

**Wentworth Select Board  
Meeting Minutes  
August 24, 2021**

**Those present:** Arnold Scheller, Jordan King, Andrew Lasser, Pete Chierichetti, Jeff Ames, Paul Manson, Mike Leviss, Dave Clark and Linda Franz.

**Called to Order:** Arnie Scheller called the meeting to order at 5:00 pm.

The following documents were signed: Payroll and vendor checks; Meeting minutes for August 10, 2021; Intent to cut for Scheller; Septic approvals for Meadows and Horgan; McKibben agreement for further well water testing.

A.Scheller read a letter from Ronald Boucher and Stanley Luczko requesting permission to install a farmer's gate on Saunders Hill Road. After some discussion on the location of the gate, the following motion was made.

**A.Scheller made a motion to allow Ronald Boucher and Stanley Luczko to install a farmer's gate to be unlocked and unposted on the Class VI portion of Saunders Hill Road. Jordan King will provide an exact GPS location for the position of the gate and communicate to the landowners. Seconded by J.King. All three voted in the affirmative, and the motion carried.**

A.Scheller opened three sealed bids for the town-owned property Map 11, Lot 4-16. The highest bidder was Granetta Morse, with a bid of \$30,000.

**A.Scheller made a motion to accept the highest sealed bid for town-owned property Map 11, Lot 4-14 of \$30,000.00 from Granetta Morse. Seconded by A.Lasser. All three voted in the affirmative, and the motion carried.**

A resident on North Dorchester Road inquired about putting additional detached structures on his property. There was a discussion about accessory dwelling units based on a letter from the Planning Board Chair, Marina Reilly-Collette. It was determined that he would need to subdivide the property.

**A.Scheller made a motion to inform a resident on North Dorchester Road that his inquiry regarding additional dwellings on his property would require a subdivision and would be subject to all necessary regulations and permitting such as driveway and septic permits. Seconded by J.King. All three voted in the affirmative, and the motion carried.**

A.Scheller reported that the dinner on the bridge to benefit the veterans memorial was well attended. He also discussed the possibility of allowing children from Orford to attend the Wentworth Elementary School with Orford paying all costs. This will be discussed further, and he will seek input from State Representative, Beth Folsom.

Chief Trott was not present at the meeting but provided his written report for the WPD, and it was read by Pete Chierichetti. The report is a part of these minutes.

Chief Ames read and provided his written report for the WFD, and it is a part of these minutes.

Paul Manson discussed and provided his written report for the Highway Department, and it is a part of these minutes. Paul also addressed various road maintenance issues and provided articles and statutes on the subject, and these are also a part of these minutes.

**A.Scheller made a motion to authorize Road Agent, Paul Manson, to grade, form ditch lines and do brush clearing as he sees fit to maintain Hooper Hill Road as an emergency lane and be in compliance with RSA 231:59-A. Seconded by A.Lasser. A.Scheller voted yes. A.Lasser voted yes. J.King abstained. The motion carried with a 2 to 1 vote.**

Paul Manson received a complaint from a resident on Cheever Road that his driveway is flooding and accumulating sand due to the crowning of the road done by the Highway Department. He offered a remedy which is for the town to supply a 12-inch culvert, and the homeowner will install and do paving repair at his own expense.

**J.King made a motion for the Highway Department to supply a 12-inch culvert to a Cheever Road resident to remedy a situation caused by the crowning of the road. Seconded by A.Lasser. All three voted in the affirmative, and the motion carried.**

J.King reported that the Class VI Roads Committee met at Nichols Hill Road bridge for the purpose being to determine if a section of Ellsworth Hill Road should be designated as an emergency lane. Both bridges involved looked sufficient and would be passable as an emergency lane.

**J.King made a motion to allow Rick Ducheneau to install farmer's gates to be unlocked and unposted at each end of the Class VI portion of Ellsworth Hill Road that borders along his property. Seconded by A.Scheller. All three voted in the affirmative, and the motion carried.**

**J.King made a motion to allow Rich Ducheneau to put up signs at his unlocked gates for temporary road closure during mud season, March 15<sup>th</sup> to May 1<sup>st</sup>. Seconded by A.Scheller. All three voted in the affirmative, and the motion carried.**

**J.King made a motion to allow Ronald Boucher and Stanley Luczko to put up signs at his unlocked gates for temporary road closure during mud season, March 15<sup>th</sup> to May 1<sup>st</sup>. Seconded by A.Scheller. All three voted in the affirmative, and the motion carried.**

J.King reported that he received the gravel pit boundary research and surveyor's report from HEB Engineers. It was determined that the town does in fact own the whole parcel. He also mentioned that a bridge would be necessary and that DES permitting does not appear to be too difficult. More research needs to be done, and a possible committee formed. Any further action will require a warrant article at a town meeting.

A virtual meeting with the town's new FEMA representative is tentatively set up for Tuesday, September 7, 2021 at 9:00 am. This is pending confirmation from Chris Fournier of HEB Engineers.

Linda Franz and Andrew will draft a letter to New Hampshire Electric Coop regarding their proposed schedule to provide broadband services to the town.

As a follow up to a previous discussion to have two crosswalks on Route 25, it was determined that the NHDOT would not likely allow this. There is signage before the intersection, and that is their solution.

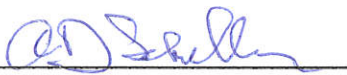
**At 7:00 pm, A.Scheller made a motion to enter into a non-public session pursuant to RSA 91-A:3, II(c) *Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of this board, unless such person requests an open meeting. This exemption shall extend to include any application for assistance or tax abatement or waiver of a fee, fine or other levy, if based on inability to pay or poverty of the applicant.* Seconded by J.King. By roll call vote, A.Scheller voted yes. J.King voted yes. A.Lasser voted yes. All three voted in the affirmative, and the motion carried.**

Re-entered the public meeting at 7:15pm.

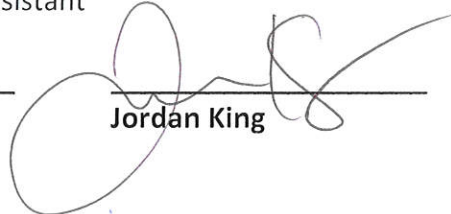
**J.King made a motion to seal the minutes of the just concluded non-public session. Seconded by A.Lasser. All three voted in the affirmative, and the motion carried.**

**J.King made a motion to adjourn. Seconded by A.Lasser. All three voted in the affirmative and the meeting was adjourned at 7:16pm.**

Respectfully submitted by: Linda Franz, Administrative Assistant

  
Arnold Scheller, Chairman

  
Andrew Lasser

  
Jordan King

**WPD Activity Report**  
**Presented 08/24/2021**

**Please note that the following is a summary of notable activity conducted by the Wentworth Police Department, (WPD), but does not reflect “all” of WPD’s activity during this time frame.**

Chief Trott was stopped by a motorist while on patrol and advised of a house cat that had been struck by a vehicle and was still laying in the road in the area of Rte#25 and North Dorchester Road. Chief Trott located the animal and discovered that it was a Bobcat that had been struck not a house cat. New Hampshire Fish and Game was contacted and the bobcat was turned over to them for testing and documentation. Bobcats are still protected in the state of New Hampshire and are closely monitored by New Hampshire Fish and Game.

Saturday August 14<sup>th</sup> was a busy day in Wentworth. The town of Wentworth hosted the “Dinner On The Bridge” event, the MMATV Club hosted a benefit run, the Iron Legacy Motorcycle Club also did a benefit run for The Special Olympics, the Wentworth Famers Market was open and operational, and Rumtown Speedway started back up after a two week break. All of these events ran smoothly and were uneventful.

Chief Trott assisted the Warren Wentworth Ambulance with several medical calls in Wentworth over the last two weeks. One of those calls consisted of an 87 year old man who had cut his let with a circular saw. Chief Trott arrived on scene within 1 minute of receiving the call and was able to render emergency first aid and control the bleeding until the Warren Wentworth Ambulance arrived. The ambulance crew rendered further aid to the resident and he was then transported to a local hospital and later air lifted to Concord where he is expected to make a full recovery.

Chief Trott spoke with several Wentworth residents in the area of North Dorchester Road, Rowentown Road, and Cross Road regarding complaints of OHRV’s operating on those roads. The residents were very helpful and cooperative and Chief Trott feels that the issue has been resolved.

Chief Trott arrested a Wentworth resident on an arrest warrant that he had obtained for disobeying an officer and reckless driving. The charges stemmed from an incident that took place recently where Chief Trott attempted to stop a motor vehicle for a speeding violation and the operator of the vehicle failed to stop. Chief Trott called for and was assisted by the Orford Police Department, the Piermont Department, and the Grafton County Sheriff's Department. Chief Trott was familiar with the vehicle and operator and they were located a short time later. The operator of the vehicle eventually took responsibility for his actions and admitted to the offenses. He was released by the Plymouth Court and given a future court date where he will be arraigned on the above charges. Please note that he was very cooperative and that the arrest was made without incident.

Chief Trott wants to remind our residents and community that the 2021-2022 school season will be starting up again very shortly, in our community, as well as our sister communities. We ask that everyone be mindful and cautious of the school buses on the roads, at bus stops, as well as students at bus stops, and the schools that you may be driving by.

## Wentworth Fire

### Calls for service

Call to a home in North Dorchester for odor of gas in the building with homeowner feeling ill, building was vented prior to fire arrival so we did not get a gas reading, we made sure all gas appliances were shut off and a gas company notified, Patient was cared for by the ambulance service.

We had 3 calls to a residence here in town for lift assist

We responded to a two vehicle motor vehicle accident, no extrication was needed and patient were given care by the ambulance service, there were no injuries .

We were called to assist Rumney involving a tractor trailer trash fire, contents of the trailer were emptied to allow extinguishment

We were called to a residence on rt 25 a for an alarm activation which turned out to be burnt food

We were called to King pine industries for an alarm activation for a water flow fire alarm and found a mechanical issue.

### Training

We have held 3 trainings this month items covered as follows

Water supply operations mixed with source and pump operations,

Next training was the greenie training where we had some portable pump training and location of items on trucks

Next training was all about vehicle extrication patient rescue and overall operations on an accident scene to include fuel spill/leakage, the rescue tools were ran and tested everyone had a chance to operate

### Other

Meetings, inspections, and preparedness of fire department for storms floods etc

Along with our regularly scheduled meetings I have had meetings in reference to dry hydrants here in town, usage, upkeep, additions etc.. A meeting with land owner looking at possible

property for the future location of a Fire Station, Meeting with the fire commissioners looking at the future of property and station. More to come on this as information becomes available to me.

#### Inspections

Inspections at the school started today for fire safety code the school is in very good shape as far as being fire safe, we will be working with staff during the school safety meetings as well as pulling fire alarms.

#### Preparedness for storms, flooding etc.

The fire department is always on alert for any incoming bad weather for flooding road issues or anything else that can happen during these storms. We had an e mail out prior to this last predicted storm readying the members to the possibility of manning the station along with staffing the emergency operations center.

#### Last but not least Fire permits

Any outside burning, campfires, brush piles, chimenairs outside portable devices for burning wood must get a fire permit raining or not. We are spot checking those we see or have been notified about someone seeing smoke.



# ROAD AGENT REPORT

August 24 , 2021

Once again we have escaped any heavy rainfall that could potentially wash out roads or culverts. We have worked hard on cutting back and mowing roads sides the week of august 16<sup>th</sup> , we all put in a lot of hours and odd hours of working times to complete the task in a week's time.

We have been getting our trucks ready for inspection our 2019 ford F550 is in great shape and is ready for inspection. The freightliner had some issues that kevin knapp has taken care of , new brake cans , s cams , slack adjuster and brake shoes. We also had to replace the rear wheel seals and rear end gasket that was leaking , This is all normal maintenance for a heavy commercial truck , we are just waiting for the tires to be replaced before we take it for inspection. Myself , cole and alan spent 2 day rewiring the rear lights , as the wiring was all very corroded and I need of help.

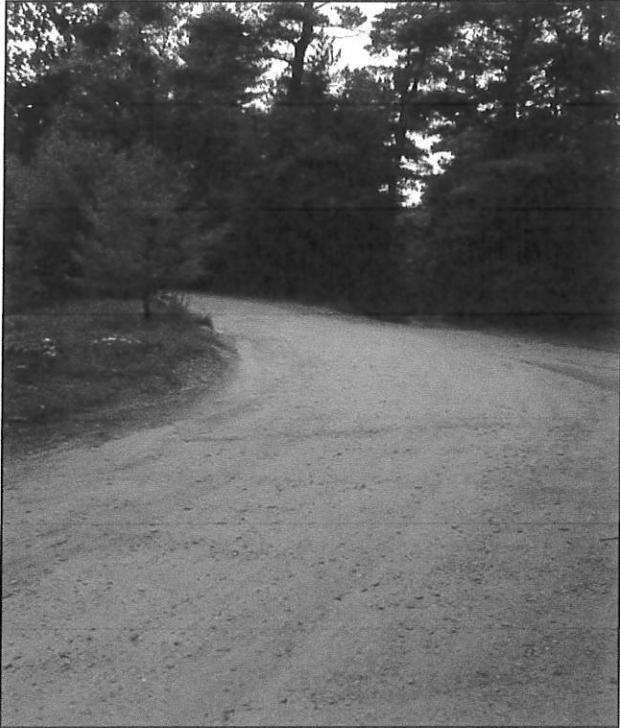
As we approach September and the normally wetter season , we will be focusing our efforts on ditching roads and will prioritize them on a as needed basis. We plan on ditching for the next 4 -5 weeks , starting on the south end and working our way to the center of town. All is well at the highway department.

Paul Manson



# Legal Q&A, Class VI Roads and Maintenance Issues

By Susan Slack, Counsel, Local Government Center



Highway repair and maintenance projects are usually well underway at this time of year, prompting questions about maintenance of Class VI roads. There are lots of misconceptions about Class VI roads, so here are some reminders.

## **Q. What is a Class VI road?**

**A.** In the state's highway classification system, which is defined in RSA 229:5, Class VI roads are "all other existing public ways," meaning public ways not otherwise classified as Class IV or Class V roads. Class VI roads include those that have been discontinued subject to gates and bars, as well as those that have "not been maintained and repaired by the town in suitable condition for travel" for five successive years or more. (See RSA 229:5, VII.) The two important keys to this statutory definition are that Class VI roads are *public ways*, and they are roads that the town has no duty to maintain. Note that the definition of a Class V road is one that the town does have a duty to maintain. (See RSA 229:5, VI.)

## **Q. Can the town appropriate money to maintain or repair Class VI roads?**

**A.** RSA 231:59 authorizes municipalities to spend money to repair Class IV and V highways, not Class VI roads. One of the basic tenets of New Hampshire municipal law is that towns and cities have only that authority granted to them by the state legislature. Without a specific grant of authority, towns and cities do not have authority to act.

## **Q. Can private parties maintain or repair Class VI roads?**

**A.** Yes, with permission of the municipality. RSA 236:9 prohibits anyone from excavating or disturbing the ditches, embankments or traveled surface of any town road, including a Class VI road, without the written permission of the municipality's governing body (board of selectmen or town/city council) or the road agent. RSA 236:10 provides that the municipality may regulate such private road work and may require a bond for the satisfactory restoration of the road. RSA 236:11 requires anyone who excavates or disturbs town roads to restore them to the satisfaction of the authorized local official.

## **Q. What happens if the municipality maintains or repairs a Class VI road?**

**A.** There are several important reasons to avoid maintenance and repair projects on Class VI roads. First, municipalities enjoy protection from liability for damage or injury due to the condition of a Class VI road. RSA 231:93 provides that municipalities have no duty to maintain or repair Class VI roads. The highway maintenance duty established in RSA 231:90 through 92-a applies only to Class IV and V highways. A municipality that undertakes Class VI road maintenance exposes itself to the risk of liability for damage or injury resulting from that work. Second, performance of maintenance or repair work could result in stopping municipal arguments, meaning that in a lawsuit involving a landowner, a municipality may be barred from arguing that it is

not required to maintain a road due to its Class VI status. See *Turco v. Barnstead*, 136 N.H. 256 (1992). Third, a Class V road that attains Class VI status as a result of the lapse of maintenance will revert to Class V status again if the town maintains 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.” See RSA 229:5, VI.

**Q. What if there are public safety reasons for occasionally repairing or maintaining Class VI roads?**

**A.** If a municipality wishes to spend money on Class VI road, it should do so under the emergency lane statute, RSA 231:59-a, which was enacted in 1994. That statute authorizes municipalities to raise and appropriate money for the maintenance of any Class VI road (or private road) that is declared an emergency lane by the governing body. The procedures required for making this declaration include a public hearing and written findings “that the public need for keeping such lane passable by emergency vehicles is supported by an identified public welfare or safety interest which surpasses or differs from any private benefits to landowners abutting such lane.”

**Q. What kind of maintenance or repair of Class VI roads is authorized by the emergency lane statute?**

**A.** RSA 231:59-a, I provides that such repairs may include “removal of brush, repair of washouts or culverts, or any other work deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles.” The municipality can establish a capital reserve or trust fund for this purpose. Maintenance or repair of Class VI roads undertaken in accordance with the emergency lane statute does not create any duty or liability for the municipality. See RSA 231:59-a, IV.

**Q. Can gates or fences be put up on Class VI roads?**

**A.** Yes, but RSA 231:21-a, I requires gates or bars maintained by private landowners to be erected so as not to interfere with public use of the Class VI road. Such gates or bars must “be capable of being opened and reclosed by highway users.” Municipali-

ties are authorized to regulate these structures “to assure public use” and they have authority to have gates or bars removed if they have fallen into disrepair or if they interfere with public use of the Class VI road.

**Q. What does the term ‘gates and bars’ mean?**

**A.** Prior to 1903, a town could only discontinue a highway completely, meaning it was no longer a public way. Only after the state legislature enacted 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. Nevertheless, 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 that a town had no duty to maintain any highway that had been closed subject to gates and bars.

**Q. Are there other ways in which municipalities may regulate Class VI roads?**

**A.** RSA 231:21-a, which was enacted in 1999, provides that all Class VI roads--regardless of how they obtained Class VI status (by layout, discontinuance subject to gates and bars, or lapse of maintenance of Class V roads)--are deemed subject to gates and bars. The statute clearly authorizes municipalities to regulate their use under the provisions of RSA 41:11; RSA 47:17, VII, VIII and XVIII (highway ordinances); RSA 236:9 through 11 (excavation and disturbance); RSA 236:13 (driveway access); and RSA 231:191 (weight limits).

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# 2015 New Hampshire Revised Statutes

## Title XX - TRANSPORTATION

### Chapter 231 - CITIES, TOWNS AND VILLAGE DISTRICT HIGHWAYS

#### Section 231:59-a - Emergency Lanes.

**Universal Citation:** NH Rev Stat § 231:59-a (2015)

#### **231:59-a Emergency Lanes. –**

I. Notwithstanding RSA 231:59 or any other provision of law, a town may raise and appropriate, and the selectmen may expend, money for the repair of any class VI highway or private way which has been declared an emergency lane under paragraph II. Such repair may include removal of brush, repair of washouts or culverts, or any other work deemed necessary to render such way passable by firefighting equipment and rescue or other emergency vehicles. A capital reserve fund under RSA 35 or a trust fund under RSA 31:19-a may be established for this purpose.

II. No expenditures shall be made under paragraph I unless the selectmen, following a public hearing, declare the relevant class VI highway, private way, or portion thereof, as an emergency lane, and make written findings, recorded in the minutes of the meeting, that the public need for keeping such lane passable by emergency vehicles is supported by an identified public welfare or safety interest which surpasses or differs from any private benefits to landowners abutting such lane.

III. In the case of a private way, notice shall be mailed to all persons known to have a legal interest in the way, 10 days prior to the hearing, and the emergency lane shall not be declared if permission is denied by any person with a legal right to deny such permission. Neither the appearance nor non-appearance of such persons at the hearing shall prevent



such permission from later being denied or withdrawn.

IV. A declaration under this section may be rescinded or disregarded at any time without notice. This section shall not be construed to create any duty or liability on the part of any municipality toward any person or property. Utilization of this section shall be at the sole and unfettered discretion of a town and its officials, and no landowner or any other person shall be entitled to damages by virtue of the creation of emergency lanes, or the failure to create them, or the maintenance of them, or the failure to maintain them, and no person shall be deemed to have any right to rely on such maintenance. This section shall not be deemed to alter the classification or legal status of any highway or private way, or to limit or restrict the authority of towns to regulate the use of class VI highways pursuant to such statutes as RSA 41:11, RSA 236:9--13, and RSA 674:41, or to authorize any person to pass over any private way when permission has been denied. This section shall not be deemed to alter the duties or powers of any party under RSA 227-L concerning forest fires.

**Source.** 1994, 80:1. 1995, 299:12, eff. Jan. 1, 1996.

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# Tree Maintenance Revisited

**Paul G. Sanderson**

*In the February 2009 issue of New Hampshire Town and City, we discussed the law of tree maintenance and the challenges presented to municipal officials attempting to keep roadsides safe and properly maintained. Since that time, the issue has been visited by both the legislature and the New Hampshire Supreme Court. This article updates our earlier advice on the issue.*

What hasn't changed is the fact that trees have a special place under our law, involving the interests of the abutting property owner, the municipality and the public utility whose poles and lines occupy the right of way. What have changed are the scope and details of the duty imposed by both statute and case law to exercise reasonable care to prevent decayed or defective trees from causing harm to others.

We start by determining who owns the tree in question. Because a tree is a product of the soil, the tree is owned by the owner of the land where it is rooted. This responsibility may be modified somewhat if the tree is located on soil subject to an "easement," that is a right held by someone else to use that land. If a person has an easement for vehicular access over another person's land, that easement includes the right to maintain or remove any tree that prevents the allowed vehicular movement over the land. Such an easement may or may not include the responsibility to maintain or remove a tree if it becomes a hazard. In the case of highways, abutters almost always own the rights of way and the trees, *Bigelow v. Whitcomb*, 72 N.H. 473 (1904), subject to the municipality's transportation easement to maintain a public road over the land. This includes the right and responsibility to maintain trees in such a way that they are not a hazard to travelers. Public utilities install and maintain poles and wires under licenses from the towns and cities, but they require additional permission to trim tree limbs.

## May 2011

**Community Spotlight:**  
Police Chief's Timely  
Emergency Responder  
Skills Save a Life in  
Jackson

**Problem Patrons in the  
Public Library: Can  
Anything Be Done?**

**Media Relations and the  
Right to Know Law**

**Municipal and School  
Contracts: What's in That  
Insurance Section  
Anyway?**

**The Commute Green  
New Hampshire  
Challenge: Reduce  
50,000 Vehicle Miles**

**Tree Maintenance  
Revisited**

### **Rights of Tree Owners**

Landowners generally have a right to grow, maintain or cut down their trees as they see fit. They also have a right not to have their trees pruned or removed without their consent, except pursuant to certain statutory procedures discussed on the next page. If a municipality or utility cuts a tree or "mutilates" it without receiving landowner permission, the tree owner has the right to damages under the common law. See *Darling v. Newport Electric Light Co.*, 74 N.H. 515 (1908). The value of a tree is not always limited to its value as lumber (sometimes called stumpage value). In past cases, trees have been given enhanced commercial value for apple production, *Elwood v. Bolte*, 119 N.H. 508 (1979), and aesthetic value as shade trees. *Barker v. Publishers' Paper Co.*, 78 N.H. 571 (1918). A failure to obtain advance permission for cutting might even be held to be a "timber trespass" in violation of RSA 227-J:8 and :8-a. The penalty may be either civil or criminal, and the damages may be enhanced by the court by no less than three nor more than 10 times the market value of the trees removed or defaced. For example, in *McNamara v. Moses*, 146 N.H. 729 (2001), a damage multiplier factor of five was imposed upon a person who cut trees upon a prescriptive right of way without permission, and damages were assessed into the thousands of dollars.

### **New Tort Liability for Tree Owners**

Until recently, it appeared that landowners had no legal duty to maintain the trees on their property to prevent harm to others from falling branches. This view resulted from language in *Belhumeur v. Zilm*, 157 N.H. 162 (2008), a case in which the plaintiff was injured when wild bees nesting in a tree on the defendant's property attacked him while he was in his own yard. The plaintiff claimed that the tree and bee nest were a private nuisance and that the defendant had been negligent in failing to remove the tree or bee nest.

The Supreme Court ruled that the case should be dismissed. As to the nuisance claim, the Court stated, "The 'established common law rule is that a landowner is under no affirmative duty to remedy conditions of purely natural origin upon his land even though they are dangerous or inconvenient to his neighbors.' Stated alternatively: 'In order to create a legal nuisance, the act of man must have contributed to its existence.'" *Belhumeur*, supra. at 235 (citations omitted).

As to the negligence claim, the Court held "that to require a landowner to abate all harm potentially posed to his neighbors by indigenous animals, plants, or insects naturally located upon his property would impose an enormous and unwarranted burden." Since the statement of the rule in the opinion expressly included the word "plants," landowners were assumed to be safe from common law tort liability for damage from falling trees or branches if they simply let nature take its course.

The Court revisited the issue in the 2011 case of *Pesaturo v. Kinne*, No. 2010-127, February 25, 2011. Here, the owners of adjoining property had a dispute over two trees, both rooted on defendant's land, but whose branches hung over the line and bothered the plaintiff. Plaintiff claimed that an oak tree with "swinging, dead limbs" limited her use of her driveway, while a pine tree had limbs that broke off and damaged a boundary fence. Just as in the *Belhumeur* case, the liability claims were based upon "private nuisance" and "negligence."

The Court rejected the private nuisance claim and restated the rule that, for a private nuisance to exist, there must have been some affirmative act taken to cause the problem. Apparently, this means that a person must have planted or tended the tree in question in some manner which caused the harm to defendant. A tree which has taken root naturally apparently cannot be the cause of a private nuisance.

The negligence claim was another matter. "We believe that a landowner should be held responsible for a decayed or defective tree that he permits to harm another because it would be an 'inherent injustice' to allow a landowner to 'escape all liability for serious damage to his neighbors merely by allowing nature to take its course.'" The Court retreated from its language in *Belhumeur* and announced a new rule, "...a landowner who knows or should know that his tree is decayed or defective and fails to maintain the tree reasonably is liable for injuries proximately caused by the tree, even when the harm occurs outside of his property lines. However, a landowner does not have a duty to consistently and constantly check all trees for nonvisible decay. Rather, the manifestation of the tree's decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm."

### **Implications of the New Rule**

The *Pesaturo* case serves as notice that all landowners now have a legal duty to maintain trees appropriately so as not to constitute an unreasonable risk of harm to others. This includes owners of trees in the highway rights of way. The abutting landowner now faces the risk of liability to the traveling public or a public utility if a defective or decayed tree falls on a pedestrian, vehicle or utility line.

Also, a new theory of liability may be suggested by the *Pesaturo* case for trees that are intentionally planted in the highway right of way. Suppose an abutting landowner has planted trees in or near the right of way, and those growing trees now interfere with utility reliability, or they now shade the road and create conditions for enhanced winter icing. Because the trees have been planted, are they not now a "private nuisance" which may result in common law liability to the municipality or the utility?



Although municipalities usually do not own trees growing along the edges of public highways, it is no longer prudent for municipal officials to simply "let nature take its course," or otherwise fail to actively manage the condition of such trees, because municipalities have the duty to maintain municipal highways. RSA 231:3. For municipally owned property, the duty falls to the governing body. In towns, the authority to act comes from the RSA 41:11-a duty to manage town-owned property. These trees must be inspected and maintained by the public, at public expense.

#### **Statutory Procedure for Tree Removal by Municipalities**

How may a municipality resolve these seemingly conflicting duties to respect the property rights of abutting landowners and to protect the public from hazardous trees? Strong incentives are present for officials to remain vigilant about the condition of trees in the right of way. If a falling tree or limb brings wires down from poles, it is local first responders who will be in the greatest danger from any energized wires. In those municipalities that have erected their own fire alarm or data cables to connect municipal facilities or schools, their own infrastructure can be brought down by such trees. If a tree falls and obstructs a road, bridge or sidewalk, it will create an "insufficiency" and expose the municipality to liability if its response is deemed "grossly negligent." RSA 231:90 through :92-a.

Under RSA 231:150 municipalities have a duty and right to remove from highway rights of way all trees and bushes that may damage or pose a danger to the highways or traveling public so long as the vegetation has a circumference of less than 15 inches at a point four feet from the ground. However, for trees with a circumference of more than 15 inches at a point four feet off the ground, consent of the landowner must usually be obtained for pruning or removal. If the highway has been designated a "scenic road" by the town pursuant to RSA 231:157, trees along the scenic road shall not be cut, damaged or removed without the prior written consent of the planning board or other designated municipal body. The municipality may proceed under RSA 231:145 to have a tree declared a public nuisance. Notice must be provided to the landowner, an opportunity for a local hearing provided, and the landowner is provided a further right to appeal the issue to the Superior Court within 30 days of the decision declaring the tree a public nuisance. All of these procedures are unnecessary in the case of an "imminent threat to safety or property."

### **Improved Statutory Procedure for Public Utilities**

Public utilities also have a statutory duty to maintain the reliability of their services and to protect the value of their equipment placed into the public right of way by license. These duties are enforced by the Public Utilities Commission acting under RSA 374 and their associated administrative rules. Yet, if either the municipality or the utility fails to obtain the consent of a tree owner, there may be liability for significant damages resulting from the injury or removal of the vegetation.

Following the ice storm of 2008, the legislature reviewed the statutory scheme contained in RSA 231. Laws 2009, Chapter 267 significantly amended sections 145 and 172 to improve the definition of vegetation that constitutes a "public nuisance" in the highway right of way and to improve the procedure used to obtain consent to cut from private landowners. Removal of a tree is now allowed if it constitutes a "public nuisance by reason of unreasonable danger to the traveling public, spread of tree disease, or the reliability of equipment installed at or upon utility facilities." The public utility may petition the selectmen under the procedures of RSA 231:145. The removal may be immediate if there is an "imminent threat to safety or property."

Alternatively, a utility may utilize the procedure contained in RSA 231:172. At least 45 days in advance of a non-emergency effort to prune or remove a shade or ornamental tree, notice is provided to the landowner. If the landowner does nothing, the cutting or removal may then proceed. If the landowner does object, a hearing is available before the local board of selectmen, who shall determine if the action is necessary and assess any damages against the utility to compensate the owner for loss of the tree.

### **New Incentives for Cooperation?**

As a result of the recent statutory changes and the *Pesaturo v. Kinne* decision, it may be easier in the future for municipalities and utilities to obtain consent from abutting landowners for tree pruning or removal. Landowners now are exposed to tree liability not only to the traveling public but to municipalities and utilities. Landowners now have a greater risk of liability to the municipality for damages from falling trees under RSA 236:39, which creates civil liability for a person who "shall place any obstruction in a highway or cause any defect, insufficiency or want of repair of a highway which renders it unsuitable for public travel..." Statutory damages include road repair costs and sums the municipality may be compelled to pay for injuries to third parties. Under an amendment effective January 1, 2009, such damages may be "established through an appropriate contribution claim or under rules of joint and several liability." This statute clearly applies to intentional conduct and may extend to negligence of the tree owner.

The landowner may now also have a greater risk of liability to the public utility for negligently causing damage to utility service. If a landowner negligently allows a defective or decayed tree to fall on a utility line, there may be common law liability to the utility. The chances that such liability could be imposed are enhanced if the landowner has received notice of the location and condition of such trees from either the municipality or utility.

Local officials and utilities are often willing partners in undertaking tree maintenance actions in public spaces. Now landowners, too, have a strong incentive to cooperate in these efforts in order to avoid liability as well as the significant costs of tree maintenance and difficult task of finding a vendor who is willing to work for a private landowner on trees that are very close to utility property.

Despite these real incentives, it is not always a simple matter for local public works officials or utility line crews to obtain landowner consent to prune or remove a tree that an individual wishes to preserve, even if there is objectively verifiable risk of damage to the highway or overhead utility lines. It may not be readily apparent who should be contacted to request permission to maintain or remove a tree if the property owner is not resident at the location, the land is vacant, or the land is owned by an entity such as a trust or corporation, or the land has multiple individual owners holding the land in common. In these cases, the statutory remedy will still be required.

Hopefully these recent changes in statute and case law will prevent both the wholesale or indiscriminate cutting of our scenic trees and the sort of neglect that endangers all of us when we pass near a tree that could fall and kill.

Landowners, municipalities and utilities all have the incentive, with appropriate professional assistance, to inspect and maintain trees in accordance with best management practices to preserve most trees for many years to come and to plant the right species in the right places in the future.

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## **Suggested Steps for Municipalities**

- **Inspect**

All municipally owned land and public highways should be regularly inspected to determine if there are trees which should be maintained or removed. New inspections should occur after significant weather events such as ice storms, windstorms or

heavy rains. Records should be kept to document steps taken to actively manage the risk. The inspections may be coordinated with public utilities serving the area. Following an inspection, a plan may be developed to address trees of concern. If a landowner refuses to give consent to vegetation management, assist the utilities in review and resolution of the problem location.

- **Warn**

When there are insufficient resources immediately available to maintain or remove the damaged trees, post some type of warning until corrective action may be taken.

- **Adopt a Policy**

Adopt a written policy establishing orderly procedures and priorities that take into account the scope of the municipality's tree maintenance responsibilities and its personnel and financial resources. This will help to define what is reasonable for the municipality to accomplish under the circumstances.

- **Educate**

Undertake a local educational campaign, either alone or in cooperation with the utilities, to highlight the risks of poorly maintained trees. Once alerted, many people will agree to prune their own vegetation, contract with professionals or give their consent to municipal or utility crews to safely remove the dead or diseased trees and limbs.

- **Work with the Local Conservation Commission**

Work with the local conservation commission and others such as University of New Hampshire Cooperative Extension to continue highlighting the issue in future years. Vegetation management involves not only annual pruning but also management practices to prevent the problem in the future. Identify species which can or cannot be safely planted near roads and utility lines. There are many resources available from professional foresters, the utilities and others, such as the National Arbor Day Foundation, to help in the selection of the right tree to plant in the right place.

- **Work with the Planning Board**

Work with the planning board to create site review and subdivision regulations to implement these best management practices.

- **Tighten Up Local Regulations**

Improve local regulations to better define what constitutes an "interference with public travel" using the authority of town meeting under RSA 31:51, or a "public nuisance by reason of danger to

the traveling public" using the authority of the governing body under RSA 231:145. Use the regulations to create a coordinated approach to vegetation control by the governing body, road agent or public works department, police and fire departments and the emergency management director.

- **Work with the Utilities**

Create and maintain a better working relationship and lines of communication with utilities at both the governing body and departmental levels. Learn which company has primary maintenance responsibility in the event of an outage. Exchange contact information to allow a faster and easier flow of information in both directions.

**roads**

Article Topics: **liability**



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