

Town Right of Way (ROW) Issues – Comments by Jim Barlow, Senior Staff Attorney at VLCT
Discussion at the Road Foreman Meeting on July 27, 2011

Note: These notes are intended as a brief summary of what was discussed at the road foreman meeting. For official legal advice, please consult with your town lawyer or you may contact Jim Barlow at VLCT.

Must have resource to have on hand:

- Title 19, Section 1111 (handout)

Also check out:

- Example Highway Access Ordinance – Town of Ludlow (handout)
- Example ROW permit application – Town of Rockingham (handout)
- VLCT News July 2011 – pages 4-6 – summary of Dorset road reclassification case and more detailed Q&A about town highway water run-off damage and responsibility for failed driveway culverts (available online at http://www.vlct.org/assets/News/Newsletter/2011/vlctnews_2011-07.pdf)
- VLCT News June 2010 – pages 4-5 – summary of Shelburne snowploughing case (available online at http://vlct.org/assets/News/Newsletter/2010/vlctnews_2010-06.pdf)

In most cases in Vermont, land is owned privately, with easements held by the town for the road. There are two rights connected to ROWs – the public right of travel and the private right to access the road. The private right is conditioned by state statute.

Unless otherwise stated, the ROWs are 1 ½ rods from the road centerline. This recognizes that over time the road centerline may move slightly. If the centerline moves too far, however, it becomes a taking.

Under state statute (Title 19, Section 1111), the private landowner cannot put fences or mailboxes in the ROW without selectboard approval. Driveways, ditches and culverts require permits from the town.

Road ordinances and highway access ordinances and permits

It is useful to have a road ordinance. Most towns don't have an ordinance and just deal with ROW issues on a case by case basis. But it is good over time to have a record of the process of decision-making as it protects the town's legal rights. Ludlow has a good example of a highway access ordinance (handout) and Rockingham has a good example of a permit for work within the highway ROW (handout).

Culverts and driveway/access permits

Culverts at the end of the driveway are often the responsibility of the property owner. Culverts should be permitted as part of a driveway permit (including conditions about size, maintenance, etc).

What if the landowner does not ask town first? See part G (Permit Suspension) in Title 19, Section 1111. You can suspend use of driveway until permit is issued. If they continue use after suspension the access point can be closed if the safety of highway users is or may be affected.

Road foremen do not make decisions about driveway permits – they can only advise the selectboard. If a bad decision is made, the selectboard may not necessarily be legally liable.

Some towns give a permit to construct which includes a road foreman visit ahead of permit being issued so they can work out what conditions should be included in the permit for culverts, location, etc. Once the driveway is

Town Right of Way (ROW) Issues – Comments by Jim Barlow, Senior Staff Attorney at VLCT
Discussion at the Road Foreman Meeting on July 27, 2011

completed the road foreman and a selectboard member visit the site to check it was constructed according to the permit specifications. Only then is the access permit itself issued.

For *pre-existing access and culverts*, even if there is no permit, it is still the landowners responsibility to maintain. Grandfather clauses should not be added for access or culverts.

As a last resort, if a driveway or culvert is causing damage to the town highway and the landowner is not being cooperative, the town could replace the culvert and bill the landowner (although they may not pay).

Permits should be recorded in the deed upon approval. Title issues (including lack of driveway permit) can come up during preparation for property transfer. If they lack a driveway permit they will have to go to the road foreman to work something out – and at this point the road foreman will have some leverage to get things done right.

Repairing items within the ROW that were damaged by the road crew

Generally the town has the benefit of sovereign immunity when maintain a town highway (which is a function of government) and damage something like a fence, mailbox or culvert. Different towns approach it differently, but it is worth considering that if you repair one item, you would be setting precedence.

Mailboxes in the ROW

Under state statute (Title 19, Section 1111), the private landowner cannot put fences or mailboxes in the ROW without selectboard approval. The road foreman need to talk with the Post Office. Mailboxes need to comply with town ROW, but also need to comply with federal regulations about the location, height, etc of the mailbox.

General advice with all conversations and correspondence

Keep good records about who you talked to and when, and what actions were agreed upon.

General process

1. Road foreman talk informally with the landowner. Keep records. Get landowner to commit to an action by a specified (reasonable) date.
2. If that does not work, get the Selectboard to give a deadline, citing the specific regulation which is at issue
3. If that still does not work, the Selectboard should go to the town attorney. They can cite the penalty in statute – a violation which is day sensitive (each day is a violation).

Roadside mowing and tree removal

Landowners often ribbon off areas to deal with themselves. *But* it could come back to bite you.

(Check into West Windsor and Bridgewater – where they both lost cases concerning a tree in the ROW)

Process

1. Give notice about action (eg to remove tree)
2. Get Town Tree Warden to hold a hearing (makes sure the landowner knows)
3. Then the Tree Warden can make a decision (due process – It is the landowner's tree, but the town has a responsibility for travel).
4. If the landowner wishes to appeal, they can take the appeal to the selectboard.

Town Right of Way (ROW) Issues – Comments by Jim Barlow, Senior Staff Attorney at VLCT
Discussion at the Road Foreman Meeting on July 27, 2011

Note about who should NOT hold the position of tree warden – road foreman should not (would not be impartial). Members of the Selectboard should also not (since the decision of the tree warden can be appealed to the selectboard)

Absentee landowners

The cause of the problem is outside of the town ROW but cannot do anything to drain water onto ROW without permit. Could only do something in town ROW, otherwise cannot.

Ditches

Allowed in town ROW. Often found outside of 1 ½ rods, which constitutes a taking. Should get an easement in deed and get a concurrent right to discharge it and maintain the ditch. There is a legal doctrine of adverse protection – it is a prescriptive right to continue action after 15 years if no objection or approval (although might need to get a court to reinforce the right). The 15 year clock does not stop every time a property changes ownership (tacking).

If any of the discharge goes outside of the ROW, get an easement. This is for channelized discharge, not typical runoff from a crowned road.

Snowploughing and snow as a discharge

Route 7 in Shelbourne – VT Supreme Court Case. (See VLCT News in June 2010 for summary)
Building within 8ft of expanded ROW from widening of Route 7. Snow deposit was challenged as an illegal taking and trespass – which the court did not agree with. Snow and snowploughing are a “fact of life in Vermont”. The Vermont Supreme Court held that VTrans is under a lawful duty to remove snow from Vermont’s highways and this duty carries with it the privilege to deposit snow on adjacent property so long as this action is reasonably necessary to performance of the duty. VTrans has discretion to choose an efficient method of removing snow, even if the method it chooses causes some intrusion into or incidental damage to adjacent property.

Seasonal maintenance of class 3 roads

If you don’t want to plough sections of class 3 roads in the winter because only seasonal residents, you need to go through the process to designate the road sections not to be ploughed or reclass the road to Class 4 (recommended option).

In Dorset the VT Supreme upheld a reclassification to class 4 because a steep road.

Needs to be a good reason – not just economic and convenience. Need to prove the safety of the travelling public and road crew.

No obligation for maintenance of class 4 except culverts and bridges is a common rural myth. There is nowhere in law to support it. *But* it is a very hazy area.

Can put up signs for class 4s about no liability and travel at own risk – increasingly useful with GPS routing.

How do you close down a class 4 road?

Reclassify to trail – so there can be no motor travel. *Or* you could close the road in some situations (winter and mud season) by posting rules and putting up signs. If you reclassify to a trail you could add a provision for *certain* people for certain purposes in certain seasons (eg for Joe Bloggs to use in hunting season)