

## **Off-Road Building The Issuance of Building Permits on Class VI and Private Roads**

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Spring, although a bit delayed, is upon us, and so is that time when people begin to look at land and consider building new homes. Prospective residents will flock to the town hall, the planning board and the code enforcement officer. The town is then often presented with the question: Can we, or should we, permit this applicant to build on this unmaintained road? Thus begins the complicated balance of the law, primarily held in RSA 674:41 and policy considerations. The legal analysis alone can be mind-bending as it requires navigation of the roads statutes as well as the subdivision statutes. Intertwined in that analysis, is the policy making authority of the town with regard to building on its Class VI and private roads. The purpose of this article is to assist municipalities in making legally sound and consistent decisions regarding development of Class VI and private roads.

### **The Basics**

RSA 674:4 1 regulates the placement of new buildings and issuance of building permits based on the status of the street giving access to a particular lot and building. Assuming that the local planning board has been granted platting jurisdiction, a building permit may be issued and building erected where the street giving access to the lot:

- is a Class V or better road that attained that status prior to the time when the local planning board existed with subdivision authority;
- is shown on an official map;
- is on an approved subdivision plat;
- is on an adopted street plat;
- is reviewed by the planning board and accepted by a vote of the legislative body. A majority vote required if the planning board approves but a 2/3 vote is required if it does not approve;
- is a Class VI road if the governing body policy permits;
- is a private road if the governing body policy permits.

Deciding when and where a building may be erected pursuant to the statute is only part of the equation. New development inevitably raises questions of road quality and maintenance, emergency services access, general liability, and in some cases, a change in the character of an area.

### **Building on Class VI Roads**

RSA 674:41 permits building, and issuance of building permits, on Class VI roads where:

- the governing body, after comment by the planning board, has voted to allow such building on the entire road or a portion thereof;
- the municipality doesn't assume responsibility for maintaining the road or liability for damages resulting from its use; and

- the applicant has filed an acknowledgement of this limit of liability and responsibility regarding the road at the registry of deeds.

Beginning in 2002, this same standard applies to building on private roads. The most pivotal part of this analysis lies in step one. Will the town allow this type of building at all? If the selectmen have not yet voted to allow building on Class VI or private roads generally, or any such road in particular, and the project requires access from such road and has frontage on that same road, then the code enforcement officer may not issue a building permit. RSA 674:4 1, III. Paragraph II of 674:41 describes the process for those cases where the applicant wishes to appeal such an administrative denial. The applicant should appeal a decision of the selectmen or code enforcement officer to the ZBA. If the town does not have a ZBA, the applicant should appeal the selectmen's denial to the legislative body. In order to establish a basis for appeal, the applicant must show that the enforcement of 674:41 relative to their project would either entail practical difficulty or unnecessary hardship and that the project does not require the structure to be related to the street. The procedure to be used on appeal is contained in RSA 674:14 and :15.

Note that in towns that do not require building permits, the selectmen must still approve a policy of allowing mission to build may be appealed directly to the ZBA, the local legislative body or the board of appeals in that town. The statute indicates that in such cases, the ZBA or permitting body may issue a permit subject to reasonable conditions so long as issuance would not, 1) distort the official map or have a negative impact on the master plan, and 2) cause hardship to future purchasers or undue financial impact to the town. These are similar to the factors that the town would consider even if it does have a building permit process.

If the selectmen are considering whether to allow building on such a road in the face of an application, the board, along with the planning board, should consider the possible precedent setting effect of such a decision, and whether building on these roads is in the interest of the town from a financial and aesthetic perspective. For example, if the selectmen vote to permit Joe Smith to build his house on Hayes Road, a Class VI road with no other houses, the town would have little to no justification to deny the next person who came along wanting to build on Hayes Road. When making this decision, the town should consider what the effect of not one, but 10 or 12 houses would be in that part of town. It may be that such development is in the interest of the town or that the particular section of town is slated or suited for development. In some rural areas it may be considered less desirable to develop the outlying roads. Then again, some very rural towns have so few maintained roads it would be impractical not to allow building on unmaintained roads. It should always be considered that increasing numbers of residents on an unmaintained road might eventually petition the town to change the status to a Class V maintained road. See RSA 231:8 (citizen petition to selectmen to layout a Class V highway over an existing Class VI); RSA 231:22-a (petitioned warrant article for a town meeting vote to reclassify the road as Class V).

### **Conditional Permits**

RSA 674:4 1 clearly allows the town to grant permission to build on a conditional basis where the town does not have an established building permit process. The statute, however, does not specifically state that a conditional permit may be issued otherwise. Nonetheless, an argument can be made that if the selectmen have the statutory authority to wholly grant or deny

permission, then, implied in that discretion is the authority to place conditions on a grant of permission to build.

### **Road Surface Quality**

Often towns are approached by an applicant who wishes to upgrade the surface of the road prior to building. If the road is a Class VI and is unpaved and the applicant simply wants to grade or level the road at his own expense, that type of improvement does not create an issue for the town. However, sometimes the applicant wants to “upgrade the road to a Class V” before putting in one, two or three houses. If the applicant wants to lay down pavement at his own expense that is fine, but pavement alone does not make a Class V road. The applicant needs to use the proper procedure to see if the road may attain Class V (town maintained) status. If the road existed as Class VI prior to planning board jurisdiction or is shown on an official map, the applicant may petition the selectmen to layout a Class V road over the Class VI road. The selectmen must decide whether this “improvement is in the public interest” given considerations of added expense and liability weighed against the benefits of residential access. Otherwise, the applicant must present the road upgrade issue to the voters at town meeting to see if the town wishes to upgrade the status of the road. RSA 674:40. Of course, if your town has road condition standards based on classification in its ordinances, then those standards would apply as well.

Sometimes, towns will allow a building application on an unmaintained road in exchange for the applicant’s promise to upgrade the “condition” of the road to “Class V standards.” This type of policy decision can give rise to a host of problems for the town. First of all, as we have said, the surface condition of the road does not determine the status despite the fact that the planning board may have adopted road construction standards. Thus, the applicant ends up with a paved, Class VI road that the town cannot maintain. The applicant must still file the acknowledgement of no liability and maintenance (covered below), however, by being required to improve the road a property owner may feel entitled to services and maintenance. If the town is concerned that the road, in its unpaved condition, is too dangerous to live on, even with the recorded waiver, then the town should stick with a policy of not permitting building at all.

The town should also consider RSA 236:9-12. These statutes prohibit the disturbance of any town road surface without prior permission from the selectmen. RSA 236:9. In granting permission, the selectman may require the applicant to furnish a bond to assure satisfactory completion of the road. They may also regulate the manner in which the project is carried out. RSA 236:10.

### **Acknowledgement of Rights and Liabilities**

One detail that cannot be overlooked in this process is the filing of acknowledgement by the applicant builder. RSA 674:41 requires that all persons building on Class VI and private roads pursuant to a 674:41 permit, acknowledge in writing that the town is not liable for damages to the applicant related to the unmaintained road and that the town is not responsible for maintaining the road. This document of acknowledgement should be signed by the applicant and filed at the registry of deeds referencing the book and page number associated with the property. Towns that have a policy of permitting building on Class VI or private roads should have a form agreement on file. NHMA and/or your town attorney can assist you in drafting an appropriate document.

## **The Law of Roads Meets the Law of Subdivision**

Municipal authority to regulate the creation and maintenance of roads is currently codified in RSA Chapter 231. Under those statutes, the selectmen have the general authority to “lay out” streets upon petition. But the legislature also vested municipalities with subdivision regulation authority. RSA 674:35. A number of related subdivision statutes followed, creating an often-overlooked merger of the law of roads and the law of subdivision. When read together, RSA 674:40 and 674:41 require that all new public roads, not holding the legal status of a Class V road or better prior to the establishment of the local planning board, or shown on a map, be accepted by the local legislative body or its delegate. Thus, no new public roads may be laid out or accepted by the selectmen without review and approval of the planning board and, in some cases, the vote of the town. This is quite contrary to the conclusion that might be drawn in an isolated reading of RSA 231:8 which states that, “Selectmen of a town, upon petition, may lay out any new . . . Class V or VI highway or alter any such existing highway within their town for which there shall be occasion.”

From a practical perspective, in the case where a large subdivision is approved by the planning board, any road shown on that plat is clearly one that building permits may be issued on under the provisions of 674:41. Still, the road remains a private road until it is accepted by the local legislative body pursuant to RSA 674:40, or the selectmen pursuant to delegated authority. RSA 674:40-a. If the town, through the legislative body or the selectmen, does not approve the road then it remains a private road.

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