Real Property Law

Road Bills Winding through the General Court — Highways to Summer Cottages and Private Road Maintenance

By Paul Alfano

The General Court is considering two bills of note dealing with roads this year. One bill would affect the non-maintenance period for highways to summer cottages, and the other is a renewed effort to impose maintenance obligations on owners of residential property on private roads.

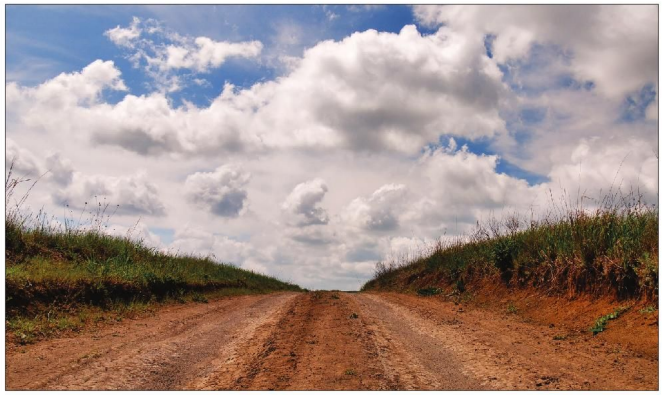
Highways to Summer Cottages

Municipalities are exempt from maintaining highways to summer cottages from December 10 to April 10. RSA 231:79-81. These roads otherwise are full, Class V roads, meaning municipalities have the obligation of maintenance and repair.

The General Court created this exemption in 1893. The original statute did not contain the voting requirement under the current law, and neither the original nor the current statute define a highway to summer cottages.

The four-month exemption period has remained the same for the past 126 years, but SB 53, which has passed the Senate (as of this writing), would empower municipalities to extend the four-month exemption period to a longer period, but no earlier than November 15 or later than April 30.

Other than the sponsors and the New Hampshire Municipal Association, the lone member of the public to testify at the Senate Transportation committee hearing



was the road agent for the town of Washington. The road agent said he has been experiencing difficulties removing hard pack created by snowmobiles, OHRV and other recreational vehicles.

Interestingly, the hard pack problem likely would not exist but for the passage of laws permitting the use of snowmobiles and OHRVs on Class V and VI roads. Some citizens fought back this year with a bill that would have prohibited municipalities from authorizing the use of OHVRs on Class V roads (HB 498), but the House killed the effort.

Private Road Maintenance

If you think you've seen this issue before, you have. Another attempt is being made this year to enact a law requiring owners of residential property on a private road to contribute toward the road's maintenance. Previous efforts failed to pass both chambers.

There are two backdrops of note. One is the New Hampshire Supreme Court's decision in *Village Green Condominium Association v. Hodges*, 167 N.H. 497 (2015), discussed in the May 2017 issue of the *Bar News*. In short, Village Green holds that, where there is an express easement with a right (versus an obligation) to maintain a way which both the servient (the property burdened by the easement) and dominant (the property with the benefit of the easement) owners have the right to use, the dominant owner has an obligation to contribute toward its maintenance. *Village Green* interpreted an easement, not a private road. While the rationale underlying *Village Green* may be difficult to avoid when applied to private roads, the distinction between an easement and a private road is not clear when a statute is involved. *See, e.g., Russell Forest Management, LLC v. Town of Henniker*, 162 N.H. 141 (2011) (interpreting RSA 674:41).

The other backdrop is an apparent refusal by the Federal National Mortgage Association (FNMA) to insure mortgages on properties situated on private roads without maintenance agreements among all the owners. People who testified in favor of this year's bill, SB 39, assumed a statute imposing a maintenance obligation would satisfy FNMA.

While passage of SB 39 very well may facilitate more residential transactions by facilitating funding, a cynical lawyer might say passage of the bill in its current form would benefit lawyers the most. Consider:

- SB 39 does not define "private road." Disputes over the difference between an easement and a private road are not uncommon. RSA 674:41 is a particular breeding ground.
- Parties must contribute "rateably." As to what? Frontage? Distance from the nearest Class V road? By assessed value? (The 2017 version of this bill would have assessed responsibility "in proportion to the benefit received by each such property.")
- The law would apply only "in the absence of an express agreement or requirement governing maintenance." Testimony before the Senate Transportation Committee indicated a handshake agreement would suffice; written agreements are not required. The intent appears to preserve the innumerous verbal arrangements that have worked for years, but one unhappy owner now will have the option of claiming no such agreement exists.
- The bill mandates payment of the "reasonable" cost of "maintaining" the road. The drafters excluded repairs from this year's bill intentionally. Perhaps the ensuing litigation will provide helpful guidance on the difference between repair and maintenance in the context of roads.
- Only residential owners must contribute toward a road's maintenance. Commercial owners could get a free ride, although they would not have the power to force the residential owners to maintain the road.

The next hurdle facing SB 39 and SB 53 is to pass the House.

Paul J. Alfano, Esq. Paul can be reached at paul@alfanolawoffice.com or (603) 226-1188.

Real Property Law

Equitable Subrogation

By John Willis

Equitable subrogation allows someone who has paid off a mortgage to take the priority position of the paid-off mortgage as a recorded lien. That occurred in three New Hampshire Supreme court cases: *Chase v. Ameriquest Mortgage Co.* (2007), *Bilden Properties, LLC v. Birin* (2013), and *Fifield v. Mayer* (1918).

In *Chase*, the property at issue was owned by Mr. and Mrs. Chase. Ameriquest held a mortgage on the property. According to the stipulated facts, Mr. Chase had forged Mrs. Chase's signature on Ameriquest's mortgage. Pursuant to a divorce agreement, Mrs. Chase became the sole owner of the property. Ameriquest initiated foreclosure proceedings against her. She filed a lawsuit seeking to enjoin the foreclosure. She argued that the statutory homestead exemption relieved her of any obligation to pay the mortgage, because her signature on the mortgage was forged. The New Hampshire Supreme Court agreed with Mrs. Chase regarding the homestead exemption statutes.

However, the court also agreed with Ameriquest that equitable subrogation applied. Ameriquest's mortgage had fully paid off a prior mortgage which was signed by both Mr. and Mrs. Chase. It would have been a windfall to Mrs. Chase to own the property free and clear of all mortgage debt, at the expense of Ameriquest. The New Hampshire Supreme Court quoted the trial court's description of that outcome as "inequitable."

The New Hampshire Supreme Court set forth four requirements for equitable subrogation, including that "subrogation may not work any injustice to the rights of others." In order to meet that requirement, the court held that equitable subrogation was only in the amount of the paid-off mortgage ($71,300), not the amount of the new mortgage ($74,439.78).

The court also noted that although Ameriquest allegedly was negligent in failing to uncover the forgery, under Fifield negligence on the part of a surety does not invalidate the right to subrogate and thus does not bar equitable subrogation.

The court held that another requirement for equitable subrogation, not being a volunteer, was met because Ameriquest paid off the prior mortgage to protect its

interest as a mortgagee. The other two elements were met because Ameriquest was not liable for the prior mortgage and Ameriquest fully paid off the prior mortgage.

In *Bilden Properties*, the property at issue was encumbered by mortgages granted by Austin James Properties, LLC, to Southern New Hampshire Bank in 2001 and the Birins in 2006. The mortgage granted to the Birins had an incorrect caption which identified the grantor as Austin James Development.

When the property was being sold in 2007, a title examination did not disclose the Birins' mortgage because it was indexed under "Austin James Development, LLC" instead of "Austin James Properties, LLC." Therefore, proceeds from the closing paid off Southern New Hampshire Bank's senior mortgages, but not the Birins' junior mortgage.

The New Hampshire Supreme Court held that despite the misindexing, the Birins' mortgage was in Austin James Properties, LLC's chain of title because another mortgage in that chain of title identified the grantor as "Austin James Properties, LLC a/k/a Austin James Development, LLC." The court considered that to be a sufficiently curious or suspicious fact that a purchaser should have investigated it by searching the grantor index under "Austin James Development, LLC."

Funds for the 2007 closing had come from both the purchaser, Bilden Properties, and the lender, TD Bank. Therefore, the New Hampshire Supreme Court held that both Bilden Properties and TD Bank were equitably subrogated to the priority position of the Southern New Hampshire Bank mortgages. The court rejected the Birins' argument that equitable subrogation was barred by negligence of the title examiner, both because the trial court had found that the title examiner was not negligent and because the court had held in *Chase* and *Fifield* that negligence does not bar equitable subrogation.

In *Fifield*, the property at issue was a theater. It had been encumbered by a first mortgage and a second priority position mechanic's lien that was held by the plaintiff. A refinance mortgage paid off the first mortgage but not the mechanic's lien. The defendants were sureties on the refinance mortgage.

The plaintiff argued that the sureties were not entitled to equitable subrogation because they were volunteers. The court rejected that argument because the sureties had expected that by paying off the first mortgage, they would acquire the same priority position as the first mortgage.

The court further held that even though the sureties were negligent in not discovering the mechanic's lien, that negligence did not prevent equitable subrogation. The court relied on **Hammond v. Barker** (1881), in which the failure to conduct a title exam was held to be insufficient to prevent subrogation. The court wrote in Fifield: "Indeed, in most of the cases upon this subject it is apparent that the mistake of the party claiming subrogation might have been avoided by reasonable investigation as to the state of the title." The court further explained that equity afford relief for mistakes.

John Willis is a member of the New Hampshire and Massachusetts bars. As an attorney at Fidelity National Law Group in Boston, he handles real estate title litigation in both states. He graduated from Tulane Law School in 1989.