

[Plan-link] **Private Roads (here we go again)**

Fri 7/27/2012 9:30 AM  
Donald Coker  
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To all:

The Town of Strafford has a subdivision regulation that requires 200 feet of frontage. It says: **1.14.5 Frontage. "Frontage means the length of the lot bordering on the public right of way and/or private right of way".**

In essence what is happening is developers are calling a driveway a private road, and gaining "credit" for frontage. While they must build this "private road" to Town standards (ostensibly to eventually have the Town approve this as a Town road and take over maintenance of it) as a practical matter, the Town would never vote to take over responsibility for what is nothing more than a driveway.....and besides, they are asking for waivers to avoid building to town standards.....pavement,. width, etc.

Using this "private road" declaration, the last application effectively reduced the road frontage on some lots from 200 feet to about 150 feet, resulting in 9 lots where there may have been only room for 6 or 7 if the traditional frontage was applied. This was seemingly wrong on many levels, not the least of which is the Master Plan's goal of "maintaining the rural character".

A number of questions arise:

- 1) Can a developer simply say "this is a private road, not a driveway" and gain the credit for the frontage? Is a private road created simply by declaring that it is a private road?
- 2) Are there any cases that have dealt with this in the past that anyone is aware of?
- 3) Is a town OBLIGATED to accept the designation of a driveway as a "private road"? Is there any case law to that effect that anyone is aware of?
- 4) What constitutes a private road vs. a driveway?

My past 13 years on the Portsmouth Planning Board did not have any private roads come up for consideration. This is all new to me. Perhaps maybe I just don't understand the nature of private roads....anything is possible.

Any advice or case law on this would be most appreciated.

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Fri 7/27/12 9:44 AM

Donald,

Please review [RSA 674:41](#) entitled Erection of Buildings on Streets. I believe careful review and understanding of that statute will answer the majority of your questions.

Steven B. Keach, P.E.  
Keach-Nordstrom Associates, Inc.

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Fri 7/27/12 10:17 AM

On a side note re RSA 674:41, the Supreme Court recently handed down a decision in Merriam

Farm, Inc. v. Town of Surry (opinion issued July 18, 2012) that provides guidance in defining the terms "practical difficulty" and "unnecessary hardship" as used in RSA 674:41,II. The Court determined that the terms are interchangeable and further concluded that both terms refer to the unnecessary hardship test as set forth in [RSA 674:33,I\(b\)\(5\)](#).

Sara H. Carbonneau  
Swanzy Town Planner

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Mon 8/6/12 11:27 AM

Donald,

My only comment is also to consider long term maintenance. If this private road (a.k.a., driveway) is built, who will maintain it if it is not a town road? Too often we get all caught up in today's regulations and the review/approval process but need to consider what will be there in 20 years when the current board members are gone, staff has changed, abutters have moved and all that remains is the record.

If a road is built and does not become a class V highway (i.e., "town road"), what is the mechanism for it's perpetual maintenance? When these private roads are created with the promise that they will "never" become a town road, somehow things change in a few years and when the developer is gone and the road begins to fail or no one is plowing the snow and the lot owners now start clamoring for the town to take it over and the fight begins. To avoid, that, make sure there is a long term plan for maintenance if it's not the town - such as a homeowners association or other legal entity who has the responsibility - and that it is clear who will pay for it.

Chris Northrop  
OEP

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Mon 8/6/2012 1:45 PM

This thread is interesting as being similar to one on the Real Estate Section of the Bar in recent days.

Town planning boards should understand that all new roads in New Hampshire start out as private roads. See [RSA 229:1](#) for the four methods of creating public highways in NH. (i) by statute (a/k/a layout by proper governing body); (ii) road over land owned by town (a discussion for another day); (iii) dedication and acceptance; and (iv) prescriptive use 20 years prior to 1/1/1968. A vast majority of new subdivision roads that become public are through the Dedication and Acceptance process. D&A is a two step process where the developer depicts a road on a subdivision plan that is recorded (the common law regarding D&A reaches back 250 years so this short email is a very simple statement of the concept). The Dedication amounts to the developer stating that they would like the road to become a public highway and is waiving all damages that may be otherwise due from an eminent domain proceeding (again – simplistic explanation). After the road is constructed the developer or the abutting lot owners request that the municipality Accept the road as public.

Interestingly, there is currently no statutory requirement for a municipality to Accept a road after construction, notwithstanding the untested argument that if the developer follows all of the municipal requirements, that the municipality will be estopped from not Accepting the road. For new subdivisions, I counsel all of my developer clients to create a homeowners association, with a detailed recorded Declaration specifying transition dates and maintenance cost obligations, to manage the road during the time before Acceptance, if it happens at all. What has happened

during this real estate down turn is that subdivision roads that were constructed to service, say 30 lots, only have 6 or 7 homes built. The towns are looking very carefully at whether it is appropriate to Accept a road with so few homes as the cost to the town to maintain exceeds the tax revenues gained. If the real estate market returns and the road is Accepted, the HOA may simply dissolve, unless there are other common facilities in need of management.

Municipalities should be aware of this interim time period, which could last many years in a prolonged down turn. Municipalities should review their subdivision regulations as they relate to requirements for:

1. Declaration of Covenants and Restrictions that include Homeowners Association creation, including provisions for collection of maintenance fees by the HOA;
2. Subdivision approval conditions that include concomitant recording of the mylar with the signed Declaration;
3. Defined transition dates for the common areas (roads and drainage structures) from the developer to the HOA; and
4. A procedure for follow-up to make sure the documents are finalized and recorded.

These procedures address the period of time between the approval and formal Acceptance of the road, which in many cases is left as a void. The recording of the Declaration also puts the lot buyers on express notice that the road is private until formally Accepted by the town (assuming they read the document).

Note that the Land Sales Full Disclosure Act, aka Attorney General Registration, of larger subdivisions requires these agreements, although, in my experience there are problems with developer follow-through and little State enforcement.

This discussion begs the question as to the constitutionality of zoning and subdivision regulations that require "x feet of frontage on a public road". If a new subdivision road is by definition private until Accepted, does this mean that only land that abuts an existing public highway may be subdivided? This too is a discussion for another day.

Stephan Nix  
Attorney at Law/Licensed Land Surveyor