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Real Property Law: Private Roads Are Getting Public Attention

By: **Paul Alfano**

Along with state highways, town-maintained public roads, and non-town-maintained public roads, New Hampshire has something else: private roads.

While an important and desirable part of the rural landscape, private roads can lead to certain inconveniences. An abutter to a private road wishing to obtain a building permit must check to make sure the local governing body has authorized the issuance of building permits on the road, in accordance with RSA 674:41. If no authorization exists, what criteria should the municipality use in considering a request for authorization? Alas, RSA 674:41 does not contain any.

And, what exactly is a private road? Even though statutes like RSA 674:41 use the term, they don't define it. At least with respect to that statute, we can say with reasonable certainty an easement servicing a single home likely does not rise to the level of a "private road." See RSA 674:41, III and *Russell Forest Management LLC v. Town of Henniker* (2011). Beyond that, the view is murky.

Perhaps the most significant characteristic of a private road is the absence of municipal maintenance, which then begs the question: who is responsible to maintain a private road?

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If covenants or other written agreements exist, then the issue is, of course, relatively easy to resolve. Absent a written agreement, the situation becomes more difficult.

The New Hampshire Supreme Court addressed this issue in *Village Green Condominium Association v. Hodges* (2015). In *Village Green*, the Supreme Court ruled 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. "This rule is based upon the principle that, by using the easement, both the dominant and servient estates contribute to its wear and deterioration and, therefore, distribution of the burden of easement maintenance and repair between both estates is equitable and just," the court ruled in Village Green. This duty exists unless the terms of the express easement provide otherwise.

The court ruled in this manner even though the easement granted the dominant owner the right (versus the obligation) to maintain the easement area. The dominant owner tried to argue "that this rule does not apply in this case because 'the terms of the servitude clearly... addressed the issue of maintenance by granting [them] the discretionary right to make repairs and improvements, but omitting a corresponding obligation... to pay for repairs and improvements.'" The court disagreed, and imposed the obligation nonetheless.

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The *Village Green* decision specifically related to an easement rather than a "private road," but absent a statute like RSA 674:41, drawing a distinction between the two might pose a challenge, particularly given the reasoning behind the court's decision.

Legislation Proposed

The *Village Green* decision apparently is not good enough for some. According to the New Hampshire Commercial Investment Board of Realtors (CIBOR), "Fannie Mae refuses to take a residential mortgage for a dwelling on a private road where the owner does not have a signed maintenance agreement with other property owners on that road. However, Fannie will waive that requirement if a state statute exists which allocates responsibility of the road's maintenance." House Bill 181 was introduced in the New Hampshire Legislature this year to address this issue.

House Bill 181 would have imposed on all owners of any residential property abutting a private road that provides access to their property responsibility "for the cost of maintaining the road in good repair and the cost of repairing and restoring any damaged portion of the road." In the absence of a written agreement among the affected landowners, "the cost of maintaining, repairing, or restoring such road shall be shared by each owner of a residential property in proportion to the benefit received by each such property."

Testimony before the House Committee on Public Works and Highways revealed many shortcomings, such as how one would determine proportionality. Would it be determined by relative location on the road? The number of times the road is used? Frontage? Another concern was philosophical: some people did not like the state dictating relationships among private property owners, some of whom may have unwritten, but workable, mechanisms already in place.

The committee voted unanimously to kill the bill on Feb. 14, 2017, and the House did likewise on March 8, 2017. (No, the bill did not include a definition of "private road.")

One other bit of public attention given private roads occurred last year with the passage of Ch. 278, Laws of 2016, effective Jan. 1, 2017. This law expanded the statutes imposing liability for property damage caused by OHRVs (RSA 215-A:19, I(a)(1)) and snowmobiles (RSA 215-C:34, I(a)(1)). Those statutes now state the operator or owner or both of any OHRV/snowmobile shall be responsible and held accountable to the owner of any lands where trees, shrubs, roads, or other property have been damaged as a result of travel over the owner's premises by such vehicles.

Paul J. Alfano is an attorney with Alfano Law Office in Concord. He practices in the areas of road law, real estate, tax abatements and business planning.

Paul J. Alfano

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New Hampshire Bar Association
2 Pillsbury Street, Suite 300, Concord NH 03301
phone: (603) 224-6942 fax: (603) 224-2910
email: NHBAinfo@nhbar.org
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