The Public Right of Way and You

**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 roadway, 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 roadway 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.

**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 lays out a road across your land to his new subdivision. Or the town decides it wants to give up the right-of-way, usually by a legal process involving notice, a hearing, site inspection, and a written decision.

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 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.
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 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:

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 maintaining 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 re-
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 for-
mal, legal pro-
cess that must be fol-
lowed. Sup-
pose, for in-
stance, that the
town wants to
build a new high-
way 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 inter-
est in property
along the pro-
posed highway
route would also
receive notice, as
would the town
planning com-
mision. Public
notice through postings and a
newspaper ad would also be re-
quired. 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 record-
ed in the town of-
ce, all within
sixty days of the
hearing. Select-
men would con-
sider not only
whether to lay
out the highway,
but how much to
pay you for the
taking. Before the
highway could be
used, the select-
men 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 dis-
trict court within
sixty days of the
opening of the
highway on the question of dam-
gages and to the superior court
within twenty days of the date the
selectmen's order to lay out the
highway is recorded on the ques-
tion 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 na-
ture of the complaint and the
state of the law on the subject.
Sometimes there's redress; some-
times 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 classifica-
tion. 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 inhabi-
tants." If you believe your class 4
highway is maintained less than
satisfactorily, contact the select-
men and attend one of their meet-
ings. 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-

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 Stat-
utes—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 high-
ways 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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The Town Highway Budget:

The highway budget gets relatively little attention at town meetings 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 reactions 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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