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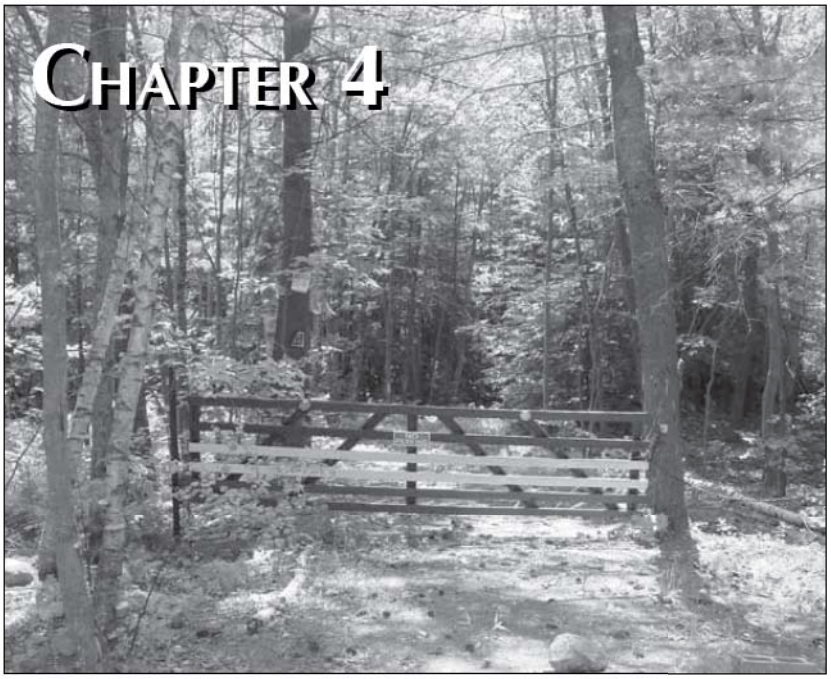

Discontinuance of Highways

The Law Favoring Highway Continuance

A well-established principle of law is that public highways should be preserved; once public rights of way are established, the rights of the public should last indefinitely, unless a formal public decision is made to discontinue them.

This chapter will cover the discontinuance of local highways. On the issue of state highway discontinuance, see Chapter 3. The Class VI designation itself reflects this policy by allowing a highway to remain in existence, even though there is no present public need to maintain it. Two other legal rules also reflect this "highway conservation" policy.

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HIGHWAYS CANNOT BE LOST BY ADVERSE POSSESSION

Although an owner of private property can lose it by 20 years of adverse possession by others (the principle sometimes called "squatter's rights"), this doctrine does not apply to public property, including highways. RSA 477:33 and 34. In *Williams v. Babcock*, 116 N.H. 819 (1976), the Court held that once a road had been established by 20 years public use (by prescription), its status was not changed by the fact that an abutting property owner subsequently barricaded it for more than 20 years. Thus, public rights, once acquired by prescription, cannot be lost by prescription. RSA 236:30 specifically provides that no person may acquire rights, as against the public, by enclosing or occupying any part of a highway for any length of time. See also *Windham v. Jubinville*, 92 N.H. 102 (1942).

THE PRESUMPTION AGAINST DISCONTINUANCE

Because the law recognizes a presumption against discontinuance, proving a discontinuance is a difficult proposition. In *Davenhall v. Cameron*, 116 N.H. 695, 697 (1976), the Court wrote, "Highway discontinuance is not favored in the law...and the burden is upon the party who asserts discontinuance to prove it by clear and satisfactory evidence." In the *Davenhall* case, there was circumstantial evidence that the road had ceased being used by the public, and certain deeds referred to the road as "old" or "discontinued," but this evidence was not sufficient to prove a discontinuance, in the absence of a formal vote of the town.

The mere fact that a highway has been physically abandoned, and trees have been allowed to grow in the right of way, has never been held to constitute a termination of the highway. *Thompson v. Major*, 58 N.H. 242 (1878). As the law stands today, the only legal consequence of nonuse and nonmaintenance is to convert the highway to Class VI, and not to discontinue it. RSA 229:5, VII; *Glick v. Town of Ossipee*, 130 N.H. 643 (1988).

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Complete Discontinuance

PROCEDURE

The complete discontinuance of a local highway (Class IV, V or VI) takes a vote of the legislative body. RSA 231:43. In towns, that means a vote of town meeting upon an article properly inserted in the warrant of the meeting. Action by the selectmen is not sufficient to discontinue a highway. *Marrone v. Hampton*, 123 N.H. 729 (1983). The best evidence of a past discontinuance is a vote recorded by the clerk in the town report.

Be aware that prior to 1945 the law required permission from a court, as well as the town vote, before certain highways could be discontinued. See *New London v. Davis*, 73 N.H. 72 (1904); *Williams v. Babcock*, 121 N.H. 185 (1981). This is no longer required. Presently, the only time a discontinuance requires court permission is when proceedings are pending in court against the town for neglect or refusal to lay out or repair that same highway. RSA 231:47. This historical perspective becomes important when researching the status of older roads.

Before a town may vote to discontinue a highway, written notice must be given to "all owners of property abutting such highway, at least 14 days prior to the vote of the town." RSA 231:43, II. Obviously, the selectmen will not know in advance whether the warrant article will pass, so notice must be given any time there is an article in the warrant calling for a highway discontinuance, regardless of how unlikely it is that the article will pass. Since the statute requires written notice to be sent to all abutting property owners, the best practice will be to research the registry of deeds immediately prior to sending out the notices to ensure that the town has an accurate abutters list.

Whenever a town votes to discontinue a highway that joins a highway in another town, the selectmen must notify the selectmen of that adjoining town, by registered mail within 15 days of the vote, that such discontinuance has taken place. RSA 231:44.

When drafting a warrant article to discontinue a highway, it is best to use words like "discontinue completely" or "discontinue absolutely." Never use words like "abandon," "close," "throw up" etc., because these words are not in the statute, and years from now there will be confusion over the intent of the warrant article. In fact, given the presumption against discontinuance, these other words are unlikely to achieve a complete discontinuance.

In *New London v. Davis*, 73 N.H. 72 (1904), the New Hampshire Supreme Court upheld a discontinuance that was conditioned upon a new highway being built. On the other hand, in *Cheshire Turnpike v. Stevens*, 10 N.H. 133 (1839), the Court ruled that a town could not discontinue a road while reserving the right to reopen it (although today this same result could be accomplished by making the highway

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Class VI). In *Grossman v. Dunbarton*, 118 N.H. 519 (1978), an old discontinuance vote where the voters clearly intended, as a condition, to create a private way, was held to be an unconditional discontinuance. Therefore, the best approach is to either completely discontinue a highway or discontinue it subject to gates and bars. Do only one or the other, without conditions. Placing conditions on the discontinuance creates too great a legal risk that either the conditions will be declared invalid, or the discontinuance itself will be declared invalid.

The Effect of a Complete Discontinuance

TITLE

If a highway is completely discontinued, all town responsibility ends and the public right of way ceases to exist. The right to use and possession returns to whoever owns title, which is presumed to be the highway's abutters (see Chapter 1), but subject to whatever private easements might exist (also discussed in Chapter 1).

Sheris v. Morton, 111 N.H. 66 (1971), stands for the proposition that when a town votes to discontinue a highway, the town relinquishes all interests in the right of way, and the abutters are relieved of the burden of the public rights across the land. But that case did not involve a highway where the town had taken a deed purporting to convey the underlying land. Case law (see Chapter 1) supports the idea that ownership status is separate from highway status. That would mean that where the town took a fee simple deed when the road was accepted, the town would continue to own the land in fee simple even after the highway is completely discontinued. There is no New Hampshire Supreme Court decision on point, and there is certainly room to argue that some particular vote of discontinuance also incorporated an intent to relinquish title.

When the town has taken fee simple title, it is a good idea to address the title issue as part of the vote to discontinue. If the town does not intend to relinquish ownership, the warrant article should recite the source of title and should state that title is not being relinquished by virtue of discontinuing the road. If the town does intend to relinquish title, include with the vote a specific authorization for the town's interest to be deeded to the abutters or other intended party. *Neville v. Highfields Farm*, 144 N.H. 419 (1999).

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POSSIBILITY OF PRIVATE EASEMENTS: THE OWNER CONSENT LAW

As discussed in Chapter 2, where a roadway is shown on a subdivision plat as the only access to lots, owners of those lots have an implied private easement over the road, including the private right to maintain the entire length of the road for public access to their lots. This is true even when such roads had, at one time, been public highways. These private easements preclude full use and possession by the underlying fee interest owner. *Duchesnaye v. Silva*, 118 N.H. 519 (1978), and cases cited therein.

Even where no plat exists, RSA 231:43, III, provides that "no owner of land shall, without the owner's written consent, be deprived of access over such [discontinued] highway, at such owner's own risk." On its face, this language seems to apply to *all* landowners, not merely those with no other access. An earlier version of the statute, effective from 1943 to 1945, was limited to otherwise landlocked lots. 1943 N.H. Laws Chapter 68:2. Therefore, in those cases where towns have not obtained written consent from landowners to give up the right of access, any highway discontinued since 1949 is subject to private rights of way in favor of all abutting landowners.

UTILITY EASEMENTS PRESERVED

After 1992, whenever a street or highway is discontinued, any licenses that have been granted under RSA 231:159 through 182 for sewers, drains, pipes, power lines, etc. (see Chapter 13), are preserved as easements encumbering the underlying land, as long as they remain in active use. A town or city may discontinue them, but the intent to do so must be explicitly stated in the vote to discontinue the highway, or in some later vote. RSA 231:46; see RSA 230:58-a relative to state highways. By contrast, before 1992 a municipality had to explicitly reserve utility easements, as part of the discontinuance vote, in order for them to survive the discontinuance.

DISCONTINUANCE SUBJECT TO GATES AND BARS

RSA 231:45 allows any Class IV, V or VI highway to be "discontinued as an open highway and made subject to gates and bars, by vote of the town." The ability to do this became effective in 1903 (1903 Laws of New Hampshire Chapter 14), even before the classification system used today (including the Class VI category) became effective in 1945. Today, the word "discontinued" in this context is somewhat of a misnomer. When a highway is discontinued and made subject to gates and bars, the only thing that is actually "discontinued" is the town's obligation to maintain the highway. RSA 231:50. It is otherwise a Class VI highway subject to public use. See Chapter 8 on the meaning of "gates and bars."

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There is no statutory duty to notify abutters in the case of a discontinuance subject to gates and bars, unless that requirement can be inferred from RSA 231:43. Nevertheless, it is highly recommended that some sort of notice be given to affected landowners since their right to appeal might be extended beyond the statutorily established six-month period following the vote.

RSA 231:45 further provides that a highway that is discontinued subject to gates and bars "shall not have the status of a publicly approved street." The New Hampshire Supreme Court made clear in *Metzger v. Brentwood*, 115 N.H. 287 (1975) that this language means only that the road is not publicly approved for zoning purposes. In most other respects, however, the road remains a full public highway. *King v. Lyme,* 126 N.H. 279 (1985).

In *Stevens v. Town of Goshen*, 141 N.H. 219 (1996) the Court addressed the effect of a vote to discontinue subject to gates and bars when the road at issue had already lapsed to Class VI status. The Court held that such a vote might still entitle an owner to damages if the owner could show that his or her land value would be affected by the realistic possibility that gates or bars would be installed. The Court wrote, "Gates and bars could prove a significant inconvenience to a landowner who must open and close several of them before arriving at his or her property." In rendering its decision, the Court made a finding that there are two kinds of Class VI highways: those that become Class VI due to nonmaintenance (lapse) and those that are discontinued subject to gates and bars. Highways in the former category were held not to be subject to gates and bars. Three years after the *Stevens* decision, the legislature addressed the same issue when it enacted RSA 231:21-a. Pursuant to that statute, *all* Class VI highways are deemed subject to gates and bars, regardless of how Class VI status was attained. In this respect, the statute supersedes the *Stevens* decision.

In addition to complete highway discontinuance and discontinuance subject to gates and bars, the option also exists to discontinue a road as a highway and convert it to a trail. RSA Chapter 231-A. That option is discussed in Chapter 9.

Appeals of Discontinuance Decisions

PROCEDURE AND STANDING

Any person or other town aggrieved by the discontinuance of a highway or by a discontinuance subject to gates and bars may appeal the decision to the superior court within six months of the town vote. RSA 231:48. The party appealing must, after filing with the court clerk, serve the court's order of notice of the pending action upon the town and owners of land abutting the road. The effect of this

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service is that those served cannot then file their own separate appeals of the same discontinuance. The appeal then proceeds in the same manner as an appeal of a highway layout.

In *Wolfe Investments, Inc. v. Town of Brookfield*, 129 N.H. 303 (1987), the Court suggested that the six-month appeal period might be extended if an owner, exercising reasonable diligence, could not find out about the discontinuance until after the appeals period had run. Today, this problem is partly addressed by the notice requirement in RSA 231:43, but that statute arguably does not govern a discontinuance subject to gates and bars. The statute also does not require notice to other individuals who are not abutters but, nonetheless, may be "aggrieved" by the vote.

In *L & L Portsmouth Theatres, Inc. v. City of Portsmouth*, 117 N.H. 347 (1977), the Court addressed the question of who has standing to appeal a discontinuance. The Court ruled that an owner whose land abutted the road in question, but did not directly abut the section being discontinued, nonetheless had standing to challenge it. This case would suggest that standing in discontinuance cases is similar to standing in zoning appeals: Anyone who can demonstrate an effect on property value is able to appeal, regardless of whether the person is an abutter.

QUESTIONING THE DISCONTINUANCE DECISION

In the *L & L Portsmouth Theatres* case, the Court found that the question of whether a road should be discontinued is distinguishable from the question of whether the plaintiff would be entitled to damages. There is no New Hampshire Supreme Court case in which a local discontinuance decision itself has been overturned. In some older cases, the mere desire of a town to rid itself of a maintenance burden was held to be an adequate reason for discontinuing a road. *Marlboro's Petition*, 46 N.H. 494 (1866); *Tuftonboro v. Fox*, 58 N.H. 416 (1878). The construction of a new highway, rendering the old one unnecessary, was also held sufficient to support a discontinuance. *New London v. Davis*, 73 N.H. 72 (1904).

DAMAGES AND DISCONTINUANCE OF CLASS V HIGHWAYS

Any person damaged by the discontinuance of a highway, or by the discontinuance of a highway made subject to gates and bars, may petition the superior court for an assessment of damages. The petition must be filed within six months of the vote to discontinue, and a petition may not be filed if an appeal has been taken under RSA 231:48. Thus, the remedies available to a person following a discontinuance are a challenge to the discontinuance itself under RSA 231:48 *and* a claim for damages under RSA 231:49. "To the extent that [the plaintiff] is specially damaged, as opposed to suffering harm similar to that sustained by the public in general, he can recover for the destruction or impairment of the right of

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access." *Wolfe v. Windham*, 114 N.H. 695, 697 (1974). The *Wolfe* case also stands for the proposition that if an owner has *any* alternative access to the system of public highways, the right of access remains unimpaired, and damages are not due.

In *Cram v. Laconia*, 71 N.H. 41 (1901), the Court ruled that an owner is not entitled to damages just because access to the property is less convenient. These are not "special damages."

Two later cases, however, gave rise to the possibility of damages in those situations where the alternative access was not "reasonable." *State v. Shanahan*, 118 N.H. 525 (1978), involved the installation of curbing that limited direct access for customers from the street. The other access to the property was far less convenient. The Court, instead of finding that *any* alternative access was enough to defeat a damages claim, remanded the case to the trial court for a determination of whether the value of the property was "substantially diminished" because of the change in access. The Court wrote: "[W]hat might be considered a merely inconvenient or circuitous alternative means of access for one landowner might be an unreasonable alternative for another...To be compensable, the damages must be substantial and amount to severe interferences which are tantamount to deprivations of use or enjoyment of property."

The same rule was applied in *Orcutt v. Town of Richmond*, 128 N.H. 552 (1986). The petitioner's land, whose only use was for timber management, had access by way of two Class V highways, only one of which was discontinued. Because of the topography of the property, she claimed that she could not remove timber from a large part of the land via the remaining road. The town's position (based on the *Wolfe* case) was that any alternative access was sufficient. The Court refused to dismiss the case, holding that the test was whether the remaining access was "reasonable," in light of the existing use of the land.

DISCONTINUANCE OF CLASS VI HIGHWAY: DAMAGES?

The complete discontinuance of a Class VI highway also entitles the owner to request damages (in the same manner as the discontinuance of a maintained highway). RSA 231:48 and 49. To date, there have been no cases on what the measure of damages would be in that situation. Since an owner retains a right of access over the discontinued highway at the owner's own risk pursuant to RSA 231:43, damages should probably be nominal at best. For such owners, the discontinuance of a Class VI highway results in an unmaintained road to be used at the owner's own risk, and this is what the owner had prior to the discontinuance. See Chapter 9 for a discussion regarding the discontinuance of trails.

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Summary: Good Discontinuance Policies

For all the same reasons that highway continuance is favored in the law, it is probably best to avoid complete discontinuances of highways unless absolutely necessary. It is often the case that the public right of way will be useful in the future. The only time complete discontinuance should be considered is when there is some specific alternative use in mind for the land, perhaps a civic center, library, or an industrial complex planned by the only owner served by the highway.

If the only goal is to save on town maintenance costs, consider discontinuing the highway subject to gates and bars instead. That is the purpose of Class VI, and the right of way will be preserved for future use, if necessary. Some municipal officials are hesitant about Class VI status because they are concerned it will create liability. On the contrary, municipalities enjoy significant statutory protections against liability and maintenance for Class VI roads. See Chapters 6 and 8.

One thing Class VI status does not accomplish is prevention of development. But complete discontinuance of a highway will not necessarily stop development either. The only way to control development, within the limits of the law, is through the proper use of zoning and planning regulations.

Other items for a local road discontinuance policy checklist:

- Make sure that the legislative body vote unambiguously and unconditionally qualifies as either a complete and absolute discontinuance or a discontinuance subject to gates and bars (or discontinuance by conversion to a trail).
- Make sure all landowners are notified of the discontinuance in advance so there will be a definite starting point for the six-month period in which to appeal or request damages. Contact owners and settle on damage amounts (or waiver of damages) in advance, to avoid surprises, and so that the total cost to the town will be known by the legislative body voting on the discontinuance.
- If there is any reason to believe the town holds title to the property, clarify at the time of discontinuance whether the town wants to retain title. If not, the legislative body should consider authorizing the execution of quitclaim deeds to abutters.
- If another use of the land is intended (for example, a public building), obtain the written consent of all abutting owners to waive the private access rights reserved under RSA 231:43. If they will not agree, those rights may need to be taken by eminent domain.