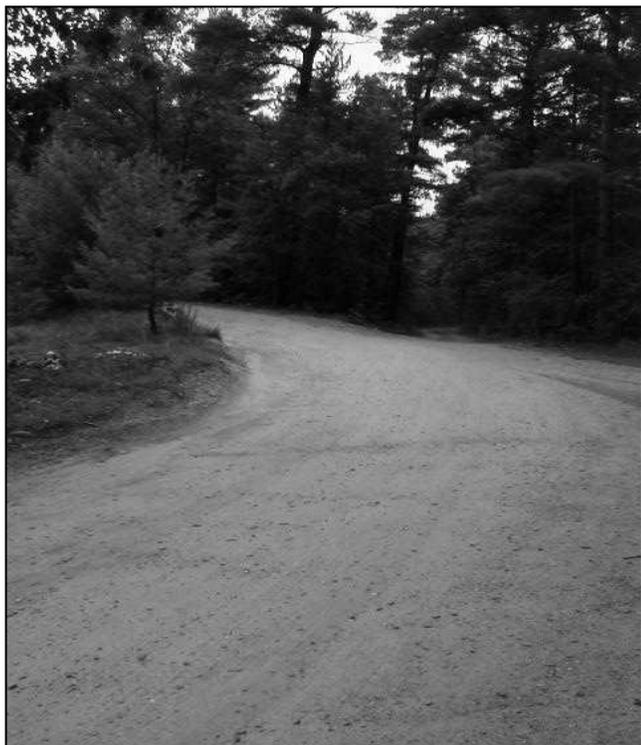


Legal Q&A, Class VI Roads and Maintenance Issues

By Susan Slack, Counsel, Local Government Center



Highway repair and maintenance projects are usually well underway at this time of year, prompting questions about maintenance of Class VI roads. There are lots of misconceptions about Class VI roads, so here are some reminders.

Q. What is a Class VI road?

A. In the state's highway classification system, which is defined in RSA 229:5, Class VI roads are "all other existing public ways," meaning public ways not otherwise classified as Class IV or Class V roads. Class VI roads include those that have been discontinued subject to gates and bars, as well as those that have "not been maintained and repaired by the town in suitable condition for travel" for five successive years or more. (See RSA 229:5, VII.) The two important keys to this statutory definition are that Class VI roads are *public* ways, and they are roads that the town has no duty to maintain. Note that the definition of a Class V road is one that the town does have a duty to maintain. (See RSA 229:5, VI.)

Q. Can the town appropriate money to maintain or repair Class VI roads?

A. RSA 231:59 authorizes municipalities to spend money to repair Class IV and V highways, not Class VI roads. One of the basic tenets of New Hampshire municipal law is that towns and cities have only that authority granted to them by the state legislature. Without a specific grant of authority, towns and cities do not have authority to act.

Q. Can private parties maintain or repair Class VI roads?

A. Yes, with permission of the municipality. RSA 236:9 prohibits anyone from excavating or disturbing the ditches, embankments or traveled surface of any town road, including a Class VI road, without the written permission of the municipality's governing body (board of selectmen or town/city council) or the road agent. RSA 236:10 provides that the municipality may regulate such private road work and may require a bond for the satisfactory restoration of the road. RSA 236:11 requires anyone who excavates or disturbs town roads to restore them to the satisfaction of the authorized local official.

Q. What happens if the municipality maintains or repairs a Class VI road?

A. There are several important reasons to avoid maintenance and repair projects on Class VI roads. First, municipalities enjoy protection from liability for damage or injury due to the condition of a Class VI road. RSA 231:93 provides that municipalities have no duty to maintain or repair Class VI roads. The highway maintenance duty established in RSA 231:90 through 92-a applies only to Class IV and V highways. A municipality that undertakes Class VI road maintenance exposes itself to the risk of liability for damage or injury resulting from that work. Second, performance of maintenance or repair work could result in stopping municipal arguments, meaning that in a lawsuit involving a landowner, a municipality may be barred from arguing that it is

not required to maintain a road due to its Class VI status. See *Turco v. Barnstead*, 136 N.H. 256 (1992). Third, a Class V road that attains Class VI status as a result of the lapse of maintenance will revert to Class V status again if the town maintains it for at least five consecutive years. The “illegal” maintenance and repair must be “regular” and “on more than a seasonal basis” so that the road is in “suitable condition for year-round travel.” See RSA 229:5, VI.

Q. What if there are public safety reasons for occasionally repairing or maintaining Class VI roads?

A. If a municipality wishes to spend money on Class VI road, it should do so under the emergency lane statute, RSA 231:59-a, which was enacted in 1994. That statute authorizes municipalities to raise and appropriate money for the maintenance of any Class VI road (or private road) that is declared an emergency lane by the governing body. The procedures required for making this declaration include a public hearing and written findings “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.”

Q. What kind of maintenance or repair of Class VI roads is authorized by the emergency lane statute?

A. RSA 231:59-a, I provides that such repairs may include “removal of brush, repair of washouts or culverts, or any other work deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles.” The municipality can establish a capital reserve or trust fund for this purpose. Maintenance or repair of Class VI roads undertaken in accordance with the emergency lane statute does not create any duty or liability for the municipality. See RSA 231:59-a, IV.

Q. Can gates or fences be put up on Class VI roads?

A. Yes, but RSA 231:21-a, I requires gates or bars maintained by private landowners to be erected so as not to interfere with public use of the Class VI road. Such gates or bars must “be capable of being opened and reclosed by highway users.” Municipali-

ties are authorized to regulate these structures “to assure public use” and they have authority to have gates or bars removed if they have fallen into disrepair or if they interfere with public use of the Class VI road.

Q. What does the term ‘gates and bars’ mean?

A. Prior to 1903, a town could only discontinue a highway completely, meaning it was no longer a public way. Only after the state legislature enacted Laws of 1903, Chapter 14:1 could a town discontinue an “open” highway and subject it to gates and bars. The term “gates and bars” is not expressly defined by statute. Nevertheless, the term historically refers to an owner’s right to enclose premises for his or her own benefit--usually to confine livestock. The owner required public travelers to open and close the gates or bars as a condition to travel. The term “gates and bars” first became associated with Class VI highways in 1925, when the legislature enacted Laws of 1925, Chapter 12:1, which provided that a town had no duty to maintain any highway that had been closed subject to gates and bars.

Q. Are there other ways in which municipalities may regulate Class VI roads?

A. RSA 231:21-a, which was enacted in 1999, provides that all Class VI roads--regardless of how they obtained Class VI status (by layout, discontinuance subject to gates and bars, or lapse of maintenance of Class V roads)--are deemed subject to gates and bars. The statute clearly authorizes municipalities to regulate their use under the provisions of RSA 41:11; RSA 47:17, VII, VIII and XVIII (highway ordinances); RSA 236:9 through 11 (excavation and disturbance); RSA 236:13 (driveway access); and RSA 231:191 (weight limits).

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