Introduction

“Highway” v. “Road”: Road, highway, street, way, lane — all mean the same thing in this context. NH statutes use the term “highway” but if a local ordinance says something different, it doesn’t really make a difference. Also referred to as the “right of way.” (Note that “trail” is something different, see RSA 231-A.)

Who Is in Charge? Generally speaking:
- Town/City roads — controlled by governing body of the town or city
- State roads — controlled by the State DOT/Legislature/Governor
- Private roads — controlled by the owner of the land under the road and anyone else with an easement to travel on it

Fundamental Rule of Municipal Government: Towns and cities (and their commissions, officers and employees) get all of their authority to act from statutes passed by the Legislature. This means towns and cities must find a statute that says they can do something; it is not enough to rely on the fact that there is no statute saying they can’t. Girard v. Allenstown, 121 N.H. 268 (1981). “[T]owns only have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto.”

What Is a Highway?
- Not a single “thing,” but rather layers (above the road, traveled surface, land below the surface), as well as sidewalks, drainage easements and embankments
- Town or city “right of way” is generally the traveled surface plus all the other areas, often extends many feet on either side of the traveled surface.
- Technically, an easement for the public to travel on, and associated rights to facilitate travel and protect the public
- Different parties may own the traveled surface, the space above, the land below, the wires, the pipes, etc.
- Presumption that abutting landowners own the land beneath a highway to the centerline, even if the deed doesn’t say anything about it. Deeds may show something different (one owns all the way across, town has been given ownership of the land, etc.)
What Does the Public Have a Right to Do? “Viatic” use only. This means travel, and any use reasonably incidental to the purpose of travel. Includes vehicles, walking, bikes, horses, etc. Generally speaking, the public and the government cannot block travel. (There are exceptions.)

Ownership of Underlying Land — is important because it determines who has rights and obligations regarding trees along the road, pipes beneath the road, and who owns it when the highway is discontinued.

What Happens When a Highway Is Discontinued? When a public highway is discontinued, the easement for public travel is extinguished. What is left is the land, owned by whomever had ownership of the underlying land. Someone must do research to figure out who that is. Are there deeds, or a dedication to the town in the land use files, or easement agreements between private parties? Road agent files?

Where to Find the Law? Among other places:
• RSA 41:11 (governing body authority, incorporating some of RSA 47:17)
• RSA 231
• RSA 236

Road Classification

Private/public road: A highway is either public or it isn’t. There are no other choices. If something is a private road, the public does not have the right to travel on it (but the owner may permit it), and the town/city has no obligation (and very, very limited authority) to maintain it.

Classes of Public Highways:
• State Highways:
  • Class I — Turnpikes and Interstates
  • Class II — Secondary State Highways (other numbered routes and, confusingly, some without numbers)
  • Class III — State Recreational Roads (roads within state parks)
  • Class III-a — Boating Access Roads (to public waters)
• Municipal Highways:
  • Class IV — Urban Compact Section Highways (listed in RSA 229:5, V, these are portions of state highways that are under town/city control)
  • Class V — ordinary town and city highways
  • Class VI — “All other existing public ways” — under town/city control, they are public roads but are different from all other public highways.

Why it matters:
• State controls use of state highways, towns/cities control use of municipal highways, including:
  • Speed
• Other traffic regulation
• Driveway permits (“curb cuts”)
• Utilities (wires/poles, conduit, pipes)
• Political Advertising
• Drainage
• Sidewalks
• Trees
• Handling obstructions

• Towns and cities have different rights and responsibilities for Class IV and V highways on one hand and Class VI on the other
• Development is handled differently on Class IV and V highways from the way it is handled on Class VI highways
• Town/city maintenance is different on Class IV and V highways than it is on Class IV

Other Interesting Facts
• Not all Class V highways are paved, and not all Class VI highways are gravel or dirt.
• Towns don't have to enact standards for Class V roads, although many do.
• This is one of the ONLY two programs municipalities must support — the other is local welfare.
• Obligation is to maintain Class IV and V roads free of “insufficiencies” (road or sidewalk is not safely passable or there is a safety hazard not reasonably discoverable by a person using the road or sidewalk in a reasonable, prudent and lawful manner, RSA 231:92).
• Any work affecting a town road (Class IV, V and VI) and any work affecting a driveway onto a town road, no matter WHO is doing it, must be approved in advance by the governing body or road agent of the town. DOT must get permission to do work in the town right of way, and so must every other town board, commission and department. RSA 236:9-:12.
  • Example: conservation commission manages a piece of property and wants to create a recreation area with parking lot. Must obtain approval and permission from governing body or road agent for the curb cut!

Class VI Highways

Defined: “…All other existing ways, and shall include all highways discontinued as open highways and made subject to gates and bars,…and all highway 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.

• They are public roads, regulated by the municipality, and subject to most of the same legal principles as all public roads.

• “Subject to gates and bars” is really another way to say “Class VI highway.” Don’t have to have gates and bars, all Class VI highways may have them whether or not those words were used in its creation, and if there are any, they must remain unlocked because it is still a public road, and the public has the right to travel on it. RSA 231:21-a.
• Created several ways:
  • Failure of town to maintain Class V highway for five successive years (even if it is used by the public) (But note: resuming maintenance on a Class VI highway that was created by failure to maintain will cause it to become Class V again!) RSA 229:5, VII.
  • Formal change of classification by legislative body vote (includes vote to “discontinue subject to gates and bars”) RSA 229:5, VII.
  • Initial layout by governing body as Class VI highway, RSA 231:21.

If It Is a Public Road, Don't We Have to Care for It? In a word, no.

• RSA 231:50 relieves towns and cities of “all obligation to maintain, and all liability for damages incurred in the use of, discontinued highways or highways discontinued as open highways and made subject to gates and bars” (i.e., Class VI highways).

• RSA 231:93: Municipalities have no duty of care whatsoever with respect to the construction, maintenance or repair of Class VI highways.

• No authority to spend money on Class VI roads: Law requires municipalities to maintain Class IV and V (but not VI) roads, and authorizes them to spend public money to do so. RSA 231:59 and :62. No statute grants authority for Class VI roads (and if no grant of authority, municipalities cannot do it).

• May only maintain, repair, plow or do other ordinary work on a Class VI highway except in three narrow circumstances:
  • If plowing or any other work is done by the municipality, it should charge the abutting owners the full cost of that work (and that work may only be “subordinate and incidental” to the municipality’s own operations). See Clapp v. Jaffrey, 97 N.H. 456 (1952).
  • If governing body declares a Class VI highway an “emergency lane” under RSA 231:59-a, the municipality may perform work deemed necessary to make it passable by emergency vehicles. Only permitted if governing body finds the public need for keeping it passable by emergency vehicles is supported by an identified public welfare or safety interest (aside from benefit solely to the abutters on the road).
  • Lay it out as a “winter road” under RSA 231:24 - only open and maintained between November 15 and April 1.
  • Alternative — grant approval for abutters to perform the work (it is a public road, so governing body/road agent must approve when and how work is done, but abutters do it at their own cost).

• What if a Tree Grows in the Road? Or falls down in the road? Or a storm washes the road out?
• Doesn’t change the law. See the three options above, or the abutters may fix it themselves at their own expense.
• If abutters (or anyone) does work in a Class VI or any public road, they must obtain prior permission from the governing body/road agent. Can be required to follow conditions and guidelines for the work, may be required to post a bond to secure proper completion of the work.

Scenic Roads (RSA 231:157 and :158)

What Are They?
• If designated as a scenic road, state and/or municipality must obtain written permission from the planning board before any repair, maintenance, reconstruction or paving work on that road if it will involve the cutting, damage or removal of trees, or the removal or destruction of stone walls (or any portion).
• Utility or anyone else 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.
• “Tree” in this case means any woody plant with a circumference of at least 15 inches measured 4 feet above the ground.
• Municipality must maintain a public list of all designated scenic roads.

What Are They Not?
• Doesn’t change the underlying classification of the road (Class V, IV, etc.).
• Doesn’t prevent tree cutting or stone wall removal altogether.
• Doesn’t, in and of itself, provide a way for abutting landowners to get notice before trees are cut (other laws do that for all public roads, not just scenic roads)
• Doesn’t prevent future development
• Doesn’t guarantee that a road will remain unpaved (indeed, has no impact whatsoever on whether a road is paved)
• Doesn’t impose any restriction on the use of property or the road other than the requirement for the government and utilities to obtain permission from the planning board in most cases before affecting trees and stone walls.

Designation: By vote of the legislative body (town meeting, town council, or city council). Petition of at least 10 voters (or landowners abutting the road even if they are not voters) to board of selectmen puts question on warrant for town meeting, or board of selectmen may include it on their own motion. Charter towns and cities, voters and/or property owners can petition the town council or city council, which would then vote on it (or could do it on their own motion as well). Legislative body may also rescind the designation the same way.

Notice and Public Hearing: Municipality, state, and/or utilities must seek written consent of the planning board before performing any work affecting trees or stone walls. Upon request, the planning board must hold a public hearing on the proposed work, with notice published at least twice in the newspaper (second notice must appear at least seven days before the hearing).
**Additional Local Provisions:** Towns and cities (by legislative body vote) may adopt some additional regulations for scenic roads, such as:

- criteria used by the planning board in deciding upon requests to cut trees or affect stone walls
- protections for trees smaller than 15 inches around at 4 feet off the ground for the purpose of establishing regenerative growth along the road

**Violations:** Any person who violates the scenic road law or any additional local regulations is guilty of a “violation” and is liable for all damages resulting from that violation.

**Exceptions to Planning Board Permission:**

- **Road Agent:** Road agent or designee may remove trees that have been declared a public nuisance by the governing body without the public hearing and permission by the planning board, but only when the tree poses “an imminent threat to safety or property.” Road agent must obtain written permission of the governing body first, and notify planning board and governing body afterward of what was done and why.

- **Utilities:** When a public utility is involved in the “emergency restoration of service,” it may perform work necessary to restore service promptly that has been “interrupted by facility damage” without a prior hearing or permission of the planning board and without written permission of the governing body. After performing the work, the utility must inform the governing body of the nature of the emergency and the work performed.

- **Abutting Landowners:** Scenic road designation does not affect the rights of landowners to cut trees on their own property, unless the municipality has acquired the tree as “shade or ornamental trees” under RSA 231:139 - 156. Landowners are also free to remove stone walls on their own property despite a scenic road designation (but see RSA 472:6 regarding boundary markers). The only way for a municipality to prevent an abutting owner from cutting trees is by acquiring title to the highway strip (i.e., a deed to the underlying land) or by taking tree rights under the tree warden law (RSA 231:154).

**Tree Cutting along a Non-Scenic Road**

**Who Owns the Tree?** The owner of the soil owns the tree. This is why it matters who owns the underlying land beneath the highway. If the town owns the soil in which the tree is growing, the town has control over whether, when and how the tree is cut. If the abutter owns the soil, he/she generally owns the tree, and the town does not have the authority to keep the owner from cutting it down. *Laconia v. Morin*, 92 N.H. 314 (1943).

- **Side note:** even if the town can cut the abutter’s tree as explained below, the wood still belongs to the owner of the tree. *Baker v. Shephard*, 24 N.H. 208 (1851).
How to Prevent the Owner from Cutting a Tree?

- Municipality may acquire tree rights - RSA 231:154 provides a process for the governing body to acquire the rights to trees on new or existing roads (even if the municipality doesn’t take full title to the soil under the road), and requires the town/city to pay damages to the owner.
- Tree Warden - RSA 231:139 - :154 permits municipalities to appoint a tree warden (by vote of town meeting or town council in towns, and city council in cities). Must be a person qualified by education and/or experience.
  - Duties “shall be to help care for, maintain, protect, and perpetuate shade and ornamental community trees and shrubs in town public ways, village commons, parks, cemeteries, and other public grounds, and to advise the governing body from time to time as may be necessary to help accomplish that purpose.” RSA 231:139. Works cooperatively with other municipal officials.
  - Can accept trees as gifts for the town or city and protect those trees. Can spend properly-appropriated municipal money for this purpose.
  - Can plant trees in highway rights of way for the town or city (with governing body’s approval).
  - Saplings/sprouts along public highways — tree warden may notify abutting owner of town or city’s intent to take and preserve the tree, and if no written objection within 30 days, tree becomes property of town or city.
  - May acquire existing trees within the highway right of way by agreement with the owner (donation or purchase at a fair price)
  - May acquire existing trees by a form of eminent domain (requiring payment of damages), following statutory procedure in RSA 231:141.
  - Once municipality acquires a tree in any of these ways, no one may cut it without the tree warden’s permission. Depending on where the tree is, a hearing may or may not be required.

Cutting and Clearing by the Town/City:

- Focus on Liability: Sometimes trees need to be cut to avoid liability. Dead or diseased tree - if abutter who owns the tree knows or should know that a tree is likely to come down, he/she can be held liable for damages resulting from the failure to do anything abut it. This is true even if the tree is within the right of way. Pesaturo v. Kinne, 161 N.H. 550 (2011). Municipalities are also obligated to maintain the public road in a condition suitable to safe travel, so if the town/city knows or should know that this same tree is a threat to the public, it can be held liable for failure to take appropriate action to protect the public.
- Non-Nuisance Trees:
  - Municipality has a duty “annually, and at other times when advisable,” to cut trees and bushes within the limits of the highway right of way that the governing body believes may cause damage or pose a safety hazard to the highway or interfere with public travel. RSA 231:150.
• However, if the tree has a circumference of at least 15 inches measured 4 feet above the ground, the owner must be notified in writing by personal delivery or registered mail of the intent to cut the tree. Notice must state the intent to remove the tree and should identify the tree as clearly as possible. The owner may appeal to the superior court within 30 days and is entitled to a speedy hearing. The court may uphold the municipality’s decision or overturn it. If no appeal filed, or if the appeal is dismissed by the court, the municipality may proceed at its expense. The owner has no liability or claim (other than the wood).
• Advice is not to remove the tree until the 30 days are up.
• May omit notice if delay would cause an imminent threat to safety or property.
  RSA 231:150.
• Municipality is not supposed to cut trees, bushes, or shrubs protected by the tree warden without warden’s permission.

• Nuisance Trees:
  • Governing body may declare any tree (alive or dead) within the right of way of a public highway to be a public nuisance by reason of imminent threat to the traveling public, spread of tree disease, or the reliability of utility equipment. RSA 231:145 and :146. Same notice and hearing as for non-nuisance trees (above). If no appeal, or if appeal is dismissed by the court, the municipality removes the tree at its expense, and owner has no further liability for the tree or the stump.
  • Advice, again, is not to remove tree until 30 day appeal period ends (although statute doesn’t say this).
  • “Imminent threat” — if the delay entailed in notice to owner would pose an imminent threat to safety or property, it may be omitted. RSA 231:146.
  • If the tree is under the care of the tree warden, municipality should work through him/her.

• What if Owner Objects to Tree Cutting? No cases reported on this issue. RSA 231:150 does include directive for municipalities to preserve certain roadside growth (“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, 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”). However, if there is some rational reason for cutting, a court likely would uphold that decision.

Cutting and Clearing by Utilities

• Statutory duty to maintain the reliability of services and protect their equipment in the public right of way (enforced by the NH PUC), but that doesn't remove the obligation to notify owners before cutting or clearing.

• 2 options for utilities:
  • Petition governing body under RSA 231:145 to declare a tree a nuisance if it constitutes a “public nuisance by reason of danger to the traveling public, spread of tree disease, or the reliability of equipment installed at or upon utility facilities.”
Removal may be immediate if there is an imminent threat to safety. Municipality may require utility to assist in cutting if wires are near nuisance trees (either moving wires or performing tree cutting)

- Notice procedure under RSA 231:172: If the municipality owns the tree, consent to cut in the right of way is deemed to be granted. If abutter owns the tree, utility must provide notice (in person or by regular mail) at least 45 days in advance of intent to cut, prune or remove tree. Notice includes contact information to request “personal consultation” regarding intent to cut, and if owner doesn’t so request, consent is deemed to have been granted. If owner does request, and doesn’t consent after consultation, owner/utility may petition governing body for hearing. If cutting approved, governing body determines damages to owner.
- If scenic road, then use scenic road procedures, too (not instead).

Road Law and Land Use

Minimum Road Access Requirements under State Law

- 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:

  - Class V or better public highway
  - Road shown on a plat approved by the planning board
  - Class VI highway, but ONLY if the governing body, after review and comment by 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 for any damage that occur as a result of the use of the road
  - Private road, but ONLY on the same conditions as for Class VI highway
  - Road shown on a subdivision plat approved by ZBA or governing body before the planning board was granted subdivision jurisdiction, but only if there is already at least one building on the road constructed before July 23, 2004.

- This applies to every lot, everywhere, every municipality, except those few which have not granted subdivision regulation authority to the planning board.

- Local zoning can’t change this, and land use boards can’t grant a variance or waiver from it except through one process. ZBA may grant an exception in very narrow circumstances (practical difficulty or unnecessary hardship to owner, circumstances don’t require the building to be related to existing or proposed streets, building won’t increase difficulties carrying out master plan, won’t cause hardship to future purchasers or undue financial impact to municipality), RSA 674:41, I.

- If there is no access to the lot, or if the only access is a private driveway over someone else’s land, the municipality may not grant approval. Owner must take steps to correct the situation. Not the municipality’s problem. Land owners are not “guaranteed”
access, and don’t necessarily have the right to build on every lot. (There are constitutional safety valves, but they aren’t a complete guarantee.)

Local Frontage Requirements

- Zoning ordinances and regulations may include minimum frontage requirements, including the number of feet of required frontage, that the road must be paved, etc. May also include exemptions for nonconforming pre-existing lots (“grandfathered” lots).

- Local land use boards may (if local ordinances and regulations are in place) regulate the adequacy of any access road, whether public or private, and to prevent building from occurring without such approval of the road. Here, the distinction between public and private roads is less important (a fact many applicants don’t know).

- Compare “local frontage” with “state minimum access” — municipalities may regulate frontage as they see fit, but not minimum road access.

Driveways/Curb Cuts

- RSA 236:13: Planning board (or governing body, if municipality decides that) has authority over ALL curb cuts and driveways in the municipality on Class IV, V and VI highways.

- Regulate location (to protect traveling public), drainage, traffic control devices, grades, etc. However, there are some state-mandated standards in RSA 236:13 (no driveway connection more than 50 feet wide; and no more than 2 driveway connections unless (a) the lot’s frontage exceeds 500 feet, and (b), for commercial/industrial purposes or for subdivisions, there is a 400-ft safe sight distance in both directions at a height of 3 feet, 9 inches above pavement).

- Fire chief has concurrent authority under a the state fire code (with different authority).

- Owner must maintain driveway connection, NOT municipality. Even if the driveway predates the driveway permit system, the statute, or local zoning. If there is a drainage or other problem with a driveway connection, the municipality may order the owner to fix it (and if they don’t fix it, municipality may fix it and charge the owner the cost).

- Bottom line: not even a grandfathered property owner has the legal right to maintain a driveway access that constitutes a potential threat to the integrity of a public road or to the public safety.

Internal Development Roads

- Generally, municipalities have some ability to regulate where and how (and whether) roads within a development will be created, to protect the traveling public (grade),
wetlands, ecologically sensitive areas, etc., but decisions must be reasonable and based on reliable evidence.

- NH Supreme Court Opinions of interest on this point:
  - Continental Paving, Inc. v. Litchfield, 158 N.H. 570 (2009) (special exception to build gravel access road more than 60 feet from vernal pool)

Planning Board Approval of Private Roads

- When built, most new roads are private roads (even if dedicated to the municipality for a public highway, that doesn't happen until official vote by governing or legislative body to accept the road). Often several years before acceptance (if at all, and no obligation to accept it, ever).

- Planning boards may, and should, insist that new roads comply with local road standards (whether public or private). Don't rely on promises from developer that road will remain private, because developer can't guarantee that, and it will likely cost a lot more to bring it up to standard later if it is going to become public.

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