



**VIRTUAL**

**WORKSHOPS**



# *A Virtual -A Hard Road to Travel May 6, 2021*

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# Today's Presenters



*Stephen Buckley*  
*Legal Services Counsel*



*Natch Greyes*  
*Municipal Services Counsel*



# Agenda

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



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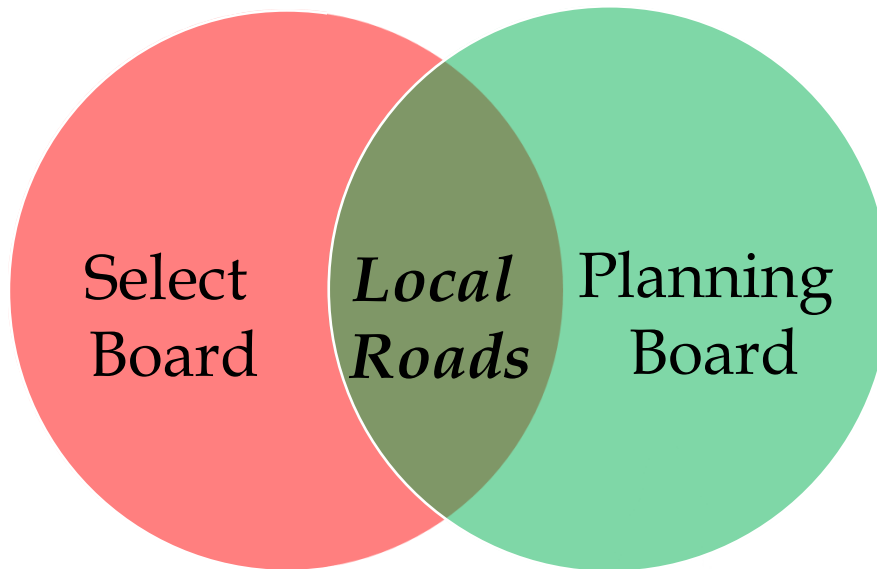
# Formation, Classification, & Maintenance



# What's a Public Highway?

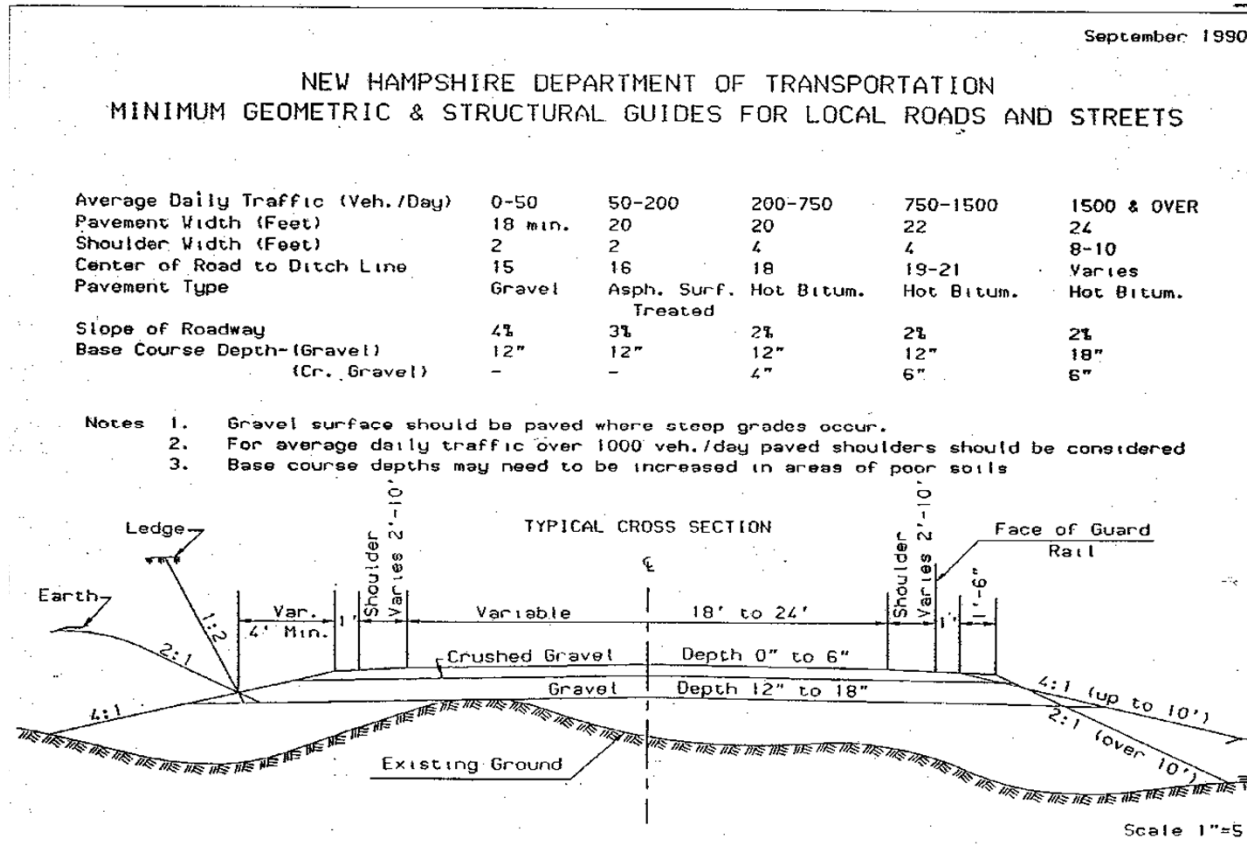
- Highway = Road
- Easement for viatic use
- **Public** use
- RSA 229:1 – Not really a “definition”
- Ownership separate from easement





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

# NHDOT Geometric Design Standards For Local Roads



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

# How are highways created? RSA 229:1





# Dedication vs. Acceptance



## Dedication

- Case law/RSA 231:51 (*Duchesnaye*)
- Clear & unequivocal intent
- Filing & recording subdivision plan
- May be implied

## Acceptance

- Vote of legislative body
- RSA 674:40: planning board, then town meeting
- May be implied (*Hersh v. Plonski*)
- RSA 674:40-a: delegated acceptance to select board

# Common Issues



Always get a deed, whether fee or easement



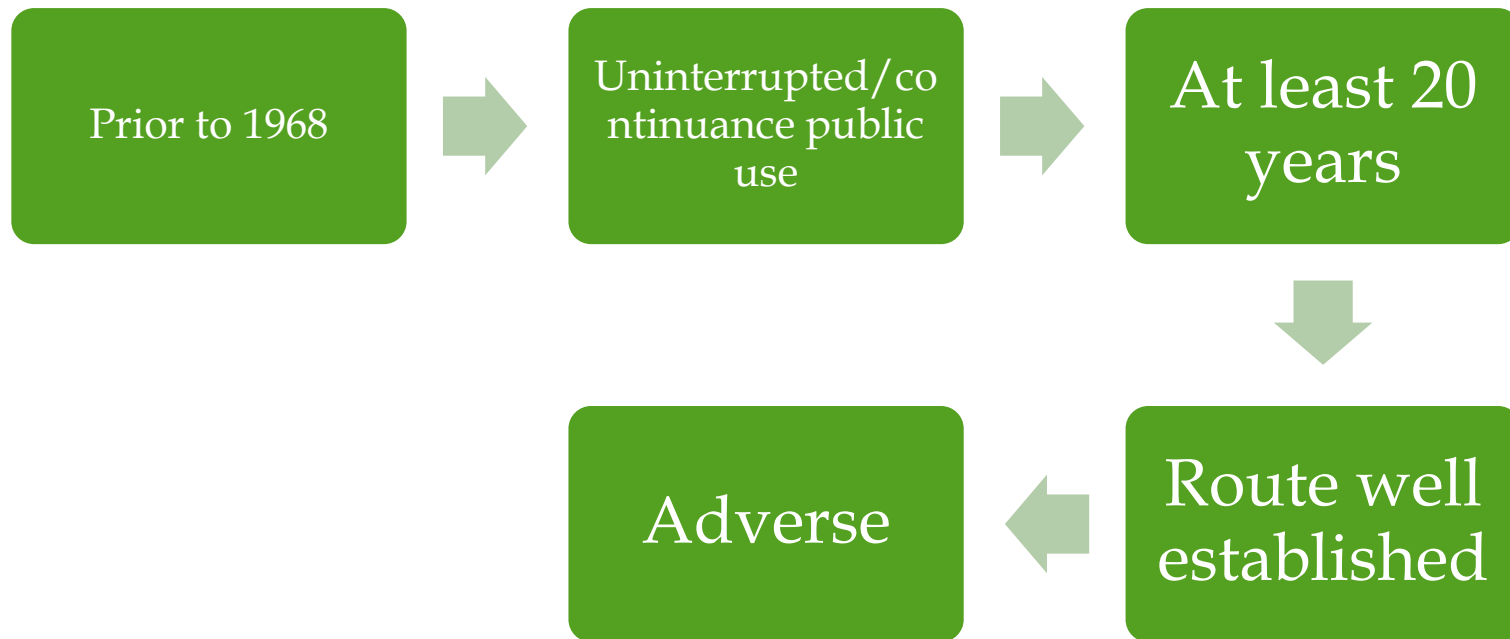
What is the width of the road?



Reestablish boundary lines if unclear



# Prescription



# Statutory Layout RSA 231:8

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



# Conditional Layout / Betterment Assessments

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



# State Roads

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

# Municipal Roads

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

# The Default Maintenance Rule

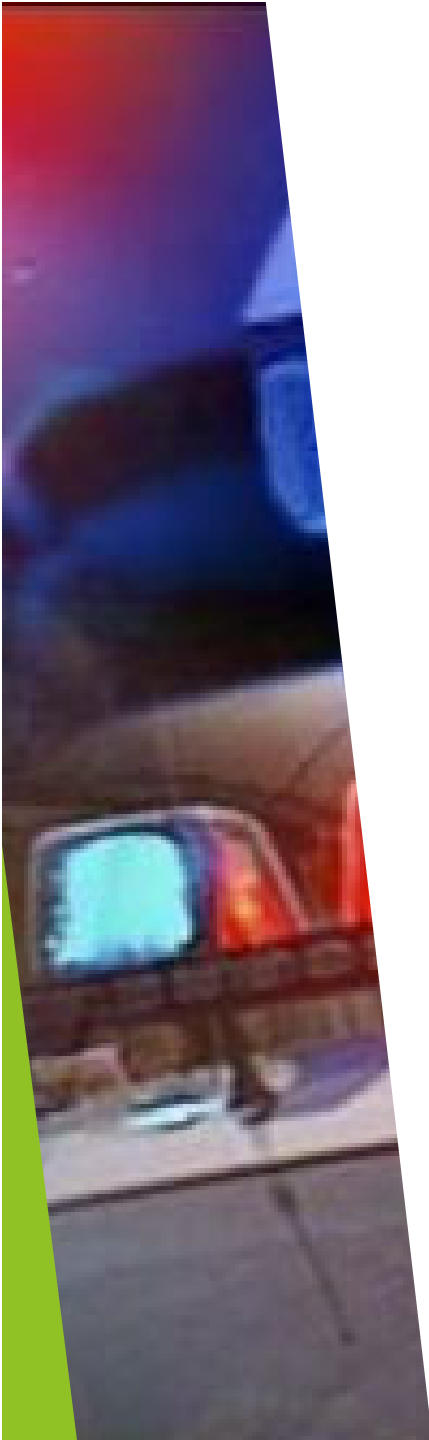
RSA 231:59 authorizes municipalities  
to spend money on repairing:

Class IV

Class V

No provision to authorize  
municipalities to repair Class VI





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

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



# Creating Class VI Roads



Layout pursuant to RSA 231:21



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



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



# Regulating Class VI Roads

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



# Limiting Access to Certain Persons

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



# Discontinuance



## Complete Discontinuance

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

## Subject to Gates and Bars

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

## Effect of Discontinuance

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



# Private Roads

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



# RSA 231:81-a: Private Roads & Maintenance

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

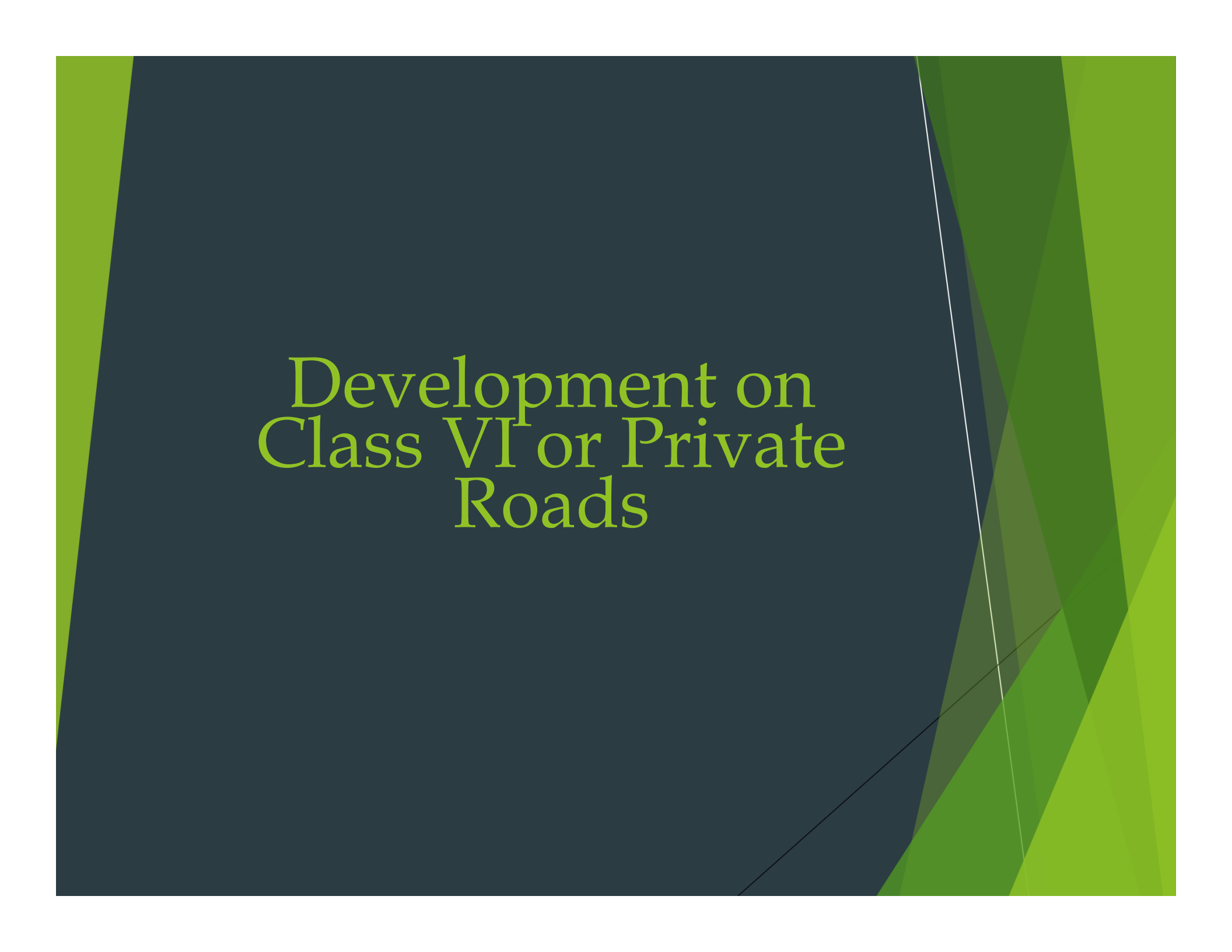




# RSA 231:81-a: Solves Municipal Headaches

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



The background features a dark blue-grey area on the left and a green area on the right, separated by a diagonal line. The green area contains several overlapping, semi-transparent geometric shapes in various shades of green, creating a layered effect.

# Development on Class VI or Private Roads

# RSA 674:41 is State Zoning

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

# What Does RSA 674:41 Do?

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

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



# (Notes About Class V Highways)

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



# Why Does RSA 674:41 Limit Building?



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

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



# Municipalities Not Obligated to Allow Construction

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

# But what about “Grandfathering?”

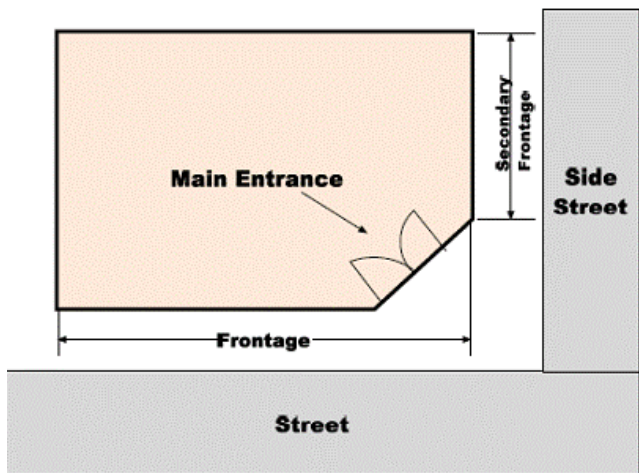
- ▶ "Grandfathered" means a nonconforming use that was lawfully established before the passage of the provision in the zoning ordinance that now does not permit that use in that particular place.
  - ▶ E.g. building on a property with frontage on a Class VI road.
- ▶ The only question is whether the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



# RSA 674:41 Applies to Building Permits in General

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

# How Much Frontage?



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

# Minimal Steps to Allow Development?

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

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

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



## Municipalities Need Not Adopt Town- wide Policies

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



## What to Consider When Considering Whether to Allow Development?



Condition of the road



Width and grade of the road



Drainage infrastructure



Extent of demands on public services



Likelihood of future lay out /  
connection to existing road network

# ROW Cannot be Only Access to Property

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

# What's the Waiver?

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

# Common Terms in a Waiver

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

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

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

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



## What if the Application is Denied?

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

# What Must the Applicant Demonstrate?

Applicant must demonstrate:

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

What does “practical difficulty or unnecessary hardship” mean?

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




# What Does It Look Like When An Applicant Fails?

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

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

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

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



# Weight Limits, Timber Hauling Operations & OHRV's

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

No requirement that the town have a weight limit ordinance.

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

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

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

# Weight Limit “Seasonal or Otherwise”

- ▶ A road weight limit (whether year-round or seasonal), should be supported with testimony or evidence from the road agent or highway engineer.
- ▶ 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.
- ▶ Municipalities can consider public safety in addition to road damage when making a determination to impose a weight limit. *Brentwood Distribution LLC v. Town of Exeter*, No. 2014-0729 (N.H. July 7, 2016)



# Weight Limit Posting, Granting Exemptions

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

# Timber Hauling Operations and Driveway Permits

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



# Timber Hauling Operations and Bonding



A bond may be required to ensure any damage to the adjacent road is repaired due to operations over a temporary driveway, or due to an operation granted an exception to a weight limit due to difficulty or hardship.



The bond requirements must be equitably and reasonably applied to 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



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OHRV's



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

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

# Procedure to approve OHRV use on a designated road or a sidewalk

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



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# Liability & Regulation

# Liability

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



# General Duty of Care to Travelers

RSA 231:90 - :92

Correct Insufficiencies after Notice



# Inclement Weather Maintenance Policy:

*What's Your Plan?  
RSA 231:92-a*







Liability:  
Municipal  
Road Work

RSA 231:92

# Liability Protections

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



## Discretionary Function Immunity

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

## RSA 31:105: Indemnification of Municipal Officials

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



# Road Agents

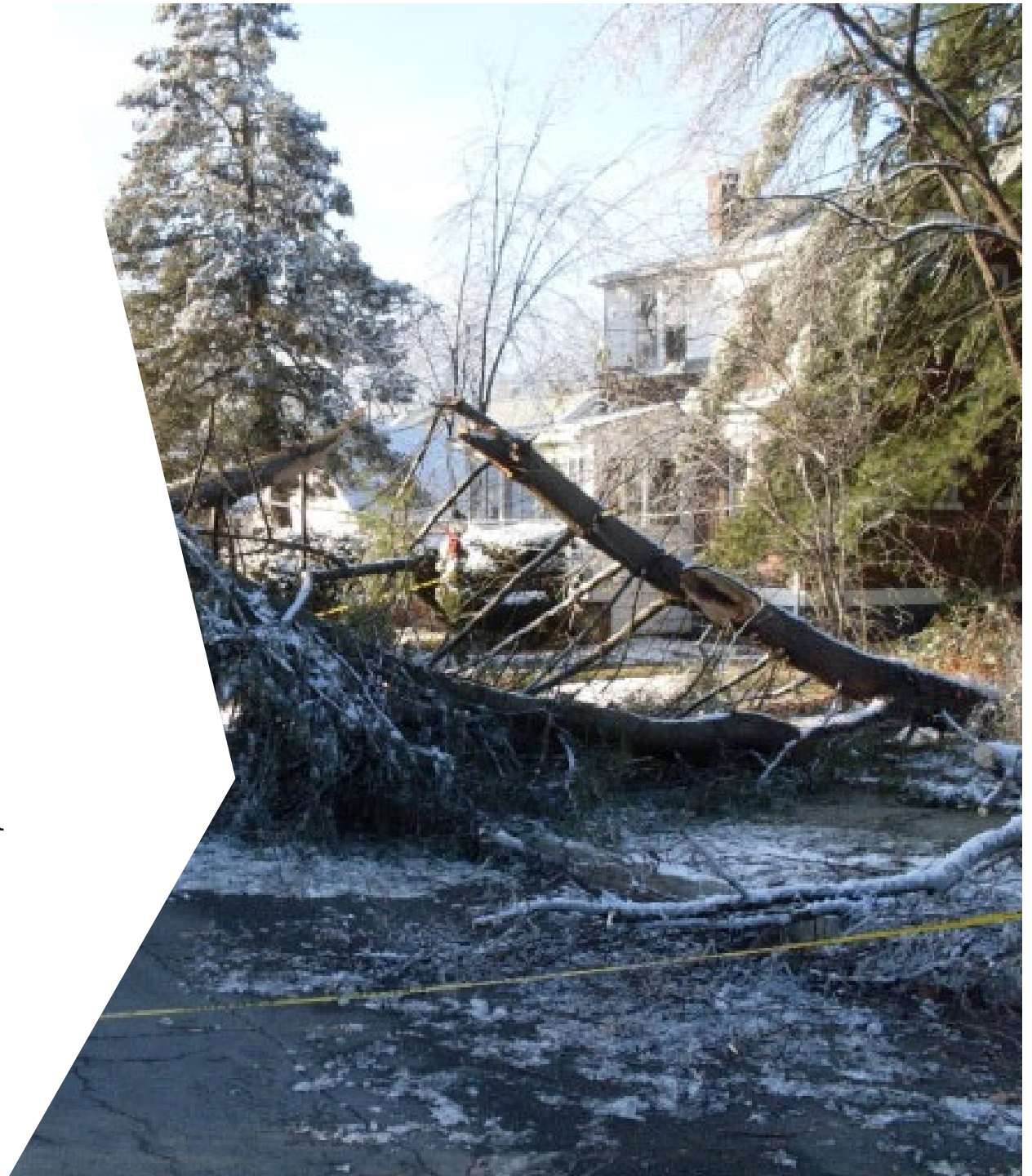
- ▶ The statutes are written to provide that either the town by default has an elected road agent, or, the town meeting has voted to have an appointed expert agent (who could be called “Superintendent of Public Works”). This is provided in [RSA 231:62](#) and [RSA 231:64](#).
- ▶ Elected Road Agents - elected every year, or every two years, or every three years (RSA 231:62, 62-a and 62-b).
- ▶ 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



*Tree falls on  
the road . . .*

Duty to cut and  
maintain RSA  
231:150

Hazardous Tree  
Declaration RSA  
231:145



What if the  
hazardous  
trees are along  
a scenic road?

RSA 231:158



# Drainage Easements

- Express
- Implied (Existing Roads)
- By Prescription





## Liability to Abutting Landowners

- ▶ Road Salt Contamination → RSA 231:92 won't protect!
- ▶ Liability for Trespass
- ▶ Damage to Grade: RSA 231:75 - :78
- ▶ Right to access highway



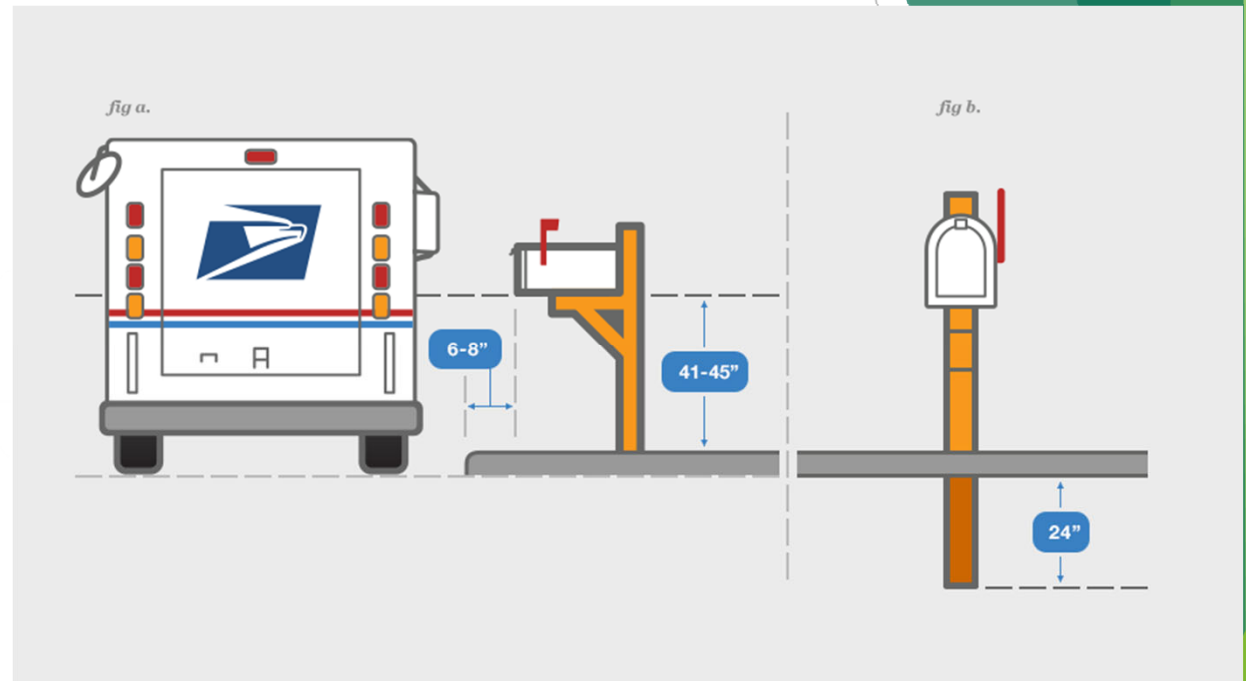
RSA 231:75:  
Damages from Grade  
or Drainage Change

- Give Notice of road work to be done to abutters
- Schedule hearing for opportunity to be heard
- Grant hearing upon request



# Mailboxes

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



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

# Driveways – RSA 236:13



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

# Liability for Damage to Town Roads

- ▶ Criminal Liability – RSA 236:38
- ▶ Civil Liability for Damage – RSA 236:39
- ▶ Restoration – RSA 236:11
- ▶ Obstructions – RSA 236:15
- ▶ Diverting Water – RSA 236:19



# Street Names & Numbers

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



# What About Obstruction by Snow?



- ▶ RSA 236:20 – Applies to State highways only!
- ▶ Towns must enact local regulations to prevent obstruction by snow.

# Street Signs



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





*For attending our  
Workshop!*

### **NHMA'S MISSION**

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