The Public Right-of-Way and You

An Introduction to Vermont Highway Law

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 developers decides to petition the selectboard to lay out a road across your land to their new subdivision. Or the road crew fails to unclog a culvert during the spring runoff and suddenly your basement becomes a riverbed. 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 5 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 that you can use to arrange for a forum where your position can be made clear to the selectboard. Sometimes the law gives you a right to appeal the decision of the selectboard 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 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.

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.

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 selectboard 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 traveled 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 in a way that prevents 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 traveling public. You can't forbid someone from traveling 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 traveled portion of the highway (short of building something in the right-of-way), but technically the selectboard 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 selectboard. 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 roadbed 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.

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 highways are well-traveled routes carrying traffic to and from Class 1 highways, maintained by the town. All other traveled town highways are Class 3s maintained 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 footpath.

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 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 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 2 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 maintaining the highway—such as the salt-polluted well we described above or the water that washes out your backyard 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 their land different from that shared by all the traveling 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 selectboard 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 selectboard would have to make a formal inspection of the site. At the hearing, the selectboard 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. The selectboard 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 selectboard 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 selectboard'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 selectboards of all involved towns must act to approve the taking.

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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 roadbed 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 selectboard.

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 snowstorm 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 selectboard 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 highway commissioners or you could file a petition, signed by 5 percent of the voters or landowners, to reclassify the highway to Class 3. By law, the selectboard is authorized 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 selectboard, in a non-adversarial but still forceful way, can make a difference in this case.

The selectboard controls 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 roadbed 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.

You can shout; you can complain; but in many cases, highway decisions belong to the selectboard exclusively.

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 nonschool budget goes to highways and bridges.

Sometimes the selectboard cuts 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 selectboard has 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 the selectboard 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 selectboard is 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 the selectboard 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.

The Vermont Institute for Government

The Vermont Institute for Government (VIG) is a nonprofit organization dedicated to ensuring that government remains responsive, accessible, and competent, by improving educational opportunities for local officials and the public regarding how government works. Since 1989, VIG has been creating educational materials, offering workshops, and collaborating on a variety of trainings and educational events for Vermont's town officers and citizens.

This pamphlet is one in a series of VIG publications on Vermont local issues. For more information and additional resources, please visit the Vermont Institute for Government website: **vtinstituteforgovt.org**.

Please note: This pamphlet was revised and updated in the spring of 2020. Changes in the law subsequent to that date may make some of what is written here no longer valid. Always check the latest versions of the law before proceeding.