

III. EXPRESS STATUTORY PREEMPTION

As noted in Section I, some preemption issues are rather helpfully spelled out in a statute. Areas of preemption include some that are more classically considered "land use" and others that may not, at first glance, appear to involve land use, but in application it turns out that they do.

A. RSA 674:41 - 'State Zoning'

The legislature has placed responsibility for regulation of land use primarily upon towns and cities through the comprehensive statutes in RSA Chapters 672 through 677. An exception to this delegation is contained in RSA 674:41, which prevents municipalities in which a planning board has been granted the authority to approve or disapprove plats from approving the construction of buildings upon private roads or Class VI highways except in limited circumstances. "The purpose of this limitation on building on class VI highways is to provide against such scattered or premature subdivision as would necessitate the excessive expenditure of public funds." *Glick v. Town of Ossipee*, 130 N.H. 643 (1988) (*quotation and omissions omitted.*) This law supersedes any less stringent local ordinance. Buildings are simply not allowed unless the lots comply with the statute, or an exception is granted under the statute.

Under this statute, no building shall be constructed upon any lot in the municipality, nor shall a building permit be issued, unless the street giving access to the lot is one of the following:

- A class V highway or better;
- A road shown on a subdivision or street plat approved by the planning board or shown on the official map of the municipality;
- A class VI highway or private road, provided that the governing body, after review and comment by the planning board, has adopted a policy allowing buildings on that Class VI highway or private road, or portion of it. If the governing body has voted to permit the building, the owner must file notice in the Registry of Deeds before the building permit may be issued, acknowledging that the municipality is neither liable for maintenance of the road nor liable for any damages resulting from the use of the road; or
- A street which existed before July 23, 2004 and is shown on a subdivision plat that was approved by the governing body or zoning board of adjustment before the municipality authorized the planning board to approve or disapprove subdivision plats, so long as one or more buildings have already been constructed on other lots on the same street.

RSA 674:41, I(a) - I(e).

The phrase "the street giving access to the lot" means a street or way abutting the lot and upon which the lot has frontage. RSA 674:41, III. It does not include a street from which the sole

access to the lot is via a private easement or right-of-way, unless the easement or right-of-way also meets one of the criteria listed in RSA 674:41, I.

"Exceptions" from the provisions of the statute may only be granted under the terms set forth in RSA 674:41, II, which allows the owner to appeal the denial of the building permit to the ZBA for relief from the terms of the statute. An exception may be available when "the enforcement of the provisions of this section would entail practical difficulty of unnecessary hardship, and when the circumstances of the case do not require the building, structure, or any part thereof to be related to existing or proposed streets..." The permit may be issued upon that appeal/application subject to conditions imposed by ZBA, if the issuance of the permit or construction of the building would not tend to distort the official map or increase the difficulty of carrying out the master plan upon which it is based, and if construction of the building or issuance of the permit would not cause hardship to future purchasers or undue financial impact on the municipality. In a municipality which does not have a ZBA, appeal may be made to the local legislative body (i.e., town meeting) or the board of appeals. In a municipality which does not require building permits, direct application for permission to construct the building may be made to the zoning board of adjustment, or the local legislative body (i.e., town meeting), or the board of appeals.

An example of the operation of this statute is found in *Vachon v. New Durham*, 131 N.H. 623 (1989). The plaintiffs in that case were denied building permits for two lots on a Class VI road. In its consideration of the appeal, the ZBA could not find that any of the conditions for a waiver under RSA 674:41, II were present because the condition of the road "substantially increased" the risks to residents and emergency personnel, and would create an increased possibility of financial impact to the town from increased liability or exposure to claims, injury to town employees and/or damage to town equipment in trying to reach the properties in emergency situations. *Id.* at 625. The Supreme Court upheld this decision, and further clarified that the statutory prohibition applied not only to building permit applications associated with a subdivision, but also to building permit applications that are not associated with any subdivision request. *Id.* at 629.

RSA 674:41 raises some interesting issues:

- No zoning ordinance may waive the frontage requirements in the statute (although some have purported to do so).
- Municipalities frequently are faced with a building permit request involving "back land whose only access is by a private easement across someone else's land. However, the statute provides that a building permit may not be issued (regardless of local regulations) unless the private easement complies with the statute, or, if on appeal, the ZBA finds that the conditions for an exception in RSA 674:41, II are met. Without such a finding, the prohibitions of the statute apply. If the easement is actually a road shown on a subdivision or street plat approved by the planning board (which is possible), then it complies. It is much more likely, however, that the easement is purely private. In that case, the landowner has a variety of options to bring the access up to the required standard. Working with the owner of the front lot, they may dedicate the easement to the town as a road and hope that the town accepts it, or request a boundary line adjustment to grant the back land ownership over a strip of land providing frontage on the road.

- Of course, municipalities have an obligation under Part I, article I of the N.H. Constitution to provide reasonable assistance to all their citizens seeking approval under zoning ordinances. *Kelsg, v. Hanover*, 157 N.H. 632 (2008); *Richmond v. Concord*, 149 N.H. 312, 314-15 (2003); *Savage v. Rye*, 120 N.H. 409 (1980); *Carbonneau v. Rye*, 120 N.H. 96 (1980). However, while it would be appropriate for local officials to provide information about the law, it is ultimately up to the applicant to work out the frontage issues in conformance with the statute.
- RSA 674:41 has been held by the New Hampshire Supreme Court to apply equally to subdivision applications and building permit applications, together or separately. See *Vachon v. New Durham*, 131 N.H. 623,629 (1989) (building permits not associated with subdivision request); *Turco v. Barnstead*, 136 N.H. 256 (1992) (subdivision application properly denied because of improper frontage).
- It is also unlikely that a blanket authorization of building permits on Class VI highways or private roads by vote of the legislative body in the zoning ordinance would pass muster because the statute requires the governing body to adopt a policy regarding the specific private road or Class VI highway, or portion thereof, at issue. However, there is one loophole in this area. Under RSA 674:41,II-a, the legislative body may vote to except any lot, including island lots for islands served exclusively by boats, from the frontage requirements of the statute. If the planning board has also approved the exception, it may be passed by a simple majority vote of the legislative body at an annual or special meeting. If the planning board voted not to approve it, the legislative body must pass it by a 2/3 vote. Other than this very narrow exception, however, blanket authorizations are unlikely to be effective.