

The Public Right of Way and You

Compiled by Paul Gillies

AN INTRODUCTION TO VERMONT HIGHWAY LAW

What a Citizen Needs to Know About Town Highways:

We drive on town highways daily, but we don't think about them very much. We take them for granted, at least until something happens to make us think again about the rights we have as citizens relating to roads.

What could happen? Suppose the town announces it will no longer plow the road to your house. Or a developer decides to petition the board of selectmen to lay out a road across your land to his new subdivision. Or the road crew fails to unclog a culvert during the spring run-off and suddenly your basement becomes a river bed. Or the town truck dumps so much salt on the road in front of your house that your well is polluted. Or the town decides it wants to give up the road that leads to your hunting camp, leaving you without access to the property.

If any of these little tragedies or inconveniences happened to you, you'd want to know what to do. That's why we've put together this pamphlet. You have rights, but they won't mean anything if you don't know about them or don't exercise them. Sometimes they are rights in common with all the voters of a town; sometimes five percent of the voters or landowners can have an impact through the use of a petition; sometimes you alone can make a difference.

Sometimes you will lose, but at the very least there are almost always procedures in place which you can use to arrange for a forum where your position can be made clear to the board of selectmen. Sometimes the law gives you a right to appeal the decision

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The Public Right-of-Way:

The road in front of your house is probably a public highway, laid out by a formal process involving the town board of selectmen some years ago.

Most likely the town doesn't own the land under the highway; probably you own the land to the middle of the road. What the town owns is an *easement*, a right to use the land for highway purposes. That easement is a public right-of-way, usually three rods (forty-nine and a half feet) wide, which includes the power to cut down trees and other growing things, smooth out curves, expand the travelled portion, and add gravel or pave the roadbed, all without having to ask your permission as long as the work is done within the limits of the easement. The town may also permit others—including power, telephone and cable companies—to use the right-of-way, or may use the easement itself for sewer or water lines.

The town has a duty to use its right-of-way responsibly. It can't reroute water from a natural stream onto your land without paying you damages or getting your permission. It can't raise the roadbed so as to prevent you from using your driveway without making amends. If it cuts down trees, it has to offer you the wood, unless it intends to use the wood to build the road (but then, corduroy roads aren't that popular anymore).

Within the public right-of-way, landowners have few rights. If the town ever discontinues the right-of-way, as a landowner you will recover full title to the land you own. While the right-of-way is in force your rights are not much different from that of the travelling public. You can't forbid someone from travelling over the road; you can't place obstructions on the highway; you can't exercise any dominion over the land. Most towns won't make a big deal about your use of the land

within the right-of-way that falls outside the travelled portion of the highway (short of building something in the right-of-way), but technically the selectmen could insist on making you ask permission to park a car or mow the grass within the right-of-way. If you want to work within the public right-of-way — build something, change the location of your driveway or the like — talk to the board of selectmen. Legally you must have their permission (yes, even on your "own" land, if it comes within the right-of-way).

The public right-of-way is a resilient legal idea that often has little to do with what happens on the ground. Even if a highway were laid out but never built, or the road bed abandoned long ago due to disuse, the right-of-way still remains until the town formally gives it up, usually by a legal process involving notice, a hearing, site inspection, and a written decision.

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This pamphlet is written with the belief that government only works if citizens understand their rights. Not every controversy needs to be settled by lawyers or courts, although sometimes they are your best hope. The first, most important challenge is knowing your rights and how to exercise them.

Types of Highways:

The public right-of-way can take any of five forms in a town highway system. Town highways may be classified as 1, 2, 3 or 4. Class 1 highways carry a state highway number and are part of the state highway route. Class 2 are not, but are well-traveled routes carrying traffic to and from class 1 highways. All other traveled town highways are class 3s, and often cause the most problems, since they are sometimes candidates for discontinuance and often are not so well maintained that they satisfy the statutory requirement for negotiability during all seasons of the year by a normal pleasure car. Class 4 highways are usually the most marginal town highways, frequently narrower and more poorly drained than any other highways in a town. Some may be traveled; some you wouldn't think of driving. A fifth class, trails, aren't highways at all; they are little more than the bare public right-of-way, sometimes including a foot path.

One way to tell types of highways apart is by how they're maintained. Class 1, 2, and 3

town highways are supposed to be maintained throughout the year. They are plowed when it snows and kept in good enough repair throughout the year so that anyone can pass over them without trouble, except perhaps during mud season or during an unusually high flood, when nobody expects a town to oppose a force of nature. Class 4 highways need to be maintained "to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town," as the law says it, and that usually means not a lot of attention. Rarely are they plowed in the winter.

Knowing the classification of the road you live on obviously matters. The town highway map is the best source for this information. Knowing the extent of the right-of-way is also important, although finding the original survey and any subsequent resurveys of the highway in front of your property may not be an easy matter. If you need the information, you have to find it; most likely, it will appear in the town office, either in the land records or in a special

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of the selectmen to the courts, where an independent judgment can be made about your complaint, and sometimes the court may order the town to pay you the value of damages you've suffered--not in all cases, but clearly if the accident stems from a poorly maintained bridge, for instance. Sometimes your best hope is found at town meeting. It all depends on what you want and what the laws say about the subject.

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book for highways. The town clerk, the listers or the road commissioner are all good sources of information on the highways that matter to you.

Theirs for the Taking: How is it, you may wonder, that the town gets to use your land for a highway without paying you for its use?

Originally, way back when, some former owner of your land might have been paid for the right-of-way. Older highways might have been laid out without compensation to the neighboring landowner as part of the "allowance land" that was retained by a town when the first divisions of land were granted after the charter was issued. In some cases, land for highways might have been taken by *dedication and acceptance*, a legal principle involving use of the land by the public, improvement of the highway by the town, and acquiescence by the landowner in the use and improvement for a period of years, after which landowners are stopped from exercising their full rights to the land underneath the highway.

The word "taking" isn't chosen lightly here. Article 2nd of the *Vermont Constitution* guarantees, "That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." A taking occurs when the government asserts control over your property and is obliged to pay for what's taken. This might happen to you if the town wanted to widen a curve and had to increase the public right-of-way onto your land. It would also happen if the town through inadvertence or error damaged your property through negligence in maintain-

ing the highway—such as the salt-polluted well we described above or the water that washes out your back yard because of a change in a brook due to highway construction.

One of the hardest concepts to swallow in highway law is the lack of damages available to a landowner when the town decides to discontinue a highway. You would think that losing access would be compensable, but the courts have concluded no damages need be paid in this case. This is based on the principle that a landowner suffers no special damage by the discontinuance to his or her land different from that shared by all the travelling public. When land is taken, it's a special loss; when it's returned to the

landowner, the law doesn't require damages to be paid.

Except in the case of accidental damage to private property, a town doesn't "take" property merely by asserting authority over it. There is a formal, legal process that must be followed. Suppose, for instance, that the town wants to build a new highway across your land to link up to an existing town road. The board of selectmen would have to give you notice at least thirty days in advance of a hearing that the town wants to use your land. All other persons having an interest in property along the proposed highway route would also receive notice, as would the town planning commission. Public notice through postings and a newspaper ad would also be required. The selectmen would have to make a formal inspection of the

site. At the hearing, the selectmen would take testimony, and after their deliberations were over they'd need to complete a written decision. Then they would order a survey, and the survey and the written decision would be recorded in the town office, all within sixty days of the hearing. Selectmen would consider not only whether to lay out the highway, but how much to pay you for the taking. Before the highway could be used, the selectmen would need to file a certificate of opening after construction was done.

You would then have a right to appeal the board's decision on either issue—to the state district court within sixty days of the opening of the highway on the question of damages and to the superior court within twenty days of the date the selectmen's order to lay out the

highway is recorded on the question of the necessity of the taking. Necessity is a word that has a long legal history and will be the primary question for the court on appeal. If the highway travels through more than one town, the boards of selectmen of all involved towns must act to approve the taking.

Highway Maintenance:

Maintenance is the reason most landowners complain about town highways. The town didn't plow the road. The town didn't do anything about that muddy place on the way to our house. The highway is too narrow along this stretch, and the pine boughs scratched the finish on my new car. I had an accident on the ice that built up on the road bed the morning after the storm and wrenched my back. People's rights vary, depending on the nature of the complaint and the state of the law on the subject. Sometimes there's redress; sometimes the only relief you'll get is airing your complaint to the board of selectmen.

If the town didn't plow your highway this year, you'll need to inquire first about its classification. A town *must* plow all class 3 highways, although the law isn't specific about how soon after a snow storm it must be done. Be patient on this score; it isn't easy to keep up with the demands of winter plowing when equipment breaks down or trucks get stuck or drivers are exhausted. As for class 4 highways, as mentioned above, winter plowing and other maintenance is a judgment call. The standard is a fuzzy concept—"the public good, necessity and the convenience of the inhabitants." If you believe your class 4 highway is maintained less than satisfactorily, contact the selectmen and attend one of their meetings. Find out their position on the subject. If that doesn't solve the problem, you could apply to the superior court for review of this decision by the county high-

The title of this section—"Theirs for the Taking"—doesn't mean to suggest that boards of selectmen are all powerful in this area of the law. The courts are there to review what the boards have done and to correct errors of judgment or process.

No landowner, unhappy with the results of a board's decision, should simply give up without thinking through the options for appeal.

Where to Go for More Information:

This pamphlet obviously isn't the last word on what you can learn about town highways. There's an entire title of the Vermont Statutes—Title 19—devoted to it (and parts of Title 23 as well). There's an extraordinary governmental agency at St. Michael's College, called the Vermont Local Roads Program, which devotes its efforts to increasing the highway expertise of town officials, which can also provide you with useful information about highways. The first stop is the board of selectmen for any problem you have with your highways.

For most of us, there's probably little reason to think about highways until they become an irritation or a problem for us. Knowing where to turn when they do, however, is an important advantage to any citizen.

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way commissioners or you could file a petition, signed by five percent of the voters or landowners, to reclassify the highway to class 3. A new law authorizes selectmen to order you to pay for upgrading the highway to class 3 specifications.

Mud is another problem altogether. Many Vermont town highways, including class 3 highways, are simply impassable during mud season. Chances are, if there's a bad mud spot, there's little a town can do immediately to repair it; working on it may well make it worse. The solution is to be found in a drier season, where the drainage of water from the highway bed can be adjusted. Making your feelings known to the selectmen, in a nonadversarial but still forceful way, can make a difference in this case.

Selectmen control the public right-of-way, as we've said before. This includes the right to remove bushes and trees in the corridor. They hold the power, not the road commissioner or the road crew, and they can order tree limbs cut back. For class 3 highways, there are suggested standards for width. For class 4 roads, width will vary with use.

Compensation for accidents caused by the buildup of snow or ice is not available from a town unless the damage occurs as a result of a defective or poorly maintained bridge or culvert. Back in the nineteenth century, all damages caused by highways were compensable, but today the legislature has pulled back the apron of liability for defective roads and limited recovery to problems with bridges and culverts. If ice is on the road bed because of a plugged culvert, the town is likely liable for the damage. If the bridge is the fault of the accident, make a claim. If you lose control of your car sliding down a big hill, far from a bridge or culvert, call your insurance company; the town won't cover your losses.

The Town Highway Budget:

The highway budget gets relatively little attention at town meeting these days, what with the distractions of rising school budgets and political questions that draw all the passion away from more mundane issues, but highways deserve close attention by the voters and taxpayers. In most towns, more than half of the non-school budget goes to highways and bridges.

Sometimes selectmen cut the highway maintenance budget too severely, to show residents they know how to level fund in hard times. You'll feel the effects of these cuts directly in the quality of the highways, whether it means less sand or salt or a slower response time for plowing.

Sometimes the selectmen have to make hard decisions about highways that don't always have the support of residents. Questions like whether a particular road should be paved or whether a bridge should be replaced or a highway rerouted

bring out the most virulent reaction from voters. In most cases, to their ultimate frustration, voters can't do much to affect these decisions short of running for selectman themselves. Many Vermonters are surprised to discover that a petition or a vote of the electorate can't change everything they dislike about a town. Sometimes you have to accept what happens, even in the land of direct democracy. You can shout; you can complain; but if the selectmen are dug in, you need to remember that in many cases, highway decisions belong to them exclusively.

In fact, there's a school of thought that holds that selectmen must keep the highways in good repair, whether there's money enough to pay for them or not, because the law requires it. If deficits arise, that won't necessarily slow anything down.

Knowing as much as possible about your town's highway budget, beginning with the town report, won't be a waste of time, in any case.

A Word about The Vermont Institute for Government

The Vermont Institute for Government (VIG) is a nonprofit corporation dedicated to improving educational opportunities for local officials and the public on how government works. It consists of representatives from each of the major groups in Vermont that offer such training.

The VIG has published other pamphlets that may be of use or interest to you. They include:

- *The Meeting Will Come to Order*, covering town meeting procedures;
- *Changing the World*, about how to increase your effectiveness in meetings of local and state boards and commissions;
- *Are You Appealing?*, which covers the tax grievance and appeal processes at the local level;
- *Isn't This My Land?*, relating to local planning and zoning; and
- *The Vermont Citizenship Comprehensive Examination*, a fun test of basic information a citizen ought to know about Vermont government.

Contact the VIG office for free copies of any of these pamphlets or to learn more about VIG.

Vermont Institute for Government

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