An aerial photograph of a dense urban area, likely a city center, showing numerous high-rise buildings and a complex network of streets. The image is partially obscured by a large, semi-transparent green overlay on the right side, which has a subtle grid pattern. The text is positioned on the left side of the image, set against a white background that tapers into the city scene.

# *Class VI Roads: Development & Use*

Natch Greyes, Esq., NHMA



# Presenter



*Natch Greyes*

*Municipal Services  
Counsel*

# Presentation Agenda



Classification of  
Roads



Maintenance of  
Roads



Development on  
Class VI Roads

# Classification

# What's a Public Highway?



- Highway = Road
- Easement for viatic use
- **Public use**
- **RSA 229:1** – Not really a “definition”
- Ownership separate from easement

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# Municipal Roads

Class	Class VI • RSA 229:5, VII & 231:21-a
Class	Class V • RSA 229:5, VI & 231:3
Class	Class IV • Urban Compact Section Highways - RSA 229:5, IV
Class	Class II • Unimproved Class II - RSA 230:4

# Creating Class VI Roads



Layout pursuant to RSA 231:21



Discontinuance subject to gates and bars pursuant to RSA 231:45, or



Failure of the town to maintain and repair such highway in suitable condition for travel thereon for 5 successive years or more as set forth in RSA 229:5, VII

# 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

- ▶ Still 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 cannot be locked.

# 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*



The background features a dark blue central area with abstract, overlapping green and yellow-green geometric shapes on the right and top edges. The text is centered in the blue area.

# Maintenance & Regulation

# The Default Rule

RSA 231:59 authorizes municipalities  
to spend money on repairing:

Class IV

Class V

No provision to authorize  
municipalities to repair Class VI

# Liability Protections



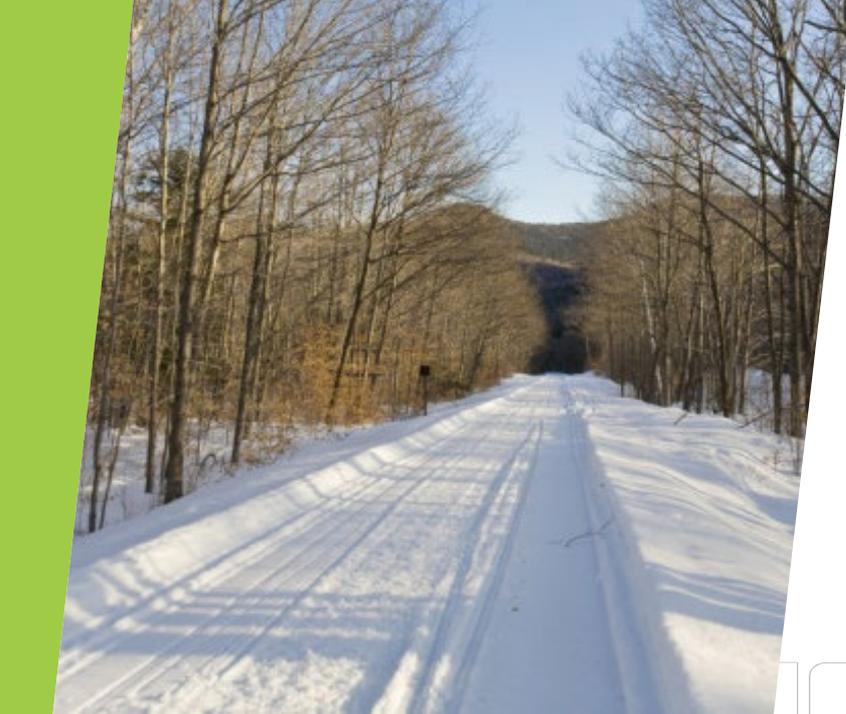
- ▶ **RSA 231:50** – Towns shall be relieved of all obligation to maintain, and all liability for damages incurred in the use of, discontinued highways or **highways discontinued as open highways and made subject to gates and bars.** (All Class VI Highways are “subject to gates and bars.”)
- ▶ **RSA 231:93** – Municipalities shall not be deemed to have any duty of care whatsoever with respect to the construction, **maintenance or repair of class I, III, III-a or VI highways...**

# Emergency Lanes: How Class VI Roads May Be Maintained by the Town



- ▶ RSA 231:59-a – Requires a layout and public hearing by select board on any Class VI or Private Road.
- ▶ Must receive information of a concrete public safety need.
- ▶ Allows the municipality to undertake such “work deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles roads.”





# These are Class V Roads



## Winter Roads

*RSA 231:24*

Nov. 15 – Apr 1

The logo for NHMA & is centered on the page. It features the letters 'NHMA' in a large, outlined font, followed by an ampersand '&' and the letter 'A' in a similar outlined font. A faint outline of the state of New Hampshire is visible behind the text. Below the logo, the text 'HAMP SHIRE MUNICIPAL ASSOCIATION' and 'EST. 1941' is partially visible.

## Highways to Summer Cottages

*RSA 231:79 - :81*

Apr 10 – Dec 10\*

May be extended to April 30 to  
November 15





# Regulating Class VI Roads



- ▶ Under the provisions of RSA 41:11, select boards are afforded the same authority as city councils to regulate local roads as provided in RSA 47:17, VII, VIII and XVIII.
- ▶ RSA 47:17 allows regulations pertaining to:
  - ▶ VII: Use of Public Ways
  - ▶ VIII: Traffic Devices and Signals
  - ▶ XVII: Parking

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# Limiting Access to Certain Persons

- ▶ Although all Class VI roads are deemed subject to gates and bars, the select board must still regulate such structures to assure public access. RSA 231:21-a, I.
  - ▶ The public, including motor vehicles, cannot be barred from using a Class VI road, except as weight limits, seasonal or otherwise, prohibit. RSA 231:191.
- ▶ Limiting access to a Class VI road requires discontinuance – making it a quasi-private road – or reclassification as a Class A trail under RSA 231-A:2.
- ▶ Class A trails can be used by owners of land abutting the trail, land served exclusively by such trail for non-developmental use (agriculture/forestry), or access to existing structures.

# Development

# RSA 674:41 is State Zoning

- ▶ The statute is not dependent upon the adoption/existence of local zoning, nor the adoption of a local building permit process, so it applies in all municipalities.
- ▶ 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.



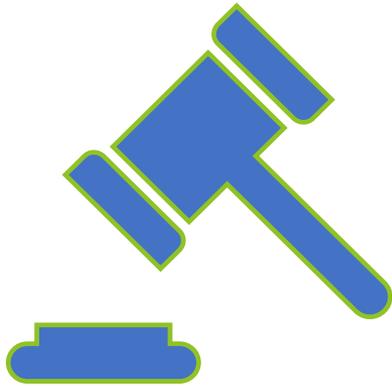
# What Does RSA 674:41 Do?



RSA 674:41 generally prohibits the issuance of a building permit for a lot unless that lot has frontage on a Class V or better highway.

In other words, no building on Class VI highways and private roads unless certain circumstances apply...

# 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).

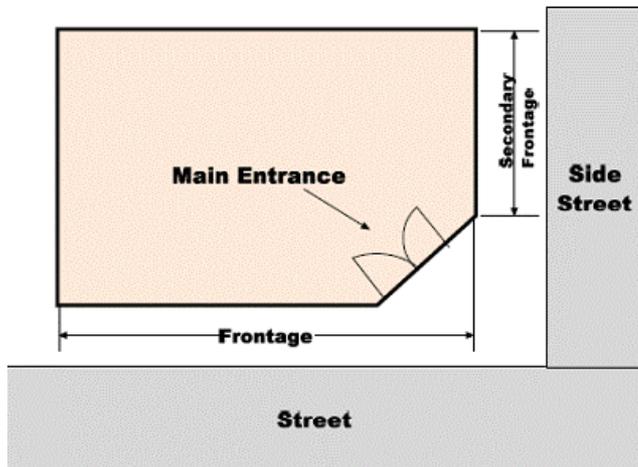
# Municipalities Not Obligated to Allow Construction

- ▶ Municipalities empowered to regulate by means of a zoning ordinance frontage requirements, which exclude access routes unsuited for expeditious travel.
- ▶ Basic purpose of requiring frontage is to ensure that a dwelling may be reached by the fire department, police department, and other agencies charged with the responsibilities of protecting the public peace, safety, and welfare.

# 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?



- ▶ Statute is concerned that there is frontage on Class V road, not how much.

- ▶ *Amount of frontage is governed by local zoning ordinance, not statute.*

# Minimal Steps to Allow Development?

Governing body, after review and comment by planning board, votes to authorize building permit.



Municipality clearly disclaims responsibility for maintenance and liability for damages resulting from use of road.



Applicant files with Registry of Deeds a notice of the limits of municipal responsibility and liability prior to issuance of the permit.

# Municipalities Need Not Adopt Town- wide Policies

- ▶ No requirement that municipalities adopt town-wide policies.
- ▶ Municipality may examine each request on a case-by-case basis.
- ▶ Even if municipalities adopt policies, they can do adopt policies that only allow construction in some areas, but not others.

# What to Consider When Considering Whether to Allow Development?



Condition of the road



Width and grade of the road



Drainage infrastructure



Extent of demands on public services



Likelihood of future lay out /  
connection to existing road network

# 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.

# What's the Waiver?

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

# 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 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?

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.

# What Does It Look Like When An Applicant Fails?

*Vachon v. Town of New Durham Zoning Bd. of Adjustment*, 131 N.H. 649, 625 (1989).

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

“that due to bare rocks, narrowness, swampy areas, ledge outcroppings, close bankings, and seasonal flooding, Webster Road was ‘... probably one of the worst ...’ class VI roadways in the town. The ZBA further found that police, fire, and rescue vehicles would have serious difficulties in reaching the properties, thus ‘creat[ing] a substantially increased risk for the inhabitants of such ... proposed building[s], and an increased possibility of financial impact to the municipality in terms of increased liability or exposure to claims, 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.



Suggested Resource:  
NHMA's  
*Hard Road to Travel*  
+  
2020 Supplement



*for joining me today!*

## NHMA'S MISSION

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