

Planning Lunches at Noon (PLAN) Monthly Webinar Series

Welcome to the January 2025 PLAN Webinar!

“Building or Development on Class VI or Private Roads”

Check out OPD’s [Planning and Zoning Training webpage](#) for:

- Slides and recording of past PLAN Webinars and conferences
- Planning Board and Zoning Board 101 slides and recordings
- Planning Board and Zoning Board Handbooks
- Optional Tests and Certificates

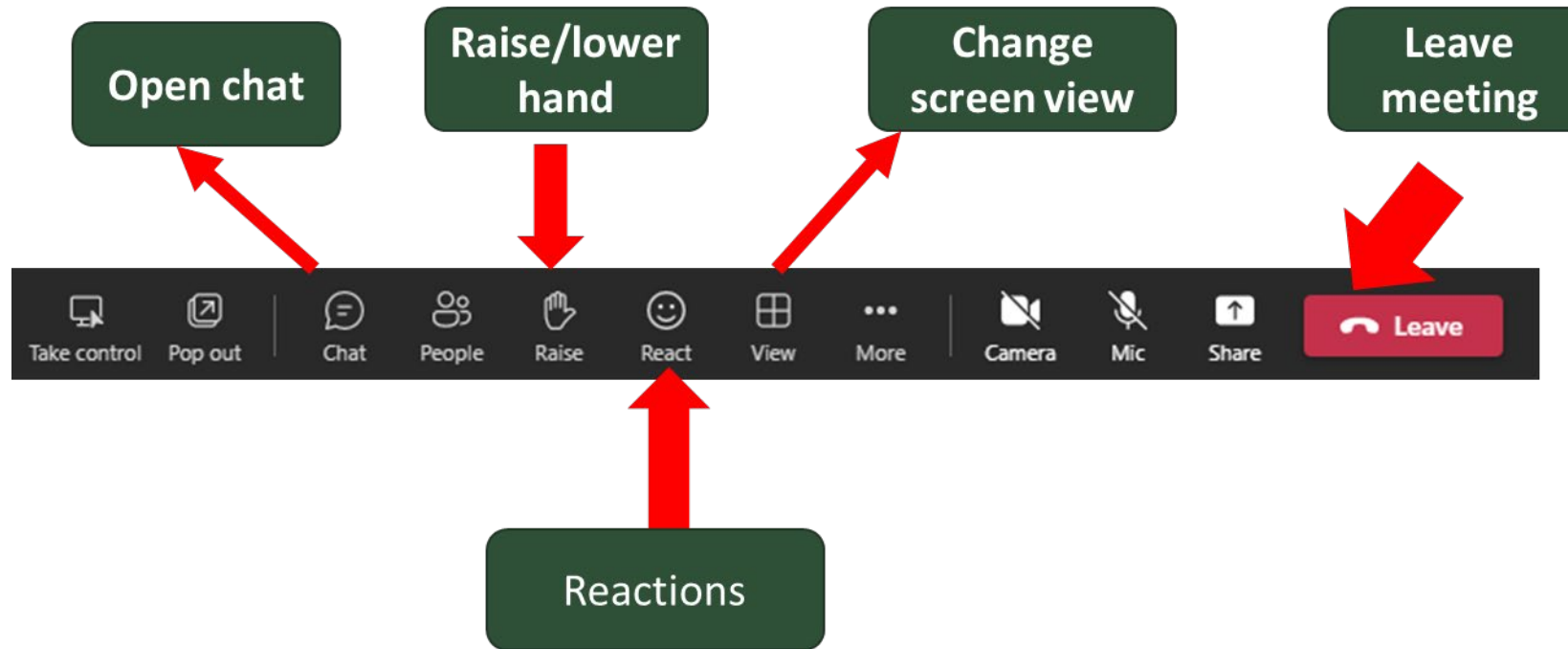
Building or Development on Class VI or Private Roads

**Jonathan Cowal
Municipal Services Counsel
New Hampshire Municipal Association**

January 16, 2025

How To Participate

- ▶ For questions, type them into the chat box
- ▶ We will do our best to answer all questions by the end of the webinar



BUILDING OR DEVELOPMENT ON CLASS VI OR PRIVATE ROADS



Road Terminology

- Right of Way
 - "a right to pass over another's land more or less frequently according to the nature of the use to be made of the easement" - *Jean v. Arsenault*, 85 N.H. 72
- Private Road
 - Can refer to a discontinued road, a class VI road, subdivision roads that are still under development, etc. Main factor is that municipality has no duty to maintain, however public may still have a right of way.
 - The term "private road" is commonly used to describe municipal responsibility, not necessarily the public's right to access.
- Public Road
 - Roads subject to reasonable regulation by public authorities, duty to maintain, and where the town, city or state holds the right of way.

Class VI Roads

- RSA 231:50 relieves towns and cities of “all obligations 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”
- Therefore, towns need not worry about insufficiencies, noticed or otherwise, on Class VI roads.
- However, if a town is performing some function on a Class VI road, they should take care not to act negligently.

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.

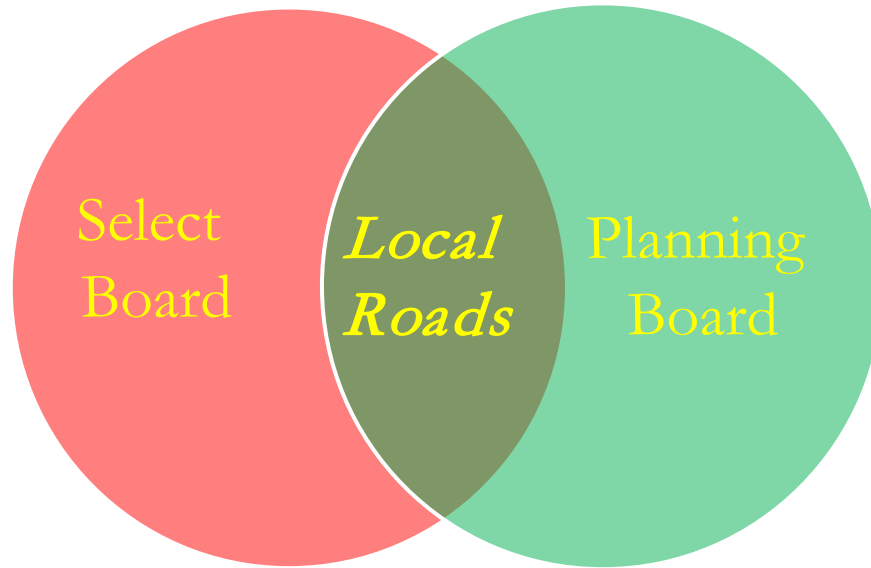
Effect of Discontinuance

- Extinguishment of public right of access and travel
- Does not create a private road
 - Nothing in statute about how private roads are created or how they are different from, e.g., an easement including a private right-of-way.
- However, discontinuance does not eliminate any private lots from being able to access their properties along the former highway.

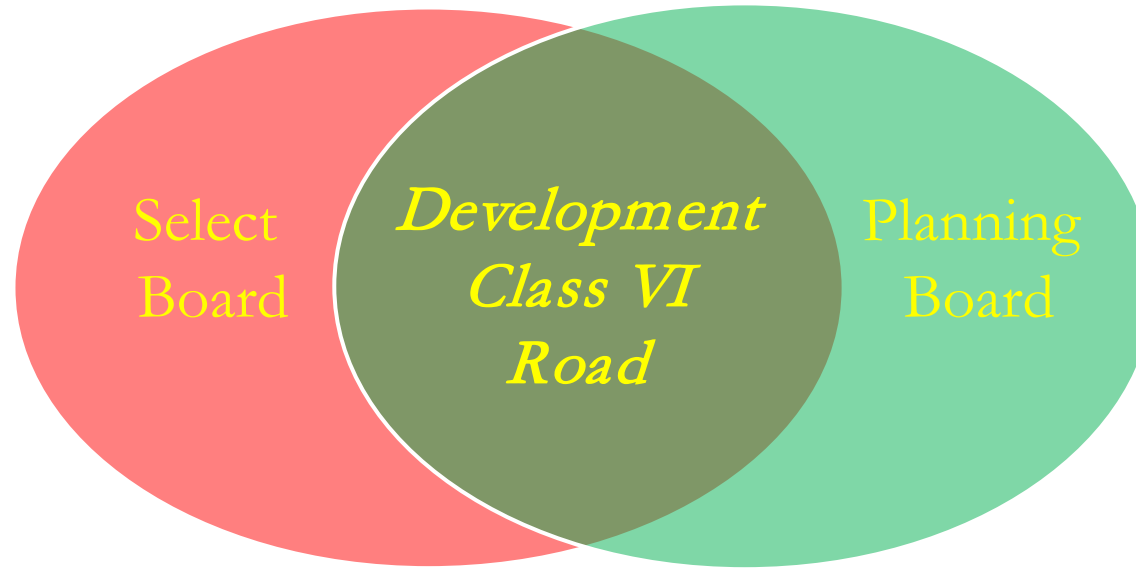
Private Roads

- 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*





- Layout of new roads – *Select Board RSA 231:8*
- Acceptance of new roads – *Select Board 674:40-a*
- Maintenance of existing roads – *Select Board 231:65*
- Town Road Construction Standards – *Select Board RSA 41:11, RSA 47:17, VII, VIII, XVIII*
- Approval of new subdivision Roads – *Planning Board RSA 674:36*
- Planning for new and existing roads – *Planning Board RSA 674:2, II*
- Capital Improvement Planning for roads – *Planning Board*
- Subdivision & Site Plan Road Construction Standards – *Planning Board RSA 674:36, I, (e); RSA 674:44, II, (d) (c) (f)*



- Hold public meeting to vote on issuing building permit
- Have applicant fill out waiver clearly disclaiming municipality from liability and maintenance
- File waiver with registry of deeds

- Meet to review and comment on application for select board
- Hold conceptual consultation on subdivision applications, review for variance needs

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, as it applies in all municipalities that have adopted RSA 674:35 authorizing the planning board to approve subdivisions.
- 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.
- ✓ RSA 674:41 applies to new buildings, as well as to remodeling, additions, or conversions to year-round use of already existing buildings.
- ✓ Also, the first sentence of paragraph II speaks of the “structure or part thereof,” implying that any physical expansion of the structure triggers the obligation to comply.

A Class V Road or Better

- “Class V or better” road previously laid, or appears on an official map, or has been accepted.
- RSA 674:41, I(b) – The street giving access corresponds in its location and lines with:
 - A street shown on the official map (RSA 674:10); or
 - A street on a subdivision plat approved by the planning board; or
 - A street on a street plat made by and adopted by the planning board; or
 - A street located and accepted by the local legislative body of the municipality, after submission to the planning board, and, in case of the planning board's disapproval, by the favorable vote required in RSA 674:40.

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.

But What about “Grandfathering?”

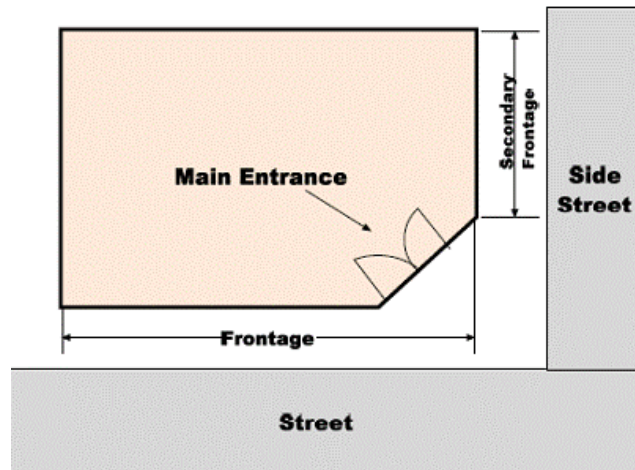


- Some municipal zoning ordinances “grandfather” existing lots. However, such zoning clauses do not make existing lots exempt from the state frontage requirement of RSA 674:41. Paragraph III:
 - ✓ “This section shall supersede any less stringent local ordinance, code or regulation, and no existing lot or tract of land shall be exempted from the provisions of this section except in accordance with the procedures expressly set forth in this section.”

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 with ensuring there is frontage on Class V road, not how much.
- *Amount* of frontage is governed by local zoning ordinance, not statute.

Know Your Zoning Ordinance!

- The planning board cannot approve a subdivision that would not comply with the municipality's zoning ordinance. *Cesere v. Windham*, 121 N.H. 522 (1981).
- The board or code official must determine how the zoning ordinance defines the dimensional requirements for subdivided lots.
- Does the ordinance say that frontage must be on a Class V road or better? If the zoning ordinance requires minimum frontage on a Class V road, a variance would be required from the zoning board of adjustment before the board could approve the subdivision.
- Does the ordinance say that frontage must be on a public road? If it does then a Class VI road would qualify as a public road, but a private road would not. Thus, a proposed subdivision on a private road would also require a variance.

Minimal Steps to Allow Development on Class VI or Private Road?

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

**What to
Consider When
Deciding
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.

Planning Board Considerations

- Conceptual consultation- make sure that an application for subdivision on a Class VI or Private Road is one that the planning board will approve before making applicant go through process
- Only the select board can issue a building permit on Class VI road, therefore a limitation on the scope of the planning board's authority must be made clear to the applicant
- As provided in RSA 676:4, II (a), "such consultation shall not bind either the applicant or the board and statements made by planning board members shall not be the basis for disqualifying said members or invalidating any action taken. The board and the applicant may discuss proposals in conceptual form only and in general terms such as desirability of types of development and proposals under the master plan."

Planning Board Considerations (Cont.)

- Consider the master plan
- Provide against such scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services, or necessitate the excessive expenditure of public funds for the supply of such services.
- The focus of the inquiry is upon the effect of the proposed development on the community, not the effect of further development in general on the community. *Ettlingen Homes v. Town of Derry*, 141 N.H. 296 (1996).
- If the consensus of the planning board at conceptual consultation is the subdivision is scattered and premature, don't be shy in making that clear to the applicant.

Planning Board Approval

- Grant approval subject to a condition precedent that before the plan will be signed and recorded at the registry of deeds the subdivider must first obtain approval for the issuance of building permits on the Class VI or Private Road from select board.
- Since the planning board has already commented favorably on the proposed issuance of building permits, the only thing the select board needs to do is ensure the notice of limits of municipal responsibility and liability has been or will be recorded at the registry of deeds.
- Consider requiring filing of covenants with registry



Recording the Waiver

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

- ✓ Note: Any item recorded at the registry of deeds binds all future owners and puts them on notice of the terms.
- ✓ 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 Under 674:41, II?

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.

ZBA Decision Denying Relief Under 674:41, II

Vachon v. Town of New Durham Zoning Bd. of Adjustment, 131 N.H. 623 (1989).

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

- ✓ Due to bare rocks, narrowness, swampy areas, ledge outcroppings, close bankings, and seasonal flooding. Webster Road probably one of the worst class VI roadways in the town.
- ✓ The ZBA found that police, fire, and rescue vehicles would have serious difficulties in reaching the properties - substantially increased risk for the inhabitants
- ✓ Increased possibility of financial impact to the municipality due to 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.

Legislative Body Authorizing Exception. RSA 674:41, II-a

- Provides another way for a lot to be exempted from the frontage requirements of the statute. The legislative body (town meeting or town/city council) may vote in the same manner as it would vote on a zoning ordinance to grant an exception from the law for any lot, including island lots for islands served exclusively by boats.
- In town meeting towns, the vote may occur at an annual or special meeting.
- The question must first be submitted to the planning board for its approval. If the planning board approves, a simple majority vote of the legislative body is sufficient; if the planning board disapproves it, a 2/3 legislative body vote is needed.

Contact Information

Jonathan Cowal, Municipal Services Counsel
New Hampshire Municipal Association

legalinquiries@nhmunicipal.org , (603) 224-7447

Q&A

THANK YOU