSA 482-A prohibits anybody from excavating, filling, dredging, or constructing any structures in or adjacent to wetlands (as defined in the statute) without a permit. Applications go to the Department of Environmental Services (Wetlands Bureau), with appeals (after a request for reconsideration to the department) going to the Wetlands Council created under RSA 21-O:5-a.

Road drainage work almost always involves wetlands. Indeed, it's not at all uncommon for a road to have created "man-made" wetlands due to alterations of the natural grade and initial drainage work. The legislature has recognized how prevalent this is and has provided some relief in the form of RSA 482-A:3, IV, quoted in full here:

(a) The replacement or repair of existing structures in or adjacent to any waters of the state which does not involve excavation, removal, filling, or dredging in any waters or of any bank, flat, marsh, or swamp is exempt from the provisions of this chapter.

(b) Man-made nontidal drainage ditches, roadside and railroad ditches, detention basins, ponds and wetlands that have been legally constructed to collect, convey, treat or control storm water and spring run-off, legally constructed ponds on active farms, erosional features caused by proximate human activity, fire ponds and intake areas of dry hydrants that have been legally constructed to provide water for municipal firefighting purposes as approved by a local fire chief, and aggregate wash ponds, sluiceways, and other legally constructed man-made water conveyance systems that are used for the commercial or industrial purpose of collecting, conveying, storing and

recycling water, may be maintained, repaired, replaced, or modified as necessary to preserve their usefulness without a permit under this chapter; provided, that the exempted facility, area or feature is not extended into any area of wetlands jurisdiction of the department of environmental services, dredged spoils [sic] are deposited in areas outside wetlands jurisdiction of the department of environmental services, wetlands or surface waters outside the limits of the exempted facility, area or feature are neither disturbed nor degraded, the exempted facility, area or feature was not constructed as mitigation under a wetlands permit or as part of a settlement agreement, best management practices are followed, and the work does not infringe on the property rights or unreasonably affect the value or enjoyment of property of abutting owners.

(c) Legally constructed culverts may be cleaned as necessary to preserve their usefulness without a permit under this chapter provided the conditions of subdivision (b) are met, however any repair, replacement or modification of a culvert must be made in accordance with RSA 482-A:3, XVI.

There is also an exemption in the statute for culvert work by municipal employees who have fulfilled a certification program. Refer to RSA 482-A:3, XXVI and XXVII.

If the work the municipality is doing doesn't fall under the above exemptions, either a "permit by notification" form or a "minimum impact expedited application" will likely have to be completed. A major highway construction project could require a minor or major permit dredge-and-fill permit, but only if it is a very large project located in wetlands. For permitting regulations, see Env-Wt 303. Questions about wetlands applications should be directed to the Wetlands Bureau at 603.271.2147 or wetmail@des.state.nh.us. Information and fact sheets are available on the DES website as well.

CHAPTER TWELVE

HIGHWAY FUNDING

This chapter takes a brief look at highway funding sources, including state funding options, local property taxation, and several other financing mechanisms for local highway projects. State bridge aid is discussed in Chapter 10.

NON-LOCAL SOURCES OF FUNDING

Highway Block Grant Aid Funds

This is the major source of state funding for the construction and reconstruction of Class IV and V municipal highways. Highway block grant aid is governed by RSA 235:23 and 25. These grants are distributed automatically to cities, towns, and unincorporated places based on a three-part "apportionment" formula. Village districts are not eligible pursuant to RSA 231:4.

'Apportionment A' Funds. Apportionment A is the largest part of the distribution formula. Each year, 12 percent of the total road toll (gasoline tax) revenue and motor vehicle fees collected by the state in the preceding year are allocated to this fund. In fiscal year (FY) 2022, the total was $30,566.534. Apportionment A funds are split among cities, towns, and unincorporated places as follows: half of the amount is based on the proportion of local road mileage compared with the state total, considering regularly maintained Class IV and V roads; the other half is based on the proportion of the municipality's population compared with the total state population, as estimated by the state Office of Planning & Development. RSA 235:23, I.

Updating Road Mileage Records. Every March, the Department of Transportation's (DOT) Bureau of Municipal Highways sends an "Information Report" to each municipal office. Among other things, it requests information about highway reclassifications, discontinuances, layouts, or any other actions concerning local highways or bridges. Information should be provided using the road inventory number that the particular local highway has been assigned in the DOT database. The DOT Bureau of Transportation Planning can provide a printout map showing recorded road names and inventory numbers. To request a map, or the total mileage used for the municipality's block grant aid funds, call the Bureau of Transportation Planning at 603.271.3344. To correct inaccuracies in the DOT database, local officials should send the DOT a map showing the correct information. To verify certain mileage changes, the DOT sometimes surveys municipal roads to verify road lengths.

As the New Hampshire Department of Transportation (NHDOT) is responsible for determining the actual disbursements of funds, it is important that they be provided accurate and current information regarding each municipality's Class IV and V mileage. This is typically accomplished by filling out the "Information Report" sent to municipalities each year by the Bureau of Planning and Community Assistance. At the conclusion of each municipality's yearly legislative meeting (i.e. Town Meeting), the NHDOT should be notified of all changes to the community's roadway system. The information should include the length and location of all Class IV and V highways reclassified, accepted, and/or discontinued by the municipality that year.

It is obviously in every municipality's interest to make sure this information is correct and current because the amount of aid received from the state depends in part on mileage totals. Conversely, if a municipality has erroneously listed a Class VI road as Class V on the DOT report, that may be a factor considered by the courts in determining the municipality's duty to maintain that road. *See, Turco v. Barnstead*, 136 NH 256 (1992).

'Apportionment B' Funds. Apportionment B funds are meant to assist municipalities with particularly high local road mileage and a relatively low total taxable property. RSA 235:23, II provides that each municipality receives a sum that "when added to the amount which would be derived by a tax of $.11 on each $100 of the municipality's last equalized valuation, [would] equal $117 for each mile of regularly maintained class V highway in such municipality."

'Apportionment C' Funds. Apportionment C is simply a statutory authorization that requires the DOT to allocate any federal aid funds that may be available in any particular year. RSA 235:7 designates the DOT as the agency to accept and administer federal funds on behalf of the state. Local officials with questions about federal funds available should call the Bureau of Planning and Community Assitance at 603.271.3344.

Distribution. On or before January 1, the DOT is to notify all cities, towns, and unincorporated places of the amount of highway block grant aid they will receive. The block grant aid payments are spread over the year as follows: 30 percent in July; 30 percent in October; 20 percent in January; and 20 percent in April. Unused balances may be carried over to the following municipal fiscal year. RSA 235:25 requires that block grant funds must be "used only for highway construction, reconstruction or maintenance purposes." Thus, if this money is spent on equipment, such as trucks or backhoes, make sure that equipment will be used exclusively for highway purposes.

State Aid Construction Funds for Class I, II and III Highways

The state provides funds for the improvement of Class I, II, and III highways (RSA 235:10 through 235:21), and the state has full responsibility for paying for all work done on Class I and III highways, as discussed in Chapter 3. Thus, the main interest towns and cities may have in these funds is for Class II highways that have not yet been improved to DOT standards and are still maintained by the municipality at municipal expense. RSA 230:4.

State aid construction funds for Class II highways are not received automatically; specific application must be made to the DOT for these funds. Preliminary discussions about such projects should be held well in advance of the May 1 application deadline, for several reasons. The highway design must be in compliance with standards set forth in DOT manuals relating to bridge and highway construction. RSA 235:14, II. Therefore, the road agent and governing body should make sure the plans meet those standards. In addition, the municipality must state in its application that it has already raised, appropriated, or set aside its required contribution share. RSA 235:14. How does the city or town know what its share is? Before February 15 of each year, the DOT notifies those cities and towns "which have expressed an interest" as to the amount of funds available and to what highway locations the funds can be applied. RSA 235:13. Once the municipality knows what state funds are available for the Class II highway project and has made the necessary local funding arrangements, it must apply to the DOT for the state aid share on or before May 1. (Note that when appropriating funds for the project, it may be useful to condition the appropriation on the receipt of the necessary state funds.)

How Costs Are Split. RSA 235:15 sets the municipality's share at one-third of the costs and the state's share at the remaining two-thirds. Half of the municipality's one-third share must be paid to DOT before the work starts, with the other half remitted when the project is finished. RSA 235:17. Local and state shares are combined into a joint fund. If a project isn't finished during the year, this fund can be carried

over into subsequent years (RSA 235:19), and if there is any amount left upon completion of the project, it is returned to the state and municipality in the same proportion it was contributed (RSA 235:20). RSA 235:21 gives DOT the option of increasing the state's share if the municipality is unable to pay, or if the highway is of no particular benefit to the city or town.

This same statutory scheme allows cities and towns to undertake projects on Class I and III highways with state aid construction funds, even though the state is fully financially responsible for such highways. This might be considered if a highway is particularly important to a municipality but is not receiving priority under the State Transportation Improvement Program. RSA 228:99. The same rules, including the one-third to two-thirds split of costs, would apply. Given current municipal fiscal conditions, most cities and towns will probably leave the state on its own with respect to Class I and III highways.

Highway and Bridge Betterment Program

The funds in this program, which was established in 1991, are allocated directly to the six state highway districts according to a statutory formula set forth in RSA 235:23-a. The program is funded using $.03 per gallon of the gasoline tax. These funds are intended for that portion of the state highway system that is not supported by federal funds. These funds are not available for use on local highways, including those Class II highways still maintained by municipalities. There is no formal involvement of local government in this program, but municipal officials may want to discuss project ideas and priorities with DOT's local highway district officials. See Chapter 10 for further discussion of state bridge aid.

State Aid for Road Damage Disasters

Any city, town, or unincorporated place suffering damage to its roads in a disaster is entitled—at least according to RSA 235:34—to state aid for repair of the damage if the estimated amount of the damages is greater than one-eighth of one percent of the municipality's total assessed valuation. Be aware that although these provisions are in the law, to date the state legislature has failed to fund this program.

Under the statute, the DOT is to be notified of the damage and, after investigation, would estimate the amount of aid to which the municipality is entitled. The DOT would survey the damaged highways and prepare an estimate of the cost for rehabilitation of these roads, notifying the municipality of the share the state would contribute and the estimated amount of aid available. Available aid is no more than 75 percent of the amount in excess of one-eighth of one percent of the municipality's assessed valuation.

Highway Safety Improvement Program

The Highway Safety Improvement Program (HSIP) supports projects that improve the safety of road infrastructure to reduce traffic fatalities and serious injuries. HSIP funding is provided through the federal government and averages $10 Million per year. The HSIP program is a partnership between local, regional, state and federal partners. In particular, locally identified projects are justified through a Road Safety Audit. Municipalities may apply for a Road Safety Audit to gain eligibility for HSIP funding. A Road Safety Audit must identify locations that have fatal or severe injury crash history; the supporting crashes must be located at and related to the local highway location of interest; and the crashes should be correctable and show a pattern indicative of an infrastructure-related problem rather than a single isolated incident. Applications for a Road Safety Audit are due annually in December 1st. The application form can be accessed at this location: **https://www.nh.gov/dot/org/projectdevelopment/highwaydesign/hwysafetyimprovements/documents/hsip_rsaapplication_2017.pdf**

Congestion Mitigation and Air Quality Improvement Program

The Congestion Mitigation and Air Quality Improvement Program (CMAQ) supports projects that reduce emissions of transportation related pollutants, particularly emissions resulting from traffic congestion. CMAQ apportions federal funding on average $10 - $12 Million per year. NHDOT releases competitive solicitations for CMAQ funding every two years, generally during the odd numbered years. More information about CMAQ as administered by NHDOT can be found at this location: **https://www.nh.gov/dot/org/projectdevelopment/planning/cmaq/index.htm**

Transportation Alternatives Program

The Transportation Alternatives Program (TAP) is a set aside of Surface Transportation Block Grant funding that supports non motorized transportation needs. New Hampshire's TAP set aside averages approx. $4 Million per year. NHDOT transfers a portion of TAP funding to the NH Department of Natural and Cultural Resources to support the Recreational Trails Program.

NHDOT releases competitive solicitations for TAP funding every two years, generally during the even numbered years. More information about TAP can be found at this location: **https://www.nh.gov/dot/org/projectdevelopment/planning/tap/index.htm**

Rebuilding American Infrastructure with Sustainability and Equity

The Rebuilding American Infrastructure with Sustainability and Equity, or RAISE (previously known as Better Utilizing Investments to Leverage Development - BUILD) a federal discretionary program, provides federal funding for road, rail, transit and port projects that promise to achieve national objectives. Instructions for completing a Project Information Form are posted at **http://www.transportation.gov/RAISEgrants/raise-info**.

LOCAL FUNDING OF HIGHWAYS

The Property Tax

Every town and city is required by RSA 231:57 to raise and appropriate an amount that equals at least one-quarter of 1 percent of its total tax valuation for repair of highways and bridges. The statute authorizes raising more than that amount, but states that no municipality shall be required to raise more than $50 per mile for highway repair. These funds may only be spent on the repair of Class IV and V highways. It could be worse: at one time, many towns forced their citizens to contribute physical labor to the maintenance of highways. For example, in Exeter in the year 1644, it was voted to set aside four days a year for mending highways, and anyone who was absent was fined five shillings. Bell, *History of Exeter* 466 (1888), as quoted by Loughlin, 16 *N.H. Practice: Municipal Taxation & Road Law* §47.01.

Special Revenue Funds for Highways

Under RSA 31:95-c, II(a), a municipality can vote to establish a special revenue fund to provide special highway funding, designating to the fund revenues from sources such as block grants, motor vehicle permit fees, parking meter fees, and fines. These funds are non-lapsing and can be used only for highway expenditures upon a specific appropriation by the legislative body.

Under RSA 31:95-c, II(b), a municipality can vote to establish a special revenue fund for capital improvements, again designating non-tax revenues to be deposited into a special non-lapsing fund. In order to do this, the town or city must have in place a properly adopted, up-to-date capital improvements plan. Appropriations from a special capital improvements plan fund may be used only to pay for individual capital projects identified in the plan. See Chapter 7 for further discussion about capital improvement programs.

As another alternative, a town or city could set up a capital reserve fund or trust fund under the general statutes relating to those funds. RSA Chapter 34 or 35 and RSA 31:19-a.

Additional Motor Vehicle Registration Fee

A town or city may adopt the provisions of RSA 261:153 by vote of the legislative body and charge an additional motor vehicle registration fee of up to $5.00 to be used for supporting a municipal and transportation fund. Upon adoption, the municipality would also create a capital reserve fund under RSA Chapter 34 and RSA Chapter 35.

Parking Meter Fees and Fines

Under RSA 231:131 the revenue derived from parking meters can be expended to maintain and improve streets and highways.

Central Business Service District

Under RSA 31:120 through :125, a town or city can set up a special taxing district in a high density, primarily commercial, area to fund such services as snow removal, landscaping, street cleaning, "and other services related to the maintenance of an attractive and useful pedestrian environment." See the statute for full details.

Tax-Increment Financing District

Under RSA Chapter 162-K, a municipality can create an economic development and revitalization district, also known as a TIF district. The idea behind TIF districts is that improvements made within the district can be paid for by increased tax revenues attributable to increases in the assessed value over the assessed value of the district at the time it was established (that is, before the improvements were made). In a number of municipalities, the new development that occurred within the district as a result of the improvements has generated enough increased tax revenue to allow the municipality to pay off its bonds several years early. Although it's unlikely a municipality would create such a district solely to finance roads, it is mentioned here because roads can constitute part of such a district's development program.

Village District

One of the many functions for which a village district may be created is the layout, acceptance, construction, and maintenance of roads. RSA 52:1, I(m). A village district constitutes a property tax assessment and collection territory with different boundaries than those of the town or city where the village district is located. A village district may also cover portions of several different towns or cities. A village district is not a town method of financing roads: it is an entirely separate municipal entity, with its own voter checklist, its own village district meeting, and its own governing body (village district

commissioners). A village district cannot exercise any authority over highways unless it was specifically created for that purpose under RSA 52:3, or unless that purpose has been added later under the procedures of RSA 52:6.

The creation of village districts under RSA 52:1, I(m) has been used in New Hampshire primarily as a mechanism for funding the maintenance of formerly private roads—for example, in very large second-home developments. The village district may maintain those roads, but they do not become public or municipal roads. Conversely, the mere creation of a village district within part of a town or city does not automatically transfer public highways inside the district boundaries to the jurisdiction of the village district. That district territory is still part of the town or city, and all town or city roads remain so. In fact, there is no obvious simple mechanism for transferring a town/city highway to a village district. The only sure way is for the municipality to discontinue the highway and for the village district commissioners to then lay it out anew as a village district highway. Note that village districts are not eligible for state block grant funds or state bridge aid.

CHAPTER THIRTEEN
UTILITY LINES AND OTHER PRIVATE ENTERPRISE HIGHWAY USES

In this chapter, the word "utility" is used in the generic sense to include not just those services defined by statute as "public utilities" under the jurisdiction of the Public Utilities Commission, but rather all services distributed via highway rights of way and other easements, including water, sewer, gas, electricity, fiber optics and telecommunications.

LICENSING OF UTILITY LINES

General Information

RSA 231:159 through :182 is a comprehensive set of laws governing the installation of poles, conduits, cables, wires, etc., in the public rights of way. Water and gas lines are governed by RSA 231:183 through :189.

As a general proposition, it is fair to say that no utility lines or structures are allowed to be placed within town or city rights of way without a license from the town or city. The exception to this rule is when the location of such lines and structures has already been approved as part of a subdivision or site plan and a new highway is subsequently accepted or laid out in the same location, so long as the work plans or other data showing the locations of the structures are submitted to the municipality. RSA 231:160-a.

The licensing laws have two main purposes: to give municipalities the authority they need to make sure utility lines and structures do not interfere with highway users, and to place the ultimate liability for injuries resulting from these structures on their owners. *Gorman v. New England Telephone & Telegraph Co.*, 103 N.H. 337 (1961).

Procedure for Licensing

The first step for a utility owner wanting to construct lines or structures on a Class IV, V, or VI highway is to petition the select board or mayor and council. RSA 231:161. The law requires no set form for the petition, though some municipalities have developed their own. Regardless of the form used, the applicant should be required to show enough detail as to the types of structures and lines, and their location, so as to prevent any future dispute over exactly what has been licensed. It is best to require the applicant to include clearly drawn plans and diagrams, which are then attached to the license. RSA 231:161, V, provides:

> The selectmen in such license shall designate and define the maximum and minimum length of poles, the maximum and minimum height of structures, the approximate location of such poles and structures and the minimum distance of wires above and of conduits and cables below the surface of the highway, and in their discretion the approximate distance of such poles from the edge of the traveled roadway or of the sidewalk, and may include reasonable requirements concerning the placement of reflectors thereon. Such designation and definition of location may be by reference to a map or plan filed with or attached to the petition or license.

Duration of Licenses and permits

RSA 231:161, II provides that permits last only for a maximum of one year and can be extended for additional terms of no more than one year at a time. This is not to say, however, that the application process must be repeated every year. RSA 231:161 distinguishes between "permits" and "licenses." A license is not subject to the one-year limit. There may be instances where nothing but a permit is called for (for example, a temporary line to provide power to a traveling circus). Thus, a license is the more common method of granting permission to place utility structures in the rights of way. The municipality does not need to limit license duration in order to exercise more control over utility structures since a license does not convey any vested rights. See Effect of License: No Vested Rights, this Chapter.

Decision to Issue License

RSA 231:161 requires the license to be granted "if the public good requires." In *Parker-Young Co. v. State*, 83 N.H. 551 (1929), the select board of Woodstock had refused to grant licenses to one electric company on the ground that another company would provide better service. The Court ruled that the select board had no power to weigh service and competition issues but could only make sure that the poles would not interfere with other valid uses of the highway.

This requirement for the governing body to consider only highway use, safety, and maintenance issues and not the business, service, or competitive posture of the applicant is even more vital in the telecommunications field because of the federal Telecommunications Act of 1996. Under section 253 of the Act, local authority over the town's right of way is preserved, but only if administered on a "competitively neutral basis" without discriminating among companies. Thus, under federal law, as a general proposition, a municipality may not allow one telecommunications provider to enter the right of way while prohibiting another. Be sure to check the most recent Federal Communications Commission regulations regarding local licensing, as they have continued to evolve over the past few years.

Recording of Decision

Under RSA 231:164, the application, plus the select board's decision, is combined into a "return," which must be recorded with the town clerk within six months of the application. Note the similarity of this procedure to the "return" of a highway layout described in Chapter 2.

Transfers and Replacements

Licenses may be transferred by a utility without any action by the town. The assignment must be recorded with the town clerk. RSA 231:170. In addition, a license holder has authority to renew and replace the lines "as occasion requires in approximately the location originally designated therefore." RSA 231:171. Again, no action on the part of the town is necessary except for removal as described below.

Appeals

Any person whose interests are affected by the decision on a license application or who is dissatisfied with it may appeal to the superior court within 60 days after the recording of the return described above. The case proceeds the same way as an appeal of a highway layout. RSA 231:166.

Effect of License: No Vested Rights

Although a license under RSA 231:164 has the effect of allowing the lines and structures to be erected in the highway (RSA 231:161, VI), the legal position of the owner is no better than a tenant-at-sufferance. First, the owner acquires neither property rights nor contract rights with respect to the lines. RSA 231:174 emphasizes that the presence of these lines or structures in a highway does not "create an easement or raise any presumption of a grant thereof." Also, RSA 231:163 provides that the select board "after notice to any such licensee and hearing, may from time to time revoke or change the terms and conditions of any such license, whenever the public good requires."

Order to Remove or Change Location

RSA 231:177 allows the highway agent to order any line to be removed to a different location upon 10 days' notice in writing delivered to an agent of the utility. RSA 231:179 describes what the notice should contain and how to record it. If the poles are not removed within the allowed time, the town can perform the work itself at the expense of the owner. RSA 231:181. It is well settled, even under this state's common law, that in the absence of express provisions to the contrary, utilities are required to relocate their facilities at their own expense whenever that relocation becomes necessary for public health, safety, or convenience. *Opinion of the Justices*, 101 N.H. 527 (1957); *Manchester Gas Co. v. Griffin Construction Co*., 119 N.H. 179 (1979); *Colebrook Water Co. v. Commissioner of Department of Public Works & Highways*, 114 N.H. 392 (1974).

Temporary Removal

Under RSA 231:182, a town can order the temporary displacement, removal or severing of any wire, pole or structure whenever it becomes necessary "for any lawful purpose." The person desiring the temporary removal must first request that the utility do it. If the utility does not comply within 24 hours, the person may petition the select board for an order. The select board is required to hold a hearing within six days, giving the utility at least three days' notice. The select board must then decide whether to issue an order, the length of time within which it must be complied with, and whether the costs of the temporary removal will be paid by the utility or by the petitioner.

ENFORCEMENT AND LIABILITY

Enforcement Powers

The statutory authority of municipalities to order utilities to move upon 10 days' written notice does not include a penalty provision for failure to do so. While RSA 231:181 allows the town to take action at the expense of the utility owner, there is no mechanism to collect these costs short of a lawsuit. The only penalty provision in the entire subdivision is one favoring a utility—making it a misdemeanor for anybody to maliciously injure gas or water pipes. RSA 231:189. There is no penalty for installing lines or poles without a license. In fact, RSA 231:162 seems to suggest that the only remedy a town may pursue in response to an un-licensed line is to "confirm" its location by issuing a license. While RSA 231:173 provides that a utility must remove any unlicensed structure "upon demand," it seems that the only way to enforce the statute is by way of a lawsuit in superior court. Thus, an order that should be obeyed within 10 days could take years to enforce.

Utility Liability to the Public

One way in which the town is protected is with respect to liability. Neither the municipality nor its employees are liable for any injury that may result from the location, construction, or maintenance of licensed lines or structures. RSA 231:168. The utility is also required to indemnify the town for any damages occasioned by the presence of utility structures in the rights of way. RSA 231:175. Under RSA 231:176, anybody injured by poles or other utility structures may sue the owner thereof "if such injury has been caused by the location of the object so as to interfere with safe, free and convenient use of the highway, or by the negligent construction, operation or maintenance of such object." If the line or structure is unlicensed, the injured person enjoys a presumption that the line or structure was negligently installed, which the utility then has the burden to overcome. Case law indicates that the company has a duty to protect highway users when choosing the location and installation of lines and structures. *Bourget v. Public Service Company*, 98 N.H. 237 (1953).

Despite the liability protections given to towns by these laws, it seems wise to require the utility itself to draw up all siting plans in the first instance, with the town mandating changes only when there is an inconsistency with some clearly drawn municipal standard. That way, the utilities are in fact exercising the responsibility that the law says they have.

UTILITY VIOLATIONS OF LANDOWNER RIGHTS: TREES

Anybody whose "estate" (real estate) is damaged by the construction of utility lines in a highway can apply to the selectmen for an assessment of damages. RSA 231:167. The procedure for assessment of damages is the same as that for the laying out of highways. See Chapter 2. This statute seems to conflict with RSA 231:168, which provides, in pertinent part, "In no event shall any town or city…be under liability by reason of…damages sustained…to any property occasioned by or resulting from the location, construction, or maintenance of any pole, structure, conduit, cable, wire, or other apparatus in any highway." Since the purpose of the statute is to ultimately place liability with the utility, *Gorman v. New Engl. T&T*, 103 N.H. 337 (1961), presumably the statutes should be interpreted to require the utility to indemnify the town for damage to adjacent real estate caused by the construction of utility structures.

Trees: Owner Consent Required

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. For non-emergency cutting, pruning, or removal of trees on a landowner's property, licensees must provide the owner with written notice at least 45 days in advance. Notice shall, at the option of the licensee, be given in person, or sent separately by ordinary mail, and not included in or as part of a utility bill or other communications, to owners of affected land using the name and address that appears on municipal tax records for the property or sent separately by e-mail

(if the owner has established regular e-mail communication with the utility). The notice must provide the name and contact information of a representative of the utility who may be contacted to schedule personal consultation regarding the activities. If the owner fails to request such consultation within 45 days, they are presumed to consent.

If an owner refuses to consent, the select board, upon petition, after notice to the owner and licensee, and a hearing, "shall determine whether the cutting pruning or removal is necessary and if determined to be necessary, assess the damages that will be occasioned to the owner thereby." RSA 231:172, II. In the case of scenic roads, the provisions of RSA 231:157 and :158 must be followed as well (planning board consent, plus any additional local provisions). *See* Chapter 5.

In addition, if the owner or the owner's predecessor in interest has granted the utility an easement which provides legal authority for the utility to remove, cut, prune, or trim trees or vegetation on the owner's land, no notice is required under RSA 231:172. RSA 231:172, IV.

If a utility cuts the tree or "mutilates" it without landowner or select board permission, the owner has the right to damages under the common law. In *Darling v. Newport Electric Light Co.*, 74 N.H. 515 (1908), the utility argued that a license to put poles in the highway (issued under the predecessor to RSA 231:161) gave it the right to cut limbs that extended over the right of way. But the Court held that the utility was required to obtain the owner's permission. In response to the argument that no damages were due, the Court wrote:

> The defendant's argument is based on the erroneous assumption that the plaintiff's rights in his trees were created by this statute.…[But h]is rights existed at common law, and the statute prevents their invasion and limits the manner in which they may be appropriated for certain public uses.…A failure to comply with [the statute] made the defendant's acts unlawful.

UTILITY LINES ON CLASS VI HIGHWAYS

The utility licensing statutes also apply to Class VI highways. The case of *King v. Town of Lyme*, 126 N.H. 279 (1985) confirmed that a Class VI highway is a full public highway for all purposes except maintenance, including the select board's authority to authorize poles and wires.

Although there is no case law on point, it could be argued that the phrase "if the public good requires" in RSA 231:161 may be applied differently relative to Class VI highways, depending upon the type of policy the select board has adopted under RSA 674:41 for building on Class VI highways. *See* Chapter 8. For example, if the policy prohibited building on a particular Class VI road, the select board may be justified in denying any new utility licenses that would be inconsistent with that policy.

Special Provisions for Water or Gas Lines

RSAs 231:183 through :189, governing water and gas lines, create a similar statutory framework as that described above. There are, however, two main differences:

- There is no explicit authority for a town to issue orders to remove or relocate water and gas lines at owner expense. But there are cases that indicate that owners would be responsible in the same manner as for poles and wires. *See, Opinion of the Justices*, 101 N.H. 527 (1957), and *Manchester Gas Co. v. Griffin Construction Co.*, 119 N.H. 179 (1979).
- Unlike in the case of poles and wires, select board can, in the case of gas or water lines, actually grant an easement. RSA 231:187. The procedure is the same as for a highway layout petition

discussed in Chapter 2. There is no case law that illustrates what such an easement would convey, but it would appear to convey greater rights than a mere license, which, by statute, conveys no vested rights at all. RSA 231:174. The question becomes: What would happen if the town, after granting such an easement, had a genuine need for the gas or water line to be relocated or reconfigured? The town might very well be required to pay damages since the holder of the easement had acquired greater rights than a mere license. Thus, local governing bodies should consider very seriously whether they want to grant such easements without including provisions that address the possibility of relocation or other types of work.

Highway Discontinuance and Utility Lines

Under RSA 231:46, whenever a local highway is completely discontinued, all existing utility easements, permits, and licenses established pursuant to RSA 231:159 through :182 shall be "presumed to be reserved and shall remain in effect as an encumbrance upon the underlying land for so long as they remain in active use" unless the easements, permits, and licenses were included in the vote to discontinue. Even if they were not included in the original vote to discontinue, the municipality could subsequently vote to discontinue such easements, permits, and licenses.

Line Repairs: Authorization and Regulation

Utility structures often need repair, but repair work can block or endanger vehicular and pedestrian traffic. Such activity can be regulated. While the utility licensing laws themselves are silent on this issue, the governing body's authority to regulate highways is quite broad under RSA 41:11 and RSA 47:17. *See* Chapter 6. The utility line licensing procedure should address this issue in advance. Enact an ordinance specifying how emergency repairs will be carried out. Perhaps require approved written contingency plans or criteria for all repairs to be included as part of each license "return." Be sure to specify that any police details made necessary will be paid for by the utility.

Even in the absence of such regulations, RSA 236:6 and RSA 265:14 make it unlawful to place any "unauthorized sign, signal, marking or device which…attempts to direct the movement of traffic." These laws are just as binding on utility companies as anyone else. Therefore, any utility that conducts a repair operation that entails the use of roadblocks, traffic cones or "workers ahead" signs in a town highway, without select board permission, is in violation of the law.

New Lines on Existing Poles

In today's utility-competitive environment, the owner of existing lines may well want to lease space on the pole to another company, or even for a totally different type of service. Usually, towns want to encourage this to reduce clutter in the rights of way. The lessees of space on existing poles are probably not required to apply for a license. RSA 231:161, VI provides that a licensee may place upon such poles and structures the necessary and proper guys, cross-arms, fixtures, transformers, and other attachments and appurtenances which are required in the reasonable and proper operation of the business carried on by such licensee, together with as many wires and cables of proper size and description as such poles and structures are reasonably capable of supporting during their continuance in service.

In *Rye v. Public Service Company of New Hampshire*, 130 N.H. 365 (1988), the Court held that a town cannot interfere with the utility's rights under this statute, except for reasons relating to the "safe, free and convenient use for public travel of the highway." It is also risky to limit the leasing of space on existing, licensed poles since the Telecommunications Act of 1996 forbids local governments from interfering with the business activities of telecommunications providers. Limiting the installation

of additional wires may also be viewed as limiting competition, a practice also prohibited by the Telecommunications Act.

Moreover, RSA 231:170 allows a company that transfers "all or any interest" in its lines to another party to also transfer its license to use the highway, so long as the transfer is recorded with the town clerk. This statute, when read in conjunction with RSA 231:161, VI, probably allows the sublease of pole space for lines owned by another company without undue interference by the municipality.

Utility Compensation to the Town?

RSA 72:8-d and :8-e, along with RSA 75:1 , establishes a statutory formula for the valuation of utility property for local property tax purposes. The formula applies only to distribution assets, not to transmission assets classified as such by the Federal Energy Regulatory Commission (FERC), and not to electric generation facilities or FERC-regulated gas transmission pipeline facilities. It also does not apply to telephone, cable, or Internet service provider assets, or large-scale natural gas or propane gas storage or processing facilities.

For electric and gas utility assets, other than land and land rights, value is based on a weighted average of 70 percent of each asset's original cost and 30 percent of each asset's net book cost. For water utility assets, it is based on 25 percent of the original cost and 75 percent of the net book costs. Three percent of the value derived using this formula is added to account for the use of public rights of way and private easements.

Each company is required to report annually, by May 1, to both the municipality and the Department of Revenue Administration the original cost and net book value as of the preceding December 31 of each category of assets located within the municipality. The formula will be phased in over a five-year period. In the first year (the tax year beginning April 1, 2020) the value will be a weighted average of 80 percent of the locally assessed value for the 2018 tax year and 20 percent of the value determined using the new formula; in the second year the split will be 60-40, and so on until the formula is fully implemented.

Section 253 (c) of the federal Telecommunications Act of 1996 explicitly permits local governments to charge telecommunications providers a "fair and reasonable compensation" for the use of their rights of way, so long as the fees are collected on a competitively neutral and nondiscriminatory basis. There has been a great deal of litigation in the federal courts nationally over what can be considered "fair and reasonable compensation." Some courts have upheld a local government's ability to charge telecommunications providers a flat fee (for example, a percentage of revenue) for usage of the rights of way, while other courts have concluded that the fees must be directly related to the costs incurred by municipalities in regulating and maintaining the rights of way.

In New Hampshire, there is no statutory authorization for municipalities to collect any fees for such use. New Hampshire is not a home rule state; therefore, municipalities have only that authority granted to them by the state legislature. The only fee authorized in the utility line licensing laws is the town clerk's fee of $10 in RSA 231:165. This amount obviously does not come close to compensating the town for the numerous expenses associated with the utilities' use of the rights of way, such as administering the licensing statute, monitoring and tracking the installation of utility structures, and the degradation of the rights of way.

The town is not completely without the ability to protect the rights of way from damage done by utilities. RSA 236:9 requires anyone who wants to "disturb the shoulders, ditches, embankments or the surface improved for travel" of any town highway to get local official permission. RSA 236:10 authorizes the official giving permission to require a bond securing the repair of the highway, and RSA 236:11 requires the restoration of the highway to the satisfaction of the person giving permission. RSA 236:14 makes it a violation or misdemeanor for failure to comply. The disadvantage of these statutes is that they do not

provide a way to compensate the town for the cumulative effects of continuous digging and patching that shorten the lifespan of highways.

However, in, *Liberty Utilities Corp./Energy North v. City of Concord and Liberty Utilities/Energy North v. City of Manchester*, 2017 N.H. LEXIS 141, the NH Supreme Court ruled that road excavation fees constituted valid and reasonable municipal fees. Both Concord and Manchester adopted ordinances that require the payment of fees to obtain a permit to excavate public roads. Both ordinances require a fee of $5.00 per square foot of excavation on paved roads, plus enhanced fees for excavation occurring on roads that have been paved or otherwise upgraded within the last five years. As a utility company operating in both cities, Liberty Utilities was required to pay these fees to open roads and perform work on its utility lines. Liberty Utilities objected to these fees, arguing both that the cities were preempted by state law and that the fees constituted illegal taxes.

First, the Court held that the regulation imposed valid fees. The Court analyzed the fees under the "rational basis test," which requires only that municipal regulation be "rationally related to a legitimate government interest" to be valid. Under this test, municipal legislation is presumed valid unless the objector can establish otherwise. The Court agreed with the cities that the excavation fees were rationally related to the government interest of protecting city roads, based on studies that show excavation and patching of roads leads to accelerated road degradation and diminished road life expectancy.

Second, the Court held that the $5.00 per square foot fee was reasonable and did not constitute illegal taxation. RSA 41:9-a authorizes municipalities to impose fees in relation to the issuance of any license or permit which is part of a regulatory program established by the municipality. However, these fees cannot exceed an amount reasonably calculated to cover the enforcement costs. RSA 41:9-a, III. Fees that are grossly disproportionate to the actual costs associated with implementation of municipal regulation constitute a tax, and, therefore, the excess revenue is an unlawful tax unless is survives constitutional scrutiny.

Finally, the Court also held the enhanced fees for excavation of newly-constructed or upgraded roads was valid, overturning the trial court's decision. The trial court had determined, based on testimony from city officials, that the enhanced fees were established to punish and deter utilities from opening roads. The New Hampshire Supreme Court stated that even if motive in establishing a fee was material to the analysis, deterrence is a valid regulatory purpose. Based on the studies and evidence produced to support the manner in which the enhanced fees were calculated, the Court also held that these fees were reasonable, and not unlawful taxes.

Air Rights

RSA Chapter 48-B authorizes a municipality, after a vote by its legislative body, to lease air rights over streets, public parking facilities, and other land and waters owned by the municipality. The statute governs the erection of buildings over such property (not the right to fly aircraft since that activity is governed by federal law). The construction of a building subject to such lease is fully subject to the building, fire, health and zoning ordinances of the municipality. Presumably, the project would also be subject to site plan review regulations, although not specifically addressed by the statute. All such buildings are taxable as if the owner thereof owned the land outright.

Hawker and Peddler Use of Right of Way

RSA 31:102-a allows the governing body of a town or city to adopt an ordinance requiring all "vendors, hawkers, peddlers, traders, farmers, merchants, or other persons who sell, offer to sell, or take orders for merchandise from temporary or transient sales locations" to get a local license. Such people may also need

a license from the state. RSA chapters 320 and 321. Any person who violates such an ordinance is guilty of a violation, and each day of the violation constitutes a separate offense.

CHAPTER FOURTEEN

SIDEWALKS, PARKING, AND STREETLIGHTS

SIDEWALKS

A sidewalk is a component part of a public highway (*Hall v. Manchester*, 40 N.H. 410 (1860); *Gossler v. Miller*, 107 N.H. 303 (1966)), and is thus subject to most of the general principles laid out in this book.

Regulation, Repair, and Liability

Sidewalks are explicitly included in the select board's authority to regulate highways under RSA 41:11. The duty to repair and maintain sidewalks rests with the highway agent under the direction of the local governing body. RSA 231:113. Sidewalks are specifically included under the "insufficiency" and liability laws, in the same manner as streets. RSA 231:90 through :92-a. The liability protections given to municipalities when "insufficiencies" are caused by bad weather may be strong enough to support a policy of not removing snow at all from certain sidewalks as long as this discretionary decision is specified in the municipality's written bad weather maintenance policy. However, as explained in Chapter 6, there is an argument that the Americans with Disabilities Act requires municipalities to perform some reasonable snow and ice removal. It is not yet clear what, exactly, would be considered "reasonable."

Most sidewalks along older roads likely arose in the same way that the highway did—through prescription (described in Chapter 2). If a sidewalk is a component part of a highway, then there is a presumption that a sidewalk along a public highway is also public. Often, there will be no documentation of a sidewalk's status unless it was created as part of a modern subdivision. Information about the status of sidewalks, when available, should be collected and maintained in the road file for the highway it abuts. The municipality should consult the road files if there is uncertainty about the status of a sidewalk before reconstructing or renovating it. However, on a practical level, an abutter who opposes the municipality's actions will be required to produce evidence that the sidewalk is purely private property to prevail in an action against the municipality.

Abutter Assessments for Sidewalks

Abutting owners cannot be held responsible for the maintenance of sidewalks—either financially or by requiring the abutter to work on the sidewalk. *See* RSA 231:113; *State v. Jackman*, 69 N.H. 318 (1898); and Chapter 1. Importantly, while RSA 47:17, VII gives cities (and, by extension through RSA 41:11, town select boards) the authority "to compel persons to keep the snow, ice, and dirt from the sidewalks in front of the premises owned or occupied by them," the New Hampshire Supreme Court found an ordinance under this statute unconstitutional more than 100 years ago. *State v. Jackman*, 69 N.H. 318 (1898). Why the statute has never been amended to remove that portion is a mystery. On the other hand, abutters (at least in cities) can be held financially responsible for the construction of sidewalks. RSA 231:111 allows the mayor and aldermen of cities, upon petition, to construct sidewalks and to assess the abutting owners for up to half of the construction costs. RSA 231:112. The statute does not include details about who may petition or how the petition process should work, but it does require the assessments to be proportional to special benefits received. See Chapter 7 for further discussion of the "rational nexus" test. The assessment

is payable in one year, or payments can be prorated over a period of up to 10 years, at the discretion of the city. The assessment will create a lien on the property for one year after it is made, and the property can be sold for nonpayment as in the regular property tax collection process. Dissatisfied abutters can appeal to the superior court in the same manner as for highway layout appeals.

It is not clear that towns have the same authority to assess abutters for the construction of sidewalks, because RSA 231:111 and :112 refer only to the mayor and aldermen. However, the language in RSA 231:113, dealing with repair and maintenance of sidewalks, includes specific reference to both towns and cities. This may imply that RSA 231:111 through :113 (including the special assessment authority) applies to towns as well as cities, but town officials should discuss this with their regular municipal attorney before taking such action.

In commercial districts, both towns and cities can charge assessments for the costs of sidewalks and other pedestrian-related improvements through the creation of a central business service district. RSA 31:120 through :125. Also, see Chapter 12 for further discussion of central business service districts.

Parking Regulations

The parking of vehicles is considered to be part of the public's right to viatic use of a highway. *Opinion of the Justices*, 94 N.H. 501 (1941). As long as all state and local laws are being obeyed, even abutting landowners who may own the right-of-soil underneath the highway to the centerline cannot prevent the parking of vehicles. The authority to regulate parking on public streets and highways is part of the governing body's regulatory authority. See Chapter 6 for the procedures for enacting such regulations. Just as with any other regulations, parking restrictions will not be enforceable unless they are properly posted. RSA 236:3. Many parking regulations are covered under state law contained in RSA 265:68 through :74. The following is only a summary of the requirements of RSA 265:69 and :71. Note that RSA 265:70 specifies that the provisions of RSA 265:69 shall not supersede the provisions of any local ordinance that has been adopted to regulate parking in restricted areas in the compact part of any city or town.

Offenses Enforceable Without Signs

- Stopping, parking, or leaving a standing vehicle on the pavement or traveled way, or without leaving an unobstructed way for other vehicles (with exceptions for disabled vehicles).
- Parking, stopping, or standing (hereafter shortened to "parking") on the roadway side of any other stopped or parked vehicle.
- Parking on a sidewalk, within an intersection, or on a crosswalk.
- Parking on any bridge or overpass or in any tunnel.
- Parking on any railroad tracks.
- Parking alongside or opposite street excavations or obstructions when doing so would obstruct traffic.
- Parking on any limited access highway or in the median of a divided highway.
- Parking in front of a private driveway, within 15 feet of a fire hydrant, or within 20 feet of a crosswalk.
- Parking more than 12 inches from the curb, or in any manner other than parallel to the curb or edge of the road (except where lines expressly permit angle or perpendicular parking).

- Parking within 20 feet of a fire station driveway.
- Parking within 30 feet of a traffic signal or stop sign.

Offenses Requiring Local Ordinance, Posted Signs or Markings

- Parking within a safety zone or within 30 feet of the ends of a safety zone.
- Parking without special plate in spaces reserved for persons with disabilities.
- Parking on the side of a street opposite the entrance to any fire station within 75 feet of a fire station entrance, if posted.
- Parking any place where official signs prohibit parking.

Parking Meters

Towns and cities have authority to install parking meters upon a vote of the legislative body. RSA 231:130. The constitutionality of parking meters was upheld in *Opinion of the Justices*, 94 N.H. 501 (1941), even when the amount charged is significantly more than would cover the cost of installing and maintaining meters. The Court also upheld the authority to vary the length of time that parking is allowed in any given space or to charge higher fees in order to cause a greater turnover in certain parking spaces. Parking meter revenue must be used to finance the purchase, maintenance, and policing of the meters; to maintain and improve highways; or to acquire, construct, improve, maintain, and manage public parking areas and public transportation systems. RSA 231:131.

Special Enforcement Mechanisms for Parking

In order for parking enforcement to work well, it must be easy to administer. However, the imposition of any fine requires the same level of due process that is afforded to criminal defendants, including a "beyond a reasonable doubt" burden of proof. For this reason, the courts have held that a municipality cannot collect parking fines simply by going to small claims court. *Portsmouth v. Karosis*, 126 N.H. 717 (1985). The state legislature has responded to this problem with several statutes easing the process of parking enforcement:

Denial of Car Registrations. The legislative body of a city or town may adopt the provisions of RSA 231:130-a, which, when combined with RSA 261:148 (which requires the registration of motor vehicles with the city or town where the owner resides), can prevent anyone with outstanding parking violations from registering his/her car in any other town or city that has adopted the same statute. The statute requires the municipality where the fine is paid and the violation is no longer outstanding to notify all the other municipalities in the system within 10 days. Computerized record keeping makes this feasible and allows for notice to be given quickly.

Presumption of Responsibility. While most traffic tickets are issued to an identifiable driver, parking tickets are most frequently simply left on the vehicle. This might cause enforcement problems because the officer could not prove the identity of the driver. The state legislature dealt with this problem by creating a presumption that the registered owner of a vehicle is responsible for all parking violations attributable to that vehicle. RSA 231:132-a, I. If an owner had no ability to control the car (because it was stolen, for example), the owner can raise that fact as an affirmative defense in court.

Enhanced Penalty. The law also allows a municipality to adopt an ordinance calling for enhanced penalties for someone who does not pay the parking ticket within a stated time period. RSA 231:132-a,

II, III, and IV. The defendant still has the right to contest the ticket, but if he or she is found guilty, the enhanced penalty will apply.

Towing Vehicles that Block Access. RSA 31:102 authorizes a police officer or select board to employ a wrecker to tow away any vehicle that is blocking the entrance to a business or other driveway. The owner or operator of the wrecker acquires a lien on the vehicle for his or her costs. Cities can use this authority as well through RSA 44:2.

Immobilization. RSA 47:17, XVIII authorizes cities (and, through RSA 41:11, towns) to adopt ordinances providing for the immobilization or towing of any vehicle for the nonpayment of parking fines. While this statute provides that the recovery of fines can be made by civil process, there remain questions about this process in light of the *Portsmouth v. Karosis* case (above). The municipal attorney should be consulted before utilization of this statute.

Public Parking Facilities

Towns and cities have long been able to acquire land and establish parking lots on it. *Rogers v. Concord*, 104 N.H. 47 (1962). However, since 1969 there has been a special procedure for the establishment of public parking facilities, allowing the municipality to charge part of its costs to landowners receiving special benefits—usually commercial businesses whose customers and clients would park in the facilities. RSA 231:114 through :129.

Before 1993, this statute was limited to cities with populations of 50,000 or more, but it is now available to be adopted by any town or city. The constitutionality of the statute was upheld in *Opinion of the Justices*, 109 N.H. 396 (1969). Towns and cities adopting the statute must make certain findings of fact and develop a parking needs plan before beginning construction. The financing plan is also critical: at least 50 percent of the construction and operating expenses must be raised by special assessments on the benefited owners, with no more than 25 percent coming from motor vehicle fees under RSA 261:154, and no more than 25 percent from general tax revenue. Eminent domain can be used to acquire the facility. Read the statute carefully for details.

STREETLIGHTS

Under the old version of RSA 31:4, which contained a list of purposes for which municipalities were authorized to appropriate money, paragraph IV explicitly allowed appropriations for the lighting of streets. This section was amended in 1983 to provide a much more general authority to appropriate money for public purposes, which undoubtedly continues to authorize streetlight expenditures.

RSA 236:55 prohibits any person from positioning any light, either on or off the highway, in such a way "as to blind or dazzle the vision of travelers" on the highway. Violators are entitled to a written notice, giving them a 30-day opportunity to correct the problem—otherwise individuals are guilty of a violation and other entities can be guilty of a misdemeanor. The lighting of private property, particularly business property, should be addressed either in a zoning ordinance or as an element of site plan review. In that way, standards can be tailored to the municipality's needs and can be made more measurable and definite than the vague standard of this statute. Local lighting regulations that are more stringent than this statute have been upheld, even when their sole purpose was aesthetics. *Asselin v. Conway*, 137 N.H. 368 (1993).

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