Do's and Don'ts of Class VI and Private Roads

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Road Terminology

- Right of Way
  - "a right to pass over another's land more or less frequently according to the nature of the use to be made of the easement"- *Jean v. Arsenault, 85 N.H. 72*
- Private Road
  - Can refer to a discontinued road, a class VI road, subdivision roads that are still under development, etc. Main factor is that municipality has no duty to maintain, however public may still have a right of way.
  - The term "private road" is commonly used to describe municipal responsibility, not necessarily the public's right to access.
- Public Road
  - Roads subject to reasonable regulation by public authorities, duty to maintain (unless a Class VI road), and where the town, city or state holds the right of way.

Discontinuance

Complete Discontinuance

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

Subject to Gates and Bars

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

Effect of Discontinuance

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

Class VI Roads

- A Class VI road is a road that has been discontinued by vote of town meeting 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.
- Class VI highways are full public highways in very respect except maintenance.
- Class VI highways shall be deemed subject to gates and bars and any gates and bars maintained by private landowners cannot be erected 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.

Private Roads

- No authority to regulate outside of street names and numbers for E-911 purposes.

- No duty or authority to maintain.
  - So stop plowing private roads!
  - (See *Clapp v. Jaffrey*)

- If you maintain them, you may have accepted them under *Hersh v. Plonski*

RSA 674:41 is State Zoning

- The statute is <u>not</u> dependent upon the adoption/existence of local zoning, nor the adoption of a local building permit process, as it applies in all municipalities that have adopted RSA 674:35 authorizing the planning board to approve subdivisions.
- In addition, the statute states that it preempts any less stringent local regulation, and thus the municipality cannot exempt lots from having approved frontage, meaning that grandfathered lots are not exempt from the statute's requirements either. RSA 674:41, III.

A Class V Road or Better

- "Class V or better" road previously laid, or appears on an official map, or has been accepted.
- RSA 674:41, I(b) – The street giving access corresponds in its location and lines with:
  - A street shown on the official map (RSA 674:10); or
  - A street on a subdivision plat approved by the planning board; or
  - A street on a street plat made by and adopted by the planning board; or
  - A street located and accepted by the local legislative body of the municipality, after submission to the planning board, and, in case of the planning board's disapproval, by the favorable vote required in RSA 674:40.

But What about "Grandfathering?"

- Some municipal zoning ordinances "grandfather" existing lots. However, such zoning clauses do not make existing lots exempt from the requirement of RSA 674:41. Paragraph III:
  - ✓"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."

ROW Cannot be Only Access to Property

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

Why Does RSA 674:41 Limit Building?

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

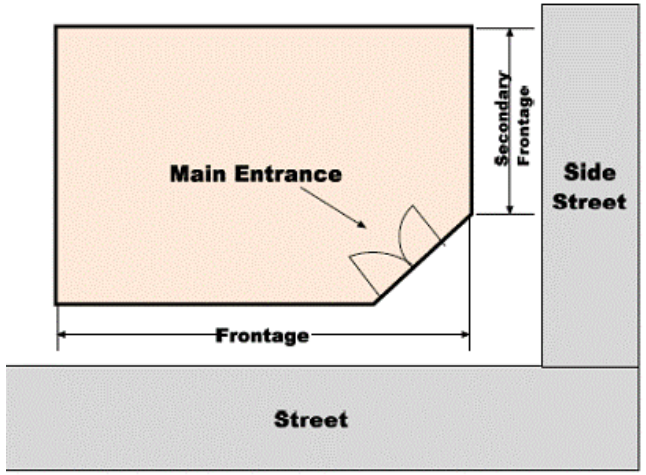
Glick v. Town of Ossipee, 130 N.H. 643, 649 (1992).

(still applicable but eroded somewhat)

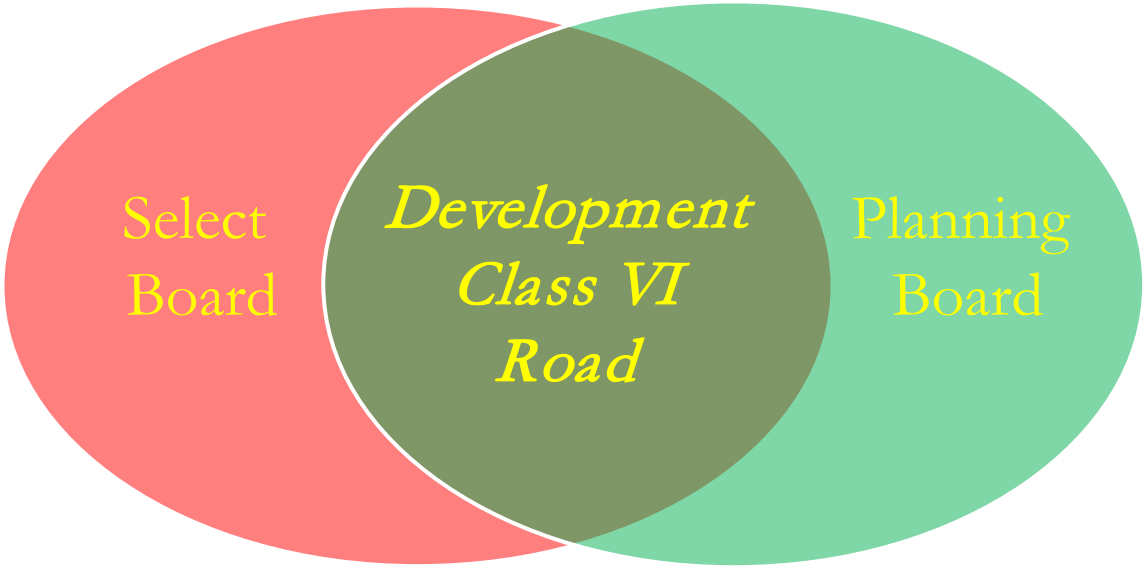
RSA 674:41 Applies to Building Permits in General

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

How Much Frontage?



- RSA 674:41is concerned with ensuring there is frontage on Class V road, not how much.
- *Amount* of frontage is governed by local zoning ordinance, not statute.



- Hold public meeting to vote on issuing building permit
- Have applicant fill out waiver clearly disclaiming municipality from liability and maintenance
- File waiver with registry of deeds

- Meet to review and comment on application for select board (if applicable)
- Hold conceptual consultation on subdivision applications, review for variance needs

Questions?

Amendments to RSA 674:41
Effective September 13, 2025

- HB 296 amends RSA 674:41.
- Currently, a building permit for the erection of a building on a Private Road can only be authorized by the local governing body (select board, town council, board of aldermen) after review and comment by the planning board.
- HB 296 amends RSA 674:41, I (d)(1) and will allow as an alternative to going to the planning board for review and comment the applicant can instead establish that the private road identifies and complies with a policy adopted by the governing body.
- Where governing body has adopted a policy for building on private roads, and the applicant complies with that policy, then planning board input would not be not required.

Policies for Permits on Private Road

- *Conditions of the Private Road:
  whether the road has adequate drainage,
  whether the grade is suitable to handle increased development and use,
  whether the surface is suitable for increased use and/or weight, including by public safety personnel, and
  whether public safety personnel, vehicles and/or equipment would have difficulty reaching the property, creating increased risks to those occupying or using the proposed structure(s) as well as increased risk to the responding public safety personnel, vehicles, or equipment.
- The nature, condition and grade of the private road from its intersection with a Class V or better road to the driveway of the subject property.
- Length of travel to reach the nearest intersection with a Class V or better road (see Section 4 below).
- Conditions of connecting roads and intersections: whether they are adequate to handle increased traffic.
- Whether issuance of the building permit would tend to distort the Town's or Master Plan.

* *Town of Pembroke Policy Building Permits on Class VI or Private Roads*

Amendments to RSA 674:41 Effective July 1, 2026

- SB 281 amends RSA 674:41, by permitting the issuance of building permits on Class VI roads without requiring approval from the governing body.
- In order to get a building permit for erection of a building a Class VI road the applicant must:
  - ✓Sign and record at the registry of deeds a liability waiver acknowledging that the municipality will not maintain the road nor provide services to any lot accessible by the road.
  - ✓That the municipality will not be responsible for losses or damages caused by lack of services and, that the responsibility for such services falls solely on the applicant.
- Prior to the issuance of the building permit, the applicant shall prove that the lot and any buildings thereon are insurable. We recommend that select boards prepare a standard liability waiver that is used for applicants under this statute. The municipality must verify that the waiver has been recorded.

Frontage Requirements in the Zoning Ordinance

- The change to the statute by SB 281 does not prohibit municipalities from establishing separate road frontage requirements for new construction.

- A municipal zoning ordinance can require frontage (of a certain length) on a Class V or better road. However, the municipal ordinance must clearly state this requirement by defining the road as "Class V or better."

- If the zoning ordinance does require frontage of a Class V or better road, a variance from the ZBA would still be required to build on a Class VI road. Because the statute is not effective until July 1, 2026, municipalities have time to amend their zoning ordinances if desired.

Recording the Waiver

The landowner must execute and record a release and indemnification agreement prior to issuing the building permit.

- ✓ Note: Any item recorded at the registry of deeds binds all future owners and puts them on notice of the terms.
- ✓ Necessary to protect the municipality from potential liability that could arise in the event there is an injury at the property due to condition of the road.
- ✓ *Prior* because they won't do it afterward, even if you plead.

Know Your Zoning Ordinance!

- The planning board cannot approve a subdivision that would not comply with the municipality's zoning ordinance. *Cesere v. Windham*, 121 N.H. 522 (1981).
- The board or code official must determine how the zoning ordinance defines the dimensional requirements for subdivided lots.
- Does the ordinance say that frontage must be on a Class V road or better? If the zoning ordinance requires minimum frontage on a Class V road, a variance would be required from the zoning board of adjustment before the board could approve the subdivision.
- Does the ordinance say that frontage must be on a public road? If it does then a Class VI road would qualify as a public road, but a private road would not. Thus, a proposed subdivision on a private road would also require a variance. A proposed subdivision on a Class VI would require approval of the select board under RSA 674:41

Planning Board Considerations For Proposed Subdivisions on Class IV Roads

- Conceptual consultation- make sure that an application for subdivision on a Class VI is one that the planning board will approve before making applicant go through process

- Only the select board can issue a building permit on Class VI road, therefore a limitation on the scope of the planning board's authority must be made clear to the applicant

- As provided in RSA 676:4, II (a), "such consultation shall not bind either the applicant or the board and statements made by planning board members shall not be the basis for disqualifying said members or invalidating any action taken. The board and the applicant may discuss proposals in conceptual form only and in general terms such as desirability of types of development and proposals under the master plan."

Planning Board Considerations (Cont.)

- Consider the master plan
- 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 expenditure of public funds for the supply of such services.
- The focus of the inquiry is upon the effect of the proposed development on the community, not the effect of further development in general on the community. *Ettlingen Homes v. Town of Derry*, 141 N.H. 296 (1996).
- If the consensus of the planning board at conceptual consultation is the subdivision is scattered and premature, don't be shy in making that clear to the applicant.

Planning Board Approval

- Grant approval subject to a condition precedent that before the plan will be signed and recorded at the registry of deeds the subdivider must first obtain approval for the issuance of building permits on the Class VI or Private Road from select board.

- Since the planning board has already commented favorably on the proposed issuance of building permits, the only thing the select board needs to do is ensure the notice of limits of municipal responsibility and liability has been or will be recorded at the registry of deeds.

- Consider requiring filing of covenants with registry

Common Terms in a Waiver

- Municipality assumes no responsibility for maintenance, including snow plowing, nor liability for any damages resulting from the use of the road
- Landowner is responsible for maintaining the road and the access to the subject property and releases and discharges the municipality from any maintenance obligation, and from providing any municipal services, including police, fire and ambulance services.
- Landowner agrees to indemnify the municipality from claims, whether brought by the Landowner or third parties, arising out of the use and occupation of the Landowner's property and the maintenance or repair of said road.
- Landowner is responsible for transporting any children to the nearest regular school bus stop.

What if the Application Under the Current Version of RSA 674:41 is Denied?

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

What Must the Applicant Demonstrate Under 674:41, II?

Applicant must demonstrate:

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

What does "practical difficulty or unnecessary hardship" mean?

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

ZBA Decision Denying Relief Under 674:41, II

Vachon v. Town of New Durham Zoning Bd. of Adjustment, 131 N.H. 623 (1989).

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

- ✓ Due to bare rocks, narrowness, swampy areas, ledge outcroppings, close bankings, and seasonal flooding. Webster Road probably one of the worst class VI roadways in the town.
- ✓ The ZBA found that police, fire, and rescue vehicles would have serious difficulties in reaching the properties - substantially increased risk for the inhabitants
- ✓ Increased possibility of financial impact to the municipality due to in injury to town employees and/or damage to Town equipment in trying to reach those properties in emergency situations, etc.

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

Legislative Body Authorizing Exception. RSA 674:41, II-a

- Provides another way for a lot to be exempted from the frontage requirements of the statute. The legislative body (town meeting or town/city council) may vote in the same manner as it would vote on a zoning ordinance to grant an exception from the law for any lot, including island lots for islands served exclusively by boats.
- In town meeting towns, the vote may occur at an annual or special meeting.
- The question must first be submitted to the planning board for its approval. If the planning board approves, a simple majority vote of the legislative body is sufficient; if the planning board disapproves it, a 2/3 legislative body vote is needed.

Questions?

for attending this legal lunch and learn webinar

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