A Hard Road to Travel

New Hampshire Law of Local Highways, Streets and Trails

Local Government Center
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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 has been rewritten and updated in this volume to reflect changes in statutes and additional case law since 1997 by the legal staff of the Local Government Center, including attorneys Cordell Johnston, Nolan Koon, Judy Silva, Susan Slack and former staff attorneys Gary Bernier and Jennifer Villeneuve. 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.

Susan Slack, Editor

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CHAPTER 1

What Is a Public Highway?

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, though not always, owned by abutting landowners. The earliest New Hampshire cases support this principle. Makepeace v. Worden, 1 N.H. 16 (1816); Town of 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. 661 (1994); Dumont v. Town of Wolfeboro, 137 N.H. 1 (1993); Nadeau v. Town of Durham, 129 N.H. 663 (1987).

A “public highway” is a very particular type of easement. The rights of the public versus the land-owners 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. 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.


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 (1885)). 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. Town of Gilmanton*, 101 N.H. 424 (1959), 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,” since these uses were not viatic and thus “not within the original purpose of the taking for which damages were paid.”

In a later case, though (*Papademas v. State*, 108 N.H. 456 (1967)), 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. At all other locations, their duty is merely to yield to oncoming vehicles, except in crosswalks, where walkers have priority.

**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. Those rights are no longer subject to the wishes of the underlying landowner, but such rights are subject to reasonable regulation by public authorities—by the town itself with respect to town roads.

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. The other key defining trait about highways that is vital to grasp is that they are for public use. 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. 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. 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). 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 similarly 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 will necessarily be measured back from that center line. Again, the language of a relevant deed may control. See Holebrook 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. 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. 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 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).

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. 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.”

In short, any claim of town title to rangeways is still up for debate. 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 and Such 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. Who has control over trees and shrubs, either growing naturally or planted there?

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.

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.

One old statute allows an owner to apply to the selectmen for a property tax abatement when he or she has planted and maintained roadside trees. RSA 76:19. An indication of how old this statute is is that such an abatement “shall not affect his...right to vote.” As recently as 1992 this opportunity for abatement was discussed by the Court and is presumably still viable. Barksdale v. Town of Epsom, 136 N.H. 511 (1992).

CAN ABUTTERS BE PREVENTED FROM CUTTING?

Modern municipalities often want to preserve roadside trees. Is this possible in light of the Morin case? 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 144 (originally enacted in 1901) gives a surer solution to preventing the cutting of trees within the right of way. First, the governing body or other citizens nominate a tree warden. Actual appointment is made by the director of the Division of Forests and Lands in the state Department of Resources and Economic Development.

Once appointed, a tree warden can plant (or supervise the planting of) trees in highway rights of way. 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), or even without agreement by serving a written notice on the owner and the town clerk. Consult the statute for details and follow it carefully. If an owner objects, he or she can appeal to the governing body for damages, or ultimately to 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 and a written record made of them, including the species, location and date of acquisition.

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.

After a tree has been planted or taken, and tagged, by the tree warden, nobody—private person or town worker—can cut the tree unless the tree warden grants permission. A hearing must be held, after notice posted in two public places and posted on the tree. The warden’s decision may be appealed to the governing body. The tree warden can, however, designate a “residential section” of town outside of which no pre-cutting hearing would be needed.

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. However, the owner usually must be notified. The public’s viatic use rights include the right to cut trees that, in the judgment of the governing body, interfere with public travel. In fact, RSA 231:150 requires such cutting “annually, and at other times when advisable.” RSA 231:145 gives towns a way to declare dead or diseased trees to be a public nuisance. But trees with a circumference of more than 15 inches at 4 feet off the ground (at breast-height, as it’s sometimes called) 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 owner can even appeal to the superior court within 30 days. RSA 231:146. Presumably this means the tree can’t be cut for 30 days, although the law doesn’t actually say that. The same notice and right to appeal is triggered if a tree of any size is declared a nuisance under RSA 231:145. Notice
can be omitted only if “the delay entailed by such notice would pose an imminent threat to safety or property.” 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 most owners seem blissfully ignorant of. But 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 argue against accepting a jury’s verdict on the reasonableness of a road plan over that of the governing body itself.

CUTTING BY UTILITIES

Public utility companies also have to follow certain procedures prior to cutting trees. For a utility, the law requires not only notice, but landowner permission. RSA 231:172. If the landowner denies permission the utility can appeal to the governing body, which can grant permission, but only after notice and hearing. See the statute for details.

ABUTTER LIABILITY FOR ROAD OR SIDEWALK HAZARDS

If a traveler is hurt on a highway—by a tree, say—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? At least one statute implies that owners may be liable, since they are explicitly relieved of that liability if the tree is declared a nuisance. RSA 231:146. Case law is a bit sparse. With private easements, an underlying owner has no affirmative duty to maintain the easement for benefit of the easement holder. Madow v. Chase, 94 N.H. 241 (1947).
Yet, the owner does have a duty not to obstruct the easement’s use. *Hatch v. Hillsgrove*, 83 N.H. 91 (1927). The same rule applies to highways. 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). It is still unclear how this doctrine applies to trees within the right of way. Hypothetically, it would depend on whether the tree grew “naturally” or was being tended and maintained by the owner (an “affirmative act”).

Municipal highway officials themselves should not heavily weigh 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 all damages and costs which the town shall be compelled to pay to any person injured by such obstruction, defect, insufficiency or want of repair.” 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 attribute to abutters a duty not to knowingly do anything to damage the road. But what about “natural” processes, like trees or beaver dams? Cases from other states hold that an owner has a duty to eliminate known tree dangers to adjoining land, even if the danger came about by “natural” growth (2 C.J.S. “Adjoining Landowners,” Sec. 51). But there are no reported New Hampshire cases.

Given the language of RSA 231:92, if the town has actual notice of a dangerous condition, 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. If they do they might find themselves liable for triple damages. RSA 539:1. 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 should apply to highways. Also, 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.” This implies the right to enter abutting land if the encumbrance can’t be removed otherwise. The road agent can even hold the thing hostage until the costs of removal are paid. In the alternative, the official can order the owner to remove the encumbrance, and if disobeyed, can complain to a justice of the peace. RSA 236:35 and 36.

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 the town 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, 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). Also, 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 statement of intent, Laws of 1983, 21:1.

• 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 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 town 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 will likely be liable. See Chapter 6.

The question remains, what is “properly placed”? Can municipalities regulate mailboxes? Well, yes and no. The United States Postal Service has not limited the extent to which towns can regulate their own highways. In fact, postal customers are explicitly required to obey any local regulations when erecting mailboxes. 39 CFR § 111.2(a); *Domestic Mail Manual*, § DO41.2.7. 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. Think of the municipality and the post office as two independent overlapping regulatory authorities. Hopefully 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). 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. This may not be a legal problem, but it could be a political problem. If the town wants to regulate mailbox placement, check with the postmaster to make sure owners are left with delivery options.
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.
How Are Local Highways Created?

A public highway is defined as an easement held in trust by government for the use of the public. 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 highway, and a strip covered with tall, majestic trees may still be a highway, though probably Class VI.

The ‘Definition’ of Highways

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

- 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 most 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 not often used today for the creation of new local roads and streets, but is 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.

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. Either one alone isn’t enough.
WHAT’S A ‘DEDICATION’?

Highway dedication isn’t described in the statutes. 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 any express act by the record owner, not just a leaseholder, 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).

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)), 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 this statute, 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.

Delegation Under RSA 674:40-a. If a road has received planning board approval as part of a recorded subdivision, site plan or street plat, the board of selectmen may vote to accept it as a town highway, but only if the town meeting has previously voted for a warrant article delegating this highway acceptance authority to the selectmen. If there has been no vote of delegation, or if the planning board
has never approved the road, or if the town has no planning board, then acceptance still takes a town meeting vote. The board of selectmen must hold a public hearing prior to exercising this delegated authority to accept a road.

**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), and *Beck v. Auburn*, 121 N.H. 996 (1981).

**Planning Board/Governing Body Consistency.** Attorneys Peter Loughlin, in his treatise, 16 N.H. Practice § 45.02, and H. Bernard Waugh, in the original edition of this book, 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 selectmen 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.
- 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 aren’t 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.

**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 only on paper. 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, 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, that 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 are sold fronting a paper street that never gets accepted, 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, nevertheless every back lot owner 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. 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.

ASSEMBLE A RECORD FOR EACH ROAD

The legislature ended the operation of the prescription theory in 1968. To prove the existence of a highway by prescription today, there must be evidence of public use beginning at the latest on January 1, 1948. As memories fade, it gets harder to gather this evidence. If it isn’t 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 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 *Leo Foundation v. State*, 117 N.H. 209 (1977), a case about 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. Of course, if the owner’s attempts to interrupt the use don’t occur until after the 20-year period, that’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. *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. Town of 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).

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. *Town of 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. Town of 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 (1981)); historic maps showing the road before or during the claimed period (Williams v. Babcock, 116 N.H. 819 (1976), and Mahoney v. Town of Canterbury, above); the existence of cellar holes for houses that seem to have had no other access (Williams v. Babcock above); and evidence of town maintenance during the period (Catalano v. Town of Windham, 133 N.H. 504 (1990)). Again, see the end of this chapter for a list of sources for highway information.

PRESRIPTION 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 likely that the legislature could not now 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. Town of Dunbarton, 118 N.H. 519 (1978). For details on the history of layout laws see Loughlin, 16 N.H. Practice, § 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 selectmen would often use layout—a process completely under the selectmen’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 selectmen, 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. Town of 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. *City of Nashua v. Gaukstern*, 117 N.H. 30 (1977).

**PETITION REQUIRED**

RSA 231:8 permits the selectmen to lay out a highway “upon petition.” *New London v. Davis*, 73 N.H. 72 (1904). The petition is filed with the board of selectmen. 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 selectmen can’t lay out a highway on their 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 selectmen, 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 § 53.06. RSA 231:12 does not bind the selectmen 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 selectmen’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 selectmen’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; and see *City of 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 *City of 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 to “tenants for life or years, remaindernen, 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. 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 only be omitted 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, but 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, maybe 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 procedures that also must be followed whenever the underlying owner has not agreed on (or waived) damages:

- The value of the land being taken must be determined by an impartial appraiser. RSA 498-A:4, I(a).
- Reasonable efforts to negotiate must be made. RSA 498-A:4, I(b).
- A written notice of offer must be made containing the elements listed in RSA 498-A:4, II(a). A list of all notices of offer must be made public. RSA 498-A:4, II(c).
- Service of the notice must be by certified mail with special provisions applying to minors or unknowns. RSA 498-A:4, III(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, III(b). If the offer is not accepted within 10 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 complying 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. City of Manchester*, 125 N.H. 547 (1983).

**FACTORS FOR GRANTING OR DENYING LAYOUT PETITION**

The selectmen’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, the three factors that require balancing are:

- 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.

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 selectmen not to layout 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. Town of 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 wasn’t required to take a betterment lien that might end up worthless.

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 selectmen 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 selectmen to make a layout conditional upon a person specially benefited paying the costs of construction and maintenance. 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. Most recently, in Rodgers Development Co. v. Town of 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 selectmen 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 selectmen’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 only entitled to nominal damages. *Wilkins v. Manchester*, 74 N.H. 275 (1907); and *Price v. Keene*, 122 N.H. 840 (1982).

When damages are due, RSA 498-A:4, I(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...” for which she 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 only by employees, 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 only about procedure, 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, 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 a reference to the statute. Taking fee title may create complications later if the highway is discontinued if 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 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. Selectmen 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. Town of 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**

The selectmen are 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 selectmen.) The process allows the selectmen 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 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).

**Creating Local Road Files:**

**Sources of Information**

This section is a shortened version of a 1996 Municipal Law Lecture given by Stephen T. Nix, Esq. 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., allowing these interested people to add their information to your official files, it won’t take long to collect enough information to start really paying off the effort. 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 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 aren’t 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.”
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 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 only in the following cities and towns:

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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, VII. Chapter 8 of this book provides a detailed look at Class VI roads. 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 land owners 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.

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 board of selectmen 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 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 nonmaintenance, 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 less well-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 selectmen. RSA 230:55. Within 60 days of getting this notice, the selectmen are 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 selectmen are also required to notify the commissioner in writing of their decision. If the selectmen decide that the road should be a town highway, or if the selectmen fail 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 selectmen find that an “occasion” does not exist, they 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 *Town of 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 *Discontinuance of State Highways*, above, the selectmen 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.”
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.

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. 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 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 *Davenport 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 *Davenport* 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, and trees have been allowed to grow in the right of way, has never been held to constitute a termination of the highway. *Thompson v. Major*, 58 N.H. 242 (1878). As the law stands today, the only legal consequence of nonuse and non-maintenance 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) takes a vote of the legislative body. RSA 231:43. In towns, that means a vote of town meeting upon an article properly inserted in the warrant of the meeting. Action by the selectmen is not sufficient to discontinue a highway. 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.

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.

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 selectmen 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.

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

When drafting a warrant article to discontinue a highway, it is best to use words like “discontinue completely” or “discontinue absolutely.” Never use words like “abandon,” “close,” “throw up” etc., because these words are not in the statute, and years from now there will be confusion over the intent of the warrant article. In fact, given the presumption against discontinuance, these other words are unlikely to achieve a complete discontinuance.

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 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. The right to use and possession returns to whoever 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).

*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 (1999).
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. 519 (1978), and cases cited therein.

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 somewhat of 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. In most other respects, however, the road remains a full public highway. King v. Lyme, 126 N.H. 279 (1985).

In Stevens v. Town of 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 order of notice of the pending action upon the town and owners of land abutting the road. 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.

In *Wolfe Investments, Inc. v. Town of Brookfield*, 129 N.H. 303 (1987), the Court suggested 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. City of 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

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. There is no New Hampshire Supreme Court case in which a local discontinuance decision itself has been overturned. 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).

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 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. Town of 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 Class VI, 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. But 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 5

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 road 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. Town of 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 three legal mechanisms under which a municipality can finance certain limited types of road improvements by charging only those property owners within an identified district. These three 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, major road reconstruction is not included in this authority.

- **Economic Development and Revitalization Districts.** RSA Chapter 162-K authorizes creation of districts where tax-increment financing is used to finance the costs of road 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 roads. This isn’t truly a town means of road financing, because once the village district is formed, it becomes a municipal entity separate from the town, with its own governing and legislative bodies.

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 few 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

Town, 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 road 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 selectmen 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 road 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.
- 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 IV 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 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 selectmen hold 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 previously upon all owners either abutting or served by the road and certainly to 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 selectmen determine the “occasion” for the layout. 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 hold a second hearing to present this detail.

**Abutters’ Petition.** The statute 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 selectmen 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 selectmen must decide: 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 selectmen commit 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. Selectmen can abate betterment assessments for good cause. RSA 231:32.

One factor influencing the selectmen’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 Association, Inc. v. Town of Conway, 133 N.H. 130 (1990), the New Hampshire Supreme Court upheld a refusal of the selectmen 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 only allows the betterment procedure to be used 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 Laws of 1945, 188:31, Part 5, 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 and *V.S.H. Realty, Inc. v. City of 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 board of selectmen. 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 boards of selectmen.
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. 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. But not any more. The statute was rewritten in 1989, and 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.

**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”
- By the selectmen, upon petition, 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. Although the law doesn’t indicate, it is likely that a 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.

NOTICE AND PUBLIC HEARING

The planning board must hold a public hearing on any request from the municipality or a utility to cut trees or remove stone walls. 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.

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). 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.

Road Agent. The road agent 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 board of selectmen 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 or written permission of the selectmen. After performing such work, the utility must inform the selectmen 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. 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. 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.

**DESIGNATION PROCEDURE**

A petition signed by 10 voters, or landowners abutting the road, 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 town meeting. Designation can be rescinded in like manner. 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 selectmen to insert in the town meeting warrant themselves any article that can be inserted by petition. The selectmen 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.

**CONSTITUTIONALITY**

In *Webster v. Town of 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.”

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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 selectmen 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. 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 their discretion, the selectmen decide 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 law, none of which has been decided in any 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.
*Tracy v. Surry*, 101 N.H. 438 (1958). Nevertheless, many boards of selectmen refuse these petitions because the town would be inserting itself into one side of a private dispute. The statute has no appeal standards, but authorizes the selectmen to act “in their discretion.” We are aware, anecdotally, that some boards of selectmen have agreed to lay out rights of way for lumber removal, but no denial has yet been overturned by a court.

A second question arises as to whether a timber removal right of way under this statute is only available 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 only on Class IV and V highways. RSA 231:59. However, in 1994 the state legislature recognized a public safety need to keep some Class VI roads and private ways passable for emergency vehicles without requiring the municipality to reclassify or accept them as Class V roads 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 selectmen, after a public hearing, declare the relevant road as an “emergency lane.”

**PROCEDURE**

In order to declare an emergency lane, the selectmen 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.

After the public hearing, the selectmen must first make written findings 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.
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.” RSA 231:59-a, I.

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... 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.

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 selectmen 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 sent to owners and abutters, but no public hearing is required unless one of the parties objects 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 selectmen have no discretion, but must lay out the highway subject to gates and bars within 60 days if they find 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.
Liability, Regulation and Maintenance Duties

Highway Liability: Duty Toward 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. 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.
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. City of 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 City of 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).

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 $150,000 per person, and a maximum of $500,000 per occurrence. These limits of liability, however, do not apply if the insurance coverage applicable to any particular claim exceeds the statutory liability limits ($150,000/$500,000). 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 the exercise of policy-making, discretionary judgment, 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. Town of 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.’”

Separation of Powers. The constitutional principle of separation of powers is another reason for discretionary function immunity. It is the notion that judges only constitute 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. City of 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 municipal highways:

In Sorenson v. City of 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.
In *DiFruscia v. N.H. Dept. of Transportation*, 136 N.H. 202 (1993), the deceased drowned inside her car as 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. City of Concord*, 137 N.H. 253 (1993) 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 was a result of a faulty plan, then there would be discretionary immunity, but if the defect was 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.

In *Bergeron v. City of 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 only guidelines, 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. Town of Conway*, 140 N.H. 579 (1995) 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.
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. 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 *City of 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: selectmen 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.
Even if an injury is caused by an insufficiency that a municipality had prior knowledge of, the municipality is not liable provided:

- The insufficiency was caused by bad weather;
- The municipality had a bad weather policy adopted in good faith; and
- The municipality was following that policy without gross negligence or recklessness.

RSA 231:92-a. This bad weather statutory immunity applies to public highways, bridges and sidewalks, but does not apply to public parking lots or driveways. See Johnson v. City of Laconia, 141 N.H. 379 (1996).

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.

**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 selectmen, given that they have 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 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, which documents 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 lead to 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.”

However, the New Hampshire Supreme Court has construed this immunity narrowly. In Bancroft v. Town of 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. 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.”
THE ISSUE OF STANDARDIZED SIGNS: THE MUTCD

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(b). 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.”

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 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.
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. Town of Deerfield, 132 N.H. 235 (1989), the plaintiff abutter complained of flooding from poorly installed culverts and sued the selectmen and the town. The Court dismissed the claim against the individual selectmen 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…injured 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 “tresspass,” 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 “tresspass,” 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 this case 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.”
DAMAGES FOR ‘CHANGES IN GRADE’

RSA 231:75 through 78 provides that a landowner may recover damages resulting from a change in the grade of a public highway (for example, adding fill or ditching). Any persons whose property has been damaged, and not just abutters, may seek relief for changes in grade. A claimant must provide notice of any alleged damages to the board of selectmen. The board then must hold a hearing and render a decision within 30 days. An aggrieved landowner who is dissatisfied with the selectmen’s decision may appeal to the superior court.

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.” 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.

SUPERVISION AND DUTIES

Whether road agents are elected or appointed, they must perform their duties “under the direction of the selectmen.” RSA 231:62. In fact, the selectmen may remove a road agent for deliberate refusal or neglect to comply with the selectmen’s lawful instructions, or to perform legal duties. RSA 231:65.

Road agents are in “charge of the construction, maintenance, and repair” of highways, bridges and sidewalks; moreover, they are responsible for the hiring of people and the purchasing of equipment and materials. RSA 231:62. By vote of a town meeting, a road agent can be given responsibility for waste collection and disposal, and care of parks, cemeteries, beaches, forests, playgrounds and trees. RSA 231:63.

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.

Nevertheless, towns should act proactively 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.
Regulation of Local Highways

GOVERNING BODY’S STATUTORY AUTHORITY

Unlike other powers, town selectmen may exercise their authority to regulate highways without prior action by the town meeting. RSA 41:11. Selectmen are afforded the same broad powers as a city council under RSA 47:17, VII and VIII. Notwithstanding the selectmen’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 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 selectmen 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. In Stamper v. Selectmen, Town of Hanover, 118 N.H. 241 (1978), the Court upheld the selectmen’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 selectmen’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.
Similarly, 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 the city. In doing so, the *Hutchins* Court cited RSA 47:17, VIII, which authorizes a city council to “exclude such vehicles altogether from certain ways...”

**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 selectmen 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.

**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 only requires public, and not actual, notice. As such, a town can generally satisfy this due process requirement by posting notice of the regulation in two 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 selectmen’s vote, the town should conduct a hearing where 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 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 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

RSA 41:11, the enabling statute that allows selectmen to regulate highways, does not prescribe any penalty for regulatory violations. RSA 265:2, however, states that anyone violating “this chapter” (that is, Chapter 265) is guilty of a violation. Because selectmen’s powers are co-extensive with city council powers under RSA 47:17, VII and VIII, selectmen arguably have the authority to enact penalties of up to $1,000. RSA 47:17.

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. City of 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. RSA 664:17 states “No 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.” This poorly written sentence might be interpreted to mean that political advertising may be placed on public property with the consent of the “owner,” whoever that might be. However, the more reasonable, and generally understood, interpretation is that the “owner’s consent” provision applies only to private property, and that political advertising is absolutely prohibited in highway rights of way and other public property. The statute provides for time limits when a political sign may be affixed to, and must be removed from, private property; however, the statute is not rigorously enforced. Statutory enforcement could result in a constitutional challenge. 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). 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 City of 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.

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. See statute for 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. Speed limits can be made lower at intersections (RSA 265:63, I(a)) and in school zones (RSA 265:60, II(a)).
Before altering speed limits, a town must perform an engineering or traffic investigation. A municipality is not required to hire outside consultants, if it has sufficient staff to perform the investigation internally. RSA 265:63, II-a. 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.

LOAD WEIGHT LIMITS

RSA 231:190 and 231:191 authorize the council or board of selectmen to enact exact maximum weight limits on Class IV, V and VI highways. In order for municipalities to have enforceable road weight limits, they should make every effort to 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.

Limits Must be Posted. The weight limit must be posted at all entrances from other highways using “weather resistant materials.”

Identify Officials with Authority to Grant Exemptions. The names of those officials legally authorized to grant exemptions from the weight limit (that is, selectmen, highway agents or street commissioners) must be posted in the town or city hall. A municipality may condition an exemption upon bonding and restoration, but cannot impose restoration costs on anybody without “reason to believe that the…damage…is attributable” to that person.

Grant Exemption if Limitation Imposes ‘Significant Interference.’ A municipality must grant an exemption to a person if the weight limit causes “significant interference.” However, it can require the person to post a bond and/or restore the road. It may deny the exemption if it “would be detrimental to public safety.”

PRIVATE WORK ON OR DAMAGE TO PUBLIC HIGHWAYS

It is impermissible to excavate or disturb the ditches, shoulders, embankments, or improved
surface of any highway (including a Class VI), absent written authorization from appropriate local officials (for example, selectmen or highway agent). RSA 236:9 through 236:12. Prior to granting such authorization, a municipality may require certain conditions such as a restoration bond (RSA 236:10) or road restoration, even where no bond was posted. RSA 236:11. In order to exercise its restoration powers, a town should be able to show a connection between the particular vehicle(s) and the damage. It is not a prerequisite to have enacted a weight limit restriction for this law to apply. Nevertheless, in *Kerouac v. Town of Hollis*, 139 N.H. 554 (1995), a town strategically used a weight limit to prevent road damage by excavators.

**Liability.** RSA 236:38 and 39 impose both civil and criminal liability on any person who causes damage to a public highway. 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.

**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.

**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 selectmen 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.

PARADES AND DEMONSTRATIONS

Under RSA 286:2, a license from the selectmen (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, selectmen 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

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, such as: width, angles, slopes and grades of connections, curbs, ditching and culvert standards to prevent erosion and preserve highway drainage, adequate lines of sight to prevent safety hazards, and limiting 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 board of selectmen.

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.

**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. Town of 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

Selectmen 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. RSA 234:38 permits a mayor or selectmen to “temporarily close or regulate travel” on any class IV or V highway or bridge as well as to establish detours. 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.

## 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. Town of 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, and the benefited persons must fully reimburse the town so that no tax monies are spent.

**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.

**Liability Exposure Increases.** Towns and cities enjoy significant protections from liability with respect to the use of public roads, but the same is not true for private roads. Therefore, public maintenance of private roads exposes a municipality to unnecessary liability.

**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.

If a municipality wishes to spend money on Class VI or private roads, then it should do so under the emergency lane statute. RSA 231:59-a; see Chapter 5 for details. Otherwise, if a town or city performs maintenance on a private road, it should charge a fee to the landowner. 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.

### CONSTRUCTION CONTRACTS

**Bonding.** RSA 231:61 provides that a municipality may contract out highway work. For any work worth over $25,000, 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 $25,000, 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. City of Manchester*, 120 N.H. 391 (1980). When a municipality does engage in competitive bidding, though, it must treat all bidders fairly. Specifically, the law requires a municipality to:

- Award a contract to the “lowest responsible bidder;” *Curran, Inc. v. Auclair Transp. Inc.*, 121 N.H. 451 (1981);
- Notify all bidders of changes in procedures; *Irwin Marine, Inc. v. Blizzard*, 126 N.H. 271 (1985); and
Since a public highway is a use of land, every road issue is also a land 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 has been accepted by the municipality (RSA 674:41, I(a), 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 consulting with the planning board, has adopted a policy allowing building 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 on that road (RSA 674:41, I(c)); or
- A private road, but as with Class VI roads, only if the governing body, after consulting with the planning board, has adopted a policy allowing building 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 on 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 (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 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. Town of 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) or (c).”

**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 *Battcock v. Town of Rye*, 116 N.H. 167 (1976), that a local grandfather clause exempts existing lots from road frontage requirements.

**Streets and Driveways.** A road 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). 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.

**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. Although 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 virtually 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 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.

**Zoning Ordinance Exceptions.** 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. Paragraph III of RSA 674:41 provides that this law supersedes any less stringent local ordinance.

**Towns Without ZBAs.** In a town with no ZBA, the governing body (board of selectmen) 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, 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. City of Lebanon, 117 N.H. 147 (1977), the owner of land with frontage only on a Class VI road 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.

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. Town of 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 selectmen, 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. See the Guide to District Court Enforcement of Local Ordinances and Codes published by the New Hampshire Bar Association.
• The planning board has a major role in this statute under RSA 674:41, I(b). An owner of a lot with frontage only on a pre-planning board, unapproved road 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 selectmen 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 selectmen 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. 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 selectmen 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. Town of 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, though, 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. Town of Brentwood, 117 N.H. 497 (1977).

In Goslin v. Town of 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.”

PRE-EXISTING LOTS

Many zoning ordinances have grandfather or lot-of-record clauses that exempt existing lots 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. *Town of 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. Town of 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. 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’s authority to regulate access points to the public highways. 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.
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. 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 one driveway connection unless that parcel’s highway frontage exceeds 500 feet (RSA 236:13, IV(b)) and 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 or its designee can order the owner to repair it. If the owner doesn’t comply, the municipality can do the repair and charge its costs to the owner.

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); also see 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, 140.
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 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.

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.
DO EXISTING ROADS CONSTITUTE LOT LINES?

Those who think a road automatically constitutes a lot line often point to *Keene v. Town of 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); also see Rathkopf’s, *Law of Zoning & Planning*, Section 64.03(2)(a).

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 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) 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. Town of Barnstead, 129 N.H. 45 (1986). And it “need not, and indeed cannot, be particularly detailed in describing future land uses.” Triesman v. Town of 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 ordinance: 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. Town of 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. City of Concord, 118 N.H. 579 (1978), a homeowner raised a taking 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 taking 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 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 50 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.


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. Town of Conway_, 132 N.H. 431 (1989) and _K&P, Inc. v. Town of 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.

More recently, in Cherry v. Town of Hampton Falls, No. 2003-121 (April 16, 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.

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. Town of 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. Town of 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 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 selectmen will legally be able to consider is the “public convenience and necessity” for that highway. See the section on layout in Chapter 2. The selectmen’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. Town of 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. Secondly, modern planning discourages straight-line streets except on arterial thoroughfares. See Handbook of Subdivision Review, by the New Hampshire Office of State Planning (1996), p. 60 through 63.

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. Town of 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. Town of 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 selectmen. 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. Some of the mistakes towns have made include:

- 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 is described thoroughly in a written performance agreement signed by the developer and the securing entity, including paving, curbing, sidewalks, catch basins, drainage, culverts, headwalls, swales, lighting, landscaping, etc. 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 the security expires the day after the developer has defaulted, leaving the municipality 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.

**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.

**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. Town of 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.

• 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 only available 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. Town of Plainfield*, 117 N.H. 817, 825 (1977). The first New Hampshire case based on this “scattered and premature” language was *Garipay v. Town of 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. Town of 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 “scattered and premature” 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’ [citing *Garipay*)] 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 [citing *Patenaude v. Town of Meredith*, 118 N.H. 616 (1978)].] Exposing more households to the risk that emergency vehicles would be unable to respond when their services were required does magnify the existing hazards.

Under *Zukis*, a town that is already behind on road improvements is not doomed to falling further behind by having to approve projects on already bad roads. But caution should be exercised. In *Ettlingen*
Homes, Inc. v. Town of 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. Town of 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.

117 N.H. at 823; also see Frisella v. Town of Farmington, 131 N.H. 78 (1988).

The Land/Vest decision was bolstered in New England Brickmaster v. Town of 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.
Also see Lampert v. Town of Hudson, 136 N.H. 196 (1992). The Court in Brickmaster rejected the notion that exactions could only be imposed 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. Town of 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).

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 has been 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.
The Limitation of Simonsen. 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. Effective June 7, 2004, RSA 674:21, V 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.

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.

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.

**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 that:

[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.
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 (emphasis added).
Although neither the state nor its political subdivisions are required to maintain them, Class VI highways are public roads. 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 (Chapter 6).

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 Class 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 Class 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 Class 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 only on Class IV and V highways.

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 board of selectmen. 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.

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.

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 selectmen are 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 to 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 (board of selectmen), after review and comment by the planning board, has voted to permit building.
- 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. Town of 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.

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 unavail-
able 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. Town of 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 two instances in which a municipality may reclassify a Class VI highway as a Class V.

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.
CHAPTER 9

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 four top 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 (m).
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 govern-
ment (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.

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. Town of 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. *Town of Lyndeborough v. Boisvert Properties, LLC* (April 21, 2004).

As a result of that decision, legislation was introduced in 2004 to exempt OHRV trails from municipal site plan review. However, the legislation that finally was enacted exempts only trails for “snow traveling vehicles” (snowmobiles) from local site plan review. The new law, RSA 215-A:15, VI, states:
The local legislative body of a municipality shall not by ordinance or resolution authorize the planning board to review and approve or disapprove site plans for the development, siting, maintenance, or use of trails on private property for snow travelling vehicles, as defined in RSA 215-A:1, XIII.

**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 in season operate 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.

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 at that point to disallow the upgrade 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. 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 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.
- 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 is a Class VI highway, the owner has a chance of getting the selectmen to change their minds, or to get an exception under RSA 674:41, II. 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 selectmen under their 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; 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…” RSA 231-A:5 explicitly prohibits 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. 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 is 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.
Municipal Trails Management

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 “wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.” 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 subcon-tractor 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 Circuit Court of Appeals, 1993). 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 only to “undeveloped” land 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.

**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 “wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity” 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 “wilful, 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 (board of selectmen 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. Violators are guilty of a violation, and the standard traffic ticket can be used.
Chapter 10

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 water course or other opening or obstruction. It includes the substructure, superstructure and all approaches. 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. Town of 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. 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 though 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 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 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 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.

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.

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 only to state bridges, the statute includes the sentence, “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 selectmen 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 Funding

How much state money there will be for bridge aid in any year depends on the politics of legisla-
tive 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 board of selectmen 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 board of selectmen. 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 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 Municipal Highways 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.

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.
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 City 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 new 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 selectmen 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. 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 only lasts 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. 535 (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 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 boards of selectmen 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.
CHAPTER 11

Highway Drainage

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. City of 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. City of 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 only to highways. 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. Town of 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. City of 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. That statute states:

If in repairing a highway by the authority of the town the grade is raised or lowered, or a ditch made at the side thereof, whereby damage is occasioned to any estate adjoining, the selectmen, on application in writing of the owner, shall, on notice to and hearing of the applicant, view the premises and assess the damages.

The purpose of the statute 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 selectmen assess the damages sustained by each landowner when property is taken for the original laying out of a road under RSA 231:15, they 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), in which the Court wrote, “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. City of Franklin, 69 N.H. 614 (1899), in which the Court wrote, “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, “[T]he 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) (emphasis added in Landry)).
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*, 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. Town of Deerfield*, 132 N.H. 235, 242 (1989) (emphasis added); *accord Hurley v. Town of 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. City of Concord, 137 N.H. 253 (1993) (discussing discretionary immunity).

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). Otherwise 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 district court.

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.

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—often referred to as a “non-site-specific” permit; or
- Disturbing a contiguous area of 100,000 square feet or more (50,000 square feet if within shoreland areas)—often referred to as a “site-specific” permit. See N.H. Code of Administrative Rules, Env-Ws 415.03, implementing RSA 485-A:17. The application goes to the Department of Environmental Services, Water Division, 6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095.

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 also
serve as the non-site-specific permit, in order to prevent having to do duplicate applications. Thus if the work involves less than 100,000 square feet total (or 50,000 square feet in shoreland areas) the main concern will be with the wetlands law.

**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) Nontidal drainage ditches, culverts, catch basins, and man-made detention ponds that have
been legally constructed to collect and convey storm water and spring run-off, and that have
been maintained so that wetlands vegetation has not become dominant, or 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, may be cleaned out when necessary to preserve
their usefulness without a permit from the department. Such drainage facilities, fire ponds, or
intake areas of any hydrants, may be cleaned out by hand or machine, provided that the facility
is neither enlarged nor extended into any area of wetlands jurisdiction of the department of
environmental services, dredged spoils [sic] are deposited in areas outside wetlands jurisdic-
tion of the department of environmental services, and wetlands or surface waters outside the
limits of the constructed drainage facility, fire pond, or intake area of a dry hydrant, are neither
disturbed nor degraded.

If the work the municipality is doing doesn’t fall under the two above paragraphs, either a “permit
by notification” form or a “minimum impact expedited application” will likely have to be completed.
These forms are available at town and city clerk offices. Questions about wetlands applications should
be directed to the Wetlands Bureau at 603.271.2147 or wetmail@des.state.nh.us.
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) 2002 the total was $25,566,257. 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 Energy and Planning. RSA 235:23, I. As an example, in FY 2003, Apportionment A consisted of $10.56 for each resident in a municipality, plus approximately $1,182 for each mile of Class IV or V highway.

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.

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.” This amount is adjusted, however, so that the total is never less than $400,000. In 2003, 22 municipalities shared Apportionment B funds.
‘Apportionment C’ Funds. Apportionment C is simply a statutory authorization that requires DOT to allocate any federal aid funds that may be available in any particular year. RSA 235:7 designates 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 Municipal Highways at 603.271.2107.

Distribution. On or before January 1, 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 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 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, 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 DOT for the state aid share on or before May 1.

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 DOT is to be notified of the damage and, after investigation, would estimate the amount of aid to which the municipality is entitled. 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.
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, p. 466 (1888), as quoted by Loughlin, 16 N.H. Practice §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 only be used 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.

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.
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 selectmen 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 only last 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 selectmen 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 selectmen 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.
RECORDING OF DECISION

Under RSA 231:164 the application, plus the selectmen’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 selectmen, 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 selectmen for an order. The selectmen are required to hold a hearing within six days, giving the utility at least three days notice. The selectmen 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. But utilities do not share the town’s rights in this regard. RSA 231:172 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.”

It is important to remember that an abutter’s title is presumed to run to the center of a highway. See Chapter 1. The “owner of the land” in the case of a highway right of way is usually the abutter. Therefore, utilities need abutter permission to cut trees even within the rights of way.

If an owner refuses consent, the utility may petition the selectmen, who “shall determine whether the cutting or mutilation is necessary and if determined to be necessary, they shall assess the damages that will be occasioned to the owner thereby.” RSA 231:172. 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.

If a utility cuts the tree or “mutilates” it without landowner or selectmen 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 selectmen’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 selectmen have 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 selectmen 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 the case of poles and wires, selectmen 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 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 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 selectmen 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 *Town of 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-b provides that all structures, poles and conduits used in the transmission of telecommunications services are exempt from taxation as real estate. This exemption was scheduled to expire on July 1, 2004, but the 2004 legislative session extended the exemption from taxation through July 1, 2006.

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. To use the law to the town’s best advantage, it is always advisable to address the issues of bonding and restoration whenever a utility applies for a license under RSA 231:159, et seq.

The previous edition of *A Hard Road to Travel* encouraged the legislature to examine the issues surrounding a municipality’s authority relative to regulation of utility structures in the rights of way and the collection of fees associated with such use. The issue came before the legislature during the 2003 session in the form of HB 307. That bill would have allowed municipalities to impose fees “reasonably related to the costs inherent in managing and maintaining the public highways,” including “the costs associated with permitting and licensing public highway occupants, verifying public highway occupation, mapping public highway occupation, inspecting job sites and public highway restoration, administering (RSA 231:161) and the costs incurred by the municipality relating to the degradation of the public highways.” The bill was vigorously opposed by utility interests and eventually killed by the House.

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.
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 selectmen’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 are probably 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. See Chapter 6 for further discussion of insufficiencies and liability.

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. 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 the RSA 231:111 through 113 (including the special assessment authority) apply 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 center-line 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 board of selectmen 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, but not 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 city 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. Town of Conway, 137 N.H. 368 (1993).
The Local Government Center Mission

The Local Government Center will provide programs and services that strengthen the quality of its members’ governments and the ability of their officials and employees to serve the public by being a catalyst for dialogue and action, an advocate for action, and an educator and trainer on the practical and ethical management of local and regional government services, an educator and trainer in public and service delivery, and a resource for information.

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