

Minimum Road Access Requirements Under State Law

RSA 674:41 has been characterized by some as zoning on the state level. It is a law that applies in all towns and cities, unless the municipality does not have a planning board with subdivision approval authority. Under RSA 674:41, no building permit can be issued, nor can any building be built, on any lot unless that lot has access from one of these five types of streets:

- A Class V or better public highway, including one that has been previously laid out, or one that has been accepted by the municipality (RSA 674:41 I(a), I(b)(4)); or
- A road shown on a plat approved by the planning board - either a subdivision plat, or a street plat (RSA 674:41, I(b)(2) and (3)); or
- A Class VI highway, but only if the governing body, after consulting with the planning board, has adopted a policy allowing building on that particular Class VI highway, or portion thereof, and then only if the owner has recorded a notice in the registry of deeds acknowledging that the town is not liable for maintenance or any damage that might occur on that road (RSA 674:41, I(c)); or
- A private road, but as with Class VI roads, only if the governing body, after consulting with the planning board has adopted a policy allowing building on that particular private road, or portion thereof, and then only if the owner has recorded a notice in the registry of deeds acknowledging that the town is not liable for maintenance or damage that might occur on that road (RSA 674:41, I(d)); or
- A street shown on a subdivision plat that was approved by the zoning board of adjustment or governing body before the planning board was granted subdivision jurisdiction. The Street must already have at least one building on it and must have been constructed prior to July 23, 2004 (RSA 674:41, I(e)).

HOW TO INTERPRET RSA 674:41

Applicability. RSA 674:41 applies to all lots, including those in older recorded subdivisions never approved by the planning board, as well as new subdivisions under the jurisdiction of the planning board. The only circumstance under which this law does not apply is in a municipality that has not granted subdivision regulation authority to the planning board. In *Vachon v. New Durham*, 131 N.H. 623 (1989), the Court held that the statute applies to all building permit applications not just those related to new subdivisions. The statute also must be considered if the erection of any building is proposed, even where the municipality requires no building permit.

RSA 674:41 applies to new buildings, as well as to remodeling, additions or conversions to year-round use of already existing buildings. The statute provides that "no building shall be erected... nor shall a building permit be issued for the erection of a building" unless the proposed building complies with the statute. Also, the first sentence of paragraph II speaks of the "structure or part thereof," implying that any physical expansion of the structure must comply.

Frontage. The statute refers to the "street giving access to the lot." Generally, the lot must have actual frontage on one of the five types of streets described in RSA 674:41, I. An easement giving access to a "back lot" over the land of another will not meet the statutory standard unless the easement itself either is a public highway or is shown on a recorded plat

approved by the planning board. In *Belluscio v. Town of Westmoreland*, 139 N.H. 55 (1994), the Court approved a building on a lot whose only access was an unapproved deeded easement. But in 1995, reacting to the *Belluscio* case, the legislature enacted the second sentence of RSA 674:41, III: "For purposes of paragraph I, 'the street giving access to the lot' means a street or way abutting the lot and upon which the lot has frontage. It does not include a street from which the sole access to the lot is via a private easement or right of way, unless such easement or right of way also meets the criteria set forth in subparagraph 1(a), (b) or (c)."

Grandfathering. Some municipal zoning ordinances "grandfather" existing lots. However, such zoning clauses do not make existing lots exempt from the state frontage requirement of RSA 674:41. Paragraph III of that statute provides: "This section shall supersede any less stringent local ordinance, code or regulation, and no existing lot or tract of land shall be exempted from the provisions of this section except in accordance with the procedures expressly set forth in this Section." This sentence was added in 1989, and thus supersedes the holding in *Battock v. Town of Rye*, 116 N.H. 167 (1976), that a local grandfather clause exempts existing lots from road frontage requirements.

Streets and Driveways. A road is either some class of public highway or it is not. If it is not, then a lot fronting on that roadway does not qualify to be built on under RSA 674:41, I(b) unless that roadway is shown on a plat approved by the planning board. Otherwise, it must satisfy the requirements of paragraph I(d) or (e). Whether the roadway is colloquially referred to as a street or driveway doesn't matter with respect to this law. The word "street" as broadly defined in RSA 672:13 includes all ways. So any roadway that passes muster under RSA 674:41 will count as a "street," no matter what it actually looks like, or whether or not it was intended to become public. The purpose of this statute is to give the planning board jurisdiction over access to all lots. The relevant construction standards are whatever standards the planning board decides to impose when the plat is approved. For example, many zoning ordinances or subdivision regulations have provisions for shared driveways. In a municipality with such a provision, a shared driveway, if shown on a plat and approved and recorded as part of that plat, would count as a street that satisfies this statute.

Street Plat. It is not completely clear how the term "street plat" as used in RSA 674:41, I(b)(3) is defined. However, this wording appears to be a historical quirk, rooted in the fact that the pre-1983 version of the subdivision enabling law - former RSA 36:19 - didn't use the word "subdivision" except in the title, but instead expressed the planning board's authority in terms of "empower[ing] the planning board to approve or disapprove, in its discretion plats showing streets, or the widening thereof, or parks..." Former RSA 36:21 provided that the planning board must adopt subdivision regulations before exercising the authority granted by RSA 36:19 and that, therefore, "plats showing streets" included subdivision plats. So the very concept of subdivision regulation began as the concept of regulating road access. In some states it is still common to omit subdivision review where all lots front existing streets. In these states lot size and other similar requirements are controlled solely through zoning. See Rathkopf's *Law of Zoning & Planning*, Section 64.03(l)(c).

A street plat is the same thing as a subdivision plat, except that it doesn't show any new lots - just a new street. Since both former RSA 36:19 and current RSA 674:41 are part of the subdivision review authority, the planning board, if it is asked to approve a street plat, should

follow the same procedures it does for subdivision plats, including the notices and hearing required by RSA 676:4. Any new roadway shown on the plat, regardless of whether it is referred to colloquially as a street or driveway, should be required to be improved to whichever set of standards is applicable in the subdivision regulations, unless the board decides to grant a waiver to those requirements.

EXCEPTIONS TO RSA 674:41

RSA 674:41, II allows the zoning board of adjustment to grant an exception when a property owner wants to build on a lot that has no frontage on any class of highway and no frontage on any roadway approved by the planning board or other board prior to platting jurisdiction - for example a lot whose only frontage is on a private roadway not shown on any plan approved by the board - or when the planning board has failed to approve a street plat submitted by the property owner. The statute must be read carefully because even though an exception is possible, the standards the owner must meet are quite stringent. To grant the exception and allow the building to be erected, the ZBA must find all of the following:

- That the enforcement of the minimum frontage requirements in RSA 674:41 would "entail practical difficulty or unnecessary hardship;" and
- That the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets; and
- That the erection of the building will not tend to distort the official map or increase the difficulty of carrying out the master plan; and
- That erection of the building will not cause hardship to future purchasers or undue financial impact on the municipality.

Analysis of Exception Standards. So far there has been no New Hampshire Supreme Court case construing this paragraph. Although case law gives good guidance on what "unnecessary hardship" is, at least for zoning variances, there is no New Hampshire case on what "practical difficulty" means. Clearly, though, the mere fact that a lot has no street frontage can't by itself constitute "practical difficulty," since if it did, every lot that applied would automatically qualify and the statute would be rendered meaningless.

Although the four standards listed above might possibly be met in the case of an agricultural shed or primitive hunting camp, they will virtually never be met in the case of a proposed year-round home because the "circumstances of the case" always require some relation to "existing or proposed streets." Also, because a lot with a year-round home but no access to maintained highways is cut off from emergency vehicles and other services, it will always constitute "hardship to future purchasers."

An alternative way to handle building requests on landlocked lots is through the street plat process described above. It gives the planning board the ability to consider the type of access road that ought to be required for the proposed use.

Zoning Ordinance Exceptions. It does not matter if the standards for a special exception in the local zoning ordinance are different from the four standards listed above. The zoning special exception does not apply. An exception under RSA 674:41 has nothing to do with a special exception under zoning. Paragraph III of RSA 674:41 provides that this law supersedes any less stringent local ordinance.

Towns Without ZBAs. In a town with no ZEA, the governing body (board of selectmen) must appoint five citizens to act as a special appeals board to determine whether an applicant qualifies for the exception under RSA 674:41, II.

THE TAKING ISSUE

If a town refused to allow any building on a lot, because of RSA 674:41, wouldn't that be an unconstitutional 'taking' of property?

A full discussion of the regulatory taking of land is beyond the scope of this book. However, in *Trottier v. City of Lebanon*, 117 N.H. 147 (1977), the owner of land with frontage only on a Class VI road had been denied approval of a proposed subdivision because of a local frontage requirement. The plaintiff claimed an unconstitutional taking, but the Court denied the claim, finding:

The facts show that prior to his purchase plaintiff made no inquiry as to the status of Old King's Highway, and the zoning problems posed by the deficient access route... It is undoubtedly true that plaintiff's land cannot be used for residential purposes without the expenditure of substantial additional sums to improve the Old King's Highway. Yet it is also true, as the trial court properly found, that the plaintiff carelessly 'purchased' this problem.

If a town's true motive for denying permission to build on a lot under RSA 674:41 relates to something other than the adequacy of the road - for example, because it wants the land to remain "wild" as some sort of preserve - then such a denial is indeed quite likely to constitute a taking. See *Burrows v. Keene*, 121 N.H. 590 (1981). Furthermore, the way to regulate density of development is through a zoning ordinance (see *Caspersen v. Town of Lyme*, 139 N.H. 637 (1995)), or through the prevention of "scattered and premature" subdivisions, not through RSA 674:41. This law provides a way to regulate road access adequacy and is not a back-door way of regulating or preventing development itself.

WHO ENFORCES RSA 674:41?

Every local official involved with land use issues can have some role to play in enforcing the state frontage requirements contained in RSA 674:41.

- If the town has a building permit system, then whoever issues the permits, whether it is a building inspector, code officer or selectmen, must refuse to issue the permit unless and until the lot complies with this law. If a town has no building permit system, it can still enforce this statute against an owner who builds without the required frontage through a citation, cease and desist order or court action under RSA 676:17, 17-a or 17-b. See the *Guide to District Court Enforcement of Local Ordinances and Codes* published by the New Hampshire Bar Association.
- The planning board has a major role in this statute under RSA 674:41, I(b). An owner of

a lot with frontage only on a pre-planning board, unapproved road can apply to the planning board for approval of that road as part of a Street plat as discussed above.

- The planning board can also get involved if someone submits a subdivision or site plan application on land that has no frontage of any of the types listed in RSA 674:41, I. If so, the application should be denied until it complies with RSA 674:41.
- The selectmen or town/city council will get involved whenever a lot's sole frontage is on a Class VI road or private road, because under the statute it is the local governing body that must decide whether the municipality's policy will be to permit buildings on that road, or portion thereof RSA 674:41, I(c) and (d).
- The selectmen or town/city council, as well as town meeting voters, also could become involved in a case where there was a long-existing private road pre-dating the planning board and not shown on any approved plan, and the owners, instead of asking the planning board for a street plat approval, decide instead to petition for a layout of that road as a public highway. See Chapter 2.
- The zoning board of adjustment can get involved if the landowner decides to seek an exception under paragraph II of the statute.
- The town meeting could get involved in a case if the planning board refused to approve a street plat and the owner then petitions the town meeting to accept the road as a public highway under RSA 674:41, I(b)(4), which refers to RSA 674:40. See Chapter 2,

HOW RSA 674:41 APPLIES

Property Access Not Guaranteed. Before the advent of the planning board, Property Owner A sold the front half of a woodlot - the part with Class V road frontage - to Property Owner B for a house lot. Although Owner A has for years used B's driveway as access to remove firewood, Owner A has no deeded easement from his land to the highway. The driveway is not shown on any plat or plan He now asks for a building permit to locate a small cabin on his woodlot. It is his belief that New Hampshire law guarantees him access to his property.

Owner A's belief about guaranteed access is a common misconception. The only statute that comes close to a guaranteed access is the owner consent section of RSA 231:43, which reserves an owner the right to access over a previously discontinued highway unless the owner gives it up in writing. See discussion in Chapter 4. This statute doesn't help Owner A, since his lot never had highway access.

Paragraph I of RSA 674:41, requires the building permit to be denied at this point, because Owner A doesn't have access via any of the types of "approved street" listed there.

In order to satisfy RSA 674:41, Owner A's first problem is to get a private easement from Owner B. Or maybe he can petition superior court for an easement by prescription or an easement by necessity. These legal doctrines relate to private easements, not public highways, so they are not described further here. A municipality does not normally get involved in the kind of private dispute Owner A may have with Owner B. It's a matter of private property law.

Assuming Owner A obtains the private easement, he must still meet the public requirements of RSA 674:41. Owner A's options are:

- Submit a street plat to the planning board showing the easement over Owner B's land as a driveway. RSA 674:41, I(b)(3). Presumably, the planning board's review could be of the expedited variety similar to boundary line agreements (RSA 676:4, I(e)) because no new

lots are being created. The problem is deciding what street standards the planning board should apply. Unless the town’s regulations contain relaxed driveway standards, the street standards in the subdivision regulations would apply, unless waived or relaxed by the planning board.

- In the alternative Owner A can request an exception under RSA 674:41, II from the zoning board of adjustment. The board can add conditions such as, in this case, appropriate width and construction standards for the driveway to make sure that granting the exception complies with the standards listed above. See *Dube v. Senter*, 107 N.H. 191 (1966), decided under RSA 36:26, which was the predecessor of RSA 674:41.
- Owner A could petition the selectmen for a layout under the statutes, or petition the town meeting to accept the driveway as a public highway, See Chapter 2. Politically, it may be futile to ask the town to pay to build a highway for just one person. One possibility would be to do a conditional layout under RSA 231:23. See discussion in Chapter 5. If Owner B had refused to give Owner A a private easement, this might be the best option.
- If Owner A intends to construct a new driveway or “alter in any way” the manner in which his driveway enters the town highway, he also needs a driveway or curb cut permit under RSA 236:13, as discussed in Chapter 6.

Deeded Easement. Consider the same facts as in the example above, except that instead of wanting to build a cabin, Owner A submits an application to the planning board for a seven-lot subdivision. All lots will have access via a new road he wants to build on his 25-foot wide deeded easement, which he has obtained from Owner B.

The planning board cannot grant subdivision approval for buildable lots if Owner A’s survey plat doesn’t show the full length of the easement. A roadway can’t count as approved under RSA 674:41, I(b)(2) unless its full length (to the nearest approved street) is shown on an approved plat.

RSA 674:41 would be satisfied if Owner A’s plat showed the entire road including the easement across Owner B’s land. But this approach may raise other problems for Owner A:

- The subdivision regulations may require a street wider than 25 feet. If so, Owner A’s subdivision must be denied unless and until he can show that he has a legal right to dedicate the proper width of roadway. *Nadeau v. Town of Durham*, 129 NH. 663 (1987).
- Even if Owner A’s easement over Owner B’s land is wide enough, that easement may be described in the easement deed as access to only one lot, not seven. Owner A’s easement rights as against Owner B may not include the right to subdivide.