

Class VI Highways

Introduction

A Class VI road is defined as:

All other existing public ways, and shall include all highways *discontinued as open highways and made subject to gates and bars*, except as provided in paragraph III-a [new boating access highways], and all highways which *have not been maintained and repaired by the town in suitable condition for travel thereon for 5 successive years or more*. [RSA 229:5](#), VII (emphasis added).

Although neither the state nor its political subdivisions are required to maintain them, Class VI highways are public roads. As such, Class VI roads are generally subject to the same legal principles that govern all highways, including:

- Abutters' rights issues (Chapter 1);
- Methods of public highway creation (Chapter 2); and
- Towns regulatory authority (Chapter 6).

Formation of a Class VI Highway

In 1925, all non-maintained public highways were classified as Class VI. The gist of the Class VI category is the absence and/or discontinuance of maintenance. The law provides four ways roads may qualify for Class VI status:

- Lapse (absence of maintenance for five years);
- Discontinuance subject to gates and bars;
- Layout subject to gates and bars; and
- Department of Transportation's discontinuance of a Class I or II highway.

LAPSE: ABSENCE OF MAINTENANCE FOR FIVE YEARS

The overwhelming majority of Class VI highways resulted from simple neglect, a consequence of rural population decline. The lapse or statute of repose component of [RSA 229:5, VII](#), provides that a road falls within the Class VI classification if it has not been maintained and repaired in suitable condition for travel for five successive years or more.

'Suitable Condition for Travel.' It is immaterial whether the road is "suitable for travel" so long as the town has not maintained and repaired the road for a period of at least five consecutive years. For instance, although a road that has not been maintained and repaired may be traveled, it does not become a Class V highway. *Glick v. Town of Ossipee*, 130 NH 643 (1988). In *Glick*, the trial court erroneously held that the Ossipee Mountain Road was a Class V road because, among other things, it had been traveled continuously for 30 years. The Supreme Court reversed, holding that a Class V road must be both traveled and maintained. The *Glick* Court concluded:

[T]he legislature's construction recognizes that if roads could be designated [C]lass V highways [as opposed to Class VI] solely because they are "traveled," even those roads that have been discontinued subject to gates and bars would be [C]lass V highways deserving of regular town maintenance because people continue to travel them. The legislature clearly seeks to avoid this incongruous result by restricting the [C]lass V designation to highways that are both "traveled"

and "maintained."

Resumption of Maintenance. Resumption of maintenance of a Class VI highway now affects its classification status, as a result of a 1999 amendment to [RSA 229:5,VI](#). A Class V road that attains Class VI status as a result of a lapse of maintenance (see above) will revert to Class V status again if the town has maintained 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." Class VI roads that have been maintained after having been declared emergency lanes under the procedures outlined in [RSA 231:59-a](#) do not revert to Class V status because of such maintenance.

If a town seeks to perform some minimal maintenance to a Class VI road, it should do so under the emergency lane statute. See Chapter 5. Independent of liability concerns, the emergency lane law ([RSA 231:59-a](#)) is an exception to [RSA 231:59](#), which requires road maintenance monies be spent only on Class IV and V highways.

Also, a town's performance of maintenance or repair work may arguably be the basis for municipal estoppel arguments – that is, in a lawsuit involving a landowner, a town may be barred from arguing that it is not required to maintain a road due to its Class VI status. *Turco v. Barnstead*, 136 NH 256 (1992).

DISCONTINUANCE SUBJECT TO GATES AND BARS

[RSA 229:5, VII](#) authorizes a town to vote to discontinue an open highway and have it made subject to gates and bars. Importantly, the vote must be by town meeting and not the board of selectmen. When drafting a warrant article or vote by the legislative body to convert a highway to Class VI, the wording should closely reflect the language of the statute – "discontinue subject to gates and bars."

Prior to 1903, a town could only discontinue a highway completely. Only after the Legislature promulgated 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, but 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 a town had no duty to maintain any highway that had been closed subject to gates and bars.

LAYOUT SUBJECT TO GATES AND BARS

A town may categorize a strip of land as a Class VI road through the "layout" process. [RSA 231:21](#) permits a highway to be laid out "subject to gates and bars." It states, in relevant part: "Any highway may be laid out subject to gates and bars... In such case it shall be determined... by whom the gates and bars shall be maintained." [RSA 231:21](#) The town's authority to lay out a road subject to gates and bars is also found in [RSA 231:22](#) (titled, "Previously Discontinued Highway") and [RSA 231:23](#) (titled, "Conditional Layout"). However, towns rarely exercise the "gates and bars" authority because it is unlikely that any such prospective roads would satisfy the "public convenience and necessity" test. See Chapter 2.

DISCONTINUANCE OF CLASS I OR II HIGHWAYS

The commissioner of Transportation has the authority to discontinue a Class I or II road as a state highway. In such instances, the highway may revert to the town as either a Class V or Class VI highway. [RSA 230:57](#). The statute is silent regarding the classification criteria for determining whether a discontinued highway shall become a Class V or VI road. According to the

Department of Transportation, the commissioner has the discretion to make such determinations.

ALL CLASS VI ROADS SUBJECT TO GATES AND BARS

In 1999, the legislature enacted [RSA 231:21-a](#), which clarified for the first time that all Class VI roads, regardless of how created, "shall be deemed subject to gates and bars." The gates and bars may not interfere with public use, and must be capable of being opened and closed by users of the road. The selectmen are authorized to regulate the structures to assure public use.

Development Along Class VI Highways

As stated above, Class VI roads are public highways for purposes of the public's right to use. However, they are distinct from other public roads for purposes of abutters using the road as access for an adjoining development.

CLASS VI ROAD NOT AN 'APPROVED STREET'

[RSA 231:45](#) provides, in relevant part: "Any [C]lass IV, V or VI highway... may be discontinued as an open highway and made subject to gates and bars... Such a discontinued highway shall not have the status of a publicly approved street." The statute was intended to alleviate pressure exerted by developers against towns to improve roads subject to gates and bars. In *King v. Town of Lyme*, 126 NH 279 (1985), the Court stated:

The purpose of the act was to make it clear that towns were not responsible for maintaining highways discontinued subject to gates and bars...The act amended RSA 231:45 in the face of growing concern that many areas were opening up to development and that developers might try to force towns to improve highways subject to gates and bars.

Although [RSA 231:45](#) prohibited public improvements to roads that were discontinued subject to gates and bars, it did not expressly impose a similar restriction on Class VI roads that resulted from the five-year lapse period. Further, the statute did not address private development along Class VI roads. Depending on the condition of a particular road, each town dealt with private development differently. Such piecemeal planning predictably resulted in a lack of uniformity.

BUILDING ALONG CLASS VI HIGHWAYS: RSA 674:41, I (C)

In 1983, the legislature enacted [RSA 674:41, I \(c\)](#), to address the disparate approaches taken by municipalities to permitting development along Class VI highways. Under [RSA 674:41, I \(c\)](#), in order to construct a building along a Class VI highway, the following is necessary:

- The local governing body (board of selectmen), after review and comment by the planning board, has voted to permit building.
- The municipality assumes neither responsibility for road maintenance nor liability for any damages arising out of road use.
- Prior to the issuance of a building permit, the applicant produces evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds.

Authority to Deny Construction Along a Class VI Road. [RSA 674:41, I \(c\)](#) allows a town to prohibit building along Class VI highways. In *Vachon v. Town of New Durham*, 131 NH 623 (1989), the Court upheld a town's policy of prohibiting any building along a Class VI road if the driveway was more than 600 feet from the nearest Class V or better road. In doing so the Court

rejected the landowner's argument that the landowner had the right to build so long as it offered the town a release from liability.

In lieu of denying a building permit, many towns have adopted policies restricting building along Class VI roads unless the owner/applicant agrees to upgrade the road for reclassification as Class V.

Exception from the Zoning Board of Adjustment. When the local governing board rejects an application for a building permit, an aggrieved owner can request an exception from the zoning board of adjustment, [RSA 674:41, II](#).

Record Notice of Limitations at Registry of Deeds. For purposes of satisfying the statutory notice of limitations requirements, [RSA 674:41, I \(c\)](#) does not require any particular form. However, the following information should be provided as part of any notice:

- Landowner's name and contact information.
- Description of the property.
- Location of owner's deed at the registry of deeds (that is, book and page).
- Road's name.
- Road's status as a Class VI highway.
- Circumstances surrounding road's classification (for example, discontinued subject to gates and bars, five years of non-maintenance, etc).
- After the planning board's review and comment the governing body has adopted a policy under [RSA 674:41, I \(c\)](#) that allows building on this particular Class VI highway. The notice should also detail when the policy was adopted and its location on file.
- Details regarding the issued building permit and its location on file.
- With reference to [RSA 674:41, I\(c\)\(2\)](#) and [RSA 231:93](#), a statement that the municipality has no legal duty to maintain (for example, plowing, grading, drainage, etc.) the highway or any liability for damages resulting from road use. Further, the notice should provide that municipal services (for example, police, fire, ambulance, school bus transportation, etc.) may be unavailable at times.
- The owner agrees to these limitations of town responsibility and liability, and the owner is responsible for any road maintenance and repair work.
- Prior to performing any road repair or maintenance work, the owner must obtain approval of the governing body or highway agent under [RSA 236:9](#). The notice should also describe types of work where the owner has permanent recorded permission to perform, together with any conditions.
- The road is a public highway, and the owner shall not prohibit authorized public use.
- Pursuant to [RSA 41:11](#), the governing body retains full authority to regulate the public use of the highway, including the applicant's use, and the erection, of unlocked gates or bars.
- Witnessed signatures of the owner(s) and the local governing body.

The statutory notice requirement should not be taken lightly. At least one New Hampshire court has found that a town is required to provide maintenance to a Class VI highway where the landowner was unaware of a road's legal status. In *Turco v. Town of Barnstead*, 136 NH 256 (1992), the Court held that a landowner had justifiably relied on a building permit as a representation that the town would provide some road maintenance.

Reclassification of Class VI Road to Class V

The law provides two instances in which a municipality may reclassify a Class VI highway as a

Class V.

LEGISLATIVE BODY VOTE

Pursuant to [RSA 231:22-a](#), the legislative body (town meeting) may reclassify a Class VI highway "by vote ... as a [C]lass V highway, or as a [C]lass IV highway if located within the compact sections of cities and towns." The statute allows a town to reclassify a road irrespective of whether the Class VI status arose under the five-year lapse provision or by discontinuance subject to gates and bars.

Importantly [RSA 231:22-a](#) allows the legislative body to delay the effective date of any reclassification, thereby affording a town an opportunity to upgrade or effectuate any repairs to a road prior to any status change. A town may also condition any reclassification upon compliance with betterment assessments as provided in [RSA 231:28 through 231:33](#). Property owners abutting or served by the road have the same rights and remedies as provided in these statutes, including the right to submit a petition not to conditionally reclassify the highway. Finally, the costs assessed against the owners cannot reflect construction standards any higher or more stringent than those reflected in the best town road giving access to the reclassified highway.

RECLASSIFICATION BY LAYOUT

A town may reclassify a Class VI road to Class V status through the layout process this process involves laying out a Class V road over an existing Class VI road. Under this method the town's governing body is responsible for laying out the "new" highway. The betterment assessment option detailed under [RSA 231:28](#) et seq. is available under the layout process.