

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 unavailable at times.
- The owner agrees to these limitations of town responsibility and liability, and the owner is responsible for any road maintenance and repair work.



5-29-2008

Brough trespassing and cutting our grass on OGR 10-8-10 17
2010/10/08 17:28:33



CHRISTOPHER G. PARKER, AICP
Director
c.parker@dover.nh.gov



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City of Dover, New Hampshire
DEPARTMENT OF PLANNING AND COMMUNITY DEVELOPMENT

November 09, 2010

John Brough
240 Old Garrison Road
Dover, NH 03820

Re: Clearing Old Garrison Road

Dear Mr. Brough,

I am writing to you today following up on a complaint provided to my office regarding your recent mowing and clearing of Old Garrison Road. You might not be aware, but as a Class VI roadway, this roadway is intended to be minimally maintained. Included in that level of maintenance is clearing and mowing for simple passing and repassing. The complaint we received, and the associated pictures, shows yourself mowing the grass that runs along the side of the travel way.

The ownership of the land underneath the travel way is owned by the abutting property, and while you and others are allowed to pass and repass along the travelway, I ask that you respect the abutters property rights and not clear areas outside of the traditional travel way. If maintenance of the travelway is required, RSA 236:9 – 236:11 provides that the City's Road Agent may approve work to the roadway. In the future, please reach out to the Community Services Department at 516-6450 if necessary.

I would be more than happy to review the regulations for a Class VI roadway with you, if that would help. Please feel free to contact my office..

Sincerely,

Christopher G. Parker, AICP
Director of Planning and Community Development

Cc: (via email) Doug Steele, Community Services Director

DVR4C CH2
2012/02/28 14:42:15



John Brough maintenance trespass on OGR





09 02 2014

Fournier, Amber

From: Steele, Doug
Sent: Monday, February 27, 2017 3:24 PM
To: john brough
Cc: Joyal, Michael
Subject: RE: Old Garrison Road impassable

John,

I write in response to your email below regarding Old Garrison Road. As you know, Old Garrison Road is a Class VI, unmaintained City Road.

As mentioned to you before, pursuant to the provisions of RSA 231:59-a, the City periodically reviews portions of Old Garrison Road to see if they are passable for emergency response vehicles. Fire Chief Eric Hagman has reviewed a portion of Old Garrison Road and has concerns that a section of it, in the vicinity of Spruce Lane, may not currently be passable for emergency response vehicles. Therefore, and consistent with the referenced statute, the City Council will be asked to consider declaring a portion of Old Garrison Road as an emergency lane, which would permit limited maintenance to make the road passable for such emergency vehicles. With the foregoing in mind, please be advised that we have not come to any agreement with you regarding an emergency lane declaration. Rather, when we spoke on Friday I advised you of the above. It is entirely within the discretion of the Council, following a public hearing, whether or not to declare an emergency lane. I anticipate this matter will come before the Council at its March 8, 2017 meeting, to be referred to a public hearing and vote at the Council's March 22, 2017 meeting.

Regarding your statements that work will be performed on Old Garrison Road by Ryan's Tree Service of Dover, please be advised that neither you, nor Ryan's Tree Service of Dover, have permission to perform work on or to the City's road.

Douglas W. Steele II
Deputy City Manager - Community Services City of Dover, NH
288 Central Avenue
Dover, NH 03820-4169
e: d.steele@doover.nh.gov
p: 603.516.6450: 603.516.6463

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<http://www.dover.nh.gov>

-----Original Message-----

From: john brough [mailto:jwbroughjr@gmail.com]
Sent: Monday, February 27, 2017 12:26 PM
To: Steele, Doug
Cc: Weston, Karen; Joyal, Michael; City Council - All
Subject: Old Garrison Road impassable

Doug,

As per our conversation yesterday, the Fire Chief and you agree that Old Garrison Road off Spruce Lane is impassible in its current condition. We agreed that the City Council would be notified, proper hearings held, and the road updated to a City Access Road by the City of Dover DPW. The earliest that could be completed was by Mar. 22nd, 2017. This was our agreement in order for us to maintain our ONLY access to our home. That also includes access for the following: Our



Legal Briefs

Plowing Private Roads, Driveways and Class VI Roads

New Hampshire municipalities have no legal obligation to plow, salt or sand Class VI roads, private roads or private driveways with municipal funds or resources. More importantly, they have no legal **authority** to do this, except in very narrow circumstances.

For a very long time, New Hampshire municipalities have been prohibited from appropriating or spending public funds or using public resources on purely private purposes such as the plowing of Class VI roads, private roads and driveways. The New Hampshire Supreme Court clarified this point in 1952 in the case of *Clapp v. Town of Jaffrey*, 97 N.H. 456 (1952). Towns and cities may appropriate money "for any purpose for which a municipality may act if such appropriation is not prohibited by the laws or the constitution of this state." RSA 31:4. Under the New Hampshire Constitution, *public money can be appropriated only for valid public purposes, but not to create a purely private benefit*. When a private driveway is plowed, this benefits only the private owners of that property. When a private road is plowed, it benefits only the private property owners along that road. These are not valid public purposes. As a general rule, town money can't be granted to or spent on a benefit for a private person, company or organization unless that private person takes on some obligation to benefit the town. *See Clapp v. Town of Jaffrey*, 97 N.H. 456 (1952); *Opinion of the Justices*, 88 N.H. 484 (1937). In other words, there must be a "quid pro quo" by which the town obtains something real in exchange for that public money. If a town or city simply spends its highway funds (or other municipal money) to provide this service to private property owners without any payment or quid pro quo by those particular owners for the service, this is a problem.

Furthermore, there is no authorization in the law for any municipality to spend public funds to maintain Class VI roads, private roads or driveways. The fundamental rule of municipal government in New Hampshire is that towns and cities get all of their authority to act from the state legislature. *See Girard v. Allenstown*, 121 N.H. 268 (1981). This means that municipalities have to go one step further than everyone else; they cannot rely on the fact that there is no statute prohibiting a certain action, but instead have to find a statute that specifically permits it. "Towns only have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto." *Girard*, 121 N.H. at 271. The law specifically allows municipalities to spend town money to maintain Class IV and V roads, but there is no authorization for Class VI or private roads, or private driveways. RSA 231:59.

Given all this, if a municipality wants to spend public funds to plow Class VI roads, private roads or private driveways (either by using municipal equipment and employees or by contracting with someone to provide that service), it can only do so legally if: (1) each owner of the plowed driveways and each property owner along a Class VI or private road pays the town the cost of that service, and (2) this plowing is truly "subordinate and incidental" to the needs of the municipality's own highways. *See Clapp v. Jaffrey*, 97 N.H. 456 (1952). Using tax money raised from all citizens to provide a purely private benefit for a select portion of the citizens is not legal, no matter how small the amount.

There are many risks to this activity:

- Illegally spending town or city funds exposes a municipality to a citizen lawsuit for improper expenditure of funds.
- A Class VI road may become Class V even if the municipality did not mean to change its classification. While Class VI roads are public roads, and the municipality has the authority to regulate their use, the municipality has no obligation or authority to maintain them. It is possible for a Class V road (usually thought of as an “ordinary” town road) to lapse into Class VI status over time. If the municipality fails to maintain or repair a Class V road for five successive years or more in suitable condition for travel, its classification automatically changes to Class VI. RSA 229:5, VII. Nevertheless, the road may once again become a Class V road (which the municipality must fully maintain and repair) if the municipality regularly repairs and maintains it on more than a seasonal basis, in a suitable condition for year-round travel, for at least five successive years. RSA 229:5, VI.
- Public maintenance of a private road could arguably be construed by a court as an acceptance of the highway, resulting in the municipality’s permanent responsibility not only to plow that road, but also to repair and maintain it. *Hersh v. Plonski*, 156 N.H. 511 (2007).
- Towns and cities are also granted significant protection from liability with respect to the use of public roads, but the same is not true for private roads or driveways. This means a town or city might find itself forced to pay for injury or damage caused by the plowing activity on a private road or driveway that it would not be liable for on a Class IV or V road. See RSA 231:92-a; RSA 507-B:2-b.

If a municipality is currently providing maintenance services to Class VI roads, private roads or driveways, this practice generally should be stopped. If a governing body wishes to continue this service, it should only do so under the following conditions:

1. All landowners whose driveways are plowed/maintained or who live on a private road that is plowed/maintained should be charged a fee so that the municipality spends no tax dollars or other public funds for this service.
2. The governing body should only provide the service if they determine it is “subordinate and incidental” to the needs of the municipality’s own highways. In other words, does it benefit the town or city by ensuring that, for instance, snow from private driveways does not end up in the street and cause an ice problem, or that municipal plows need to travel through a private road to reach the public roads they have to plow, or that municipal plows have an area to turn around or access the public roads that they have to plow? If it is not truly “subordinate and incidental” to the needs of the municipality’s other functions (words which the New Hampshire Supreme Court has said are “vital and restrictive,” and should not be read broadly), then the plowing is illegal. See *Clapp v. Jaffrey*, 97 N.H. 456 (1952).
3. The governing body should require a written agreement with each landowner that explicitly recognizes that the private road or driveway is not “dedicated” to the town by the owner, that the maintenance does not constitute “acceptance,” and that the owner will indemnify the municipality for any and all liabilities resulting from the work.

4. Alternatively, for private roads, the governing body might choose to declare one or more of these private roads "emergency lanes" under RSA 231:59-a. In a town, an emergency lane declaration may only be made by the board of selectmen after a public hearing if the selectmen find 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, municipal funds may then be spend to remove brush, repair washouts or culverts, plow, or do other work "deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles." RSA 231:59-a, I. The municipality then has the authority, but not the obligation, to maintain the road in that manner. An emergency lane declaration may be withdrawn or disregarded at any time by the selectmen, and no one may recover damages from the town for failure to maintain an emergency lane. RSA 231:59-a, IV.

*C. Christine Fillmore, Staff Attorney
February 2010*

For more information regarding this or other legal issues, please contact the LGC Legal Services Attorneys at 800-852-3358 ext. 384 or legalinquiries@nhlgc.org.