



A Hard Road to Travel: New Hampshire Law of Local Highways, Streets, and Trails
2020 Supplement to the 2015 Edition
Supplemental Content Highlighted in Bold

Chapter 1
What is a Public Highway?
Page 19

Add a new citation following the paragraph titled “‘Viatic Use’ Only”

Recently, in an unpublished decision, the New Hampshire Supreme Court reaffirmed *King’s* holding that, although viatic uses are generally understood to be limited to use of a public road for public travel, where the legislature has adopted statutes, such as RSAs 231:160 - :161, permitting other uses of a public right-of-way, those uses will be deemed to be within the scope of a highway easement. *Society for the Protection of N.H. Forests v. Northern Pass Transmission Line, LLC*, No. 2016-0322 (N.H. January 30, 2017).

Chapter 3
New Hampshire’s Highway Classification System
Page 65

Add a new paragraph following the listing of cities and towns under heading Class IV:
Urban Compact Section Highways

In 2018, the legislature amended RSA 229:5 to include a new section, which authorizes the commissioner of transportation to establish additional compact sections to create class IV highways in any municipality by agreement with the municipality. This expansion of authority does not change the commissioner’s authority to unilaterally establish compact sections in the previously listed cities and towns.

Chapter 4
Discontinuance of Highways
Page 70

Add a new paragraph following the first complete paragraph under the title “Procedure”

Note that the discontinuance procedure requires a clear and unambiguous vote of the legislative body to discontinue the highway. *See, Davenhall*, at 697. Wording such as “discontinue and throw up” has been held by the New Hampshire Supreme Court to be ambiguous, and the Court has held that such ambiguity allowed the Class VI highway to continue to exist. *Town of Goshen v. Casagrande*, 178 A. 3d 1252 (N.H. 2018) (holding that a town vote in 1891 to “discontinue and throw up” a portion of a highway on the condition that another town would “throw up theirs to meet us” was ambiguous and, therefore, the unmaintained portion of the road remained a Class VI highway open to the public). NHMA recommends that a warrant article to discontinue a highway use a phrase such as “discontinue completely” or “discontinue absolutely,” not wording such as “abandon,” “close,” or “throw up,” which do not reflect the statutory wording “discontinue.”

Chapter 6

Special Categories of Layouts and Roads

Page 86

Modify the first full paragraph following the title “Highways to Summer Cottages” as follows:

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, **except as modified by RSA 231:81**. 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.

RSA 231:81 allows a town to extend the period during which it is exempt from maintaining highways to summer cottages. Under this statute, the town’s legislative body may vote to extend the non-maintenance period from December 10 to April 10, but in no event may the non-maintenance period begin earlier than November 15 or end later than April 30. Once adopted, the extended period will remain in effect until it is amended or rescinded in the same manner.

Chapter 6

Liability, Regulation and Maintenance Duties

Page 113

Add a new citation following the first full paragraph following the title “Speed Limits”

In addition, recently amended RSA 265:62 allows the governing body of a municipality to petition the Commissioner of Transportation to recommend a seasonal decrease in the posted *prima facie* speed limit on any part of the state highway system that is seasonally congested by pedestrian and bicycle traffic.

Chapter 6
Liability, Regulation and Maintenance Duties

Page 114

Add a new citation following the paragraph titled “Minutes Should Memorialize
Testimony”

See Brentwood Distribution LLC v. Town of Exeter, No. 2014-0729 (N.H. July 7, 2016) (holding, in an unpublished opinion, that municipalities could consider public safety in addition to road damage when making a determination to impose a weight limit).

Chapter 6
Liability, Regulation and Maintenance Duties

Page 115

Replace the paragraph titled “Prior Permission” with the following:

As an initial matter, even if no weight limits have been imposed, no abutter or other private person or entity may excavate or disturb the ditches, shoulders, embankments, or improved surface of any highway (including a Class VI), absent prior written authorization from appropriate local officials (for example, select boards, highway agent, or city or town council). RSA 236:9 through 236:12. This may take the form of actual excavation, but might also include damage caused by a heavy truck on a road weakened by the spring thaw and similar damage. Prior to granting authorization to disturb the highway, a municipality may impose rules and regulations, **including requiring the payment of a fee to excavate on paved roads**, and may require the person to provide a bond for the satisfactory restoration of the highway. **If the municipality opts to impose, by ordinance, a fee under RSA 41:9-a to excavate a public road, the fee must be reasonably calculated to compensate for road degradation and diminished road life expectancy.** *Liberty Utilities Corp./Energy North v. City of Concord*, No. 2015-0510 (N.H. June 16, 2017) (holding, in an unpublished opinion, that a fee of \$5-per-square-foot of excavation was reasonably calculated to compensate for road degradation and diminished road life expectancy).

If the municipality requires a bond, the bond requirements must, by statute, be equitably and reasonably applied to other bonded vehicles using the highway. The type of commodity being transported “shall not” be the determining factor for requiring a bond or for the dollar amount of the bond. RSA 236:10. The person or entity providing the bond shall determine the type of bond furnished, and it may be in the form of cash, letter of credit acceptable to the municipality, or a bond from an insurance company. However, when the public health or safety is in danger, a person may take “such immediate action as may be necessary” to address it, so long as they notify the municipality at once. RSA 236:9. It is not a prerequisite to have enacted a weight limit restriction for this law to apply. Nevertheless, in *Kerouac v. Hollis*, 139 N.H. 554 (1995), a town strategically used a weight limit to prevent road damage by excavators.

Chapter 6
OHRV (RSA 215-A) and Snowmobile (RSA 215-C) Use on Highways
Page 119

Replace third full paragraph with the following:

City or town councils and select boards may authorize the use of sidewalks and Class IV, V, or VI high- ways and bridges, or portions thereof, by OHRVs. RSA 215-A:6, IX. **Under prior law, the governing body of a municipality could vote to allow or prohibit OHRVs on Class IV, V, or VI highways with no notice or hearing requirements. Amendments in 2019 now require the governing body to hold “a duly noticed public hearing advertised at least 14 days in advance in a public location in the city or town and notification to abutters by verified mail pursuant to RSA 451-C:1, VII” in advance of any change in local rules. The cost of the notice to abutters is to be borne by the person or organization asking the governing body to alter the currently existing local rules.** Violations of the use restrictions on a town highway are enforced by the local police department.

Chapter 6
Liability, Regulation and Maintenance Duties
Page 123

Add after full paragraph titled “Public Purpose Requirement”

In 2019, the legislature passed RSA 231:81-a, which provides that when more than one residential owner enjoys a common benefit from a private road, in the absence of an express agreement or requirement governing maintenance of a private road, each residential owner must contribute equally to the reasonable cost of maintaining the road. In other words, in those situations where a private road exists but there is no clear agreement governing its maintenance, those who benefit from the road, i.e. those with homes or businesses along it, must share equally in the costs of maintenance. This appears to codify the idea expressed in Clapp v. Jaffrey, discussed above, that private roads are a private benefit and should be dealt with between private parties.

Chapter 6
Liability, Regulation and Maintenance Duties
Page 125

Replace amounts in the first three full paragraphs of \$35,000 with \$125,000.

Chapter 10
Bridges
Page 183

Replace the second full paragraph dealing with “red listed” bridges with the following

RSA 234:25-a requires the Department of Transportation to maintain a list of “red-list bridges” **and defines a structurally deficient bridge as “a bridge with a primary element in poor or worse condition (National Bridge Inventory (NBI) rating of 4 or less).”** Such bridges are “red-listed” for priority repairs or replacement and include highway bridges owned by the state or a municipality as well as railroad bridges owned by the state. Separate lists of red-list bridges are maintained for state-owned and municipally owned bridges. The department is required, **at a minimum**, to inspect state owned bridges on the list biannually and municipally owned bridges annually. The department must notify the governing body of a municipality, on or before **April 1** of each year, of any red-list bridges owned by the municipality and any state-owned red-list bridge within the municipality. RSA 234:25-b.

Chapter 13
Utility Lines and Other Private Enterprise Highway Uses
Page 207

Revise the first full paragraph under Trees: Owner Consent Required to read as follows

As detailed in Chapter 1, trees in highway rights of way are presumed to belong to abutting landowners, subject only to the town’s right to cut them when they endanger traffic. RSA 231:172, I provides that “no such licensee shall have the right to cut, mutilate or injure any shade or ornamental tree, for the purpose of erecting or maintaining poles, or structures...without obtaining the consent of the owner of the land on which such tree grows.” However, as amended in 2009 **and later, in 2015**, after significant damage caused in a series of ice storms, the statute goes on to provide that licensees are presumed to have consent to “cut, prune or remove shade or ornamental trees growing on land located within the right-of-way, **or which may fall upon the right-of-way**, that pose an unreasonable danger to the reliability of equipment installed at or upon licensed utility facilities.” In other words, utilities may cut trees within the right of way **or which may fall into the right of way during a storm**, whether they are located on abutting land or not, to avoid damage to the poles, lines, or other structures.